

Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: 6850/2003

REPORTABLE

In the matter of

D[...] R[...]

Plaintiff

and

J[...] E[...] H[...]

First Defendant

JULIA S ANDERSSEN N O

Second Defendant

JUDGMENT DELIVERED : 29 JULY 2005

MOOSA, J:

Introduction

1. I agonised to reach a decision that is fair, equitable and in the best interests of J[...] in respect of access, sole custody and sole guardianship. The issues revolved essentially around the relationship between the father and his minor son, J[...]. J[...] was born of the marriage between plaintiff and first defendant (“the parties”). The mother is of the Jewish faith and the father is of the Christian faith. While the parties were living together, J[...] was exposed to the doctrines and practices of both the Jewish and Christian faiths. During those formative years of

J[...]’s upbringing, a very close bond was forged between father and son. By force of circumstances, after the birth of J[...], the father became the prime care-giver of J[...] and the mother became the prime breadwinner of the family. This does not mean that there was less love between mother and son. They were still very close, but because of her work commitment, she was able to spend less time with J[...] than the father. On the one hand, first defendant conceded that plaintiff was a good mother. On the other hand, plaintiff acknowledged that first defendant was a good father. A clinical psychologist, Bernard Altman, described the initial relationship of J[...] towards his father as follows: “*J[...] loves his father to bits*”. The question arises what then went wrong?

2. In December 1997, plaintiff took her son and left the common home in Gauteng to stay with her family in Cape Town. J[...] was 3½ years old at the time. From the time plaintiff left the common home to the time of the divorce, first defendant was afforded supervised access to J[...] in Cape Town. Such access was supervised by Mr R[...], plaintiff’s brother. At times Mr R[...] had a security guard of Moroccan origin, present at such access. Plaintiff alleged that first defendant had threatened to abduct J[...] to Johannesburg. First defendant alleged that plaintiff used the Moroccan mafia to prevent him from exercising his right of access to J[...] effectively. The parties were divorced on 26 March 1998 pursuant to an order of the High Court of the Witwatersrand Local Division. The terms of an Agreement of Settlement between the parties were incorporated as part of the Court Order. In pursuance to such order, custody of the minor child, J[...], born 3 February 1994, was awarded to plaintiff subject to the right of reasonable access granted to first defendant. The order also provided for J[...] to be brought up in the Jewish faith.

3. After the divorce, first defendant was given unsupervised access to J[...] over certain week-ends and holidays. This arrangement continued until J[...] was admitted to school. In March 2002, a school counsellor found that J[...] was manifesting signs of behavioural and emotional problems. She alerted Ms Donneson, a social worker attached to the Jewish Community Services. On 8 April 2002, Ms Donneson mediated an agreement between the parties in terms of which structured access to J[...] was introduced. This included personal and telephonic access and

communication in writing. At the time J[...] was in therapy with Mr Altman, a child psychologist. Such therapy was ostensibly terminated by plaintiff because Mr Altman tried to resolve issues of access which was causing J[...] considerable confusion and distress. In August 2002, Dr Carew, a child psychiatrist, assessed J[...]. She found that both parents experienced psychological problems. She also concluded that J[...] struggled to deal with the conflict relationship between the parents and experienced separation anxiety and behavioural problems. She recommended group therapy for the family. First defendant was not to be found for such therapy and blamed plaintiff for J[...]’s problems.

4. In October 2002, plaintiff launched an Application in this court in an attempt to secure the co-operation of first defendant for the involvement of mental health professionals to assess and regulate access in the best interests of J[...]. The relief sought was refused but the court, on 17 October 2002, ordered: *“That the Respondent is bound by the Agreement dated 8 April 2002 and the rulings given by Ms Renee Donneson”*. Ms Anne Cawood, a social worker in private practice, was appointed to supervise access. On 4 March 2003, because certain problems were encountered, Ms Donneson set guidelines in respect of telephonic contact and imposed certain restrictions on first defendant’s telephonic and physical access. First defendant allegedly breached such guidelines by raising religious topics, denigrating the R[...] family, discussing court proceedings and prompting J[...] to talk on these matters. On 1 April 2003, telephonic access was terminated following a report of Dr Yodaiken, a clinical psychologist, concerning inappropriate telephonic dialogue between first defendant and J[...]. Certain concerns were also raised by Ms Cawood in connection with physical access. Mr Altman, who was re-appointed by plaintiff to continue therapy sessions with J[...], also raised concerns regarding J[...]’s anxiety and responses in therapy following contact with his father. This prompted Ms Donneson to suspend physical access between first defendant and J[...] on 14 August 2003.

The present action

5. On 18 August 2003, plaintiff instituted the present action against first defendant in terms of which she claimed an order suspending his access to J[...]

pending first defendant undergoing psychological and/or psychiatric treatment and for an order granting plaintiff sole guardianship and sole custody of J[...]. First defendant, who conducted his defence in person, opposed the relief sought. The thrust of his defence is that plaintiff conspired with various people, including those that testified for her in this case, to systematically alienate him from his son and remove him from his son's life completely. This conspiracy, he alleged, is furthermore advanced on the fraudulent claims that he suffered from mental illness and personality disorder. First defendant stated that he had no faith and confidence in psychiatry or psychology and had serious misgivings about their efficacy in the judicial process. He averred further that J[...] was being abused by plaintiff.

6. After reading and considering the pleadings filed in this matter, I, *mero motu*, raised with the parties and the family advocate, the desirability of appointing a legal representative for J[...]. In terms of Section 28(1)(h) of the Constitution of the Republic of South Africa, No 108 of 1996 ("the Constitution") every child has a right *"to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result"*. In terms of article 12 of the United Nations Convention on the Rights of the Child ("the Convention") the court is required to afford a child who is capable of forming a view on a matter affecting him or her, the right to express those views. Such views to be given due weight according to the age and maturity of the child. The parties and the family advocate had no principle objection to such appointment. There were a number of factors which moved me to give consideration to such appointment. Firstly, plaintiff was seeking drastic relief in the existing access arrangement, which could have serious implications for both J[...] and first defendant. Secondly, the interests of J[...] may not be compatible with those of the custodian parent. Thirdly, there may be the need to articulate the views of J[...] in these proceedings in the interest of justice. Fourthly, separate legal representation may be in the best interests of J[...].

7. In **Soller NO v G and Another** 2003 (5) SA 430 (W), the court discussing the respective roles and functions of the Family Advocate and the legal representative envisaged in Section 28 of the Constitution, at 438D-G, concluded as follows:

“... it would seem that the Family Advocate and the Section 28 legal practitioner occupy dissimilar positions. The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of the child.”

8. After consultation with the parties, the family advocate and the legal aid board, I, in terms of Section 28(1)(h) of the Constitution, appointed Adv Julia Anderssen to articulate the views of J[...] and to represent his interests in these proceedings. She agreed to act *pro amico* in this matter. During the course of the proceedings Adv Anderssen brought an application to be joined as second defendant. While supporting the relief sought by plaintiff for sole guardianship and sole custody, she also sought an order restraining first defendant from instituting any legal proceedings concerning J[...] without the leave of the High Court. First defendant opposed the relief sought by both plaintiff and Adv Anderssen. In giving consideration to the application for joinder, I am satisfied that Adv Anderssen N O not only has a direct and substantial interest in the subject-matter of the present litigation, but is also seeking additional relief in the best interests of J[...]. In the circumstances I find that convenience, equity and the avoidance of multiplicity of actions and costs, dictate that Adv Julia S Anderssen N O be joined as second defendant in these proceedings. The application for joinder should accordingly be granted.

The best interests of a child

10. In considering what is in the best interests of J[...], a convenient point of departure is the Constitution. Section 28(2) of the Constitution provides that *“a child’s best interests are of paramount importance in every matter concerning the child”*. This is a universal principle which is found in most of the international instruments or conventions dealing with the rights of a child. The Convention which was ratified by South Africa on 16 June 1995 provides as follows:

“(a) Article 3(1) –

in all actions concerning children, whether undertaken by public or private social institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration;

(b) Article 9(3) –

state parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”

Similar provisions are found in the African Charter on the Rights and Welfare of the Child (“the Charter”), which was ratified by South Africa on 7 January 2000. Article 4: Bests Interests of the Child, in subsection (1), provides:

“In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

Article 19: Parent Care and Protection, in subsection (2), provides:

“Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.”

11. Implicit in the best interests of the child is his or her well-being, education, physical and mental health, spiritual, moral and social development. The primary responsibility for the protection and promotion of the interests of the child vests in the parents. In the case of divorce or separation, the responsibility can be regulated

by agreement between the parents in the best interests of the child, but subject to the overriding control of the court as the upper guardian. In the absence of an agreement, the responsibility is primarily that of the custodian parent. Although both parents have certain interests in and obligations towards the child, such interests and obligations yield to the best interests of the child. (**V v V** 1998 (4) SA 169 (C) at 189B-E.)

12. In **Kok v Clifton** 1955(2) SA 326 (W) at 330, **Roper, J** said:

‘It is common-place that it is in the interests of the child of divorced parents that it should not be estranged from either parent, the child should not be placed in such a position as to lose affection of either of its parent nor that either of the parent should lose affection for and interests in the child.’

See also **Marais v Marais** 1960 (1) SA 844 (C) at 847C-F. It is the duty of the court as the upper guardian of a child, to balance the competing interests of the custodian parent and that of the non-custodian parent in the best interests of the child. The court will only deny the non-custodian parent access to the child in very exceptional circumstances and on good cause shown and only where this is in the best interests of the child. (Boberg’s: **Law of Persons and the Family**, 2nd Edition, at page 504.)

Evaluation

13. With the aforesaid factual and legal backdrop, I will proceed to evaluate the evidence to determine whether plaintiff and second defendant are entitled to the relief claimed by them. It is appropriate to mention at the outset that Ms Donneson, in consultation with certain experts, unilaterally suspended the access enjoyed by first defendant in terms of the court order issued on 17 October 2002. Whether she was entitled to do so, without the sanction of the court, has perhaps become a moot point. It is common cause that since the suspension of access, there has been no contact between father and son for more than a year. That a degree of estrangement has occurred between them cannot be excluded. Apportioning blame

to anyone does not help the situation. What the court has to decide, in addition to the other remedies sought: Is it in the best interests of J[...] that access to his father be suspended until the father undergoes psychotherapy?

14. The grounds upon which plaintiff relies for seeking suspension of access to J[...] by first defendant are: firstly, that first defendant is suffering from paranoid personality disorder; secondly, that he has abused his right of access to J[...]; thirdly, that he has failed to develop an insight into the negative effects which his behaviour, during access periods, has on J[...] and fourthly, the emotional trauma J[...] has suffered because of first defendant's inappropriate behaviour during access periods. Plaintiff relies substantially on the same grounds to seek relief in respect of sole guardianship and sole custody. I will deal with each of these grounds to determine whether plaintiff is entitled to the relief sought.

Whether first defendant suffers from paranoid personality disorder

15. Plaintiff tendered the evidence of a number of experts in an attempt to establish that first defendant suffered from a personality disorder:

15.1 Dr Lesley Carew, a child psychiatrist, who had assessed J[...], consulted first defendant on 3 October 2002. She described him as well-groomed, a polite man with a warm responsive relationship with his son and who is clearly motivated by a deep-seated and genuine concern for his son's welfare. She was concerned at the degree and complexity of what she described as a complex delusion which dominates first defendant's world view and action. She suspected that he may be suffering from a chronic major psychiatric disorder and suggested that he be seen by an independent psychiatrist;

15.2 Mr Martin Yodaiken, a clinical psychologist, was asked to assess and evaluate J[...] and his parents towards the end of 2002. Mr Yodaiken indicated that during his interview with first defendant he detected elements of paranoia and believed that paranoia may be symptomatic of personality

disorder. Mr Yodaiken referred first defendant to Dr Wayne Sanders, a psychiatrist, for a psychiatric evaluation;

15.3 Dr Sanders testified that he had seen first defendant for approximately one hour for purpose of assessment. He found symptoms of a persecutory nature which indicated traits of a paranoid personality. On the basis of further information obtained, he believed there to be symptoms of delusional disorder, which could fall within the category of mental illness. Dr Sanders stressed that in the event of a suspected delusional disorder of a non-bizarre nature, it is difficult to reach a conclusion in the absence of collateral information and verification of such information. Dr Sanders stated that should first defendant be found to be suffering from a paranoid personality disorder, there may be encouraging results if he undergoes psychotherapy and took prescribed medication. If he was found to be suffering from a delusional mental disorder which is chemically based, he could be treated with prescribed medication which could result in a remission ;

15.4 Mr Altman, a child psychologist, who has been acting as J[...]’s therapist and who interviewed first defendant, was not prepared to express an opinion on his mental state. He indicated that such an assessment would have to be undertaken over a relatively lengthy period of time.

16. First defendant tendered a written report from Dr Ashraf Jedaar, a psychiatrist, who had assessed him. Dr Jedaar concluded that, in accordance with his clinical diagnosis, first defendant was not mentally ill. He observed that he was not thought disordered as he could provide a detailed sequential account of his self and the scope of the enquiry. He did not observe any abnormalities of behaviour. His insight and judgment were similarly intact. Dr Jedaar, however, did qualify his findings by stating that should there be no rational and plausible basis to his allegations then it could be concluded that he was deluded and hence mentally ill. Dr Jedaar was not called to testify and his opinion could therefore not be tested.

17. First defendant has indicated that he is not suffering from a personality

disorder or a mental illness. He therefore sees no need for psychological or psychiatric intervention. Moreover, he claims he has no faith in either psychology or psychiatry. He claims that there is a conspiracy on the part of plaintiff and some of the professionals who testified for her to have him wrongfully declared to be suffering from a personality disorder or a mental disorder so as to remove him completely from the life of J[...]. I should, however, in fairness to all parties concerned, mention that I found no evidence of such conspiracy.

18. The evidence of the psychological and psychiatric assessments and evaluations placed before the court by the Plaintiff's experts are firstly, inadequate and incomplete; secondly, they have been done without the full co-operation of first defendant and in deference to the requests of experts in whom he had very little confidence; thirdly, they were done in a very short space of time and the reliability of the assessments and evaluations have been questioned. I am of the view that there is no conclusive proof that first defendant is suffering from a personality disorder and/or mental illness.

Whether first defendant abused his right of access

19. The experts were *ad idem* that first defendant loved J[...], but they were concerned at the way in which expression to such love was given. They regarded his behaviour towards and the manner in which he related to J[...], as inappropriate. Mr Yodaiken testified that first defendant does not appear able to discern what appropriate behaviour is and what appropriate thoughts are in respect of his relationship with J[...]. According to Mr Yodaiken, he is supported in this conclusion by empirical data contained in extracts from the transcript of the telephonic conversations between first defendant and J[...] and certain contents of letters sent by first defendant to J[...]. He described them as "bizarre" and not contextually relevant and appropriate. He said that such extracts and contents were calculated to alienate J[...] from his family, encouraged J[...] to believe in omnipotent fantasies and in the process distort his thinking, create confusion in his religious upbringing and induce in him a feeling of guilt. He was of the opinion that the manner in which first defendant conversed with J[...] displayed a lack of maturity and intellectual

judgment.

20. I have examined and evaluated the relevant extracts from the transcripts and contents of the letters and find them very incisive. They are as follows:

20.1 It clearly emerges from these telephonic extracts that he discusses the court proceedings instituted by him and plaintiff and prompts J[...] to talk about these proceedings, with the view of influencing J[...] to take a position on these proceedings in his favour and against the mother. The inevitable consequence of such discussion is that it creates a feeling of ambivalence in J[...] towards his mother and her family;

20.2 According to the telephonic extracts first defendant introduces J[...] to the “coming of rapture” with superhuman qualities and equates it to the coming of the “Messiah”. He exposes J[...] to the doctrines of Christianity and in the process undermines the teachings of Judaism. The unfortunate consequence of such dialogue for J[...] is that it creates confusion in his religious upbringing.

20.3 In a letter addressed by first defendant to J[...] he describes plaintiff in uncomplimentary terms and belittles her in the eyes of J[...] by drawing a caricature of her which is headed by the words: *“Extremely Dangerous – Crime Stop – Wanted”*. Certain disparaging remarks are made of the mother and he is warned to be careful of her. In the same letter he denigrates the grandmother and uses the physical characteristic of his maternal uncle to poke fun at him. The inescapable conclusion is that he undermines the image of these family members in the eyes of J[...] with the view of alienating him from them.

20.4 These are but a few of the many inappropriate interactions between father and son. Similar interactions during physical access were reported by plaintiff, Mr Altman and Ms Cawood.

21. First defendant's explanation of these digressions was not very convincing. His explanation that they were harmless and good-hearted bantering between father and son is unconvincing and unacceptable. I am of the view that the contents of the extracts of the transcripts and letters complained of amount to a vilification and denigration of the mother and her family and the value system they profess to subscribe and are calculated to undermine the image and esteem of the mother and the family and their value system in the eyes of J[...]. Such conduct towards a child of tender and impressionable age is unbecoming of a father who has the best interests of his child at heart. I am satisfied that first defendant abused his right of access as alleged by plaintiff.

Whether father realised the negative impact his behaviour had on his son

22. Plaintiff and some of her experts justified supervised access on the ground that the conduct of first defendant during access periods had negative affects on J[...]. According to Ms Donneson, supervised access was imposed to develop the insight of first defendant to the physical, emotional and psychological needs of J[...]. First defendant, on the other hand, regarded the restrictions on his access to his son as an impediment to his right to access. I am mindful of the fact that any restriction placed on access has its attendant difficulties. A court will only impose restrictions where circumstances justify such limitations and such limitations are in the best interests of a child. Generally speaking, restrictions on access are inimical to the development of good and lasting relationship between the child and the non-custodian parent and are not in the best interests of the child. It is unfortunate that animosity between the parents has negatively impacted on the life of J[...]. I am of the opinion that neither party is free from blame.

23. According to Dr Carew, both parents experienced psychological problems. The mother suffered from major depressive disorder and psychotherapy was recommended. The father was suspected of suffering from major chronic psychiatric disorder. Both clinical psychologists suggested that first defendant would benefit from psychotherapy which would be a means to address his problem and which, according to them, would be a prerequisite to any future access. Mr Altman testified

that J[...] was receiving psychotherapy and suggested that first defendant participates in such psychotherapy. A request to that effect was previously declined by first defendant.

24. When J[...] started displaying behavioural problems at school, structured access was introduced which included controlled personal and telephonic access and written communication. As further problems were encountered later, certain guidelines and restrictions were placed on access. First defendant breached such guidelines by having inappropriate telephonic dialogue with J[...], prompting Ms Donneson to terminate telephonic access. Mr Altman who had continued therapy sessions with J[...] reported certain concerns regarding J[...]’s anxiety and responses in therapy following contact with his father. These concerns were reinforced by Ms Cawood who had supervised physical access. In view of the concerns raised by these professionals, Ms Donneson terminated the physical access as well. Despite professional intervention and assistance, it appears that first defendant had failed to develop insight into the negative affects which his behaviour had on J[...], during access periods.

Whether J[...] suffered emotional trauma

25. The professional and expert witnesses expressed concern in regard to first defendant’s ability and capacity to provide J[...] with appropriate guidance as would be expected from a responsible parent. Dr Carew indicated that J[...] was presenting with separation anxiety from his mother and first defendant’s comments about his mother and her family fuelled this anxiety. Mr Altman testified that J[...] exhibited anxiety and confusion in respect of contact with his father and that his resistance should not be ignored. There appears to be consensus amongst the professional and expert witnesses that gave evidence, that first defendant had an underlying problem that impacted on his relationship with his son. They were basically of the view that J[...] no longer derived any benefit from having access to his father, which access had a detrimental affect on his emotional and mental well-being.

26. Plaintiff testified that certain information conveyed to J[...] by first defendant

during access periods caused him considerable confusion and distress. Mr Altman testified that during psychotherapy with J[...] he was required to deal with such confusion and distress which emanated from J[...]’s contact with his father. Ms Cawood testified that J[...] changes completely when he sees his father and returns to his own when he leaves his father. She regards their relationship as age-inappropriate, has no boundaries and appears to be defined by first defendant’s deep-seated emotional need for his son’s affection. She was of the view that the access was not beneficial to J[...] and suggested that first defendant should obtain psychiatric help.

27. It is common cause that both parents were involved in litigation involving J[...]. The parents were not on speaking terms. J[...] found himself in the centre of a conflict situation and suffered understandably from anxiety and distress as he struggled to deal with the conflict relationship between the parents. This was further aggravated by the inappropriateness of the dialogue between father and son. I am, therefore, satisfied that J[...] suffered emotional trauma as a result of first defendant’s inappropriate behaviour during access periods.

Evaluation of the family

28. I now proceed to evaluate the family. I observed first defendant in court presenting his case. He appeared to be very intelligent and self confident. He presented his case calmly, logically and rationally. I did not detect that he was suffering from a personality disorder or for that matter mental illness. I gained the impression that he was aggrieved, rightly or wrongly, by the systematic denial of access to his son with whom he had developed a very close bond. He felt strongly that all the professionals had conspired with the plaintiff to remove him completely from his son’s life. At first glance there might be some substance in his assertion, but on closer scrutiny of his conduct and behaviour, particularly in his interaction with J[...], a different picture emerges. The existence of an underlying psychological or psychiatric problem which first defendant could be suffering from, cannot be excluded. During the course of the trial, he appealed to the court that he at least be allowed to send J[...] letters and cards especially on special occasions in order to

maintain contact with his son.

29. I also observed plaintiff giving evidence in court. She appeared to be sensitive and emotional. Mr Altman described her as impulsive. She suffered from a major depressive disorder and received psychotherapy for her condition. First defendant conceded that plaintiff was a good mother. However, he alleged that J[...] suffered abuse at the hands of the mother. There was no evidence to substantiate such abuse. The professionals and experts who testified refuted such allegation. They acknowledged the fact that she disciplined J[...] when he manifested behavioural problems. There was also no acceptable evidence placed before the court to substantiate first defendant's claim that plaintiff and her family had deliberately alienated him from J[...]. There was, however, evidence that normal access by first defendant to J[...] was made difficult by plaintiff and her family and when Mr Altman tried to facilitate such access in the best interests of J[...], his services were terminated.

30. It has generally been recognised that children of intellectual and emotional maturity need to be heard with regard to their wishes, desires and preferences in connection with their physical, moral, emotional and spiritual welfare. In **McCall v McCall** 1994 (3) SA 201 (C) at 207H **King, J** (as he then was) said:

“...if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give, in his expression of a preference, a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words, to make an informed and intelligent judgment, weight should be given to his expressed preference.”

31. I had the benefit of interviewing J[...] in chambers. This was done with the concurrence of all parties concerned. Prior to that, first defendant suggested that J[...] be called to testify in court. I was not to be found for such request. I was of the view that it would have placed tremendous strain on J[...] and caused him untold distress. It would not have been in the best interests of J[...] as he, in all likelihood, would have had to take a stand against one or other of his parents. J[...] is a bright,

impressive and sensitive young lad. He is acutely aware and anxious of the conflict between his parents. He is conscious of the central role he plays in such conflict. He does not want to disturb the status quo pertaining to access. He indicated that he is not yet ready to have access to first defendant at this point in time. He left open the question of future access. He was, however, prepared to accept the occasional letters and cards from his father.

32. From the interview, it appeared that he had settled down and had accepted the fact that he would not have access to his father within the immediate future. I am of the view that to disturb the status quo, without professional intervention, would not be in the best interests of J[...]. I agree with Mr Altman that J[...] was above average intellectually, but is emotionally immature for his age. I cannot help but conclude that J[...] has been left with emotional scars as a result of the conflict to which he was exposed in the dealings between his parents. In the light of all the circumstances I conclude that it would be in the best interests of J[...] that first defendant undergoes professional assessment and evaluation and if necessary suitable treatment and/or therapy and/or counselling before access to J[...] is restored.

Sole guardianship and sole custody

33. I now turn to the question of sole guardianship and sole custody. Plaintiff is seeking such relief on the same grounds that she advanced in respect of her claim for the suspension of first defendant's access to J[...]. In addition thereto, plaintiff has also advanced the following grounds: firstly, that first defendant is not capable of making decisions which are in the best interests of J[...]; secondly, he frustrated joint decisions as co-guardian in the past; and thirdly, that he has failed to provide financial support for J[...]. First defendant's capacity to make decisions in the best interests of J[...] has been overshadowed by evidence indicating that he may be suffering from personality disorder or mental illness. The court earlier found that there was no conclusive proof that first defendant suffered from personality disorder or mental illness. The question of whether he is capable of making decisions in the best interests of J[...] will depend whether he undergoes professional assessment,

evaluation, treatment and counselling, if necessary, to which the court alluded earlier.

34. The problem relating to joint decisions, concerned an application for a passport for J[...] to travel with plaintiff to Mauritius on holiday. First defendant was not co-operative and plaintiff was compelled to bring an urgent application to court for the necessary relief. First defendant gave consent at the very last moment, but at that stage the court had apparently given permission. In my view this was firstly, an isolated incident and secondly, first defendant did give permission, however, belatedly. A further issue which created a conflict between the parties and which was not in the interests of J[...] was the Jewish faith in which J[...] was being raised. First defendant, at the time of the divorce, agreed that J[...] could be raised in the Jewish faith. This was made part of the divorce order. In any case, in the absence of an agreement, the custodian parent, that is plaintiff, could decide in which faith J[...] should be raised. In terms of the common law, the custodian parent has the right and duty to determine what religious upbringing, if any, the child should have. Religious upbringing is one of the common law incidents of parental authority over children. However, there is no obligation on parents to raise a child in any particular religion. The parents are entitled to raise the child as an atheist, agnostic or in any religion of their choice. Likewise, a child who has reached a level of intellectual, emotional and spiritual maturity is entitled to make an informed decision with regard to his beliefs consistent with the constitutional right to freedom of religion and thought.

35. It appears that first defendant also wanted J[...] to be exposed to the Christian faith. In this regard he found support for his contention in the Constitution which provided for freedom of religion. Article 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion. Article 14(1) of the Convention provides that state parties shall respect the right of the child to freedom of thought, conscience and religion and Article 5 thereof provides that state parties shall respect the rights and duties of the parents and where applicable legal guardians to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

36. The question which needs to be answered is whether it is in the best interests of J[...] that he, at this stage of his spiritual development, should be exposed to different religions. In the view of the court it would depend on the purpose of such exposure. If the exposure is meant to be educational and extend his knowledge to other world religions, the court cannot see any objection thereto. If the objective is to proselytize J[...], it is highly undesirable as it could only create confusion in J[...]’s spiritual upbringing and would, in my opinion, not be in his best interests. I cannot exclude the possibility that first defendant was subtly trying to proselytize J[...] to the Christian faith. I am reinforced in this conclusion by the fact that first defendant in his communication with J[...], tried to belittle Judaism and promote Christianity.

37. In **Dunscombe v Willies** 1982 (3) SA 311 (E and CLD) the father was a member of the Jehovah’s Witnesses and the mother was a member of the Catholic Church and the minor children were attending a Catholic school, **Milne, DJP** granted the mother sole guardianship and sole custody of the minor children, pending the mother instituting action for such relief. At page 317E-F, **Milne, DJP** said:

“Furthermore, it seems to me undesirable and against the interests of the children that they should from their father on the one hand receive positive proselytising education in one faith, whereas, on the other hand, the whole religious basis of the schools which they attend is on a completely different and inconsistent basis. That would be to put them in a conflict situation which I do not consider to be in their best interests.”

38. The Court will only in exceptional circumstances deprive a parent of guardianship or custody of his or her minor child and only if the best interests of such child dictate such a move. On the basis of the evidence presented before me, I am not convinced that first defendant is not capable of making decisions which are in J[...]’s best interests. The fact that first defendant has failed to support J[...], in my view, is not sufficient ground to deprive him of guardianship and custody. However, the best interests of J[...], dictates that first defendant undergo an assessment and evaluation of his psychological and mental state and, if necessary, treatment and/or

counselling, to enable the court to determine whether he should be deprived of joint guardianship and joint custody of J[...]. Such assessment and valuation are to be undertaken within a reasonable period, failing which plaintiff will be entitled to approach this court, on application, for the granting of the relief sought in respect of sole custody and sole guardianship.

Vexatious litigant

39. I now turn to discuss the relief sought by second defendant for an order that first defendant be declared a vexatious and litigious litigant and be interdicted from instituting any action concerning J[...] without the special leave of the High Court. I have mentioned earlier that both parents were involved in civil litigations in the Magistrate's Court and in some of these J[...] featured prominently. They took the form of interdicts. First defendant also laid numerous criminal charges against plaintiff for refusing him reasonable access as ordered by the High Court. The different actions were instituted at the time the parties felt aggrieved at the conduct of each other. It appears that these actions came to an end when the present proceedings were instituted in the High Court. It also appears that most of the civil proceedings in the Magistrate's Court ended inconclusively whereas the criminal charges laid by first defendant against plaintiff were not prosecuted.

40. First defendant denied the charge that he was vexatious and litigious. He contended that he was justified in taking legal proceeding against plaintiff for denying him access to J[...]. During the course of these proceedings, first defendant gave an assurance that he does not intend litigating further in the Magistrate's Court as most of the issues that he had raised at the lower court are being addressed in the present proceedings. The criminal proceedings, on the other hand, will depend on the outcome of the present proceedings. I am prepared to give first defendant the benefit of the doubt and accept his assurance to this court about further litigation. In the circumstances the court, in the best interests of J[...], is prepared to postpone the relief sought by second defendant depending on the future conduct of first defendant.

41. In the circumstances, the court concludes that it will be in the best interests of J[...]:

(a) that the application of J[...]'s legal representative to be joined as second defendant, is granted;

(b) that first defendant's access to J[...] and the relief sought by plaintiff for sole custody and sole guardianship and by second defendant for an interdict against first defendant, be suspended pending first defendant undergoing psychological and/or psychiatric assessment and evaluation with a registered psychologist and/or psychiatrist;

(c) that should first defendant be diagnosed to be suffering from any psychological and/or psychiatric problem, he undergoes treatment and/or therapy to address the particular problem or problems;

(d) that should first defendant not be diagnosed to be suffering from any psychological and/or psychiatric problem or should he be diagnosed as such and after successfully undergoing suitable treatment and/or therapy, he shall co-operate with and participate in the therapy and/or counselling J[...] is receiving from Mr Altman with the view of phasing in access by first defendant to J[...]; that first defendant in the interim shall be entitled to send letters and cards to J[...] via Mr Altman who shall vet and approve such letters and cards in the best interests of J[...] and J[...] shall likewise be entitled to reply and/or respond to such letters and cards to first defendant via Mr Altman;

(e) that first defendant shall, within a reasonable period of time, make available to the court, plaintiff, first defendant, Mr Altman and Adv Brits (the Family Advocate), or her duly authorised representative, the assessment and evaluation reports of the professionals and if applicable the professional reports of the treatment and/or therapy and/or counselling undergone by first defendant;

(f) that Mr Altman and Adv Brits, or her duly authorised representative shall, after receiving and considering the reports referred to in clause (f) above, make recommendations to this court with regard to the lifting of the suspension of access and if so, the terms and conditions under which the suspension should be lifted and they shall also make recommendations with regard to the sole custody and sole guardianship of J[...] claimed by plaintiff and the interdict claimed by second defendant;

(g) that plaintiff, first defendant, second defendant, Adv Brits or her duly authorised representative shall be entitled to approach this court, at any stage on application, for any suitable relief suspended by this judgment, provided it is in the best interests of J[...];

(h) that the question of costs stands over for later determination.

E MOOSA