REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 2896/23

In the matter between:

C[...] K[...] **Appellant**

And

D[...] H[...] **Respondent**

Heard: 03 March 2023

Delivered: 16 March 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII.

JUDGMENT

LEKHULENI J

INTRODUCTION

[1] This is an application for the care and contact of the minor child born between the applicant and the respondent. The applicant and the respondent ('the parties') were married to each other on 25 August 2012. One minor child was born in their

marriage, and the child is currently 13 years old. The marriage relationship between the parties was dissolved by this court on 22 May 2015.

[2] In contemplation of their divorce, the parties signed a Consent Paper regulating the division of their assets and maintenance. The divorce order also incorporated a Parenting Plan concluded by the parties regulating the care and contact of the minor child. The Parenting Plan was endorsed by the family advocate. In terms of the Parenting Plan, the parties agreed that the minor child would primarily reside with the applicant and that the respondent would have reasonable access rights to the child every alternate weekend from 18h00 until 18h00 on a Sunday or for such a time as mutually agreed between the parties.

[3] However, on 11 November 2022, the respondent took the minor child to his care. Through his legal representatives, the respondent informed the applicant that the minor child would not be returned to her care on Monday, 14 November 2022, after school. The applicant was informed that the minor child will remain in the respondent's care pending the outcome of a contact and care assessment conducted by Dr Lezaan Lennox, a forensic social worker in private practice. Despite repeated requests to return the child, the respondent refused to return the child to the applicant. Pursuant thereto, the applicant brought this application on an urgent basis seeking an order directing the respondent to comply with the divorce order and to return the minor child to her primary care.

BACKGROUND FACTS

[4] On 26 October 2022, the applicant was involved in a vehicle accident in which her car was written off. This accident happened while the applicant was *en* route to fetch the minor child from school. Ostensibly, the accident took place close to the minor child's school. This accident culminated in the minor child not being returned to the applicant's primary care after the contact weekend with the respondent. The applicant avers that when the accident happened, she was not intoxicated, nor on medication, and was in her full senses. More so, after the accident, police officers from the Bothasig Police Station gave her a lift home. If there were signs of

intoxication or of her not being at her full senses, the police would have acted thereon and charged her, but they did not.

[5] On 02 November 2022, the respondent wrote a letter to the minor child's school raising issues of neglect on the minor child. In the letter, the respondent stated that the minor child had been hungry beyond the norm for months. The respondent also stated in the letter that the minor child's clothes and school uniform are neglected. He further noted that the child reported to him that there was no food at home and that the applicant swore at him.

[6] The applicant disputes these allegations and states that the minor child wears brands and that none of his clothes has unreasonable wear and tear. She also disputed that there is no food in her house. She stated that in the past, they lived an above average lifestyle. However, her international contract ended, and they now have only normal food in the house. There are no more Woolworths food and biltong.

[7] Pursuant to the respondent's letter, the school counsellor at the minor child's school issued a Form 22 read with section 110 of the Children's Act 38 of 2005 ('the Children's Act'), which is normally used to report abuse of minor children to social workers. The Form 22 was submitted to Badisa, a registered non-profit organisation that protects the rights of children. The applicant denied that she abused the minor child or neglected him. She denied that she abused alcohol or medication, has a history of alcohol or drug abuse. Through her attorneys, she demanded the investigation and reports from the school that resulted in the conclusions of the allegations made in the Form 22. Applicant avers that same was not forthcoming as there was no evidence to support the claims in Form 22.

[8] She avers that the school counsellor just took what the respondent stated in his letter at face value, completed Form 22 and ticked various check boxes without applying due consideration to it. She urged the court to ignore the letter of the respondent and Form 22 of the School counsellor. She agreed to the appointment of Dr Lennox to investigate the question of care and contact. Dr Lennox investigated the matter and released her report in December 2022. In her report, Dr Lennox

recommended that the minor child remains in the respondent's care and that the applicant exercise supervised access to the minor child.

[9] The applicant impugns the report of Dr Lennox and contends that the latter is a social worker in private practice and does not have the authority in terms of legislation to override an order of this court. She contended that Dr Lennox did not do any home visits, nor the respondent's factory where the child stays. The applicant argued that Dr Lennonx was biased in favour of the respondent. The applicant wants the office of the family advocate to investigate the matter, and she committed to cooperate fully with their investigation. The applicant also asserted that unless the court orders otherwise, the minor child should be returned to her care as per the Divorce Order. She states that since 11 November 2022, the minor child has lived with the respondent in the latter's factory in Montague gardens. She contended that the factory is not meant to accommodate people, let alone school going minors.

[10] The respondent, on the other hand, opposed the application and stated that the relief the applicant sought is contradicted by the mutually appointed child care expert report - of Dr Lennox. The respondent contends that the applicant's application is based almost exclusively on the applicant's speculative conspiracy theories regarding the alleged manufacturing of evidence against her and ill-founded and unsupported allegations of bias on the part of Dr Lennox's expert report. Although in terms of the divorce order, the minor child had been primarily residing with the applicant since divorce, the minor child has in recent times suffered neglect in the care of the applicant. This much is evident from the report of the school counsellor in Form 22 as well as the report and recommendations of Dr Lennox.

[11] The respondent referred the court to Dr Lennox's report, in which it is reported that the applicant admitted to periodic excessive use of alcohol as a coping mechanism. When consulted by Dr Lennox, the minor child stated that the applicant often drinks wine during the day and sometimes uses medication with wine. The minor child also reported to Dr Lennox that he is aware of instances where the applicant would drive her car after drinking alcohol.

[12] The respondent avers that the applicant, even on her version, exhibits problematic drinking behaviour, which she is attempting to trivialise and represents normal in her application. The respondent stated further that, to his experience, the applicant abuses both alcohol and prescription medication at times, simultaneously. He denied that Dr Lennox's report was biased, false, or misleading. The respondent averred that from the eyewitnesses who observed the applicant after the accident on 26 October 2022, as reported by Dr Lennox, she seemed to be under the influence of either alcohol, prescribed medication, or narcotics.

[13] The respondent referred the court to the statement of L[...] L[...], the minor child's maths teacher, who encountered the applicant at the scene immediately after the accident. Ms L[...] had a conversation with the applicant, and according to her, the applicant seemed intoxicated and emotionally unstable. Lizmarie Roberts, the armed response officer from District Watch who attended the scene of the accident involving the applicant, averred that the applicant appeared to be severely intoxicated, alternatively, under the influence of an unknown substance, as she was exceptionally unstable on her feet after the accident.

[14] As a result of the drug and alcohol-induced accident and the resulting report from the school, the respondent instructed his attorneys to inform the applicant that the minor child would remain in his care. The child has been in his care ever since. The respondent further stated that he provided the child with suitable accommodation and attended to his daily needs. The child is adequately maintained in his care. He denied that he is in contempt of the court order and averred that the minor child is in his care by agreement between the parties. He applied that the applicant's application be dismissed with costs.

THE DISPUTED ISSUES

[15] This court is enjoined to consider the following disputed issues: whether this application is urgent and whether the applicant has made out a case for the relief claimed.

RELEVANT LEGAL PRINCIPLES AND DISCUSSION

Is the matter Urgent?

[16] This application was brought on an urgent basis in terms of Rule 6(12) of the Rules of court. The applicant sought condonation from this court for non-compliance with forms, service and the time period provided in the Uniform Rules and implored this court to entertain this application urgently.

[17] It is trite that an applicant who approaches court for relief on an urgent basis must satisfy the requirements of Rule 6(12) of the Rule of court. Rule 6(12)(a) of the Uniform Rules provides as follows:

> "In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit."

[18] In such an application, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and why the applicant claims that the applicant could not be afforded substantial redress at a hearing in due course. The respondent has argued that the applicant's application is neither rational nor urgent and must be dismissed with a punitive costs order on that score alone. The respondent further asserted that the real reason for this application which was launched more than three months since the minor child started to be in his primary care, is that the applicant seeks payment of maintenance in respect of the minor child, which she is not receiving while the child is with the respondent.

[19] Meanwhile, the applicant contends that the urgency of this matter relates to the minor child not being in her care, which is in direct violation of the Divorce Order, and secondly, the minor child is not being adequately cared for while in the care of the respondent.

[20] In considering the issue of urgency in a case like this, the court in my view, must apply the best interest of child the principle. The overarching principle in our

law in matters involving children has always been what would be in the child's best interest. Section 6(2)(a) of the Children's Act provides that 'all proceedings, actions, or decisions in a matter concerning a child must respect, protect, promote, and fulfil the child's rights set out in the Bill of Rights and must respect the child's inherent dignity'. The Bill of Rights in the South African Constitution is celebrated for its extensive commitment to the protection of the rights of children in section 28, particularly section 28(2), which emphatically underscores the paramountcy of the child's best interests. Section 9 of the Children's Act echoes section 28(2) of the Constitution. It provides that 'in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied'. It is the interests of the child that are paramount in all matters concerning the child, and the interests of the child take preference over the interests of the parents. *J v J* 2008 (6) SA 30 (C) para 36.

[21] In *casu,* it is common cause that the child has been in the applicant's care ever since birth. The child is now 13 years old. It is also common cause that ever since the child was removed from her, the applicant was only allowed contact with the minor child under supervision four times since 22 November 2022. Dr Lennox recommended this in her report. The applicant saw the minor child on 20, 29 December 2022, and on 04 January 2023. The applicant has not seen the child adequately for over three months. The applicant averred that she misses her child dearly. The child has also indicated to the applicant that he missed her too. The applicant asserted that she constantly communicates with the minor child through the WhatsApp platform. The latter has complained to her about living with the respondent and missing the applicant, his half-brother, and his dogs. He wants to return to her as soon as possible.

[22] As an upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue of paramount importance: the best interest of child. *De Gree and Another v Webb and Another* 2007 (5) SA 184, para 36. In *AD and DD and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) para 30, the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interest of minor children should not be held at ransom for the sake of legal niceties. The court noted that the best interest of the child should not be mechanically

sacrificed on the altar of jurisdictional formalism. *De Gree ad Another v Webb and Others (Centre for Child Law as Amicus Curea)* 2007 (5) SA 184 SCA para 99.

[23] In the same way, the minor child ‘s right to spend time and have contact with her mother cannot be held at ransom by the requirements of urgency as suggested by the respondent. In my view, the delay in resolving the dispute between the parties if the matter was to be dealt with in the normal course, is bound to have dire consequences to the emotional and psychological development of the minor child. I have no doubt that it is in the minor child's best interest that the applicant resumes contact with her son urgently. Crucially, section 6(4)(b) of the Children’s Act provides that in any matter concerning a child, a delay in any action or decision to be taken must be avoided as far as possible. To my mind, the argument that the matter is not urgent is without merits and must fail.

Is the applicant better placed to care for the child in the interim?

[24] When the parties' marriage was dissolved, they concluded a Parenting Plan regulating the exercise of their parental rights and responsibilities concerning the minor child. Regarding the Parenting Plan, the parties agreed that the applicant would be the parent of primary residence for the minor child and that the respondent would be the parent of the alternative residence. The parties also agreed that the respondent would have reasonable contact with the child during terms time every alternate weekend on a Friday from 18h00 until 18h00 on a Sunday and during school holidays. These arrangements persisted until 14 November 2022, when the child was removed from the applicant. The applicant is fervent that the respondent is in violation of the court order.

[25] It is a basic rule of our law that an order of a court of law stands until set aside by a court of competent jurisdiction and until that is done, the court order must be obeyed, even if it is wrong. See *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC). However, the circumstances of this case in my view, are a bit novel. The report prepared by the school counsellor is very much damning against the applicant. In the report, the school counsellor states that the applicant is a drug addict and suffers from depression. The School counsellor also notes that the

applicant was intoxicated when she was supposed to pick up her child from school and that she wrecked her vehicle in an accident.

[26] The applicant disputes these allegations. She states that she was not drunk when the accident happened. In my view, these allegations must be thoroughly investigated. Undeniably, the allegations levelled against the applicant in Form 22 and by Dr Lennox's report are very serious. Dr Lennox notes in her report that the applicant initially denied all accounts offered by the school as documented in Form 22, yet eventually, in consultation, acknowledged her current stressors and her periodic yet excessive use of alcohol to cope with her prevailing circumstances.

[27] As an upper guardian of minor children, the court cannot ignore these allegations. They are serious and call for an investigation. The applicant's application was served at the office of the family advocate, and the latter is of the view that based on the allegations as contained in the applicant's founding affidavit alone, the matter should be referred to their office for investigation. I am aware that the applicant disputes that she was intoxicated when she was involved in a collision. I am also mindful that she disputes the contents of Form 22, and that she was not furnished with a report or investigation supporting the allegations contained in Form 22; however, I cannot ignore these allegations especially when the best interest of the minor child is considered.

[28] As discussed above, these allegations must be investigated by the office of the family advocate. The family advocate is not appointed as any party's representative but acts as an advisor to the court. The applicant contended that Dr Lennox was biased against her. The family advocate's position differs from that of Dr Lennox. The family advocate is a professional and neutral communication channel between the conflicting parents, the child, and the court. See *Soller No v G and Another* 2003 (5) SA 430 (W) at 27.

[29] I am aware that the Divorce order directs that the minor child must reside with the applicant. However, as correctly pointed out by the respondents' counsel, when a court sits as upper guardian in a custody matter, it has extremely wide powers in establishing the child's best interests. The court is not bound by procedural

strictures, the limitations of the evidence presented, or contentions advanced by the respective parties. It may have recourse to any source of information, of any nature, which may assist it in resolving custody and related disputes. See *Terblanche v Terblanche* 1992 (1) SA 501 (W) 504C. It follows, therefore, that this court has to consider all the evidential material placed before it, including the version of the applicant, Form 22, the report of Dr Lennox, and the eyewitnesses who saw the applicant immediately after the accident which catapulted the child being removed from her.

[30] On a conspectus of all the evidential material before the court, I am of the view that pending the finalisation of the investigation of the matter by the office of the family advocate, the minor child must remain in the care of the respondent subject to the applicant's rights of supervised access to the minor child every alternate weekend on Saturdays between 08h00 and 18h00 or on such dates as the parties may mutually agree. I must also stress that the respondent must allow the applicant to have contact (in person) with the minor child.

[31] Lastly, Dr Lennox, in her report, notes that the child was cautious to disclose information about his care while residing with his mother. His loyalty to his parent and loyalty crisis towards his mother to convey information about home circumstances were evident. According to Dr Lennox, the child presented with psycho-motor and psycho-social stress indicators.

[32] In my view, during the investigation of this matter to determine care and contact and in this court, the child's view must be heard and be given respectful and careful consideration. See *McCall v McCall* 1994 SA 201 (C). Section 10 of the Children Act provides that '[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child *must* be given due consideration.' The child in this matter is 13 years old. He is of such an age that he can express his view on issues that affects him. In my view, this is an appropriate case for the appointment of a legal representative on behalf of the child in terms of section 28(1)(g) of the Constitution to give the child a voice. The said

legal representative will be tasked to present and argue the wishes and desires of the minor child.

ORDER

[33] In view of the above considerations, and as an interim measure pending the finalisation of the investigation by the office of the family advocate, the following order is granted:

33.1 The office of the family advocate is directed to conduct an investigation to determine what is in the child's best interest regarding care and contact.

33.2 Pending the investigation by the office of the family advocate, the minor child will reside with the respondent, and the applicant will have supervised contact to the minor child.

33.3 As recommended by Dr Lennox, the applicant should gain access to the minor child in the presence of other neutral and known individuals to the parties every alternate weekend on Saturdays between 08h00 and 18h00 or on such dates and times as the parties may mutually agree starting from Saturday, 18 March 2023.

33.4 In terms of section 28(1)(g) of the Constitution, the Regional Operations Executive of Legal Aid South Africa is hereby directed to appoint a legal representative from Legal Aid at state expense for the minor child herein.

33.5 The application is postponed to 05 May 2023 for the report of the family advocate.

33.6 The costs hereof will stand over for later determination.

LEKHULENI JD

JUDGE OF THE HIGH COURT