

SOUTH AFRICA / JUDGMENT

EC v AWC and Another (1304/16) [2017] ZANCHC 2 (13 January 2017)

[2017] ZANCHC 2

COURT

Northern Cape High Court, Kimberley

BEFORE

Pakati

CASE / FILE NUMBER

1304/16

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1304/16

Heard On: 12/09/2016

Delivered On: 13/01/2017

In the matter between

EC

Applicant

And

AWC

1st Respondent

DS 2nd Respondent

JUDGMENT

PAKATI J

[1] My brother Lever AJ granted the following interim order on 24 June 2016:

·1.1 [The] first and second respondents are interdicted and prohibited to have [baby EC], the daughter of [the] applicant and [the] first respondent, be evaluated by any psychiatrist, psychologist, or private social worker or to have her medically examined for alleged sexual misconduct previously committed;

1.2 [The] respondents are prohibited and interdicted to proceed with the intended evaluation of [baby EC] by a certain Dr Cooper or any other person.

2. [The] second respondent is interdicted and prohibited to interfere with the abovementioned children of [the] applicant and [the] first respondent and in particular:

2. I That she [the second respondent] be prohibited to lay charges at Child Line.

3. The issue as to costs is postponed until 12 September 2016 to the opposed roll. "

[2] The applicant, Ms EC, is married to the first respondent, Mr AWC, a police officer in the South African Police Services (SAPS) stationed in Douglas. They have two minor children, a son born on 20 July 2007 and a daughter born on 19 January 2012. These parents stay with their respective live-in partners. The applicant with Mr S dW and the 1st respondent with Ms DS, the second respondent.

[3] The applicant initiated divorce action in the Regional Court, Kimberley, under Case Number NC/KBY/RC 144/2014. The primary care and residency of the minor children was in dispute. Mr AH Nel, the Family Advocate, and the Family Counsellor, Ms ER Browsers, investigated the matter and recommended in their reports dated 28 February 2014 (Annexure "A"), that the primary care and residency of the minor children be awarded to the applicant. At that stage, there were no allegations of sexual harassment of the minor daughter. The second respondent was residing in Henna nus at the time. Ms Browsers held a joint consultation with the parents on 28 August 2014. The final report is dated 24 February 2015 and by then the second respondent was settling in in Douglas. The first respondent rejected the Family Advocate's recommendations.

[4] It is of significance to note that before the second respondent arrived in Douglas and stayed with the first respondent there were no sexual abuse complaints of any nature against Mr I dW, the applicant's partner. The first allegations of sexual harassment coincided with the second respondent's arrival. Ms Maretha M Klinck, a Family Advocate, compiled a further report (Annexure "B") dated 12 May 2015 and specifically dealt with the sexual abuse allegations but could not confirm same. The pertinent portions of her report record:

"Information from [baby EC, the minor child]

[5.2.4.1] The child was reluctant to talk to the Family Counsellor at the beginning of the assessment but by using free drawing and extended rapport building, she became congenial and talkative.

[5.2.4.2] The Family Counsellor established through non-leading and non-suggestive questions that the child does not experience any discomfort regarding the significant people in her life.

[5.2.4.3] The egg technique was used to establish if [baby EC] experiences people intruding in her personal space. She was asked to indicate who she allows into her personal space and no intrusion

without her permission was established.

[5.2.4.4] The body diagram technique was used to determine [the minor child 's] knowledge of body parts and to determine if she experienced any intrusion of her body. No sexual body parts were identified and no discomfort regarding her body was identified.

[5.2.4.5] The child was able to identify the emotions sad which she indicated as "trane" (tears) and happy which she indicated as "beter ", (better), but could not indicate what makes her feel sad and happy.

[5.3] Observations before and after the assessment.

[5.3.1] The child was accompanied by the plaintiff and her boyfriend, [Mr I dW].

[5.3.2] Contact between the minor child and [Mr I dW] was spontaneous and she displayed no fear or discomfort towards him. She asked him to assist her to get her food from her bag, was happy to be reunited with him after the assessment and she was satisfied to be kept busy by him, while the plaintiff completed the questionnaire.

6. EVALUATION:

6.1 Good rapport was established between the minor child and the Family Counsellor. The child 's poor language development was overbridged by clarifying terms with the plaintiff and by clarifying with the child to establish what she said.

6.2 Through age appropriate media and techniques used during the assessment of the child, no trauma was identified within the child and no statement of sexual abuse was made by [baby EC]. "

[5] The applicant alleged that the second respondent arranged for baby EC, who was three years old at the time, to be physically examined by Dr G Morolong at Douglas Hospital on 04 May 2015 without the applicant's consent. A criminal allegation of sexual harassment of baby EC was lodged against Mr I dW after the children had visited the respondents. Dr Morolong found no injuries to the genitalia of the minor child after the medical examination .

[6] Again, a clinical psychologist, Ms Bettina Daubermann, examined the child and consulted with all the parties between 26 June 201 5 and 18 July 2015. A comprehensive report dated 01 September 2015 was compiled in this regard but the respondents, dismissively, did not accept the result. Ms Daubermann gave the following impression about the applicant and Mr I dW, her partner:

"4.2.2 Biological Mother: /M s EC]

During the assessment, [Ms EC] and her partner were calm and contained and maintained a serious composure. No mood symptomology was found to be of significance for the biological mother. Interpersonal

boundaries were clear, as reflected by their assertive communication style. The couple composed themselves in a respectful, serious and polite manner. Their emotions were contained and their responses controlled. No signs of psychopathology were found to be of concern for their ability or capacity to fulfil primary caregiving roles for the minor children.

The parental/couple subsystem appeared separate from the children/sibling subsystem indicating a healthy family system. [Ms EC] and [Mr I dW] are considered able to provide the children with a stable, caring and organised home environment. The couple both believe in "early to bed, early to rise " and are focussed on preparing for tasks ahead and showing commitment. The children's lifestyles are likely to be calm and stable, characterised by routine and on-going care and supervision from their caregivers."

Ms Daubermann concluded that: "no signs of abuse or psychopathology were identified." As pointed out earlier the respondents

rejected the report and on the contrary, contemplated legal action against Ms Daubermann for alleged defamation of character.

[7] An email was forwarded to the Family Advocate, Ms Liesel Evans, by the second respondent on 20 November 2015 at 09h42 stating: "U het gese dat ek 'nforensiese evaluasie by 'n ander sielkundige kan kry as tweede opinie. " Ms Evans responded in an email addressed to the first respondent the same day at 09h47 as follows:

"Ek het aan u gestel dat u welkom is om 'n ander sielkundige aan te stel om u te evalueer. Ons benodig dit nie in terme van ons ondersoek nie, so ek kan ongelukking nie aan u versoek voldoen nie. "

[8] Ms Daubermann's report referred to an incident where the second respondent had a Facebook post on the "Douglas Skinderblad " apparently defamatory in nature of the applicant. She had attached photos of her children. The report revealed that the second respondent contacted Child Line and had borrowed money from her employer to have the minor child, baby EC, evaluated further.

[9] Para 2.5.2 of Ms Daubermann's report states:

"[Ms DS] reported that she initiated contact with [Mr AWC] on Facebook in 2014 after hearing about his marital problems and "they provided much needed emotional support to each other, and developed a strong friendship ". In her personal script, a challenging childhood, personal life achievements, as well as "controlling,

and verbally and emotionally abusive " marriage was described. During the last years of her marriage, [Ms DS] reportedly saw two Clinical Psychologists, two Psychiatrists, was voluntarily admitted into a psychiatric Clinic, and saw a Specialist Physician. [Ms DS] saw a Clinical Psychologist for marital problems with her former husband. In 2011, Psychiatrist, Dr Christie reportedly diagnosed her with Bipolar II Disorder, and she was prescribed medication as a result. Due to a negative reaction to the medication, she was referred via a GP to a Specialist Physician,

who diagnosed her with Chronic Fatigue Syndrome. She was advised to get sterilized, which resulted in feelings of depression and her seeking help from another Clinical Psychologist, namely Dr Fischer. She reported that Dr Fischer allegedly concluded that she did not have Bipolar II Disorder but was unable to provide collateral information to confirm this."

Ms Daubermann recommended that the minor children remain in the primary care of the applicant while maintaining regular contact with their father.

- [10] The applicant alleged that when the respondents realised that the sexual allegations against Mr I d W did not succeed they accused the latter's son, Mr S dW, of sexually molesting baby EC. The first respondent secured a brief report from a private social worker, Ms Mariette Joubert, which he presented to the magistrate's court and applied for an order placing baby EC in his custody, which was granted. The applicant stated that she was not afforded an opportunity to challenge the said application. When baby EC was placed in the custody of her father the applicant allowed her son to accompany him not to separate them.
- [11] Ms Christelle Hattingh, the National Area Manager of Child Welfare, Northern Cape, assisted the parties in the preparation of a parenting plan. She also investigated new allegations of sexual abuse lodged by the respondents against Mr S dW, the son of Mr I dW. Once the parenting plan was concluded, the parties appeared before Magistrate Fourie. The first respondent rejected the plan and refused to accept it even though he signed it. Oral evidence was then adduced consequent upon which the Magistrate awarded primary care and residency of the children to the applicant. The respondents were dissatisfied with the decision and commenced with plans to commission a further report by a clinical psychologist. The first respondent threatened the applicant with criminal charges accusing her of contravening the parenting plan. This took place after the Magistrate's order that the applicant had not consented to further evaluations of the child EC. In desperation to prove sexual abuse, the respondents persisted in their demand for further evaluations of the child EC.
- [12] Ms Hattingh in her investigation considered the reports and further ones by the experts and concluded that there was no proof of any sexual molestation of the minor child by Mr S dW. Her report also revealed that a Dr Esta van Niekerk and a Dr L Brits, a gynecologist under anaesthesia, also examined the minor child. However, Dr L Brits concluded that her hymen was still in tact.
- [13] The applicant refused that the minor child, herself, Mr I dW and his son, Mr S d W, be referred for further evaluation. The respondents were undeterred and threatened with further evaluations by a Dr Cooper. Despite her refusal, Dr Cooper nevertheless consulted with the minor son, Mr AWC, Ms DS and her two children. The applicant and her daughter (the minor child) did not avail themselves for assessment.

- [14] In her papers the applicant makes the averment that the minor child's repeated examination by experts were humiliating, prejudicial and upsetting to her (the minor child). The fact that the respondents threatened to sue Ms Daubermann for not giving a report favourable to them, which led to her withdrawal of the said report, is quite disturbing.
- [15] The respondents' intention was to remove the minor children from the primary care and residency of the applicant to avoid paying maintenance towards his minor children until she obtained an order from the maintenance court. Only then did he pay a minimal amount (not stipulated). Despite the family advocate's report and other reports the first respondent obstinately refused to accept that the applicant was found to be a fit and proper mother to take care of her children.
- [16] The respondents alleged that the appellant is falsely implicating them in wrongdoing. According to the first respondent, the applicant neglected and abused the minor children before the divorce proceedings were initiated. He says he informed the Social Worker, Ms Collette Botes, about it. The applicant refused counselling and/or therapy and instead filed for divorce during January
2014. She left the common home with the children and moved in with Mr I dW who had prior history of domestic violence. He was concerned about the safety and welfare of the minor children. He maintains that the applicant also frustrated his contact rights, which resulted in the office of the family advocate conducting an investigation. He concedes that Advocate Nel and Family Counsellor, JR Browsers, in their reports dated 24 February 2015 recommended that the primary residency of the minor children be awarded to the applicant.
- [17] The respondents contended that all the evaluations involving the little girl were done with the instruction of the Family Advocate and the applicant's consent. There was no need for the litigation because "a simple phone call to the respondents or an email or phone message sent directly to the respondents, or a meeting between the applicant and the respondents requesting prayers 1.1 to 2.1 would have resolved this matter without the need for unnecessary and expensive legal intervention. " They contended further that after all evaluations were completed no further evaluations were conducted.
- [18] According to the first respondent, the evaluation of his daughter by Dr Cooper "focussed on submitting a recommendation regarding the primary care and residency of the minor children, and not for evaluation of sexual abuse."

- [19] The first respondent states that during April 2015 he raised a concern with Ms Klerk about his minor daughter who complained that she had been inappropriately touched during bath times. He says Ms Klerk interviewed the minor child who in turn confirmed this. Advocate Evans then instructed the applicant to take the minor children for examination but she refused.
- [20] The first respondent alleged further that the applicant's father assaulted him and threatened him with further violence in front of the children on 01 May 2015. He instructed Ms DS, the second respondent, to report the incident to Child Line. The latter advised them to report the matter to the police, which they did on 04 May
2015. The first respondent states that Ms Klinck examined the minor child on 07 May 2015 but the applicant did not object to this. The respondents were not even present during this consultation.
- [21] After the interim parenting plan was ordered by the Regional Magistrate on 13 May 2015 Mrs Hendrina Selepe, the Social Worker of Child Welfare in Douglas, enquired about the progress of appointing a psychologist. It was when he, the child, the child's father, arranged Dr Cooper to examine the child.
- [22] The respondents alleged further that the applicant and her legal representative prevented them from receiving communication regarding the minor children. They cited an instance where a letter was forwarded to Ms Lizette Pienaar on 14 June 2015 whereas the applicant knew that Ms Pienaar was no longer representing the second respondent. It is said that the second respondent received this letter from Ms Pienaar on 21 June 2015 and did not have enough time to respond to it. According to the first respondent the letter was not addressed to the second respondent and did not refer to the minor child's evaluation regarding any sexual misconduct. It reads, inter alia: "Dit is ans opdrag om u mee te deel dat ans klient nie haar toestemming verleen vir enige verder evaluasies van haar minderjarige kinders nie tensy dit deur die gesinsadvokaat versoek ward. "
- [23] The first respondent stated that on 05 November 2015 he and the applicant had a second interview with Ms Evans during which he raised his concerns about the minor child. Ms Evans addressed a letter on 18 November 2015 to Ms Pienaar with the following instructions found at para 3:

"Srywer het met beide partye na die konsultasie telefonies gekonsulteer en is daar ooreengekom om vir 'n laaste maal te poog om tot die bodem van hierdie problem te kom. Jn terme van die agtergrond en geskiedenis van hierdie aangeleentheid sal 'n kortstondige assesering of vlugtige fisiese ondersoek nie na wense of in die beste belang van [baby EC] wees nie. "

Thus, according to Ms Evans a physical examination was deemed to be not in the interest of the child.

[24] The first respondent stated that he is in agreement with prayers 1.1 to 2.1 of the Notice of Motion being granted in favour of the applicant. He nevertheless opposed the application because it was against the instruction of Family Advocate Ms Evans who stated *inter alia*, in her letter dated 23 March 2016:

"... 'n onpartydige sielkundige, moontlik in Kimberley aanstel om die sielkundige evaluasie op die partye se lewensmaats asook die minderjarige kinders te doen, met die oog op 'n verslag van wat in die beste belang van die kinders sal wees ten opsigte van primere sorg en kontak na die egskeiding. Hierdie skrywe kan as verwysing aan die verkose sielkundige verskaf word. "

[25] The first respondent denies that the evaluations were intended to investigate sexual misconduct but to assist the family advocate investigate and make recommendations regarding the primary care, residency and contact of the minor children in the divorce proceedings. He contended that if the applicant was against the evaluation of the minor children by psychologist s she should have said so in March 2016 already when the second respondent forwarded her an email on 24 March 2016 informing her about the family advocate's request to appoint one. During the divorce hearing in Douglas Regional Court it became clear that Ms Hattingh had advised the girl's parents to appoint a psychologist in compliance with the family advocate's instructions. He contended that the applicant consented to the medical examination of the minor child by Dr Van Niekerk who also referred her to Dr Brits on 03 May 2016. The second respondent was at work then.

[26] Adv Nel extended the contact rights of the children, an act which displeased the applicant. It was also claimed that she also disregarded a parenting plan that was ordered by the Regional Court, Douglas on 13 May 2016. Consequently,

the first respondent opened a case with the SAPS, Douglas, with Cas: 131/6/ 16. On 23 June 2016 Ms Pienaar forwarded to the first

respondent the present application which the second respondent was unaware of.

[27] The first respondent gave an impression that his partner is innocent in this conundrum. He intimated that she was out of town when he received the email and the letter from Ms Liezette Pienaar on 23 June

2016. Para 3.7 of opposing affidavit states:

"The second respondent was shocked by the application as the second respondent is not a party in this matter and did not participate in any discussions or decisions regarding the minor children and was never present or part of any evaluations on [baby EC]. The only involvement that the second respondent has in the minor children was during their visits with the first respondent. [The] second respondent did provide supporting statements for the first respondent in terms of specific incidences in this matter. [The] second respondent has been contributing towards the costs of the psychological evaluation since the first respondent and the applicant do not have the financial resources. Dr Cooper wanted to be paid a deposit before he started his evaluation and the second respondent merely wanted to prevent further delays in this matter.

This was the only financial contribution that the second [respondent] made in this matter. "

[28] It is evident that the second respondent has been highly involved in this matter. She borrowed money from her employer in order to finance the evaluation of the children by Dr Cooper. She is the one who phoned Child Line and was directed to the police by them. She organised the assessments of the children by Dr Morolong. She further addressed a Whatsapp message to the applicant dated 30 March 2016 where she, inter alia, wrote:

"Ek is 14 my oupa en ouma begrawe. Ek het my oupa se meubels en kar geerf Daar was geen geld om horn te begrawe nie. My pa het die kar en van die meubels verkoop net om begrafniskostes te dek. Die ou Mercedes kar by oom Simpie fangs die skuur is my oupa se kar gewees. Ek het begin rook en drink. Ek ontmoet 'n regte washout gemors wat 20 was. Hy trek by ons in. Hy en my pa begin besigheid van huis af Een aand was ons gesuip saam pelle. ·Een van hulle het my verkrag. Ek moes alleen vigs toets doen en bid ek is nie swanger nie. Die ou het my as seksslaaf gebruik en mishandel. Hy het skuld ajbetaal deur my uit te Leen vir mans vir seks. Toe ontmoet ek Alec kart na ek 16 was. Ek het die gemors gelos. Alec het my terug na Jesus gebring en soos prinses behandel. My ouers was bitter lief vir horn en ek ook. Ek was dom om horn te los toe ek universiteit toe gaan. (10.00am) "

[29] The second respondent attached to the opposing affidavit a report by Martin Yodalken and Leigh Pettigrew, Clinical and Educational

Psychologists, dated 09 May 2016, compiled in order to conduct a care and contact assessment in the best interests of her minor children with her husband. In their evaluation of the second respondent, they record in paras 68, 70 and 94 and report:

"68. Dr Pingo reported on 26 February 2015 that she consulted with [Ms DS] on 07 March 2014 with symptoms of a Major Depressive Disorder which Dr Pingo assessed was part of a Bipolar Type II. She was admitted on 11 March 2014 to Kenilworth Clinic's in-patient program and discharged on 04 April 2014 having been provided with mood stabilisers and antidepressants. She was followed up once on 17 April 2014 and she did not attend further appointments reportedly because of the distance between Hermanus and the clinic.

69. Dr Pingo was contacted telephonically on 18 March 2016. Following this interview Dr Pingo submitted an email in which she confirmed the information, which she provided telephonically after having consulted her notes.

70. Dr Pingo first saw [Ms DS] on 07 March 2014 when she presented with symptoms of a Major Depressive Episode with a background of marital stressors. She had previously consulted with a psychiatrist, Dr Christie, who had diagnosed her with a Bipolar 11 Disorder. She had been given medication, but because of the side effects, she had stopped taking the medication and had instead commenced

psychotherapy.

94. The clinical assessment of [Ms DS] did not confirm the existence of the Obsessive Compulsive Personality Features but did reveal traits and behaviours consistent with the diagnosis of a Histrionic Personality Disorder with Narcissistic features."

The second respondent also revealed this information to Ms Daubermann.

[30] At para 4.2.1 of her report, Ms Daubermann stated:

"4.2.1 ...Furthermore, she presented with poor interpersonal boundaries, and to have enmeshed herself in [Mr AWC's] personal affairs, such as his marital and parental related problems. Without establishing clear boundaries, [Ms DS] has the capacity to do harm to the children's relationship with their biological mother, by interfering in personal affairs and influencing the minor children's perception of their mother. The couple display predominantly extroverted qualities, and it is the clinical impression that they are in the early romantic phase of their relationship, reflecting pre-mature commitment, characterised by enmeshed interpersonal boundaries. As a result, [Mr AWC] and his partner are not considered able to provide the minor children with an emotionally stable environment [now]. Additional reasons include the significant life adjustment of [Ms DS] (ie. new job; new home, father figure and schools for her minor children); [Ms DS's] current hypomanic episode, and the couple's strong egotistical

traits."

- [31] The second respondent also attached a report compiled by Ms Miranda Pretorius, a Clinical Psychologist, who referred to the findings of Dr Christie, a Psychiatrist in Hermanus, who also diagnosed her with Bipolar Disorder, Type II. She described Bipolar Type II disorder as follows:

"Bipolar II disorder is characterised by the following symptoms: the patients experience unusually intense emotional states that occur in distinct periods called "mood episodes." Each mood episode represents a drastic change from a person's usual mood and behaviour."

- [32] Ms Pretorius concluded in her report dated 21 November 2015 that she did not find any evidence that the second respondent is suffering from Bipolar 2 Disorder. However, she has a history of depression but denied that she felt depressed at that moment. According to Ms Pretorius she might be suffering from Chronic Fatigue Syndrome, which fitted the findings of a Dr Tredoux. She recommended, though, that it would be useful to get more collateral information from family members/work colleagues who have known the second respondent for an extended period who would be able to give a view of her long-term behaviour/emotional patterns. Dr Christie, on the other hand, would also give details as to why she diagnosed her with Bipolar II Disorder in 2011. Dr Pretorius also recommended that Kenilworth Clinic, where she was admitted, should have been able to confirm her diagnosis at admission.

- [33] Significantly, the reports show that Ms DS suffers from a psychological problem, which influences the way she conducts herself

especially around Mr AWC and his children. The unfounded allegations of sexual abuse confirmed by a number of specialists, as alluded to earlier, were a ploy by Mr AWC and Ms DS for the applicant to loose primary care and custody of her minor children. Placing them under their care and custody would not be in their best interests as is evident from the reports. Ms DS is clearly meddling in the affairs of the girl and her

parents. Mr AWC has chosen to look the other way. Ms Daubermann found that Ms DS has a capacity to do harm to the children's relationship with their mother. She was therefore not an innocent bystander, especially where Ms Daubermann remarked at para 2.5.2 of her report:

"[Ms SD] initiated the psycho-legal process with the undersigned Psychologist, was found to have written the first email to the undersigned Psychologist on [Mr A WC]'s behalf, and settled the account. When clarification was sought as to who wrote the first email (from denisecorrie7@gmail.com) that was signed, ["MR AWC"], [Ms DS] confirmed that she had written the email on his behalf, as she was "doing the 'admin 'for [Mr A WC] and using his phone "hence the signature" . As a result, it was uncertain as to who wrote the emails from denisecorrie7@gmail.com that were signed, ['Mr AWC'] thereafter."

[34] [Ms DS], on her own volition, submitted to Ms Daubermann her psychiatric or psychological information. But when it dawned upon her that the Bipolar 2 Disorder is turning out to be an impediment, the criticism which is contained in the opposing affidavit to this effect was composed:

"[Ms] Daubermann has less than five years ' experience as a clinical psychologist; and it was her first attempt in doing a forensic evaluation in a custody case. She did not have adequate experience in conducting a proper evaluation and resorted in reviewing the Rule 58 Application documents that [were] not yet reviewed by the Court, conducted short interviews with the adults and minor children and performed one diagnostic test that was not normally used in custody cases. [Ms] Daubermann only contacted two collaterals."

[35] Ms Daubermann addressed a letter of withdrawal of the contents of her report that she compiled in respect of the respondents to Advocate LB Evans, a Family Advocate, on 23 February 2016. She mentioned inter alia, that the respondents claimed that the contents of her report insinuated allegations of defamation of character against them. The second paragraph of the letter states:

"The reasons for the above request are: Two adult parties assessed, namely [Mr A WC] and [Ms DS], have raised significant concerns in writing (see email correspondence and attachment) about the respective psycho-legal report. Their concerns have been interpreted to include concerns about the reliability and validity of the findings in the report. The respective parties claim to hold contradictory evidence in relation to a large portion of the findings of the report, and as a result, request further assessment in order for their evidence to be taken into consideration before a /the psycho-legal report is presented to court. Mr [AWC] and Ms [DS] further claim emotional damages [because] of the content in the report respective of [defamation] of character. "

[36] It is strange that the respondents' letter addressed to Ms Daubermann where they raised their concerns is not included in their papers. The contents of that letter are significant in the face of the threat to sue her. What is interesting is that in 2011 already [Ms DS] was diagnosed with Bipolar Disorder II by Dr Christie.

[37] Ms Daubennann found that the applicant had no Bipolar or Depressive symptomology, which was found to be significant. She also found that her "compulsive personality traits suggest that [Ms EC] is expressively disciplined in that she maintains a regulated, highly structured and organised life. " On the other hand, Ms Daubermann stated the following about the first respondent (Mr AWC):

"According to [Mr AWC], the Social Worker of the Court [which] had conducted an investigation into the alleged sexual allegations with [baby EC]. had given direct feedback to him that [EC] had told her a similar story as to what she told him (confirming the sexual allegations). [Mr AWC] was unable to identify the name of the respective [sic] Social Worker who had allegedly given him this feedback or provide any documentation containing these findings. [Mr A WC] displayed a nonchalant attitude when he was given the opportunity to locate the alleged feedback in the report of a Social Worker who had conducted such an investigation, but did not. In reviewing all the court documentation from the Office of the Family Advocate, no report was found containing the alleged feedback [Mr A WC] claimed he had received. "

[38] The respondents did not allege that Ms Daubermann received their information from any other source. Her findings result from their assessments after having consulted with them. Therefore, she did not suck the information from her thumb. They object to her findings because it was unfavourable to them. Their rejection of her report is baseless and disingenuous. The report is not considered in isolation. It is supported by other expert reports that the respondents attached in their opposing affidavit. Ms Daubermann 's report is so detailed that it cannot be ignored taking into account the best interests of the children.

[39] The respondents' attempts to have the minor daughter assessed in order to confirm sexual abuse has proved to be a futile exercise and financially draining to the first respondent. The first respondent also rejected the Magistrate's order, which granted the applicant primary care and residency of the minor children. He demanded that the order granted by Lever AJ be reviewed and set aside, which is impossible.

[40] The argument that if the prayers of the letter written to the respondents by the applicant corresponded to prayers 1.1 to 2.1 of the Notice of Motion they would have acceded to the request, does not hold water. The respondents had the opportunity to withdraw their opposition but they did not. The first respondent has tried to paint a bad picture of the applicant thereby defend ing the second respondent but the reports found differently and the evidence paints a different picture.

[41] The respondents have conceded that they are satisfied that the minor child will not be evaluated and subjected to any further examination and therefore prayers 1.1 to 2.1 may be confirmed. In para 4.1 of their opposing affidavit the following is stated:

"The purpose for the application was to prohibit the respondents from having [baby EC] evaluated by any person for previous alleged sexual misconduct. The respondents [are] in agreement with the applicant [that] the evaluations on [baby EC] [have] been concluded. The respondents [accept] the findings of the evaluations and they have no further intention of requesting any more evaluations, thus proving that this application is uncalled for and unnecessary. "

THE COSTS ISSUE

[42] The issue of costs of 24 June 2016 was deferred until 12 September 2016 when this matter was argued (see order by Lever AJ above para 1). Mr PJ Heymans, on behalf of the applicant, argued that a punitive cost order against the respondents would be justified, as the Court should show its displeasure in the way that they have conducted this matter. Their conduct was persistently obstructive in the circumstances. The respondents, on the other hand, submitted that each party should be ordered to pay its own costs.

[43] The first respondent's conduct as the father of the minor child is unacceptable. He allowed himself to be manipulated by the second respondent who interfered in his and the applicant's affairs thereby subjecting the minor child to examinations that were uncalled for, humiliating, psychologically traumatic and infringed the dignity of the child. This conduct failed to protect the best interests of the child as provided for by s 28 of the Constitution. The respondents did not withdraw their opposition notwithstanding the fact that they were not objecting to prayers 1.1 to 2.1 of the Court Order dated 24 June 2016. Nevertheless, I take into account that the respondents were unrepresented and underestimated the gravity of their conduct.

[44] "The purpose of an award of costs to a successful litigant is to indemnify him/her for the expense to which he/she has been put through having been unjustly compelled to initiate or defend litigation ".[1] The applicant had to approach court on an urgent basis on 24 June 2016 in order to protect the interests of the minor children, especially the minor daughter, from repeated allegations of sexual abuse, which proved to be without foundation.

[45] The award of costs is a matter wholly within the discretion of the court[2] but this is a judicial discretion and must be exercised on the grounds upon which a reasonable person could have come to the

conclusion

arrived at.[3] In my view, an award of costs on a party and party scale is one that I reluctantly come to.

In the circumstances, I make the following order.

1. The Rule Nisi granted on 24 June 2016 is hereby confirmed.
2. The respondents, (Mr AWC and Ms OS) are ordered to pay the costs of this application on a scale as between party and party.

BM PAKATI

JUDGE

On behalf of the Plaintiff:

ADV PJ HAYMANS

Instructed by:

VAN DE WALLINCORPORATED

On behalf of the Defendant: IN PERSON

[1] Texas Co (SA) Ltd v Cape Town Municipality 1 926 AD 467 at 488

[2] Fripp v Gibbon & Co 1913 AD 354

[3] Merber v Merber 1948 (1) SA 446 (A) at 453

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANCHC/2017/2.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ec-v-awc-and-others-unknown-topic-anchc-2017>

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