

SOUTH AFRICA / JUDGMENT

H.C.J v N.J and Another (977/2020)

[2023] ZAFSHC 182 (18 April 2023)

[2023] ZAFSHC 182**COURT**

Free State High Court, Bloemfontein

BEFORE

Gusha, AJ

CASE / FILE NUMBER

977/2020

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FLYNOTES: FAMILY – Children – Primary residence – Allegations of abuse by mother and partner – Rule nisi with terms giving primary residence to father – Recommendations of family advocate and report of family counsellor – No credible information to corroborate allegations – Both parents found wanting in parenting skills – Best interests of minor children – Ordered that mother takes primary residence of the children – Children's Act 38 of 2005, s 18(2)(a).

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No. 977/2020

In the matter between:

HCJ Applicant and NJ 1st Respondent THE OFFICE OF THE FAMILY ADVOCATE 2nd Respondent

CORAM: GUSHA, AJ

HEARD ON: 9 MARCH 2023

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 12h00 on 18 April 2023.

REASONS FOR JUDGMENT

"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined

to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of their fathers and mothers should not be visited on their children. Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how to make choices in the wide social and_moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma. No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from the abuse and maximize opportunities for them to lead productive and happy lives. Thus, even if the state cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril"[1].

- [1] These sentiments articulated more than a decade ago by the Constitutional Court, per Sachs J, albeit under different circumstances, still ring true even today. They embody what this case is about; the best interests of minor children.
- [2] The applicant (man) and the 1st respondent (woman) are former spouses, their erstwhile marriage having been dissolved by order of this court on the 21st October 2021. Two minor children DJ and EJ, both girls aged seven and six years respectively, were born from the marriage.
- [3] In those proceedings and in terms of section 18(2) (a) of the Children's Act, Act 38 of 2005 (Children's Act) the court awarded full parental rights and responsibilities to both parties, with the primary care and place of residence of the minor children awarded to the woman. The court awarded to the man, in a phased in approach, certain

contact rights. As part of that order, certain other orders concomitant with the patrimonial and non-patrimonial consequences upon dissolution of a marriage were made, which orders are irrelevant for purposes of this judgment.

- [4] Subsequent to the divorce, the applicant approached this court on an urgent basis seeking amongst others the following interim relief:

"4.1. That the 1st respondent's parental responsibilities and rights be temporarily suspended, pending the final adjudication of this application;

4.2. the minor children be deemed children in need of care and protection in terms of section 150(1) of the Children's Act and that the question whether the minor children are children in need of care and protection be referred to a designated social worker for an investigation in terms of section 155 (2) of the Children's Act;

- (c) That the First Respondent shall be afforded the following contact with the Minor Children:
- (i) Reasonable telephonic contact or contact through any other electronic means at least three
 - (3) times a week;
 - (ii) Supervised contact every alternative weekend on a Sunday during the hours from 12:00 - 15:00, which contact shall take place under the supervision of and at the residential address of the Applicant's mother (hereinafter referred to as "Ms. Brenda de Jonge").
- (a) That the Applicant's duty to pay maintenance shall cease pending final adjudication of this application and the return of the Minor Children to the First Respondent's primary care;
 - (b) That the Minor Children is (sic) placed in the temporary safe care of the Applicant;
 - (c) Consent is granted for the Minor Children to receive the necessary medical care, which includes a psychological assessment of the Minor Children.
4. The SAPS Bayswater be ordered to attend at the premises of the First Respondent, with Ms. Brenda de Jonge, which premises is situated at 1[...] H[...] V[...], H[...] S[...] Street, Pentagonpark, Bloemfontein and to collect the possessions of the Minor Children, from the house situated at 1[...] H[...] V[...], H[...] S[...] Street, Pentagonpark, Bloemfontein or any other premises where they may be found and to hand same over to Ms. De Jonge;
5. The Offices of the Family Advocate is ordered to conduct an investigation into the best interest of the Minor Children and to recommend such interventions as it would deem necessary and appropriate in the circumstances to ensure that the best interests of the Minor Children is upheld;
6. The First Respondent is ordered to subject herself to medical testing, which testing should include a psychiatric evaluation, within 14 days of the date of service of this order, the results of which should be made available to this Honourable Court, the Offices of the Family Advocate and the Applicant's attorneys of record immediately upon receipt thereof;
7. The prayers 3, 4, 5 and 6 supra shall operate as interim interdict with immediate effect pending finalization of this application;
- 8.
- 9.
- [7] The aforesaid rule nisi was thereafter extended and eventually allocated to me for hearing on the opposed roll on the 9th March

2023. Due to the urgent nature of the application and especially because it concerned the best interests of minor children, I gave an ex tempore order. My order which was in line with the Family Advocate's recommendations was as follows;

"1. That both parties should remain holders of their full parental responsibilities and rights as contemplated in section 18 read with sections 19 and 20 of the Children's Act, Act 38 of 2005.

2. That the children be returned to the care of the 1st Respondent and that she takes primary residence of the children as contemplated in section 18(2)(a) of the Children's Act, Act 38 of 2005.
3. The date, time and place of the handover, including delivery of the children's documentation and clothing, to be on the 24th March 2023 at 17h00.
4. That a psychologist, FAMSA, or any other suitably qualified professional be appointed to act as a case manager / parenting coordinator. Such a case manager/ parenting coordinator should also assist with the following:
 - a. Co-parenting, communication and conflict management for the parties.
 - b. Therapy for the children aimed at addressing their trauma caused by exposure to parental conflict and their relationships with their parents.
 - c. Re-evaluation of the minor child, EJ's, ADHD and make an appropriate recommendation therein.
 - d. Mediate any dispute that may arise from the implementation of the court's order.
 - e. Monitor, report and make further recommendations to the court on the progress of the implementation of the court's order.
 - f. That the Applicant should exercise his contact rights with the children, as contemplated in section 18 (2) (b) of the Children's Act, Act 38 of 2008. Such contact to be exercised at the paternal grandmother's residence for the first 3 (three) months following the court's order:

4.6.1. Reasonable telephonic contact.

4.6.2. 1(one) night sleep-over on alternate weekends from Saturday at 09h00 until Sunday at 17h00.

4.7. That at the end of the 3 (three) month period contemplated in paragraph 4.6 and in consultation with the designated psychologist, FAMSA, or any other suitably qualified professional contemplated in paragraph 4, the parties be assisted to draft a parenting plan extending the Applicant's contact rights. The Applicant's contact rights should not be limited to the following, except if recommended otherwise by the designated psychologist or other suitably qualified professional:

4.7.1. Reasonable telephonic contact.

4.7.2. Weekends to alternate between the parties from Friday at 17h00 until Sunday 17h00.

4.7.3. Short school holidays to alternate between the parties and long school holidays to be shared equally between the parties.

4.7.4. The parties should be encouraged to agree on any suitable contact arrangements as and when the need arises including contact on birthdays; mother's and father's day; and any other special days/holidays.

5. Each party to pay their own costs."

[8] These are my reasons for doing so.

[9] I have already alluded to some of the factual background giving rise to this application. What remains is to deal with the actual reason why we all find ourselves here, the crux of the allegations. At some point, and whilst still a nanny to the minor children, Ms Lekhooa via whatsapp[2] messages to the man, made allegations of child abuse and neglect as against the woman. On the papers as well as the reports favoured to the court, it became apparent that the allegations also bore a much more disquieting tenor than just neglect; to be precise, allegations of the man allegedly showering in the nude with the two minor children, sleeping with them in one bed, the paternal grandfather allegedly inappropriately touching and kissing the minor children.

[10] Briefly, the allegations of abuse were to the effect that the woman and or her partner would refuse the minor children meals and or treats. At times they would, as punishment for not finishing their school lunches, be made to eat same in lieu of dinner and or be locked in the bathroom for 30 minutes for one or the other misdemeanor(s). The woman would also, after hours, take the minor children to Ms Lekhooa's place of residence. This she would allegedly do, whenever she wished to join her partner at his business premises, a bar. It is further alleged that whenever the woman left the minor children with Ms Lekhooa, she would leave them overnight sans necessities.

[11] These allegations are disputed by the woman. It has been submitted on her behalf that the whatsapp messages were interpreted out of context and in a manner that cast her in adverse light. She however did not dispute that, at times, she left the minor children with Ms Lekhooa, she however averred that these were not as frequent as alleged. Further, that whenever the need arose to leave the minor children with Ms Lekhooa, she left them with their necessities and continually checked on them.

[12] As this dispute concerned minor children and their welfare, the court caused the Office of the Family Advocate to institute an investigation. Pursuant to the rule nisi granted on the 2nd September 2022 the Office of the Family Advocate conducted an investigation into the best interests of the minor children and furnished the court with its report. Before I deal therewith, I pause here to make the following remarks; the Office of the Family Advocate is established by the provisions of the Mediation in Certain Divorce Matters Act[3] . The purpose of the aforesaid Act, is amongst others, to provide for mediation in certain divorce

proceedings and in certain application

arising from arising from such proceedings, in which minor or dependent children are involved in order to safeguard the interests

of such children. The Family Advocate shall when so requested by any party to the proceedings or so ordered by the court concerned,

institute an enquiry to enable her to furnish the court with a report and recommendations on any matter concerning the welfare of each minor child of the marriage concerned or regarding such matter as is referred to her by the court[4]. The court is required to take into consideration any report produced by the Office of the Family Advocate, but is not bound by the recommendations thereof.

- [13] In its investigations regarding the welfare of the minor children, the Family Advocate was assisted by Mrs. Van der Westhuizen, a registered social worker and duly appointed Family Counsellor. As part of her investigations Mrs. Van der Westhuizen conducted interviews with the minor children, their parents and their respective partners and or housemate(s), the children's respective educators and conducted a telephonic interview with Ms Lekhooa. She also had regard to various reports compiled by psychiatrists and psychologists involved in the assessment and or treatment of the woman and the minor children as well as a report compiled by Ms Jacobs, as social worker in private practice. It would appear that well before this application, the woman requested Ms Jacobs to conduct an investigation into comments of a sexual nature allegedly made by D.J about the man. Said allegations were that the man showers with them in the nude and that she and her father share a secret. It would further appear that the man, in a retaliatory move, in turn requested Ms Jacobs to conduct a socio-emotional assessment of the minor children because of his concerns about alleged neglect of the minor children whilst in the care of their mother.
- [14] Having conducted interviews with, observations and assessments of, the minor children and their parents, individually and collectively, the Family Counsellor concluded in her report that there was a possibility that the applicant might have influenced the children before the assessment. She noted that DJ pertinently informed her that the man told her to inform the Family Counsellor how the woman treated the minor children. She further found that throughout the assessment the children often gave contradictory information and would often correct themselves upon realising that their account of their situation in their mother's care was positive instead of being negative. The minor children often gave the same account and used the exact same words used by their father to describe certain incidents and when prompted to elaborate, they were often unable to. She concluded that the minor children amongst others were confused by the current situation and lacked secure attachment with any of the parents. She further concluded that the minor children were exposed to the conflict between their parents and were negatively affected thereby.

- [15] During her interview with Ms Lekhooa, she reported that the latter did not provide any information regarding the allegations that the woman would leave the minor children with her without food and other necessities. In fact, when she broached the subject of the care and primary residence of the minor children, Ms Lekhooa expressed that the minor children should be returned to the care of the woman. It would appear though that Ms Lekhooa made an about turn on this aspect moments after the Family Counsellor telephonically sought the man's views on the statements by Ms Lekhooa.
- [16] At the conclusion of her report, the Family Counsellor found no credible information to corroborate the allegations of neglect, emotional or physical abuse within the maternal system. What was however found and diagnosed was attention deficit hyperactivity disorder (ADHD) in EJ. It bears to be mentioned that all the experts involved in the assessment of the minor children put into question the credibility and veracity of the allegations by Ms Lekhooa. For his part, the man alluded to showering in the nude with the minor children and undertook to stop same.
- [17] Aided by the aforesaid report the Family Advocate in its report made recommendations which recommendations I eventually accepted and which formed the basis of the final order I granted.
- [18] Aggrieved by the recommendations of the Family Advocate, the man raised issue therewith in his supplementary affidavit filed with leave of the court on the 15th February 2023. In it he asserted once more that the interests of the minor children would best be served if they were to remain in his primary care. He denied any allegations of sexual abuse and pleaded ignorance of the impropriety of showering with the minor children. This I find improbable. He furthermore decried what he termed the one-sided approach of Ms Jacobs. He made quite a number of other allegations which had the effect of casting the woman and Ms Jacobs in less than favourable terms. I am loathe to overburden this judgment any more than I already have, I will therefore not deal with each and every one of the allegations made, save to mention that in arriving at the decision I made, I have considered all.
- [19] Annexed to his supplementary affidavit, the man favoured this court with a report from Ms. Miller, a counselling psychologist, who provided parenting guidance and skills to him. In the same report the man expressed his decision to cease consuming alcohol. All these efforts and decisions by the man are commendable, they will certainly stand him in good stead when exercising his contact rights.
- [20] In its supplementary report, compiled and filed in answer to the man's supplementary affidavit, the Family Advocate stood by its initial report and the recommendations made therein.
- [21] The facts of this case sadly are not unique, they remind me of a poignant African proverb "Ndovu wawili wakisongana, ziumiazo ni nyika"[5]. They are reminiscent of the sad reality of many minor children, who more often than not, at the end of their parents' union, find themselves literally in a tug of war. It is a harsh reality of life that just as partners meet, fall

in love and at times have children together, that love often ends (sometimes acrimoniously) and they separate. Alive to this fact, I can only express the hope that once that eventuality arises, the partners, as the adults and presumably the more mature beings, would have the presence of mind not to put their offspring in the middle of their acrimony and thereby visit their sins and traumas on their offspring.

- [21] It is against this rather unfortunate and heart-rending factual background that this court, as the upper guardian of all minors, is called upon to determine the minor children's primary residence, differently put, what in the circumstances of this case best serves the interests of the minor children. It is indeed difficult in matters that involve a minor child's primary residence to decide which home is better than the other. The court is in a position of an outsider, looking in from the outside, as it were. It is against that locale that the court is called upon, to weigh the competing advantages and disadvantages of the circumstances of both parents as presented in the reports before the court.
- [22] In order to arrive at the aforesaid determination, this court will be guided by what is in the best interests of the minor children with due regard to the factors as listed in section 7 of the Children's Act. It is after all a constitutional imperative that in all matters dealing with and or involving children, the best interests of the child are paramount[6]. When dealing with the best interests of the child the court in *McCall v McCall*[7] held as follows;

"In determining what is in the best interest of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by a reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following: the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's

feelings.

- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs generally speaking, the provision of economic security;

- (f) the ability of the parent to provide for the educational wellbeing and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into
- (l) ...
- (m) any other factor which is relevant to the particular case with... "

[23] Having carefully considered the reports of the family advocate and the man's supplementary affidavit, I am unable to find that one parent is better able to promote and ensure the physical, moral, emotional and spiritual welfare of the minor children, than the other. On the aforementioned, the scales are evenly balanced. In fact, apart from the acrimony between them, the reports evince that they have the following in common; each are gainfully employed and each reside in adequate dwellings. As evinced by respective reports, they are not perfect parents. Both have been found wanting in their parenting skills. They each have experienced their fair share of trials and tribulations; the applicant's alcohol abuse and the woman's depression and suicide attempts being cases in point. What tips the scales in the woman's favour however is the following; during the divorce proceedings, the court aided by the Family Advocate's report awarded primary care and residence to the woman. Until the man approached the court for the rule nisi, he had not once complained about the woman's unsuitability to care for the minor children. Despite the woman's shortcomings, I could find nothing suggesting that the woman had neglected the minor children or acted in any manner that jeopardized their care. Furthermore unlike the man's mere say so on stopping his alcohol abuse, the woman has been treated by a clinical psychologist and a psychiatrist. The latter certifying, in a reported dated 19 September 2022, that the woman's depression is in remission since 2021 and that there has been no reports of any suicidal attempts since.

[24] It is evident from the reports that the minor children love their parents and both parents reciprocate the love. The minor children are however confused and conflicted, they feel the need to appease the parents, depending on which parent at any given point in their lives is the primary care-giver.

- [25] It is manifest that the man and the woman, if not for themselves, then for the sake of their minor children, have a lot to work on, singly and collectively. At the tender ages of 7 and 6 both are still in their formative years, and deserve a lot more than they have been getting from their parents. The current acrimony between the parents and tugging at their offspring does not bode well for the wellbeing of the minor children. This needs to stop!
- [26] The minor children have suffered enough. At their tender ages they have had to experience and perhaps even witness the root cause of the breakdown of their family unit. They have had to move between schools, homes, bid family, friends and familiar environments goodbye, all too often. At the risk of repetition, this needs to stop! For them to enjoy their childhood and someday be well-rounded adults, they need, as far as possible, to live in a safe and nurturing environment, they need and indeed deserve stability in their young and impressionable lives.
- [27] This court can unfortunately not itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What it can do, is to endeavor to insulate them against such by creating conditions to protect them and to maximize opportunities for them to lead productive and happy lives. This is what the court sought to achieve with its order dated 9th March 2023.
- [28] Alive to this and in an endeavor to create as little disruption as possible to the minor children, towards the tail-end of the 9 March 2023 proceedings, I broached with counsel for the woman the subject of when and how it would be opportune to place the minor children in the care of their mother, if the court were so inclined. Adv. Van der Sandt, drew the court's attention to the impending March school recess and implored the court, if it were so inclined, to utilize that period. This she submitted would cause little to no disruption to their schooling and further submitted that, should the order restore their mother's primary caregiver status, plans were afoot to have them readmitted at their former schools in Bloemfontein
- [29] Having found no cogent reasons to reject the recommendations of the Family Advocate, I accordingly granted the order in the terms I did. I was furthermore satisfied that in the present matter the court was not dealing with children in need of care and protection as envisaged in the Children's Act. What was vital in this case was for the parents of the minor children to undergo a paradigm shift with regards to their priorities and parenting skills. I am satisfied that the interests of the minor children are best be served by returning them to the care of and primary residency with the woman.
- [30] Accordingly, as this is a final order, the maintenance order that was suspended by the rule nisi is hereby revived.
- [31] The Office of the Family Advocate is ordered to report and or make further recommendations to this court on the progress of the implementation of the court's order on the 25 May 2023.

NG GUSHA, AJ

On behalf of the applicant Adv. W.A Van Aswegen Instructed by: McIntyre Van Der Post
BLOEMFONTEIN On behalf of the respondent: Adv. A Sander Instructed by: Eugene Attorneys
BLOEMFONTEIN

- [1] M v The State and Centre for Child Law [2007] ZACC 18; 2008 (3) SA 232 (CC).
- [2] An internet based social media messaging application.
- [3] Section 2 (1) and (2) of Act 24 of 1987.
- [4] Ibid Section 4.
- [5] Swahili proverb: when two elephants fight, the grass suffers.
- [6] Section 28 of the Constitution of the Republic of South Africa, 108 of 1996, see also section 9 of the Children's Act, Act 38 of 2005 which 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.
- [7] 1994 (3) SA 201 (C) at 205 A- F.

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Prepared on 14 October 2026 · Esheria