

SOUTH AFRICA / JUDGMENT

M v B (272/2017) [2017]

ZAFSHC 122 (6 July 2017)

[2017] ZAFSHC 122

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

272/2017

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 272/2017

In the matter between: D. M. and Plaintiff L. B. Defendant CORAM: NAIDOO, J HEARD ON: 20 APRIL 2017 DELIVERED ON: 6 JULY 2017

INTRODUCTION

[1] The applicant brought an urgent application, on 20 January 2017, in which he sought an order, in essence for full parental rights, including care and residency, in respect of three minor children, namely J. L. N. M.(N.), a 4 year old girl, T. Z. M. (T.), a girl aged 2 years and Z. M. (Z.), a 6-month old girl. Mr H Cillie represented the applicant and Mr Cronje represented the respondent. The court granted an order, inter alia, in the following terms:

"1...;

2. The Family Advocate is ordered to appoint Mrs Heidi Joubert in order to perform an evaluation in respect of the Applicant, the Respondent and the minor children, J. L. N. M., T. Z. M. and Z. M..
3. The Applicant shall pay the reasonable costs of the assessment by Mrs Heidi Joubert
4. The Family Advocate shall file a report in respect of the evaluation and her recommendations on or before 17 February 2017

5. The Respondent shall file her opposing affidavit, if any, no later than 24 February 2017.
6. The Applicant shall file his replying affidavit, if any, no later than 3 March 2017.
7. The minor children shall in the interim reside at the residential home of the respondent's mother, situated at [...] C. S., Brentpark, Kroonstad, Free State Province pending the finalisation of the application.
8. The Applicant shall, have the right of reasonable access to the minor children pending the finalisation of the application, which shall include to the right take the two eldest minor children with him on Sunday 22 January 2017 from 9H00 to 16H00 and thereafter each alternative Saturday from 9H00 to 16H00.
9. The applicant shall be entitled to take the youngest child with him on the same dates set out in paragraph 8 hereof from 9h00
- 11h00"

The reports of Mrs Joubert, the Family Advocate and the Family Counsellor were filed during February 2017, and I shall deal with these later in the judgment. The respondent and applicant also filed their opposing and replying affidavits.

BACKGROUND

- [2] The applicant and respondent entered into a relationship in 2011 at a time when the applicant was approximately 50 years old and the respondent about 28 years old. The applicant lived in Bethlehem and the applicant in Kroonstad. The applicant has a daughter, T., and the respondent a son, L. G., from their previous relationships. A few months after they met the respondent fell pregnant. She gave birth to N. on [...] 2012. Shortly thereafter, she fell pregnant with F. M. (F.) who was born on [...] 2013, but prior to this she formed an association with another man, as a result of which the applicant disputed paternity of F.. A paternity test revealed that the applicant was not the biological father of F.. While the respondent was pregnant with F.1 she stayed in Kroonstad. By agreement between the parties! N., who was 8 months old went to stay with the applicant in Bethlehem, to allow the respondent, who remained at her mother's house in Kroonstad, to cope with the birth of the new baby.
- [3] When F. was a few months old, the respondent left her in the care of her (the respondent's) mother and went to live with the applicant and N. in Bethlehem. The two younger children were born during the time that the respondent lived with the applicant in Bethlehem. T. was born on [...] 2015 and Z. was born on [...] 2016. The parties and the children appear to have had all the material comforts that few other people have. The applicant has a luxurious 6-bedroomed home and had employed a nanny, a domestic helper, a gardener and a driver to assist with the running of the household. Yet there was strife and discord between the appellant and the respondent, which escalated over a period of time and involved allegations of domestic violence. Ultimately the respondent left the common home on 9 January 2017,

taking all three children with her. I pause to mention that, as a result of a telephone call from someone claiming to be the father of Z., paternity tests were conducted in respect of N., T. and Z.. It was found in December 2016 that the respondent was not N.'s biological father. He was, therefore, the father only of T. and Z.. This must understandably have contributed to the tension between the parties.

- [4] After the respondent's departure from the common home, the applicant launched this application for the relief I have mentioned above. It is clear from the papers that there is a great deal of acrimony between the parties, and regrettably both parties have raised issues which give the impression that this matter is, inter alia, a point-scoring contest between them. I will touch on this if necessary. In their favour, though, it is commendable that both parties are committed to the children and have ensured that they formed secure attachments with the children, as it is clear that the children, especially N. and T., love and relate well to both parents.
- [5] In accordance with the court order of 20 January 2017, Ms Heidi Joubert (Joubert), a social worker in private practice, conducted extensive interviews with and assessments of the parties and the children, being N., T. and Z.. She also interviewed other role players in the lives of the children, the applicant and respondent in order to gather as much information as possible to compile the Assessment Report required by the court, which report was filed on 17 February 2017. The Family Advocate, Ms Astrid Davids, (Family Advocate) subsequently conducted an enquiry, with the applicant and respondent at her office, in conjunction with the Family Counsellor and compiled her report to which she attached Joubert's report and the report of the Family Counsellor, Ms Kgantse Faith Molefi (Family Counsellor), which was filed on 27 February 2017. The respondent filed her Opposing Affidavit on 2 March 2017 and the applicant's Replying Affidavit was filed on 31 March 2017. Joubert and the Family Advocate, therefore did not have the opportunity to read the opposing and replying affidavits at the time they were compiling their respective reports.

ISSUES

- [6] Both parents are seeking full parental rights and responsibilities in respect of the three children, in terms of section 18 of the Children's Act 38 Of 2005 (the Act), which rights are to include care and residency. In other words, each parents contends that it is in the best interests of the children that custody of the three children should be granted to him or her.
- [7] The applicant contends that he is financially, physically and psychologically the better parent to take care of the children in view of the respondent's circumstances, namely that she is unemployed, living with the children in an overcrowded house with other members of her family and is emotionally unstable. The latter assertion arises from an alleged suicide attempt by the applicant, while Z. was in her care. Another ground for contending that he is the better parent is the alleged physical abuse by the respondent of T., and the respondent's abuse of alcohol. The respondent, for her part, denies the allegations of the applicant and asserts that she and her five children are a family unit with a solid support system in the

form of her mother and other family members, and that the children are in a secure and loving environment. By contrast, the applicant was physically and emotionally abusive, and had assaulted her in the presence of the children, thus creating a hostile and unstable environment, which was not conducive to serving the best interests of the children.

THE LAW

(8) Section 28(2) of the Constitution of South Africa provides that "A child's best interests are of paramount importance in every matter concerning the child", while section 9 of the Act implores 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" Section 7 sets out an extensive list of factors to be considered whenever the Act requires the best interests of the child standard to be applied, the most relevant of which, in summary, are:

8.1 the nature of the relationship between the child and the parent or parents or between the child and a caregiver;

8.2 the attitude of the parents or a specific parent towards the child and the exercise of parental rights and responsibilities in respect of the child;

8.3 the capacity of the parent or parents or caregiver to provide for the needs of the child, including the emotional and intellectual needs;

8.4 the likely effect on the child of any change in his circumstances, including separation from his parent or parents and siblings or caregiver.

8.5 The practical difficulty and expense for one or both parents of having contact with the child and whether such difficulty or expense will substantially affect the child's right to maintain direct, regular contact with the parent or parents and thus maintain personal relations with the parent or parents;

8.6 The need for the child to remain in the care of his parent, family and extended family, and to maintain a connection with his family, extended family, culture and tradition;

8.7 the child's age, maturity, stage of development, gender, background and any other relevant characteristic pertaining to the child;

8.8 the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

8.9 any disability the child may have;

8.10 any chronic illness from which the child may suffer;

8.11 the need for the child to be brought up in a stable family environment or in an environment that closely resembles a caring family environment;

8.12 the need to protect the child from any physical or psychological harm, caused by maltreatment, abuse, neglect, exploitation, degradation or exposure to violence or other harmful behaviour, directed towards him or another person;

8.13 any family violence involving the child or any family member of the child;

8.14 which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

EVALUATION OF THE EVIDENCE

- [9] As I indicated, Joubert conducted an extensive evaluation of the parties and the children in conjunction with the information received from related persons. Where reference is made to Joubert's report and/or evaluation, the applicant may be referred to as the father, while the respondent may be referred to as the mother. In her evaluation, Joubert found that N. and T. share secure attachments to both parents, with N. experiencing a lack of security due to the absence of her father in her daily life. Z., who was three months old when the evaluation was done, was still being breast-fed, and was dependent on her mother for her physical and emotional needs. The older children respond positively to the father and clearly miss his presence. Joubert found that both parents interact well with the children, are able to communicate positively with them and give appropriate structure and guidance to the children.
- [10] With regard to the best interests of the children, Joubert concludes, in respect of the factors to be considered in terms of section 7 of the Act, that N. and T. have secure attachments with both parents. Z. is still dependent on the respondent for her physical and attachment needs. Both parents are capable of providing for the emotional and intellectual needs of the children. They are both committed to the care of the children and demonstrate insight into the needs of the children. N. and T. experience the loss of their father negatively and the separation of their parents has a detrimental effect on their well-being. She observed that N. and T. have already established an emotional connection with Z., and with each other. Given the developmental stages of the children they are in need of a constant caregiver who is able to provide for their physical emotional, educational and attachment needs. They are in need of a stable environment and any changes in caregiver or physical environment should be effected as soon as possible.
- [11] The children are being raised within the combined cultural backgrounds of the parents and are being schooled in Afrikaans, which is the language that both parents communicate with them in. Joubert observes that the applicant is able to provide stability in respect of the children's physical needs, such as clothing, housing, education and medical needs. He is also able to take care of their emotional needs as their caregiver, but he has to be assisted in this regard by his support network comprising the nanny, domestic worker, and driver. The respondent's current living arrangements are temporary and cramped, and not conducive to the best

interests of the children in the long term. The respondent is, however, able to provide for the children's physical and emotional

needs. From Joubert's report it is clear that the respondent is also providing for their educational needs. Joubert observes that the applicant's prospective contribution to maintenance must be taken into consideration when assessing the respondent's ability to provide for and take care of the children in the long term.

[12] I turn now to deal with the applicant's allegations of physical abuse of T. by the applicant. There was one incident where T. suffered a broken tooth, The applicant alleges that this happened in November 2016. She observed this when T. returned from school, and also that there was blood on T.'s jersey. She drew this to the applicant's attention. He, in turn, enquired about this

from the school, and the teacher denied that this happened in school. The applicant appears to have left it at that. The respondent, in her opposing affidavit, indicated that T. had other injuries at other times, such as two lumps on her forehead. The school apparently said she had hurt herself whilst playing. This too was not pursued, and the applicant flatly denied any knowledge of such injuries. Another injury that T. suffered was an alleged burn to her hand. The applicant said in his Founding Affidavit that the respondent informed him that the injury was caused when T. touched the treadmill. In her opposing affidavit, the respondent confirmed that this is how the injury was sustained but that the applicant was at home and that N. and T. were with him when the incident happened.

[13] It is clear from the papers that the respondent had a somewhat rocky relationship with the domestic help in the form of the nanny and cleaner, while she lived with the applicant. She claims that she dismissed the cleaner in June or July 2016, and she returned for only one day in November and then left again, only to return in January 2017 when the respondent had already left the applicant's house and returned to Kroonstad. During Joubert's interview with Ms N. V. D. M., personal assistant to the respondent, who was responsible for payment of the salaries of the domestic helpers, she advised that the cleaner was not in employment since September 2016 and did not return until January 2017. The nanny was on sick leave at the time. Ms V. D. M. also advised that the applicant instructed her to keep the cleaner and the nanny on the payroll even when they were not in active service.

[14] The applicant alleges that the cleaner approached him in January 2017 and asked to be re-employed. and also at that time informed him that in November 2016, she had witnessed the respondent pushing T. down the stairs, causing her tooth to break. She further informed the applicant that in December 2016, she had witnessed the respondent holding an iron in her hand and T. crying violently. She noticed that T.'s hand was burned. When this evidence is viewed in the light of the respondent's evidence that cleaner was dismissed in June/July 2016 and Ms V. D. M.'s advice to Joubert that the cleaner was not in employment since September 2016. I am inclined to accept that the cleaner did not in fact witness these alleged incidents of assault. Furthermore, why would the cleaner approach the applicant and request him to

re-employ her if she was already in employment? It is very difficult to avoid the perception that the cleaner, who had an axe to grind with the respondent, fabricated this version. The respondent's confusion/mistake regarding the dates when the cleaner was in employment, together with his instruction to Ms V. D. M. to keep the cleaner on the payroll in spite of not being in active employment, begs the question whether there was collusion between him and the cleaner in respect of the injuries suffered by

T..

[15] During the assessment of N., Joubert explored the injury to T.'s hand. N. spontaneously left her chair to demonstrate that she had switched the treadmill on and that T. had placed her hand on the treadmill, sustaining the injury to her hand. It must be borne in mind that the assessment was done some three months after the injury to T.'s hand. At the time that the applicant noticed the injury, the respondent gave him the same explanation. The manner in which N. related the incident would suggest that that is indeed how T. came to be injured. Joubert concluded that the allegations of physical abuse by the respondent could not be sustained. It is therefore, rather disturbing that the applicant would put out the version he did in respect of the injury, particularly as it seems that the cleaner was not in employment at the time. There was a belated attempt in Reply, by way of the supporting affidavit of Ms V. D. M., to create the impression that she had advised Joubert that she was unsure when the cleaner was dismissed. Not much weight should be attached to this assertion as, in my view, the applicant realised that the information given to Joubert in this regard is damaging to his case, hence the attempt to dilute the effect thereof.

[16] Similarly, the only people who corroborated the applicant's allegation of alcohol abuse by the respondent, are the nanny and the cleaner. In this respect too, Joubert concluded that this allegation could not be sustained. One has a distinct sense of unease that there is a deliberate attempt, by the applicant, to paint a poor picture of the respondent, while creating a picture of himself as the parent or partner who can do no wrong. An example is the assertion in his Founding Affidavit that N. came to stay with him when she was three months old. In his Replying Affidavit, he amends this to three days. This is patently untrue and unlikely in view of all the other evidence. At one point in the papers it was alleged that she was 8 months old, having gone

to stay with him in May 2013, while the respondent alleges that N. was approximately 11 months old. In a similar vein, the dates

reflected in paragraphs 18.19 and 18.20 suggest that N. was three months old, but after the amendment, it now reads three days. This means she would have gone to stay with him on 15 September 2012, which in my view makes no sense at all. It is disturbing too, that in his replying affidavit, the applicant attempts to dismiss N.'s narration of the treadmill incident as an unreliable story on the part of a 4 year old child, and seems to insist that the version of the cleaner be accepted.

- [17] Both parties make allegations of physical abuse and domestic violence against each other, which create a picture of a tense, volatile and unstable environment for the parties and indeed the children. The incident of domestic violence against the respondent, in respect of which she had to receive medical attention and attached photographs to her opposing affidavit to indicate the extent of her injuries, appears to be quite serious. Not only does she say she was assaulted and pushed down the stairs by the applicant, but this was done in the presence of the children. Joubert indicates that several times during various stages of the assessment, N. related the incident, saying that the applicant hit the respondent with his fist and pushed her down the stairs. She appeared to be very traumatised by the incident which caused her to be angry with her father. It also caused her to display ambivalence towards him at different times, in that she expressed how much she loved him but in the next breath expresses her anger towards him for assaulting her mother.
- [18] Once again, in his Replying Affidavit, the applicant dismisses this denying that he ever assaulted the respondent. He says pointedly, in respect of the treadmill incident, that not much reliance can be placed on the word of a 4 year old. One can only infer that his denial of the assault is based on the same premise. It must be remembered that various techniques and testing methods were employed by Joubert, who is an independent, skilled professional, to obtain information and results in order to compile her report. Common sense dictates that a 4 year old child simply does not have the intellectual capacity to fake her responses during such testing, or to appear to react spontaneously (which she did). She was genuinely deeply disturbed by the incident she witnessed, to the extent that she even said directly to the applicant that he must not push her mother down the stairs again (para 9.4 of Joubert's report). I reject the applicant's denial of the assault on the respondent and accept that N. did witness such an assault which caused her a great deal of trauma.
- [19] In respect of the alleged suicide attempt by the respondent, it seems that Joubert and the Family Advocate appear to have overlooked the fact that the respondent had four babies in four years. Human experience and common sense dictate that a woman's body and emotions must surely take a serious beating in those circumstances. The respondent admits sending a text message to her mother to say she was going to kill herself, but says that she never intended to kill herself. That was a cry for help because she felt so desperately unhappy and helpless. Z. was just one month old at that time. It is understandable that the respondent would have been physically and emotionally exhausted from the birth of a fourth child in as many years. Add to this the tension and constant confrontations with the applicant and his domestic staff, and it is clear that she had no support system to help her cope with her situation causing her to feel isolated. I cannot, without more, find that she is mentally unstable because of this incident.
- [20] The applicant is approximately 22 years older than the respondent and a trained nurse. It would be expected of someone in his situation to have a better understanding of the respondent's emotions and to have been somewhat more sensitive in his handling of her. The discovery that two of the four children born after he and the respondent entered into a

relationship, must have been devastating for the applicant and his anger is understandable. The respondent for her part did not try to justify her unacceptable conduct and accepted responsibility for it, but explains that she felt lonely and rejected. It seems that the applicant did indeed become emotionally absent, as alleged by the respondent. In his founding affidavit, the applicant merely narrates what happened during the alleged suicide incident, without any mention of what he did to assist the respondent or have her examined by a medical professional. In reply he denies that he failed or refused to assist the respondent and alleges that she refused treatment. This fortifies my impression that he makes a deliberate attempt to cast the respondent in the poorest and most negative light.

- [21] When this picture he paints of the respondent is compared with Joubert's findings in the Assessment Report, I am constrained to find that the respondent is an irresponsible or unfit mother to the extent that the applicant is the better parent. According to Joubert, they are equally matched in terms of their commitment to the children and their ability to care for and provide for the physical and emotional needs of the children. It is difficult to avoid the perception that the applicant was consistently building a case against the respondent to show her to be an unstable person and an unfit parent. How else can one view the unusual step of photographing a child's injuries, especially if there was no clarity at the time about how the injuries were sustained, or having her arrested for a domestic argument so shortly after she came to live

with him? The tone of his replying affidavit, in my view, may well lend some truth to the respondent's assertion that the applicant is a manipulative and domineering person.

- [22] As I indicated earlier, the applicant's commitment to the children, however, is commendable, even more so that, in spite of his knowing that N. is not his biological child, he treats her as his own. It is also very obvious that he loves the children dearly and they, especially N. and T., love him equally. Z. is too young to have formed the kind of bond with the applicant as the older two child have with him, but there is no doubt, that with regular contact with her, she will also be in the same position. This to, my mind, can only be to the benefit of the children in the long term, as he can be relied upon to always act in their best interests.
- [23] Although the respondent raises the issue of N.'s paternity, which she alleges renders the applicant without any rights in respect of N., there is, to my mind, no serious dispute that he behaves and has done since her birth, as a father to N. in every material way. He is clearly in a far better financial position than the respondent to provide for the material needs of the children and is on an equal footing with her in respect of his ability to take care of their emotional needs. The fact that he voluntarily buys groceries and food for the children, after they went to reside in Kroonstad, and that he has been making cash payments to the respondent, without a maintenance order in place, is also

commendable. However, consultation with the respondent as to the needs of the children would go a long in assisting to purchase food for which there is a greater need.

- [24] In a matter such as this, which is understandably emotion-charged and emotional, one party is bound to be unhappy, whatever the court decides. The court must, however, be informed by the guiding principle of the best interests of the child in the decision it makes. The respondent is unemployed, lives in cramped circumstances in her mother's house with all five of her children as well as her mother, sister and the child of her sister. In essence 9 people live in a two-bedroomed house, and a wooden structure which is commonly referred to as a Wendy house, on the premises. What is important is that Joubert conducted a home visit at the home of the respondent's mother, where she lives with the children, and evaluated the children to be physically properly cared for. She also found that their basic needs such as the provision of food, shelter, clothing, comfort and education are adequately taken care of. Joubert could not identify any risk factors at the home where the children are living. Her only concern is that the cramped conditions are not satisfactory and that, in the long term, may not be in the children's best interests. Allied to this is the uncertainty of the respondent's ability to provide for the children financially.
- [25] I pause to observe that millions of South Africans find themselves in circumstances similar to the Respondent and the M. children due to poverty or lack of financial means, but are able to rise above these circumstances, with love and support. The newly appointed Deputy Chief Justice of this country is a prime example of someone who lived in very poor circumstances, but with love and support, he was able to reach the heights he has, in his chosen field. Many thousands of South Africans tell similar stories. The M. children are definitely in a more favourable position, in that they have a father who is more than adequately able to ensure that financially, materially and emotionally they need want for nothing. They have an equally capable and committed, but poor, mother. Between the parents, the possibility of a bright future for these children is a reality. The parties need to realise that it is the best interests of the children that they put the needs of the children before their own and resolve whatever differences they have in an amicable and non-volatile manner.
- [26] I agree with the view of the Family Advocate that, from the evidence placed before this court, the applicant meets all the requirements of section 21(1) of the Children's Act and therefore acquires full parental responsibilities and rights in respect of T. and Z.. The right to care and residency of the children must still, however, be determined by this court. With regard to N., the applicant indicates that he is an interested party referred to in section 23 of the Act, and as such has locus standi to bring the application for care and residency in respect of N.. Section 23(1) provides as follows:

“Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary -

- (a) contact with the child; or
- (b) care of the child”

[27] On my reading of the section, it seems that an application must be brought in terms of section 23(1) to a High Court, divorce court or the children's court for an order assigning contact and care to an interested party. The application that serves before me, in respect of N., is for full parental rights and responsibilities in terms of section 18 of the Children's Act. Although the applicant has been involved in N.'s life as if he were her biological father, this court is not permitted to grant the order foreshadowed in the Notice of Motion, in respect of N.. A specific procedure is to be followed in bringing an application in terms of section 23(1), possibly to take account also of the rights of N.'s biological father. In my view, therefore care and residence in respect of N. cannot be considered in the context of the current application. That is not to say, however, that the applicant should not continue or be prevented from continuing to have contact with N., until the correct steps are taken to regularise the care and contact arrangements in respect of her. It would not be in her best interests for contact with the applicant to cease.

[28] In deciding whether the care and residence of T. and Z. should be granted to the applicant, the court must have regard to the factors set out in section 7 of the Act to determine whether it will serve the best interests of the children to grant the order sought. I have detailed the evaluation done by Joubert in this matter and her view is that both parties have equal capabilities in providing for the needs of the children, but the applicant has the clear economic advantage over the respondent. The Family Advocate presents three possible options in respect of the order the court can make:

28.1 The daily residence and care of all three children be awarded to the respondent. The concerns raised with this option is the mental functioning and stability of the respondent, based on the alleged suicide attempt, and the uncertainty regarding the future employment and accommodation of the respondent, which could impact on her ability to properly care for the children

28.2 The daily care and residence of all three children be awarded to the applicant. The concern in respect of this option is that tZ. does not have an attachment with the applicant and is still dependent on the respondent for her needs. It will not be in Z.'s best interest for her care and residence to be awarded to the applicant.

28.3 The daily care and residence of N. and T. be awarded to the applicant, and the daily care and residence of Z. be awarded to the respondent. The Family Advocate was of the view that this would be the least detrimental to the children and although the children would suffer

the loss of one parent and of each other, this can be addressed through therapy. She recommended that this be the order the court should make.

[29] I had earlier in this judgment alluded to the fact that the respondent's opposing affidavit and the applicant's replying affidavit were filed after the completion of Joubert's report and those of the Family Advocate and Family Counsellor. They had not at that stage had the

opportunity of considering the issues raised in these affidavits. In view of what I have said above regarding these two affidavits, particularly with regard to the atmosphere that prevailed in the common home, the incidents of domestic violence and the mental functioning of the respondent, I am of the view that the recommendation of the Family Advocate may not serve the best interests of the children. In the light of what I have said regarding N.'s paternity and the rights of the applicant with regard to her care and residence, it would mean that only T.'s care and residency may be awarded to the applicant.

- [30] This would most probably be highly traumatic and unsettling for all the children, given that the three girls have already formed a close bond. This is evidenced by T.'s reaction when she heard Z. cry during one of the evaluation sessions conducted by Joubert. She herself began crying and had to be soothed and comforted by the respondent. The close relationship between N. and T., too, would militate against them being separated. I have accepted that N. witnessed the incident of domestic violence where the applicant assaulted the respondent, and that she suffered great trauma as a result. Should she now be separated from T., it could bring about feelings of rejection, in that she could perceive that the applicant favours T. over her. This perception is based on Joubert's observation of her conduct when she was in the company of both the applicant and T.. She constantly tried to deflect the applicant's attention away from T. and, according to Joubert, displayed subtle annoyance when the applicant gave T. attention.
- [31] In my view another very important aspect that has not been dealt with and not mentioned at all is whether N., T. and Z. have formed attachments with the respondent's other two children, L. G. and F.. We also know nothing about the attachments from L. G.'s and F.'s side towards N., T. and Z.. From Joubert's assessment, it emerges that N. and T. are attending school in Kroonstad and are performing well. F. is attending the same school as they are, and all three are taken to school by the respondent. It is difficult to imagine that no attachment whatsoever has resulted amongst these children. The respondent has indicated that she and the five children are now a secure family unit. The reality is that the relationship between the applicant and respondent has irretrievably broken down and there appears to be no prospect of them reconciling. The further reality is that all five children now form part of a family unit which is headed and cared for by the respondent. The effect of the separation of all five children from each other must also be explored.
- [32] I have already expressed my view with regard to the mental functioning of the respondent, based on the alleged suicide attempt

and taking into account the prevailing circumstances she found herself in at the home of the applicant. I am, however, in agreement

with Joubert and the Family Advocate that the respondent should undergo a psychological assessment and, if required, counselling in respect of stress and anxiety management. The care of five children with limited resources can present its own challenges, and if she requires assistance, then that needs to be addressed. The applicant correctly pointed out that he has no

legal obligation towards the respondent as they are not married, but indicates that he was not asked to pay for any psychological treatment that the respondent needed. I take this to mean that if he were asked, he would have paid for it. The view that the Family advocate expressed is that the respondent has not sought such counselling and therefore her mental functioning cannot be ignored as it may present a risk factor to the children. The possibility that she does not have the financial means to seek such assessment was not considered. Similarly, I agree with the recommendation that N. also receive therapy to assist her deal with the trauma of witnessing the incident of domestic violence against the respondent. This would also assist her to shed any negative feelings she has towards the applicant and assist in promoting a more loving and secure relationship between

them.

[33] Divorce or permanent separation of parents, as in this case, will inevitably have a negative impact on children. The view of Dr Tanya Robinson, in her work "What about the Children?" Cape Town: Struik Lifestyle, cited by the Family Counsellor is relevant. She says "divorce brings about great changes, and children need and function best with routine and structure to create their security. Change therefore causes insecurity which in turn leads to an anxiety that children experience but do not necessarily express or understand" It is without doubt that N. and T. have suffered as a result of the breakdown in the relationship of the applicant and the respondent, and the loss of the applicant's presence in their daily lives. The difficult function of the court dealing with a matter such as this is to find a way of consolidating the family and placing the children in a situation that is least detrimental to them, and which will promote their growth and development. In *P v P* 2007(5) SA 94 (SCA) at para 14, the court held that "Determining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgment based on its finding of facts in the exercise of its inherent jurisdiction as the upper guardian of minor children"

[34] The court has agonised over this matter for many a day in attempting to find the way to keep the children in an environment which resembles as closely as possible a family structure within which they can find stability, security and certainty, while at the same time maintaining contact with both parents in order to strengthen the bonds they have with each parent and with each other. Perhaps my starting point is to express the view that it will not be in the interests of the children to separate them. For the reasons I have mentioned above, I am not in agreement with the recommendation by the Family Advocate that Option 3 be the basis of the court order. In my view, Option 2 would not be in the best interests of the children, as it is clearly inadvisable that Z. be separated from the respondent, due to her not having an attachment

with the applicant.

[35] If any of the children had to be placed in the care of the applicant, the respondent would have to travel to Bethlehem to exercise her right of contact with them. In her current financial situation, it may be difficult to do so, and this would therefore deprive the children of their right to have personal and direct contact with her. In my view Option 1 would be the best option, where all the children are kept together in order that they may have security, continuity and the opportunity to build their relationships with each other and with the respondent. This is necessary as the five children will be part of each other's lives in the future, and in view of the order I will make, the respondent will be their primary caregiver.

[36] The applicant has shown that he does have the best interests of the children at heart, and the court feels confident that he will give effect to whatever order the court makes. He is a very successful businessman with more than ample financial and material resources to ensure that the circumstances of at least N., T. and Z. are optimally enhanced. It would be far easier for him to travel to Kroonstad regularly to exercise his contact rights. He has the financial means to assist the respondent by paying a regular

and adequate amount in respect of maintenance, while she does her part to find employment and alternative and suitable accommodation for her and the children. It is in the children's best interests that the applicant give the respondent the support and assistance needed to create a suitable environment for the children to live in.

ORDER

[37] In the circumstances, I make the following order:

37.1 The Respondent retains full parental responsibilities and rights in respect of J. L. N. M. (born on [...] 2012) [N.], T. Z. M. (born on [...]

2015) [T.] and Z. M. (born on [...]

2016) [Z.], as contemplated in section 18 of the Children's Act 38 of 2005;

37.2 The Applicant is awarded full parental responsibilities and rights in respect T. and Z. as contemplated in section 18 of the Children's Act 38 of 2005;

37.3 The daily care and permanent residence of N., T. and Z. is awarded to the Respondent. as contemplated in section 18(2)(a) of the Children's Act;

37.4 Contact between the Applicant and N., T. and Z. as contemplated in section 18(2)(b) of the Children's Act is awarded to the Applicant as follows:

37.4.1 Every alternate weekend from 16h00 on a Friday to 17h00 on Sunday;

37.4.2 One long and one short school holiday per year. The July holiday shall alternate each year between the parties and the December holiday shall be divided equally between the parties. The first period shall be from the date of closure of school to 27 December and the second period will be from 27 December to the day before school reopens. The first and second period of the December holiday shall alternate annually between the parties, so that each parent spends Christmas with the minor children every alternate year;

37.4.3 Contact on the birthday of the applicant and for at least three hours on the birthday of each child;

37.4.4 Contact on Father's Day, should this not fall on a normal contact weekend;

37.4.5 Regular and reasonable telephonic and electronic contact with the children during the week and on non-contact weekends, without negatively impacting on the routine of the children.

37.5 The Office of the Family Advocate, Bloemfontein, is directed to monitor, on a six-monthly basis, for a period of Twenty Four (24) months after the date of this order, the children in the respective environments of the Applicant and the Respondent, and compile a report with regard to their findings in respect of each visit. Such report is to be kept on file at the their office in Bloemfontein, and produced when called on by the court or any of the parties to do so;

37.6 Should the need arise for the Family Advocate to intervene, that office may, in conjunction with the Department of Social Development, takes such steps as are deemed necessary to serve the best interests of the children;

37.7 The Respondent is directed to undergo psychological testing and counselling, if the latter is deemed necessary, with a view to learning stress management techniques;

37.8 The Respondent is directed to submit N. to psychological assessment and therapy in respect of the trauma she suffers as a result of the domestic violence she witnessed;

39.9 The Applicant is directed to pay the costs of such psychological assessment and treatment in respect of the Respondent and N.;

37.10 Each party is directed to pay their own costs, save that the applicant is directed to make a contribution of 50% of the Applicant's costs.

S. NAIDOO, J

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