

SOUTH AFRICA / JUDGMENT

S M v Bezuidenhout and Another (4782/19) [2019] ZAGPJHC 53 (22 February 2019) [2019] ZAGPJHC 53

COURT

South Gauteng High Court, Johannesburg

BEFORE

Keightley

CASE / FILE NUMBER

4782/19

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REPUBLIC OF
SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION,
JOHANNESBURG)
CASE NO: 4782/19
In the matter

between:

SM
Applicant
and

MAGISTRATE:

JEAN BEZUIDENHOUT
1st
Respondent
PKM
2nd
Respondent

JUDGMENT

KEIGHTLEY J

Children's Court - review of interim care and relocation order - gross procedural irregularities - duties of presiding officer-interference by High Court with order on reviews - best interests of the children - conflict between siblings – Children's Court failed to consider best interests of all affected children in granting father care of one child and permission to relocate her away from siblings and mother in interim.

INTRODUCTION

1. This is an urgent application to review and set aside an interim order made by the Midvaal children's court on 30 January 2019 (the order). The order was made during the course of an ongoing inquiry involving the three children of the applicant (Ms M) and second respondent (Mr M), viz. MM (a girl of 13 years); SM (a girl of 10 years) and JMM (a boy of 5 years). The first respondent, who was the presiding officer of that court (the presiding officer), ordered that:
 - (a) SM was to be placed in the care of Mr M, pending investigation and reports;
 - (b) MM and JMM were to stay in the care of Ms M, pending investigation and reports;
 - (c) SM and Mr M could relocate to the Cape where SM was permitted to enroll at Laerskool Eversdal.
2. Ms M seeks a review and setting aside of the order on the basis that the presiding officer committed gross irregularities in granting it. Section 22(1) of the Superior Courts Act, 10 of 2013 provides that a High Court may review the proceedings of a Magistrate's Court on the grounds of gross irregularity, among other grounds. In light of section 28(2) of the Constitution, and section 9 of the Children's Act, the review of the order must also be considered through the prism of the best interests of the child or, in this case, the children.
3. Ms M's primary, although not sole, objection to the order is that it permits Mr M to relocate to Brackenfell in the broader Cape Town environs with SM, and for her to live there separated from her siblings. Until the order was granted, Ms M, Mr M and the children all lived in the Meyerton area, where Ms M and the other two children continue to reside. All three of the children were at school in the area until the presiding officer granted her order on 30 January. As appears more fully from the body of this judgment, there is an inextricable link between paragraph (c) of the order, and the first two paragraphs, making it necessary to review them as a whole.
4. Ms M contends that Mr M's application to the court on 12 December did not include an application to relocate SM with him to the Cape. This was a matter that came up before the court on 23 January 2019, at the second appearance by the parties before the presiding

officer. A week later, at the third hearing, which Ms M says was not for purposes of a hearing on the issues, but for purposes of securing and placing on record a legal representative for SM, the presiding officer issued her order. At this stage, it was on record that a further report from a educational psychologist, Ms Howes, who had been assessing the children was outstanding. Despite this, Ms M says that the order was granted:

- (a) In the absence of an application for SM's relocation; and
 - (b) Without Ms M being afforded the opportunity to testify under oath, to cross-examine witnesses; to properly consider the reports relied on by the court; and generally without affording her audi alteram partem rights.
5. Ms wants this court to set aside the order, and to direct that pending further proceedings in the children's court, SM should be returned to her care. Mr M has an attorney on record in the children's court matter, but he appeared in person before me. He filed an affidavit in which, among other things, he contended that there were no irregularities in the manner in which the matter had been dealt with by the presiding officer. He submitted further that it was clearly in SM's best interests to remain with him in Brackenfell. She was now in a school, and she did not wish to go back to live with her mother and siblings. It is common cause that Mr M's move to the Cape was prompted by his having lost his employment in Gauteng. His brother offered to employ him to assist in his business in the Cape.

PROCEEDINGS IN THE CHILDREN'S COURT

6. Anyone familiar with divorce proceedings involving a fight over children will know that the litigation is usually fueled by extreme acrimony between the spouses (or former spouses). Unfortunately, the current case is no exception. Mr and Mrs M are going through a very acrimonious divorce, with Ms M having instituted divorce proceedings in October
2018. They have lived separately more or less since then. One of the social worker's reports filed before the Children's Court notes that the acrimony between the parents has pushed the two sisters, MM and SM, into a situation of conflict with each other, with MM siding with her mother in the divorce, and SM siding with her father. .
7. Once the divorce proceedings had commenced there was an initial agreement between Mr and Ms M that all three children should remain in the primary care of Ms M, with contact arrangements put in place for Mr M. This truce did not last long.
8. On 12 November 2018, Mr M approached the children's court. In his supporting affidavit attached to his application in terms of Form 2 of the relevant Regulations,[1] he indicated that he believed that the children would be better off in his care and that he would better be able to see to their welfare. It is not clear from the rest of the information given in either Form 2 or the affidavit precisely what relief Mr M sought from the court. However, nothing recorded in the application makes reference to a relocation to the Cape by Mr M or any of the children. Nor does the application give any indication that Mr M was seeking to split the siblings by assuming care only of SM.

9. The Clerk of the children's court duly issued a Form 4 Notice to Attend Proceedings of the children's court, and this was served on Ms M on 19 November 2018. The Notice informed Ms M that she was to attend before the court on 12 December 2018. It further advised her (as per the pro forma content of the Form) that the court could decide to refer the matter to a family group conference or a lay-forum for mediation and that the matter could be referred back to the court for a hearing, or the matter could be referred directly to the court for a hearing, or for a pre-trial conference.
10. Prior to the date set for the first appearance before the court, Ms M states that a social worker from NG Welsyn (NGW), Ms van Niekerk, phoned Ms M and told her that Mr M had obtained a court order to allow him to take over the care of SM. This was on 23 November 2018. There was no court order to this effect, as the hearing was only scheduled for 12 December. Be that as it may, Ms M believed the social worker and, acting on this belief, permitted SM to go and stay with her father, Mr M. It is common cause that since that date SM has been in the care of her father, with MM and JMM remaining with Ms M.
11. I should add that Mr M approached NGW for their assistance. From the documents available to me it appears that NGW has been proactive in protecting his interests. From emails attached to the founding affidavit of Ms M, it seems that it was one Ms Hoof, a social worker from VaalCare, which is described on its letterhead as "a project of NG Welfare", who decided that it would be best to split the children at that stage (i.e. before the first court appearance). It is not entirely clear whether Ms Hoof was appointed by the Children's Court to mediate the matter, or if she was brought on board by NGW to do so. The information before me suggests the latter: from a report by Ms van Niekerk on 22 January 2019, it seems Ms Hoof was brought on board following Mr M's request that the children be re-assessed by another therapist after Ms Howes. He says he was not happy with Ms Howes. Be that as it may, Ms Hoof filed a Mediation Outcome form under Regulation 8 with the court, together with a report.
12. The parties appeared before the court on 12 December. The matter was postponed until 23 January 2019. One of the reasons was that Ms Hoof's report was not yet complete.
13. Ms M states in her founding affidavit that it was only at this stage, at court on 23 January 2019, that for the first time Mr M told her and her attorneys that he wanted to take SM to the Cape to live with him. His brother had offered him a job in Brackenfell and would see to his and SM's accommodation. Ms Hoof's report was given to Ms M at court. A copy was annexed to the founding papers. In it, Ms Hoof records that Mr M would like to go to Brackenfell and take SM with him. He would also like to have JMM every holiday. It further recorded that Ms M wanted primary care of all three children.
14. The proceedings on 23 January took place in the presiding officer's office. Ms M states that her attorneys pointed out to the presiding officer that there was no relocation application before the court. Further, that Ms Howes, an educational psychologist who had also been involved with the family prior to NGW becoming involved, still had a report outstanding. Ms

M's attorney voiced her concern that Ms M had not had time to consider properly Ms Hoof's report. According to Ms M, she (Ms m) make it clear to the presiding officer that she was opposed to an application to move SM to Brackenfell.

She also felt that at 10 years of age, SM was not mature and old enough to understand the implications of moving on her own to the Cape with Mr M. She felt that a proper investigation had to be done and that it was not in their best interests to split up the children.

15. The presiding officer postponed the matter for a week until 30 January 2019. There is some dispute between Ms M and Mr M as to the purpose of the postponement. Ms M says it was to appoint a legal representative for SM, and for Ms Howes' report to be filed. Mr M says it was for purposes of obtaining temporary safe custody for SM. He appears to have reached this conclusion because of something Ms van Niekerk said in a report dated 22 January 2019. In that report, Ms van Niekerk requested that the case be postponed "to obtain temporary safe care" for SM, and to determine whether MM and JMM can remain in Ms M's care. I do not have the Children's Court file before me, and the presiding officer has elected not to play an active part in these proceedings. Be that as it may, whatever the purpose underlying the postponement to 30 January, it is not determinative of the question of whether the presiding officer's conduct involved gross procedural irregularities.
16. Before the proceedings commenced on 30 January 2019, Ms van Niekerk presented the court with a further report dated 28 January. It is noteworthy that Ms van Niekerk records that despite very intensive services having been rendered to the family (via Ms Howes and NGW) "the parents continue with complaints". She also records that the parents should focus on their children's needs and not expose the children to their conflict. She refers to the social worker having been reported to the senior manager on two occasions, although there is no indication of which of the parties lodged the complaints.
17. In her evaluation, Ms van Niekerk gives her opinion that "the children will have to be split as it is at present in the children's best interest." She goes on to opine that an interim order should be made pending further investigation, with MM and JMM remaining with Ms M, and SM remaining in Mr M's care. At the end, she concludes: "The decision whether SM immediately is allowed to stay with her father in Brackenfell, Cape, or first needs to remain with her father in Meyerton pending further submission of reports, is requested to be the decision of the Presiding Officer."
18. Considering the timing of the report and the nature of the evaluation and recommendation made by Ms van Niekerk, it is difficult to conclude other than that the presiding officer based her order on precisely what Ms van Niekerk recommended, viz. an interim order splitting the care of the children, and a determination by the presiding officer on the issue of Mr M's relocation. I am not suggesting that the presiding officer simply blindly adopted the recommendation. However, it is clear that it was Ms van Niekerk's report that triggered and informed the court's decision to grant the order.

19. The report was given to Ms M and her attorney either at court on 30 January 2019, or the day before. Mr M had made his intentions known that he was going to leave for the Cape the following day. A legal representative arrived at court to represent SM. She had been appointed by Legal Aid. However, she had not yet consulted with SM. According to Mr M, the presiding officer requested that SM be brought to court. Ms van Niekerk fetched SM from school, and the legal representative had a brief consultation with her. She reported to the court that SM wished to go to the Cape with Mr M. According to Mr M, SM addressed the court herself and repeated this to the presiding officer.
20. There does not appear to have been any formality in the manner in which the proceedings were conducted before the presiding officer on 30 January. It is not clear whether matters proceeded in court or once again in the presiding officer's chambers. Ms M states that the proceedings were not recorded. Mr M does not dispute this but produced a number of photocopied pages which he said were the handwritten notes of the presiding officer. As she did not confirm them, they are of no evidential value to me. I do not dispute that the presiding officer took notes. These may indeed have been copies of her notes, but they are not confirmed, nor is there any indication that they are complete or accurate in all respects.
21. From what I can gather, the presiding officer read the various reports then available, she heard from Ms van Niekerk, and from Ms Niewenhuis, SM's legal representative. She also heard from SM. No-one was sworn in as a witness as far as I can ascertain: Ms M says this is so, and Mr M did not dispute it. Mr M says that both attorneys were given an opportunity to address the court. However, even if this is so, it seems to me that it was done very informally. Thereafter, the presiding officer gave her interim order.

WERE THE CHILDREN'S COURT PROCEEDINGS TAINTED BY GROSS PROCEDURAL IRREGULARITIES?

22. Section 60(3) of the Children's Act provides that:

"Children's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings."

23. It is easy to understand the underlying reason for this provision. At heart lie the best interests of the child or children involved. It is important that such matters be dealt with sensitively and, if at all possible, with a view to reaching some sort of equilibrium between parents as to how their children should be dealt with. However, one cannot take this provision too far. It is not intended to give the presiding officer a free hand to dispense children's justice as she deems fit in the circumstances. This is particularly so in cases like the present where the children concerned are so clearly caught in the middle of their feuding parents.
24. The Children's Act (the Act) is clear on this. It prescribes various procedures to be followed in applications to the children's court:

- (a) In terms of section 28(1), a co-holder of parental rights and responsibilities[2] may apply to a children's court for an order suspending for a period any of the parental rights or responsibilities the other

parent[3] may have in respect of a child, or circumscribing the exercise of his or her rights and responsibilities. In considering an application under s28(1), the court must take into account the best interests of the child, the relationship between the child and the parent whose rights are sought to be challenged; and any other relevant facts.[4]

- (b) The court also may order that reports and recommendations of a family advocate or other social worker be submitted; that specific matters be investigated by a person designated by the court; or that designated persons appear and give evidence.[5]
- (c) Section 60 deals generally with the conduct of proceedings before a children's court. It gives presiding officers the power to call on persons to give or produce evidence, to cross-examine a witness, and in the case of factual disputes, to permit a witness to be cross-examined by a child or a parent.
- (d) In terms of section 62, a court may order a designated family advocate or social worker or psychologist etc to carry out an investigation to establish the circumstances of a child.
- (e) A written report compiled by such a person, in which an authoritative opinion in respect of a child is given, is on its more production to court admissible evidence of the facts stated in the report.[6] The written report must be submitted to the presiding officer within a period of no later than 10 days prior to the hearing of the

matter.[7]

- (f) If a person's rights are prejudiced by such a report the court must disclose the relevant parts of the report to the prejudiced

person within the aforesaid period; and must give the affected person the opportunity to question or cross-examine the author of the report or to refute any statement contained in the report.[8]

- (g) Section 61 requires the court to allow a child involved in the matter to express a view and preference if the court finds that in view of his or her age, maturity and stage of development she or he is able to participate in the proceedings and the child chooses to do so.

25. In this matter, Mr M triggered the children's court proceedings by filing a Form 2 together with his affidavit referred to earlier. In that affidavit he expressed the view that he would be the better carer for the children. Presumably, he wanted the court to consider granting him primary care of all of the children. From there the proceedings before the presiding officer seemed to run an unpredictable course. Muddying the waters was the involvement of NGW and VaalCare. As I have already indicated, it seems to have been Ms Hoof's view that led to SM being taken from Ms M's care, split from her siblings and placed in Mr M's care. This occurred in November 2018 before the first court appearance, and thus without the sanction

of the court.

26. What is critical is that the application serving before the court was Mr M's application to for primary care of all three of the children. He did not file an application that primary care be split with him having care of SM and Ms M having care of MM and JMM. Nor did he file an application for permission for him to relocate to the Cape at short notice, and to take SM with him. The presiding officer made her order sanctioning both of these states of affairs despite the fact that no application for that relief was before her.
27. The Act is clear that application must be made for relief that will have a detrimental effect on the parental rights and responsibilities of the other parent. The effect of ordering the removal of SM to the care of her father, and permitting her relocation with him to the Cape undoubtedly had the effect of suspending Ms M's parental rights and responsibilities in respect of SM. What is even more concerning is that the order made no provision for any contact arrangements between Ms M and SM, or between SM and her siblings. This is a material deficiency warranting interference with the order.
28. The Act is also clear about the procedure that must be followed by a presiding officer in a matter such as this. The presiding officer is not permitted to treat social worker's reports as evidence without following proper processes. The court may order an investigation by a designated professional to carry out an investigation to establish the circumstances of a child or the parents of a child. A report by such a person may be admissible as evidence of the facts stated in it. However, this is subject to the affected parent being given due notice of the report, and an opportunity to refute any statement in it, or to cross-examine the author.
29. Contrary to these procedures, the presiding officer appears to have treated Ms van Niekerk's and Ms Hoof's reports as evidence on their mere production. Ms Hoof was not even present at court on 30 January. Although Ms van Niekerk was present, and appears to have interacted with the presiding officer, she was not sworn in as a witness, nor was Ms M permitted to cross examine her. In addition, neither of the reports was submitted to the court within the time limits prescribed in regulation 7(4) read with section 63(1). Nor did the court disclose to Ms M those parts of the reports that were prejudicial to her within that prescribed period as provided in section 63(3) notwithstanding that her rights were obviously prejudiced by the reports.
30. In my view, these deficiencies in the manner in which the proceedings before the court took place amounted to gross irregularities warranting interference with the order. The presiding officer ought properly to have conducted herself along the lines set out below:
 - (a) She should have ensured that there was a proper application for the relief sought by Mr M, and that this was properly motivated by way of at least a supplementary affidavit from Mr M before granting him relief different from that set out in his initial affidavit. The presiding officer's failure to do so prejudiced Ms M in that she never had due and proper notice of the amended relief he was seeking.

- (b) Once the presiding officer was aware that Mr M wished the court to sanction his separate primary care of SM, and to relocate with her to the Cape, it ought to have been clear to the court that this required appropriate and full investigation and reports. This is so not only because it involved taking SM out of her existing school and removing her about 1500 km away from her mother, but also because it involved splitting the siblings. As I will discuss in more detail later, what Mr M asked the court to order affected not only the best interests of SM, but also those of her siblings MM and JMM. To sanction this without proper investigation and reports on the effect on all of the children was not conduct that served their best interests. Although the order of the court is interim pending “investigation

and reports”, it is entirely vague on what investigation and what reports the court required. The best interests of the children required the court to be specific about the nature of investigations the court considered necessary, and who was to conduct them.

- (c) The presiding officer ought to have considered all of the above before making even the interim order she made. This is so because it is quite clear from the facts of the case that Mr M did not consider his move to the Cape with SM to be a temporary move: he had acquired a job there with his brother and he intended immediately to remove SM from the school she had attended since 2015 in Meyerton and to enroll her in a new school in Eversdal in the Cape. The interim order had the effect of sanctioning SM’s split from her siblings, and of immediately, and for the foreseeable future, cutting the geographical link she had with them, her mother and her maternal grandparents (who, it is common cause, support the family materially and in terms of physical care of the children). The presiding officer ought to have ensured that she had sufficient relevant and reliable factual and expert evidence at her disposal before granting the order, albeit that it was in principle interim in nature.
- (d) The presiding officer ought to have understood that she was not dealing only with the best interests of SM, but also of her siblings. Although the presiding officer has an obligation to take into account the views of children who are mature enough to participate in proceedings, she should not have singled out hearing only from SM, but also from MM. Although JMM is also affected by the order, at only 5 years of age, JMM would have been too young to express a view to the court. In other words, the presiding officer failed in my view properly to carry out her obligation to hear from all of the affected children who were mature enough to express one, and by only hearing from SM. Indeed, given SM’s tender age, and the social worker’s

comments that the conflict between the sisters was caused by the acrimony between the parents, the presiding officer ought not to have sought SM’s view until she had been appropriately guided by full reports on the impact of the split and the relocation on the children as a whole.

- (e) It follows from this that the presiding officer ought to have considered what was in the best interests of all of the children before granting an order that would patently affect all of them. Instead, the court wrongly considered the move by SM to the Cape as being something that had relevance only to her best interests.

31. In my view, and for these reasons, I am satisfied that the order of the presiding officer was materially affected by gross procedural irregularities. As such, this court is empowered under section 22 of the Superior Courts Act to interfere with that decision. However, this is not the end of the matter. The children's court proceedings are

still ongoing and I must consider what relief would be appropriate for me to grant in these circumstances. Of course, at heart lie the best interests of the three children affected by the ongoing litigation between their parents.

BEST INTERESTS OF THE CHILDREN

32. As I have indicated above, I am mindful of the fact that the order under review was in principle an interim order, and that the children's court proceedings have not been finalised. The long-standing principle in matters involving the powers of High Courts in reviewing the decisions of lower courts is that they are reluctant to interfere in incomplete proceedings in the inferior courts, and that they will only do so in exceptional instances where serious injustice would otherwise result, or where justice could not be attained by other means.[9] In a case involving the best interests of children, it seems to me that issues of serious injustice are necessarily implicated. This is certainly the case where the children's court makes an order that immediately and for the foreseeable future separates siblings and removes one sibling to a far-distant part of the country. It seems to me that in these circumstances, not only do I have the power to intervene, but indeed, I am constitutionally obliged to do so.
33. It is clear to me that the order given by the presiding officer cannot stand: it must be set aside. As I have already discussed, it was made on an improper basis, without proper application, in the absence of appropriate investigation and reporting to the court, on the basis of inadmissible evidence, without respecting Ms M's right to audi alteram partem as required under the Act, and without due consideration of the interests of all of the children. A decision fraught with these difficulties is grossly procedurally irregular, and does not served the best

interests of the children.

34. This does not make my task of determining an appropriate order to replace that of the children's court easy. As matters stand, there is an ongoing process in the children's court and it is that court that will have to make further decisions regarding the care of and contact with the children. However, in the interim, the children cannot be left in limbo. I must make an order that best serves their interests in the intervening period.
35. It is difficult for courts to grapple with matters involving the splitting up of siblings, let alone where this also involves the geographical relocation of one sibling to a different part of the country from her other parent and her siblings. The best interests of the M children in this matter are undoubtedly complex.

36. Mr M made a strong plea to the court that it is in the best interests of SM to remain with him in the Cape. He pointed out that he had a job there, she had been enrolled in a new school, and he and SM were well accommodated in his brother's house. He also emphasized the conflict between SM and MM, MM's desire not to see him, and SM's often expressed wish not to live with her mother and siblings, but to live with Mr M in the Cape.
37. I take note of these submissions and they are obviously factors for me to consider. However, these issues are not as simple as Mr M makes them out to be.
38. I have already referred to Ms van Niekerk's view that the conflict between the sisters, SM and MM is directly related to the fact that SM favours her father in the divorce, and MM favours her mother: in other words, it seems each sister blames the opposite parent for the breakdown of the marriage and the family. There can be no doubt that the current conflict between the sisters is a symptom of the acrimonious divorce between the parents. There can also be no doubt that SM's attitude to her mother and to MM must be viewed in the context of it being tainted by the present crisis the family is in. It is hardly the well-considered view of a mature, reasonable child whose family life is stable.
39. This is an important factor in my view. In the first place, I would caution the children's court against placing weight on SM's expressed views in the absence of the intervention of a psychologist with appropriate experience to place them in context and to provide the court with her or his expert opinion on SM's circumstances and what is driving her animosity towards her sister and mother (and, indeed, MM's circumstances and what is driving her animosity towards her sister and father). In the proceedings before the children's court on 30 January, the court obviously was persuaded by SM's views that she did not want to remain with her mother and siblings. The court should not again commit the same error of taking SM's views at face value without properly interrogating, with the assistance of experts, her relationship with her mother and MM and what is driving the animosity.
40. The second reason why the cause of the conflict between the sisters and SM and her mother is important is that it points to an overwhelming need, in the best interests of these two siblings, to take urgent steps to try to repair the relationship between them. Similarly, it points to the need to take urgent step to repair the relationship between SM and her mother, and between MM and her father. Ms Hoof and Ms van Niekerk recommended, among other things, mediation between the parents to draw up a parenting plan that will be in the best interests of the children, and attachment therapy between SM and her mother. I would add that inter-sibling therapy, particularly between SM and MM is also a priority. Siblings fight. This is part and parcel of family life. Conflict between sisters can hardly constitute an overwhelming need to split the care of the children, particularly where the family is already in crisis, and no steps have yet been taken to try to lessen the sibling conflict.
41. In my view these interventions are without any doubt urgently needed in order to serve the best interests of the children. However, it is a stark reality that if SM remains in the primary care of Mr M in the Cape, there will be no reasonable prospect of any of these interventions

taking place any time soon, if ever. If SM stays in the Cape with her father, it is difficult to foresee any other outcome than that the rift between the sisters, and the rift between them and their respective parents will become entrenched with the possibility that it may never recover. This cannot be in their best interests. It stands to reason that it will also be in the interests of JMM, as the youngest member of the family, that his sisters are placed in a position, as soon as possible, to begin to resolve their rifts.

42. I am mindful of Mr M's need to earn a living and of his freedom of choice as to how he goes about doing so. He took up his brother's offer of employment and assistance in moving to the Cape for this purpose. He should not be punished for making this election. I am also acutely aware of the fact that there is nothing to suggest that he is not a caring and concerned parent who has a good relationship with his children, save for MM with whom there is presently a rift. I can understand his belief that moving to the Cape and taking SM with him is in her interests in that it removes her from an existing family conflict. His belief is human, and there is no reason to accuse him of being mala fide or irrational in this regard. However, just because it is a genuinely held and not irrational belief does not mean that it is in the best interests of the children involved. For the reasons I have already traversed, I do not believe it is in any of the children's interests to cement the rift within the family by splitting SM's care from that of the rest of her siblings and by permitting her to remain in the Cape. Mr M's belief that it is in SM's interests ignores the interests of the siblings as a whole. It is also flawed in that it is a short-term fix, with a view to reducing present conflict, but ignoring the longer-term harm the continued separation of the children from each other will have on their well-being.
43. I observed earlier that the presiding officer seemed to have had material regard to Ms van Niekerk's report dated 28 January 2019 in granting the order. I note that in her report Ms van Niekerk raised, as an alternative to Mr M relocating to the Cape with SM on 31 January, that he remain in Meyerton until further reports were submitted. The presiding officer in my view did not give due consideration to this as an alternative. Instead, she made a drastic order permitting Mr M to remove SM from her school in Meyerton and to take her 1500km away. This was done at considerable speed: the order was granted within a week of the presiding officer first being alerted to Mr M's desire to relocate to the Cape with SM. It hardly needs to be said that an order granted at such speed cannot be regarded as serving the best interests of the children affected.
44. It is at this stage less than a month since Mr M left for the Cape with SM. His employment has been provided by his brother. I see no insurmountable obstacle to Mr M returning to Meyerton (with the assistance offered by his brother as referred to in Ms van Niekerk's report) for the period necessary to permit the initiation of the types of interventions that I have referred to earlier, so that a proper assessment can be made concerning the best interests and care of the children, whether interim or final. There is nothing to indicate that his brother will not be supportive in holding over his employment for this period. Indeed, it would be in the best interests of all of the children to have their father and mother in

geographical proximity while the complex question of their care is being resolved. I urge both parents to consider practical solutions that may be affordable with input from both their available resources to ensure, as far as practically possible, that they are both on hand to undertake whatever assessments and therapies may be determined to be in their children's best interests while the children's court process continues.

45. As far as SM is concerned, Mr M stated that her enrollment at her new school in the Cape was with effect from 4 February 2019. That is a little over two weeks ago. Up to the time she left for the Cape she had been enrolled at a local school for a number of years. Her headmaster provided a letter indicating that she was well settled at the school both academically, extra-murally and socially. I see no reasonable prospect that returning to her school in Meyersdal will be contrary to her best interests.
46. From what I said earlier, it is evident that I am aware of, and must factor in, the current conflict between SM and MM, and SM and her mother. I have given reasons why I do not believe that ongoing separation from her siblings and her mother is in her best interests. It is in her best interests that she return to Meyersdal, and that this should take place as soon as possible. I am further of the view that even if Mr M elects to return to Meyersdal for a period while the children's court proceedings go forward, it is not in the best interests of SM and her siblings to remain subject to a split-care regime. I have already discussed the kinds of interventions that need to be made before such an important decision can properly be made. Until such time, SM should return to the care of Ms M with her siblings. I am mindful that SM may need professional assistance and support in making this re-adjustment. I will include an appropriate paragraph in my order to assist her in this regard.
47. I should add in this regard that Mr M took pains to explain to the court that in his view Ms M was not fit to care for the children. He pointed to passages from Ms Hoof's reports that highlighted shortcomings in her parenting skills and in her relationship with SM. On the other hand, Ms M presently has the care of MM and JMM. The letters from all three of the children's headmasters/mistresses attest to their attending school regularly, being well turned out when they come to school and being well-adjusted and happy at their schools. There is no indication that Ms M's parenting leaves the children in need of care, or that she is abusive towards them. It is so that she is helped by her parents in caring for the children. This is not in my view an indication that she is a bad parent.
48. SM has complained that her maternal grandfather has struck her in the past and that she fears him. Unfortunately, the children have also been exposed to physical chastisement from Mr M in the past (although he says he ceased to mete out such punishment when it was held to be unlawful). The children's court will have to be guided by the views of experts in terms of SM's relationship with her maternal grandfather and the extent to which he should or should not be involved in her care. In the meantime, her maternal grandmother is on hand to assist in her care.

49. Ms M provided the court with photographs of her home. It appears to be a neat and ordered family home and large enough for all of the children. She has stable employment. She was advised to commence parenting classes and has done so. Obviously it is in the interests of all of the children for her to continue with these, and to undertake whatever other therapies may be recommended or directed by the children's court to augment her parenting skills. In the same vein, Mr M should continue with his anger management classes, as he indicated to me he would.
50. In short, I have no reason at this stage to doubt that the children will be properly looked after in Ms M's care unless and until the children's court decides differently.
51. The decision I have reached and the order I make is not intended to supplant the ongoing children's court process. At present, it is the children's court that is seized with Mr M's original application. It may be seized with further, related applications going forward. Nothing in this order prevents the children's court from making further orders as regards the circumstances and care of the children. My order sets aside the interim regime established by the order of 30 January 2019, and establishes a new interim regime that will be in place pending any further orders emanating from the children's court process.
52. In my discretion, I make no order as to costs.
53. I make the following order:
1. The Court dispenses with the forms and service prescribed by the Rules of Court and disposes of this matter as one of urgency in terms of Rule 6(12).
 2. The order which was granted by the first respondent, sitting as the Magistrate of the Children's Court, at the Magistrate's Court for the District of Midvaal (held at Meyerton), on Thursday, 30 January 2019, under file number 14/1/4-142/2018 is reviewed and set aside.
 3. Pending any further orders by the said Children's Court in the matter, the following orders are granted:
 - 3.1. The primary residence of the minor children, MM, SM and JMM shall be with the applicant.
 - 3.2. The second respondent is to return SM to the care of the applicant within 10 calendar days of the date of this order which return will be overseen by the forensic psychologist as set out in paragraph 3.5 below.
 - 3.3. The second respondent is granted contact to the minor children as follows:
 - 3.3.1. Every alternative weekend from Friday after school until 16h00 on Sunday.
 - 3.3.2. Reasonable telephonic and/or skype contact on a daily basis.
 - 3.3.3. Half of every school holiday.

3.3.4. Both parents are to share equally any costs involved in the second respondent exercising his rights.

3.4. The applicant and second respondent are directed within 4 days of the date of this order to appoint a suitably qualified forensic psychologist to investigate on an urgent basis, and to report to the Children's Court on the following:

3.4.1. The present conflict in the relationship between the sisters, MM and SM, and appropriate interventions to restore or improve the relationship between them.

3.4.2. The present conflict between MM and her father, and SM and her mother and appropriate interventions to restore or improve the relationship between them.

3.4.3. The relationship between SM and her maternal grandfather and appropriate interventions that may be necessary to improve the relationship.

3.4.4. Any other related matter which, in the opinion of the forensic psychologist, will assist the Children's Court in determining the best interests of the children.

3.5. The forensic psychologist is requested to prepare SM for her return to the care of the applicant and to facilitate/oversee the process. However, the time period within which SM is to be returned to the care of the applicant is as per paragraph 3.2 above.

3.6. Nothing in this order prevents the Children's Court from exercising its powers under the Children's Act to appoint any other designated person to investigate and report to it.

RM, KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: 15 FEBRUARY 2019

DATE OF JUDGMENT: 22 FEBRUARY 2019

APPEARANCES

APPLICANT'S COUNSEL: W WANNENBERG

INSTRUCTED BY: ESTHER MULLER INCORPORATED

FOR THE 1ST RESPONDENT: NONE

COUNSEL FOR THE 2ND RESPONDENT: SELF REPRESENTED

[1] Regulations under the Children's Act, 2005 Relating to Children's Courts and International Child Abductions, No R 250, 31 March 2010 (the Regulations)

- [2] It is not only the co-holder of parental rights and responsibilities who may apply to court. The list of persons who may apply is more extensive, and is set out in section 28(3).
- [3] Once again, the section is not limited to other parents: it may be to any person with parental rights and responsibilities to the child.
- [4] Section 28(4)
- [5] Section 29(3)
- [6] Section 63(1)
- [7] Regulation 7(4) of the Regulations referred to earlier
- [8] Section 63(3)
- [9] Walhaus v Additonal Magistrate, Johannesburg 1959 (3) SA 113 (A) at 119H-12-C; Ismail and Others v Additional Magistrate, Wynberg 1963 (1) SA 1 at 5C-6A; Building Improvements Finance v Additional Magistrate, Johannesburg 1978 (4) SA 790 (T) at 793F-G
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Prepared on 13 October 2026 · Esheria