

SOUTH AFRICA / JUDGMENT

W v B (2020/19107) [2022] ZAGPJHC 1061 (22 May 2022)

[2022] ZAGPJHC 1061

COURT

South Gauteng High Court, Johannesburg

BEFORE

Oosthuizen-Senekal CSP

CASE / FILE NUMBER

2020/19107

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG.

CASE NUMBER: 2020/19107
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES
NOT REVISED
In
the matter of
MR
W
APPLICANT
And
MRS
B
RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

“The importance of human life should be universally respected - and that refers to children before they are born and after. All children have the right to be brought up in a loving two-parent family where the notion of divorce is not even possible”

-Christopher Monckton-[1]

INTRODUCTION

[1] Central to the dispute in this Rule 43 application are the interests of a minor child, AM, born on 24 April 2017. At the time that this matter was argued, AM was 5 (five) years old.

[2] The applicant prays for of the following order:

1. That, pendente lite, full parental rights and responsibilities in respect of the minor child, AM, as set out in section 18 of the Children’s Act, Act 38 of 2005, is awarded to the applicant, subject thereto that the applicant is awarded the right to provide primary care and the place of primary residence to the minor child;
2. That, pendente lite, specific parental rights and responsibilities as set out in section 18(2)(b) of the Children’s Act, Act 38 of 2005, and in

particular the right to have contact with the minor child, is awarded to the respondent, which contact is to include the following:

2.1 Contact, under supervision of the applicant or his appointed nominee, between the hours of 12h30 - 13h30 alternatively 16h00

- 17h00 on every alternate day, at a place to be arranged between the parties;

2.2 Any other supervised contact at a time and place arranged and agreed upon between the parties.

3. The parties are to undergo a forensic assessment which is to be conducted by a suitably qualified professional, who is required to report on and to make recommendations regarding the primary care and residence of the minor child, the costs of which are to be paid by the parties in equal shares;

4. The costs of this application shall be costs in the cause;

[3] The respondent opposed the application, and in the alternative, the respondent sought relief pendente lite by way of a counter – application.

[4] The respondent prays for the following order:

1. The respondent and the applicant shall remain co-holders of full parental responsibilities and rights in respect of the minor child, AM (“the minor child”).
2. The respondent shall exercise specific parental rights and responsibilities of contact in respect of child, subject to the child’s primary residence vesting with the applicant, and subject to the child’s social, scholastic and religious activities, which contact shall include, but not be limited to, the following:-
 - 2.1.1 Every Wednesday from 17h00 to 18h00 at the respondent's parents’ residence (“the residence”);
 - 2.1.2 Every Saturday from 10h00 to 15h00 at the residence;
 - 2.1.3 Every Sunday from 10h00 to 12h00 at the residence; and
 - 2.1.4 Daily uninterrupted reasonable telephonic contact and/or electronic media contact at reasonable times.
3. The applicant and the respondent are to undergo a forensic assessment which is to be conducted by a suitably qualified professional, who is required to report on and to make recommendations regarding the primary care and residence of the minor child, the full costs of which are to be paid by the applicant.
4. In the alternative to prayer 3 above, the Family Advocate is authorised to investigate and make recommendations to this Court in respect of the parental responsibilities and rights, as well as residence, care and contact of the minor child.
5. The applicant is to pay the costs of this application on an attorney and client scale.
- [5] Both parties submitted voluminous affidavits in the matter. The court also granted the parties leave to file replying affidavits. Although the prolixity of the application renders it non-compliant with the strict provisions of Rule 43 and the general purpose and spirit of Rule 43[2] to allow the affidavits, I have exercised my discretion conferred upon me in terms of Rule 43(5) to allow the supplementary affidavits and the annexures thereto. The matter involves complex issues that needed to be properly ventilated to enable this court to make a decision that will give effect to the minor child’s constitutionally protected right as her best interests are of paramount importance.[3]

BACKGROUND

OF RELEVANT FACTS

- [6] The applicant (“the father”) and the respondent (“the mother”) are in the midst of an acrimonious divorce. In this case, as is sadly often the case in divorce actions, the conflict between the father and mother has spilled over into the parenting relationship with their minor child.

- [7] The minor child has become an arena of struggle where the conflict plays out in the form of disputes about the care, contact and other parenting issues.
- [8] The parties were married on 25 November 2016.
- [9] AM was born on 24 April 2017.
- [10] At that time the respondent was an educator at Hoërskool Riebeeckrand, however due to an intolerable working environment and a pending disciplinary hearing, she resigned from her employment during May 2019. Shortly after resigning the respondent suffered a nervous breakdown.
- [11] In June 2019 she was referred to psychologist, Dr M E Devantier, for treatment. Dr Devantier booked the respondent off work and advised that she could not return to work until 18 June 2019 due to her emotionally vulnerable state. She further recorded that the respondent was a high-risk patient for self-harm.
- [12] Dr Devantier admitted the respondent to the psychiatric ward of the Life Poortview Hospital from 4 to 11 October 2019 where she was treated by him and Dr Kalaba, a specialist psychiatrist. Dr Devantier and Dr Kalaba advised the respondent to seek assistance and support for recovery from her drug addiction at the Circle of Life Recovery Center. The respondent refused and has continued her abuse of drugs and alcohol since discharged from Life Poortview Hospital.
- [13] During March 2020 the applicant confronted the respondent with allegations of infidelity. The applicant requested the respondent to vacate the matrimonial home. On 11 March 2020 the respondent left the matrimonial home. There is no consensus between the parties as to whether the respondent left on request of the applicant or whether she was forced out of the matrimonial home.
- [14] On 12 March 2020 the respondent threatened to commit suicide. The applicant went home and found the respondent asleep. He remained with her until the next day.
- [15] Since 13 March 2020 AM has been in the care of the applicant.
- [16] On 19 April 2020 the respondent was admitted and underwent treatment at Changes River Manor Rehab Centre. She was discharged on 5 June 2020. She sought the treatment voluntarily, which she completed successfully.
- [17] After to her discharge, she has been fully committed to her recovery. She also followed the recommendations post-discharge provided to her by the aforementioned treatment centre for example:
1. She attends a minimum of one (1) Zoom meeting a day.
 2. She communicates with and receives support and guidance from her sponsors namely, Mervin Canham and Madelein Kroukamp on a daily basis.

3. She participate on various WhatsApp support groups in order to assist her with her treatment.
4. She also partakes in a 12 Step Recovery Programme.

[18] Due to the respondent's actions during the marriage and when confronted with the allegations of infidelity and her behaviour issues, the applicant through his attorney, arranged for future supervised contact between the respondent and AM. The applicant insisted that the supervised contact was to be in a public place, for example a park or restaurant. The contact was supervised by the applicant, which created numerous challenges amongst the parties.

[19] After instituting the Rule 43 application on 23 March 2020, the applicant appointed Dr Roux, a Clinical Psychologist, to compile a Psycho-legal Report. Dr Roux was requested to conduct a full psychological evaluation on each member of the family in order to assist them and the court to determine what would be in the best interests of AM with regard to residency, care and contact.

[20] The said report ("Roux Report") was completed during February 2020. Dr Roux recommended the following;

1. That shared residency to be in the best interests of the minor child.
2. Phased in contact regarding access by the applicant,
3. That the minor child will benefit from continued therapeutic intervention. It would be advisable to ensure that continued feedback exists between the psychologist and a case manager to guide the parties in co-parenting, and
4. Parental guidance is recommended for both Mr. W and Ms. B in order to co-parent AM effectively. Parental guidance should ideally be undertaken by the same individual, to ensure a streamlined approach to parenting the minor child.

[21] The Rule 43 application was heard on 12 April 2022 on the opposed roll. On the day the applicant requested a postponement, due to the applicant having concerns relating to the conclusions and recommendation in the Roux report. The applicant therefore requested a supplementary report to be compiled by Dr De Vos. He also requested permission to file a replying affidavit. An undertaking was given by the applicant that the supplementary report to be compiled by Dr De Vos would be available within four (4) weeks of the date of postponement. The respondent opposed the request for a postponement. Following consideration of the request, the court granted the postponement on condition that the applicant will be ready to proceed with the matter on 17 May 2022.

[22] Dr De Vos compiled a report ("De Vos Report") and her recommendations are in line with the recommendations of Dr Roux.

POINTS IN LIMINE RAISED BY THE RESPONDENT

[23] The respondent raised two points in limine, namely:

1. The Rule 43 application of the applicant was brought prior to the issuing of a divorce action and as such, was premature, irregular and not properly before court.
2. That relief sought is inappropriate and defective in that the applicant purportedly seeks contradictory relief.

[24] On the day of the hearing, counsel for the respondent informed that court that they are not proceeding on the points in limine raised. The court proceeded with the merits of the application.

SUBMISSIONS BY THE APPLICANT

[25] Counsel for the applicant argued that the applicant is concerned for the safety of AM if unsupervised access is granted to the respondent. The concerns raised by the applicant are that the respondent:

1. has abused alcohol, drugs and prescription medication since her teens and has been admitted to rehabilitation centres;
2. was treated for depressive episodes and anxiety;
3. has been prone to self-harm. Her arms and legs are permanently scarred as a result of her cutting and hurting herself;
4. returned home drunk, even after having been discharged from a rehabilitation facility,
5. cannot be trusted to collect the minor child from day- care. On at least three occasions in the past and before the respondent's psychotic break down in early 2019, the respondent failed to collect the minor child or to make alternative arrangements for her collection and care.

[26] The applicant during argument referred in detail to the psychometric evaluation report compiled by Dr Roux with reference to the respondent's interpersonal functioning. The following issues were referred to:

1. The respondent is likely to have significant problems in establishing and maintaining healthy long-term relationships. She is likely to have frequent outbursts of anger and unhappiness in relationships and others are likely to experience her as difficult, demanding and refractory;
2. It is clear that there is a great deal of disruption and disorganisation in the respondent's core personality. This may lead to volatility in her emotional expression and behaviour towards others. Her clinical psychometry suggests that she has significant difficulty in attaching in meaningful ways and the behavioural expression of her pathology is likely to lead to problems in most spheres of her life.
3. The respondent may often fail to meet personal obligations in relationships.

[27] The applicant emphasized Dr Roux's findings regarding the respondent's intra-psychic profile namely:

1. The respondent has a complex psychological profile and there are indications of a significant amount of pathology. The most salient personality elements are borderline and narcissistic styles and there are also aspects related to turbulence, masochism, melancholy and schizoid tendencies. These personality patterns are likely to have a marked influence on the respondent's functioning.
2. The description that captures the most salient elements of the respondent's personality functioning includes a tendency to frequent volatility and emotional dysregulation.
3. The respondent may feel depressed much of the time.
4. Those around the her will experience her as volatile and unpredictable.
5. The respondent's psychometric profile suggests that it is very likely that she has had problems with substance abuse.
6. Significant anxiety and mood problems are prominent.
7. The respondent's profile presents with features associated with major depressive disorder and the persistent depressive disorder. It is likely that the respondent suffers from significantly low mood at times and that she experiences a range of vegetative and order symptoms related to depression including a dread of the future and a sense of hopeless resignation and brooding.
8. The respondent's psychometric profile includes features prominent on the bi-polar spectrum which indicates experiences related to mania, such as irritability and/or general emotional upheaval and distress.
9. The respondent also displays anti-social tendencies.

[28] The applicant contended that the court as the upper guardian of children and therefore the report and opinion by Dr Roux should not interfere with the court's responsibilities.

[29] Therefore, the applicant asserts that the recommendations of the experts will render unrestricted and unsupervised access by the respondent and this is undesirable. The applicant contended that the court should give consideration to supervised contact, and that the recommendations by Dr Roux should not be accepted.

[30] Regarding costs in the matter, the applicant contended that cost should be cost in the cause.

SUBMISSIONS BY THE RESPONDENT

[31] Counsel for the respondent argued that the respondent took responsibility for her behaviour issues. She owned up to her drug abuse and she is trying her utmost to rectify her previous unacceptable behaviour.

- [32] The respondent contended that it is understandable that the applicant is on high alert on the issue of access by the respondent relating to AM, because of the respondent's previous interactions with her.
- [33] However, the respondent argued that the applicant clearly dictates and restricted her access to their minor child which is concerning.
- [34] Counsel for the respondent referred to Dr Roux's report, wherein she stated that there are no reasons for AM not to have meaningful interaction and access to both her parents. The respondent indicate her willingness to undergo drug testing when ever requested. She also agreed to Dr Roux's recommendation of phased in access.
- [35] Therefore, the applicant requests the court to make an order regarding access to AM as stipulated in the Roux report.
- [36] Counsel for the respondent seeks a costs order against the applicant. It was argued that due to the applicant's actions in delaying the proceedings such an order is justified. The respondent contended that the applicant was mala fide in requesting a postponement on 12 April 2022 and his behaviour in the matter was not in the interests of AM

BEST INTERESTS OF THE CHILD

- [37] The issue of care and contact during and after divorce rarely fails to provoke conflicting emotions and are never easily resolved.

Analogous to what was stated in *Shawzin v Laufer* the duty of a court, sitting as upper-guardian of minor children, when it has to resolve a dispute concerning contact, whether of primary residence or shared residence one is dealing with a somewhat singular subject in which there is substantially one norm to be applied, namely the best interests of the child.

- [38] Today the Constitution entrenches the child's best interests as of paramount importance in every matter concerning the child.[4] This constitutional principle is repeated in section 9 of the Children's Act.[5]
- [39] Section 28(2) of the Constitution has been held to create an 'expansive guarantee' and constitutes, not only a guiding principle, but also a right. It also provides the standard against which every decision that impacts a child must be measured.[6]
- [40] Section 28 (4) lists factors to be taken into account by the courts:
- a) The best interests of the child
 - b) The relationship between the child and the person whose parental responsibilities and rights are being challenged
 - c) The degree of commitment that the person has shown towards the child, and
 - d) Any other factor that should, in the opinion of the court, be taken into account.

- [42] The Children's Act, however, shifts from "parental authority" to a more child- focused concept of parental responsibilities and rights. In terms of the Children's Act, parental responsibilities and rights are to be shared between the biological parents of a child, and this sharing continues whether the parents are married or divorced.
- [43] In section 7 of the Children's Act, the legislature provides a list of factors that courts must take into consideration when determining what is in the best interests of the child.[7]
- [44] These constitutional and legislative standards need to be determined on a case-by-case basis taking into account the specific context and facts of the dispute before the Court.[8]
- [45] Sachs J provided invaluable guidance when he explained in *S v M*:^[9]

"A more difficult problem is to establish an appropriate operational thrust for the paramountcy principle. The word "paramount"

is emphatic. Coupled with the far-reaching phrase 'in every matter concerning the child', and taken literally, it would cover

virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children. This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2). The problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests"

- [46] In *Van Rooyen v Van Rooyen*^[10] the court held that part of difficulty in dealing with that the best interests of a children, in custody matters, one was also dealing with the parent's rights indirectly. The child's rights were paramount and needed to be protected, and situations might well arise where the best interests of the child required that action be taken for the benefit of the child which effectively cut across the parents' rights. Although access rights were often spoken about as the right of the child, it was artificial to treat them as being exclusive of parents' rights. The right which a child had to have access to his/her parents was complemented by the right of the parents to have access to the child. It was essential that a proper two-way process occurred so that the child might fully benefit from his/her relationship with each parent in the future. Access therefore is not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child. The more extensive that relationship with both parents, the greater the benefit to the child was likely to be.
- [47] Therefore, the best interest of a child means considering the child before making a decision that affects his/her life.

SECTION 7 OF THE CHILDREN'S ACT

[48] Since each child's best interests are of paramount importance when the issue of access is decided, it is necessary to consider all the factors set out in section 7 of The Children's Act.

[49] Section 7 of the Children's Act stipulates –“Best interests of child standard. -

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—

(a) the nature of the personal relationship between—

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards—

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child,

including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child—

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's—

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

- (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment

resembling as closely as possible a caring family environment;

- (l) the need to protect the child from any physical or psychological harm that may be caused by —
- (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
- (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child”.

[50] It is important to note that section 7(1) of the Children's Act lists fourteen factors that must be taken in consideration when deciding a child's best interests. The approach requires a close and individualized examination of the situation of the child.

[51] Undoubtedly, where the rights of the child clash with those of the parents, the bio-ethical character of the parent-child relationship calls for family- friendly solutions that will protect the family unit, but where these decisions may be contrary to the well-being of the child, then the best interests of the child must override the decisions.

EXPERT REPORTS

POORTVIEW PSYCHIATRIC CLINIC- DR KALABA AND DEVANTIER

[52] A short report by Dr Alma Kalaba, a Psychiatrist, and Dr Marlize Devantier, a Psychologist, employed at Poortview Psychiatric Clinic was attached as annexure (“BG14”) to the respondent's opposing affidavit.

[53] The report confirmed that the respondent was admitted to the Clinic on 1 October 2019.

[54] I have to mention the following extracts of the said report:

“Ms B was treated by a multi-disciplinary team psychotherapist, occupational therapist and psychiatrist. She presented with

anxiety, mood swings, impulsive behaviour, irrational thoughts, frustration and a sense of hopelessness. She has battled with substance abuse for many years and was in rehab before.

Mrs B reported on admission, that the reason for her depression and anxiety, is the marriage and volatile relationship with her husband. She expressed suicidal ideation and reported two suicide attempts in the past few months and strong tendencies to self-harm.

She was still self-medicating with Cannabis. Mrs B was allegedly diagnosed with Temporal lobe epilepsy, thus a 16 hour EEG was conducted. The result was NAD.

She was emotionally dysregulated, impulsive and easily provoked. She also presented with psycho-somatic complaints (headaches).

In my opinion she suffers from:

Substance abuse/dependence,

Underlying Bipolar disorder II,

Borderline personality disorder.

During her sessions with Dr Kalaba and Dr Devantier she would express her frustration and unhappiness with her marriage. Ms B felt that her marriage was toxic and that her husband's family was interfering. Ms B also complained that her husband was trying to keep her daughter (2 years old) away from her and her parents.

During her admission at Poortview both Dr Kalaba and Dr Devantier had to set very firm boundaries as Mr W, his parents and Ms B's mother was trying to interfere in her treatment. It became apparent that Ms B was part of a very dysfunctional family. The focus of Ms B's treatment at Poortview was to enhance her personal functioning. A lot of emphasis was on life skills, emotional regulation together with psychopharmacology. She responded well to treatment and she was discharged on 10 October, 2019."

CHANGES RIVER MANOR: DISCHARGE SUMMARY

[55] The discharge summary report of the Changes River Manor Treatment Centre indicates that the respondent was admitted at the centre on 11 May 2020, and discharged on 5 June 2020.

[56] The following information is contained in the summary report:

"Chief Complaint:

Polysubstance — Marijuana, Methcathinone (Kat), Cocaine, Alcohol

History of Addiction.

Started drinking at age 16 years and reports she first used drugs from the age of 21 years after being exposed to it by an ex-boyfriend, claimed that she used for anxiety reasons. Ms B has a history of physical abuse, starting at the age of 6. This has caused trauma. She is married with one child aged 3. Child is currently living with her husband, W and abuse is expected which has

been reported to the mother. She presented as controlling and in denial about her drug addiction and what her life has become because of it. She still struggles with relationships and trust. She is working on these issues and has learnt to take responsibility.

History of Treatment:

2014 Houghton House Recovery Centre 21 days for Addiction and depression 2019 Poortview Clinic — Mental Breakdown 23 days for Mental Breakdown 2020 Changes Treatment Centre 21 days for Addiction 2020 Changes River Manor 26 days for Addiction

Summary of Treatment:

B has a long history of substance abuse, as well as other compulsive behaviors with multiple admissions to treatment. Treatment

always concentrated, Step 1, she processed powerlessness and unmanageability of using chemicals and confronting her denial. She

explored her spiritual life in Step 2 and 3, and also worked on her control and self-will and to make clear decisions. B then started with Step 4 which is the grieving step of the 12-step program; she experienced many emotions (anxiety, sadness, denial, bargaining etc). We as a treatment team focused mainly on the consequences of her addiction and on relapse prevention — where we as a treatment team explored a recovery plan. Her written work was in depth and very concise. Group therapy focused mainly on her behavior, being accountable, identifying relapse triggers, consequences of her drug addiction including toxic behavior.

She was often focused on outside issues concerning her daughter and husband. Thus, causing emotional stress she had to deal with.

Her psychiatric diagnosis:

- Polysubstance Dependence
- Bipolar mood disorder
- Borderline Traits
- Possible Epilepsy — TLE
- Fearful

Referral and Recommendations:

- 12 Step meetings.
- Abstinence from all mood- and mind-altering substances.
- 12 Step Sponsor.
- Ongoing relapse prevention

- Ongoing counselling with an addiction's counsellor.
- Outpatient Treatment
- Ongoing follow up with her psychiatrist”

LANCET LABORATORIES- PATHOLOGY RESULT

[57] On 7 September 2020 the respondent submitted herself for a blood test at Lancet Laboratory for a drug screening test.

[58] The results were the following:

Test Drug Class Screening Test

Ur Amphetamines Not Detected Ur Methamphetamines Not Detected Ur Cocaine Not Detected Ur Cannabis Not Detected Ur Opiates Not Detected Ur Benzodiazopines Not Detected ZPOC METHAQUALONE, urine Not Detected

REPORT DR ROUX

- [59] Dr Lynette Roux, a Clinical Psychologist, obtained a B. Soc. Sci (Social Work in 1981, B. Soc Hons (Psychology) in 1982, M.A Clinical Psychology in 1986 and Ph. D. Child and Forensic Psychology in 2007. She did her Internship at Weskoppies Child and Adolescent Unit and Adult Wards in 1985.
- [60] She compiled a Psycho-legal Report following various interviews with the applicant, respondent and AM. Furthermore, she also conducted a number of tests on all the parties. The assessment commenced in April 2021 and an extensive report was submitted during February 2022.
- [61] The aim of the report was to make recommendations with regard to residency, contact and care of AM.
- [62] For purposes of relevance I am of the view that certain findings by Dr Roux in the report has to be noted.
- [63] In paragraph 13 of the report, under the heading of “Integration of Finding” the following need to emphasized:

“13.1 Mr W’s Psychological and Parenting of AM

The psychometric evaluation of Mr W indicated that he tried to influence his test results in a manner that resulted in the probability that psychopathology may not have been detected by the psychometric tests. However, it was found that Mr W can be impulsive, he needs a lot of affirmation and that he is driven by his own needs. Furthermore, Mr W is very attention seeking and manipulative.

Mr W was found to be very controlling, and he does not find it easy to consider others' emotions. Furthermore, is evident the Mr W does not have much insight into how his behaviour may impact others, including AM.

Mr W is likely to act in a hostile manner to others whose behaviours does not accord with his views and standards. This would

provide an explanation as to why Mr W has consistently tried to control and micro-manage Ms B's contact with AM. This has gone to the extent that it appears that Mr W has effectively minimised AM's contact with her mother.

It is also evident that Mr W is somewhat consumed with AM. By his own admission, his life revolves around AM. Mr W's home is set up entirely for AM's perceived needs and it is concerning that Mr W is not allowing AM to develop her own identity. This is to the extent that Amé sleeps in his bed and his bedroom contains AM's clothes and books ...

Overall, Mr W's psychological functioning....there are aspects to his psychological functioning that are concerning with regard to AM and her healthy psychological development. It is of concern that as she becomes older and begins to assert her own opinions, wishes and identity, that Mr W will struggle to allow her to become her own person. The very real possibility of Mr W imposing his perception of how AM should behave, present herself, what she should achieve academically and vocationally, the nature of her relationship with her mother, as well as other aspects of her psychological functioning, will negatively impact on AM and stifle her healthy psychological development.

These aspects will need to be addressed ongoing in therapy with Mr W in order to ensure that AM is able to progress healthily psychologically.

13.2 Ms B's Psychological and Parenting of AM

Ms B presents as a friendly but emotionally dysregulated person. She experiences a wide range of emotions within a relatively short time period. This accords with her psychological profile which revealed that she experiences mood swings and while at times she can be quite elated and socially engaging, for the most part Ms B experiences depression and irritability.

Other aspects of Ms B's psychological functioning that are evident are that she can be quite volatile, explosive, irritable and she has a strong need to have her own needs met. However, she also has a very negative self-perception and believes that she deserves the worst in life. As there are elements of borderline personality functioning, it appears Ms B lacks boundaries and can be impulsive. There are reported incidents that concur with these aspects of Ms B's functioning including her substance abuse as well as her self-harming episodes.

The pathology reports provided indicated that for well over a year Ms B has not tested positive for any substance or alcohol and it appears that her tendency to abuse alcohol and substances will need to be monitored and managed going forward.

Ms B was however, found to have some insight into Amé's needs and she observed to be able to provide good parenting for AM. She was seen to be well attuned to AM's needs and protective of exposing AM to the animosity between Mr W and herself.

Ms B is going to need long-term psychotherapy, as well as management by a psychiatrist in order for her to be able to fully realize her potential and to manage her psychological compromises in order to be the best parent she can be for AM.

13.3 AM's Relationship with Mr W

AM has a close relationship with Mr W and he plays a significant role in her life. However, it is concerning that it appears that AM does not have a secure attachment to Mr W. She does experience receiving positive emotions from Mr W and she does also feel positive emotions for her father. However, she is also somewhat ambivalent about her relationship with him as she may find him overwhelming.

It is of concern that it appears that AM has an unhealthy view of her role and importance in Mr W's life... AM refers to herself as being his girlfriend and she manipulates him.

AM needs to be assisted to develop a healthier relationship with Mr W that includes a more appropriate father-daughter relationship with appropriate boundaries.

13.4 AM's relationship with Ms B

It is clear that AM does not have a secure attachment with Ms B and her attachment paths appear to have been disrupted. This has serious long-term implications for Amé psychological well-being. AM was seen to crave contact with her mother and it is evident that she has not been assisted in being able to benefit from significant contact with Ms B.

However, AM also experiences her mother as being angry. This is most likely due to Ms B's compromised psychological functioning as well as AM being exposed to the animosity between her parents. AM does not know if she can trust her mother. This is most likely due to an interplay between Mr W's negative influence with regard to AM's relationship with Ms B, as well as Ms B's behaviour.

AM does experience positive emotions as coming from her mother as well as having positive emotions for her mother which bodes well for their relationship as long as AM receives the assistance that she needs with regard to contact with her mother as well as therapeutic intervention."

[64] Following an in-depth investigation Dr Roux recommended shared residency and phased in contact with the applicant and the respondent would be in the best interest of AM. She also recommended that the applicant and the respondent should receive individual psychotherapy and parent guidance. The applicant should also receive substance counselling.

[65] Furthermore, Dr Roux indicated that a Parenting-Coordinator should be appointed by court to assist with the ongoing disputes between the applicant and the respondent.

REPORT DR DE VOS

[66] The applicant was of the view that Dr Roux's report was lacking because information provided during the interviews were not included in her report. He was also of the view that the report lacks linear causality between data collected, the discussion and the recommendations. Therefore Dr De Vos, an Educational Psychologist, was requested to provide a second opinion

regarding the findings and conclusions reached by Dr Roux.

[67] Dr De Vos's report contained the following recommendation:

"The recommendations regarding the minor child are well-informed and is suggestive of the latest research. The W/B case lends itself to shared residency in terms of logistical aspects. The information presented in the report suggests that shared residency

would be in the best interests of the minor child.

The phased in contact as suggested in the report is practical and will provide a good guideline for the parents. The minor child will benefit from continued therapeutic intervention. It would be advisable to ensure that continued feedback exists between the psychologist and the case manager.

The recommendation regarding co-parenting is sound and well-aligned. The role of the parent coordinator/case manager as set out in Annexure B should be used as a guideline for co-parenting.

Parent guidance is recommended for both Mr. W and Ms. B in order to co-parent AM effectively. Parent guidance should ideally be undertaken by the same individual, to ensure a streamlined approach to parenting the minor child.

The recommendations regarding Ms. B can be deemed as valid. However, Ms. B's substance abuse history is of concern to the undersigned psychologist. In order to manage this concern, it is recommended that Ms. B seek counselling in the form of a Twelve-step programme with a sober-companion that will provide feedback to the case manager. Ms. B should be held accountable for her sobriety.

The recommendations regarding Mr. W can be regarded as valid.

PARENTING-COORDINATOR

[68] In The Law of Divorce and Dissolution of Life Partnerships in South Africa[11], the role of a facilitator, or parenting coordinator, is described as follows:

“Parenting coordination (or facilitation as it is currently known in the Western Cape and case management as it is currently known in Gauteng) is a child-focused ADR process in which a mental health professional or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate non-adversarial, court-sanctioned, private forum.”

[69] Therefore, Parenting Coordinators have one goal in mind: to facilitate parental cooperation and to ensure that parents carry out court-ordered arrangements relating to minor children. They assist in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate, non-adversarial, court-sanctioned and private forum.

[70] In South Africa there is currently no statute nor court rules governing the appointment or authority of parenting coordinators.

The basis of a parenting coordinator’s appointment is either by –

1. a court order;
2. a parenting plan; or
3. a settlement agreement between the parties, which has been made an order of court.

[71] The court order or relevant clause of the agreement or plan stipulates the scope of the coordinator’s authority. The

practice, which has evolved has given the coordinator’s the power to make decisions or directives regarding disputes, which is binding on the parties until a competent court directs otherwise or the parties jointly agree otherwise.

[72] In *Hummel v Hummel*[12] the applicant applied to court for an order that a case manager be appointed to deal with the conflict about the parenting of his son, and be clothed with powers to make a decision which would be binding on the parties, subject to the overriding jurisdiction of the High Court to overturn such a decision.

[73] Sutherland J (as he then was) held that the notion of a case manager is one that derives from the practice of the courts and is not a label used in the Children’s Act. After considering the provisions of section 33 of the Children’s Act, the court held that;

“... section 33 (5) [of the Children’s Act] articulates the scope for intervention to render assistance to the parents, not make decisions for them”.

[74] The court also held that the role of any “... other suitable person (such as a facilitator or case manager) is to

facilitate decision making rather than to be the decision-maker”.[13] The court concluded that

[14] ‘... the appointment of a decision-maker to break deadlocks is a delegation of the court’s power; itself and impermissible act’. I am in respectful agreement with the reasoning of Sutherland J in *Hummel*.

[75] In TC v SC[15] Davis AJ presided over an application in terms of Rule 43 for interim relief pending a matrimonial action. He considered whether a court had the authority, by virtue of its inherent jurisdiction as the upper guardian of minor children, to make an interim order whereby a facilitator is appointed to deal with parenting disputes. The court held:

“I consider that it is possible, by means of appropriate limitations on the scope of the PC's authority, to craft a role for the PC which does not constitute an unlawful delegation of judicial decision-making authority, but permits the parties (and indeed the court) to benefit from the services of a PC.”[16]

[76] The court concluded, further, that although the contents of a parenting plan had to be agreed on, and could not be imposed on parents, it did not necessarily follow that the court could not, in appropriate cases, appoint a coordinator with limited decision-making

powers to assist the parties in implementing the terms of an agreed parenting plan, which had been made an order of court.

[77] Davis AJ, however, warned that the appointment of and powers conferred on a coordinator can and should be limited to avoid an impermissible delegation of judicial authority.

[78] Davis AJ emphasised the following guidelines to limitations on the appointment of a coordinator:

First limitation

“[P]arties must have already reached agreement on the terms of a parenting plan, whether interim or final, which has been made an order of court, and the coordinator's role must be limited to addressing implementation of ... an existing court order.”

[79] Davis AJ found that an agreed parenting plan that had been made an order of court was necessary to provide the framework, which

delineates the coordinator's proper function and authority. Without it, one runs the risk of an improper delegation of judicial decision-making power of the type, which the court was being asked to authorise. Where there is a court order in place, the coordinator may be confined to making decisions consistent with the court order to assist the parties to comply with it, and the coordinator's role may be conceived as supervision of the implementation of the court's order.

[80] Davis AJ held that the High Court, by virtue of the provisions of s 173 of the Constitution, enjoyed inherent authority to ensure that its orders were carried out and it was well-established that the High Court had inherent jurisdiction to enforce its orders by committal to prison for contempt of court. Davis AJ therefore,

saw no difficulty with the notion that the High Court could, in the exercise of its inherent power to protect and regulate its own process, appoint a coordinator tasked with supervising compliance with the court's order to ensure that its terms were carried out.

Second limitation

[81] Court orders in taking the best interests of the child standard includes –

1. care and contact;
2. guardianship;
3. the termination, extension, suspension or restriction of parental responsibilities; and
4. rights, which cannot be changed by a coordinator.

[82] For example, it would be unlawful to confer on a coordinator the power to change the primary residence of a child. The

coordinator's decision-making power must be confined to ancillary rulings, which are necessary to implement the court order,

but do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order, for the coordinator not to trespass on the court's exclusive jurisdiction in terms of the Act.

[83] Davis AJ also referred to section 34(5) of the Children's Act that prescribes that parenting plans, which have been made an order of court may only be amended or terminated by an order of court on application, while s 22(7) provides that only the High Court may confirm, amend or terminate a parental responsibility and rights agreement, which relates to guardianship of a child. These provisions make it clear that a coordinator cannot make a valid directive, which has the effect of amending a court ordered parenting plan.

Third limitation

[84] This limitation on a coordinator's power is to eliminate an impermissible delegation of judicial authority. All decisions of the coordinator must be subject to comprehensive judicial oversight in the form of a full reconsideration of the court

decision. This means that the rulings of the coordinator are not in effect final, even if they operate immediately pending review, because they are susceptible to alteration by the court. By permitting a coordinator's rulings to operate immediately,

subject to a party's right to apply to court for a stay of the ruling pending a review, one strikes a necessary balance between the need for expeditious and effective conflict resolution by the coordinator and the need for judicial scrutiny of the coordinator's

rulings.

Fourth limitation

[85] Davis AJ made it clear that in the absence of the consent of the parties to the appointment of a coordinator and the terms of their appointment, a court should not impose a coordinator on parties without conducting the necessary inquiries and making the findings regarding the following:

1. The welfare of the child or children involved who are at risk through exposure to chronic parental conflict, because the parties have demonstrated a longer-term inability or unwillingness to make parenting decisions on their own (for instance by resorting to frequent, unnecessary litigation), to comply with parenting agreements or court orders, to reduce their child-related conflicts, and to protect their children from the impact of that conflict.
2. Mediation has been attempted and was unsuccessful or is inappropriate in the particular case. (This is a necessary finding to ensure that the appointment of a coordinator without parental consent is a last resort reserved for the cases of particularly intractable conflict.)
3. The person proposed for appointment as the coordinator is suitably qualified and experienced to fulfil the role of a coordinator. Before a court imposes a coordinator on parties without their consent, the court must be sure that the person appointed has the proper skills set, personal qualities and professional experience to properly render the service .
4. That the fees charged by the proposed coordinator are fair and reasonable in the light of their qualifications and experience and that the parents can afford to pay the services of the coordinator. One of the parents must agree to pay for the services of the coordinator.[17]

EVALUATION

- [86] After perusing the reports before me, the question has to be raised as to whether the applicant and respondent are serving the best interests of the minor child, AM. The minor child is still a far way off until she reaches the age of majority and it is of the upmost importance for the applicant and respondent to put their differences aside for the benefit for AM.
- [87] It is evident that the parties were, and are, having difficulty sorting out their differences regarding the access of AM in a civilised manner. Their relationship is extremely acrimonious and it is clear on reading the affidavits, that this relationship is still deteriorating.
- [88] The nature and extent of the litigation reflects a sorry state of affairs, particularly for AM. Both expert reports state that AM is extremely negatively affected by the acrimony and strife.
- [89] The photographs and WhatsApp messages attached to the affidavits do not take the matter any further, save to emphasise the extent of the extreme acrimony between the parties and the detrimental effect on the child.
- [90] However, both the applicant and the respondent love their child and neither can reconcile themselves with the idea of not being actively involved in their child's daily life.

- [91] I have no doubt that the applicant sincerely believes that the respondent is not cured of the emotional problems which beset her since her teens. This continued during their marriage. It is also undoubtedly so that the appointment of Dr Roux and De Vos supported the applicant's view that the respondent is suffering from a condition known to psychiatrists as "borderline personality disorder".
- [92] The applicant asserts that as long as psychiatrists cannot state that it is safe for him to leave AM in the care of the respondent, he cannot do so. Again, I am satisfied that the applicant is a dutiful and caring father. He as a father is fully entitled to protect his child against what he perceive to be harmful influences.
- [93] The respondent on the other hand, underwent rehabilitation for an extended period, and she was admitted on 19 April 2020 to Poortview Centre due to a mental breakdown. She also underwent treatment at Changes River Manor Rehab Centre during October 2020. She sought the treatment voluntarily, which she completed successfully.
- [94] It is evident that pursuant to her discharge, she has been fully committed to her recovery. She also followed the recommendations post-discharge provided to her by the aforementioned treatment centre. The applicant furthermore submitted her for drug testing during September 2021, all tests were negative. Thus, there is no suggestion that she is still abusing any substances. She is prepared to submit to drug testing at anytime when so requested. This is a clear indication of her commitment in order to have access and contact with AM.
- [95] The respondent was honest about her personality disorder and her substance abuse. She is accepting that her has a problem, and acceptance reflects positive on her prognosis. I am struck by the way the respondent had been able to cope as well as she has.
- [96] The applicant on the other hand paints himself and a faultless individual. However, he was also involved in abusing drugs as well as with prostitution. The respondent contended that the applicant should have access to AM, but he asserts that the access and contact should be supervised.
- [97] The respondent's arguments regarding supervised contact in the past has merit. She asserts that the applicant insisted on her access with AM to take place in a public area, either a park or restaurant. The weather at times affected her contact with AM adversely, because of rain and other factors. She also mentioned that the applicant was present during her contact visits with AM and he will intrude and disrupt the visits. I fully appreciate the fact that under such circumstances the respondent in effect has little or no opportunity to have quality time with AM, and furthermore, to provide her with the opportunity to establish a mother-daughter bond.
- [98] The applicant allowed telephonic contact with the respondent at specific times and days during the week. It is evident that the applicant was not committed to the arrangement. He would at numerous times use unacceptable excuses for the respondent to exercise her right

in this regard to AM. I understand that when AM is sleeping or eating etc, that she would be unable to converse with her mother telephonically. I would imagine that the applicant as a responsible father and acting in the best interests of AM, would manage such situations, in that he would contact the respondent via SMS and ask her to phone earlier or later, whatever time suitable. The timeframes set by the applicant in my view was and is not set in stone.

- [99] The Roux and De Vos reports were helpful in adjudicating this matter. These reports provided full insight into the complex relationship between the applicant and respondent, their personal difficulties relating to their psychology and substance abuse and their battle with regard to their minor child.
- [100] I appreciate the fact that making decisions regarding what is and what is not in the best interests of a child depends to a large extent on making predictions.[18]
- [101] I have to decide what is in the best interests of AM and whether the fears of the applicant are soundly based or not.
- [102] It is important to mention that a personality disorder is not per se a mental illness, is not a psychiatric disorder, but it does require assessment and management from time to time. The respondent accepts the fact that her condition has to be constantly managed.
- [103] The issue before me is not merely one of a mother's right to access to her daughter per se, but the extent of the child's rights of access and right to parental care.[19]
- [104] I have decided that the respondent should be granted access to AM, her daughter, because that is in the best interests of the minor child. In order to prevent further disputes, I shall attempt to include such directions in the order which I propose to make, which will, I hope, iron out the parental difficulties the parties are experiencing.

COSTS

- [105] I can see no reason in this case why the ordinary rule should not apply that the costs follow the result. I am mindful that this is a family matter and that the applicant was no doubt convinced that he was acting in the minor child's best interests.
- [106] But the fact of the matter is that the respondent has incurred expenses in resisting the application before this court.
- [107] Furthermore, the applicant persisted with the application, even after Dr Roux and Dr De Vos's report were filed, wherein they both recommended shared access by both parties. I consider that it would be unjust for the respondent to be burdened with the costs.
- [108] In terms of Rule 43(8) a court may in exceptional circumstances waive the limited fee pertaining to Rule 43 applications. The magnitude and extent of this matter justifies the waiver of the normal Rule 43 (8) fee.

ORDER

[109] After considering all the facts and arguments, against the backdrop created by the relevant constitutional and other legal principles, I make the following order pendente lite:

1. The parties shall retain joint parental rights and responsibilities in respect of the minor AM the minor child, which includes the responsibility and right to:

1.1 care for the minor child;

1.2 act as guardian for the minor child;

1.3 contribute to the maintenance of the minor child; and

1.4 have contact with the child.

2. The respondent shall exercise specific parental rights and responsibilities of contact in respect of the minor child, subject to the child's primary residence vesting with the applicant, and further subject to AM's social, scholastic and religious activities, which contact is set out in paragraphs 3 to 6.7 below.

3. Phase 1 contact which shall be for a period of 3 months, and which shall commence on the first weekend following the order granted by this court as follows:

3.1 The respondent is to exercise alternate weekend contact with the minor child from Saturday 08h00 until 17h00 on Sunday.

3.2 On the Tuesday preceding the respondent's contact weekend, the respondent shall have sleepover contact with the minor child from afterschool or after care, until she is returned to school on the Wednesday morning.

4. Phase 2 contact which shall be for a period of 3 months, following phase 1 contact, as follows:

4.1 The respondent is to exercise alternate weekend contact with the minor child from after school or after care on Friday until 17h00 on Sunday.

4.2 On the Tuesday preceding the respondent's contact weekend, the respondent is to exercise sleepover contact with the minor child from after school or after care until she is returned to the applicant at 17h00 on Wednesday.

4.3 On the Thursday after the respondent's weekend contact the minor child shall have sleepover contact with the respondent from after school or after care, until she is returned to the applicant at 17h00 on Friday.

5. Phase 3, contact which shall be for a period of 3 months, following phase 2 contact, as follows:

5.1 The respondent is to exercise contact with the minor child on alternate weekends from after school or after care on Thursday after school or after care until Sunday when she is returned to the applicant at 17h00.

5.2 On the Tuesday preceding the respondent's contact weekend the respondent is to exercise sleepover contact with the minor child from after school or after care until she is returned to the applicant at 17h00 on Wednesday.

5.3 On the Thursday after the respondent's weekend contact the respondent is to exercise sleepover contact with the minor child from after school or after care, until she is re-turned to the applicant at 17h00 on Friday.

6. Phase 4, following phase 3 contact, which is contact to be exercised on a shared residency basis as follows;

6.1 Week 1:

6.1.1 From Monday after school or after care, until Thursday morning when she is returned to school the minor child will reside with the respondent.

6.1.2 From Thursday after school or after care until Friday morning when she is returned to school the minor child shall reside with the applicant.

6.1.3 From Friday after school or after care until Monday morning when she is returned to school the minor child shall reside with the respondent.

6.2 Week 2:

6.2.1 From Monday after school or after care, until Thursday morning when she is returned to school the minor child will reside with the applicant.

6.2.2 From Thursday after school or after care until Friday morning when she is returned to school the minor child shall reside with the respondent.

6.2.3 From Friday after school or after care until Monday morning when she is returned to school the minor child shall reside with the applicant.

6.3 In respect of holiday contact, the following shall apply:

6.3.1 During 2022 the respondent is to exercise contact with the minor child during the holidays subject to one holiday per quarter, of a five-night duration.

6.3.2 During 2023 the respondent is to exercise contact with the minor child during the holidays subject to one holiday per quarter, of a seven-night duration.

6.3.3 During 2024 the respondent is to exercise contact with the minor child during the holidays subject to one holiday per quarter, of a ten-night duration.

6.3.4 During 2025 onward, the respondent is to exercise contact with the minor child during the holidays which holiday contact will be shared equally between the applicant and the respondent.

6.4 In respect of Easter and Christmas Day Contact the following shall apply:

6.4.1 Contact on Easter Sunday and Christmas Day is to alternate between the respondent and the applicant.

6.4.2 The parent who is exercising contact on Easter Sunday or Christmas Day shall have first right of refusal with regard to how they wish to exercise their holiday contact over that period, that holiday contact being in keeping with the phase of holiday contact being implemented for that year.

6.4.3 In the event that both parents are in their place of residence, or in close geographical proximity on Easter Sunday or Christmas Day, the parent who is not exercising contact on that Easter Sunday or Christmas Day shall be entitled to 4 hours of contact with the minor child on that Easter Sunday or Christmas Day from 15h00 until 19h00.

6.4.4 The respondent shall have contact with the minor child on Easter Sunday of 2022 and she shall have contact with the minor child on Christmas Day of 2022. The applicant shall have contact with the minor child on Easter Sunday of 2023, and he should have contact with the minor child on Christmas Day of 2023. Contact on Easter Sunday and Christmas Day with the minor child shall thereafter alternate accordingly.

6.5 In respect of contact on birthdays, the following shall apply:

6.5.1 The minor child shall be entitled to contact with each of her parents on that parent's birthday. She should have contact from 17h00 on the day before of that parent's birthday until the morning after that parent's birthday when she is returned to school, or the other parent.

6.5.2 The minor child should have contact with both her parents on her birthday. Such contact shall be exercised as set out below:

Parent 1 shall have contact from 17h00 on 23 April until 15h00 on 24 April.

Parent 2 shall have contact from 15h00 on 24 April until the minor child is returned to school, or to the parent exercising contact that week, on 25 April. Contact on the minor child's birthday shall then alternate on this basis.

6.5.3 The respondent shall exercise contact with the minor child for the minor child's birthday as parent 1 in 2022 and then as parent two in 2023. Thereafter contact on the minor child's birthday will continue to alternate accordingly.

6.6 In respect of contact on Public Holidays shall apply as follows:

6.6.1 Contact on public holidays that occur on Tuesdays and Wednesdays or Thursdays shall alternate between the respondent and the applicant.

6.6.2 Contact on public holidays that occur on Friday, Saturday or Monday shall be included into the weekend contact being exercised according to the contact schedule.

6.7 The minor child is to exercise daily, unrestricted telephonic contact with either parent irrespective of whose care she is in.

A Parenting Coordinator is appointed, to assist with disputes the between the applicant and the respondent that they are not able to resolve.

6.9 The Parenting Coordinator shall be either a social worker/ phycologist/ attorney or an advocate who shall have no less than 5 (five) years' experience in family law, and shall be mutually agreed by the parties within 7 days of this court order, failing which the Parenting Coordinator is to be nominated by the Johannesburg Bar.

6.10 The Parenting Coordinator is empowered to:

6.10.1 implement the contact schedule as set out in this court order;

6.10.2 to call for drug and/or alcohol testing of the respondent and/or the applicant whenever it is deemed necessary;

6.10.3 to exercise powers in terms of annexure B hereto labelled as "Powers of the Parenting Coordinator".

7. The costs of the Parenting Co-ordinator will be shared equally between the parties irrespective of the outcome of the facilitation and irrespective of whether the parties follow the recommendations of such Parenting Co-ordinator. The Parenting Co-ordinator however has the direction to make a finding/determination against either party in respect of the costs occasioned the referral of a dispute to the Parenting Coordinator.
8. The applicant is to receive individual psychotherapy and parent guidance to assist him to develop insight into how his behaviour impacts on the minor child and to assist him to develop appropriate parent-child boundaries.
9. The respondent is to receive individual psychotherapy and parent guidance to assist her to develop insight into how her behaviour impact on the minor child.
10. The respondent is to receive substance abuse counselling.
11. The applicant is directed to pay the respondent's costs of suit on the party and party scale, such costs to include the costs of counsel.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 17 May 2022

DATE JUDGMENT DELIVERED: 23 May 2022

[1] Christopher Monckton, 3rd Viscount Monckton of Brenchley.

- [2] Rule 43 contemplates a speedy and cost-effective resolution of disputes. It requires an applicant to deliver a sworn statement, in the nature of a declaration, setting out the relief claimed and the grounds therefore. The respondent is required to deliver a sworn statement in the form of a plea. Lengthy affidavits are generally discouraged and it has often been held that prolixity is an abuse of the process of court.
- [3] Section 28(2) of the Constitution of the Republic of South Africa provides that a child's best interests are of paramount importance in every matter concerning a child. In *TS v TS* 2018 (3) SA 572 GJ Spilg J considered the impact of section 28 of the Constitution and its adoption into the Children's Act 38 of 2008 may have on the application of Rule 43. He concluded that Rule 43(5) was sufficiently elastic to allow a procedure that can reconcile the other provisions of Rule 43 with both section 28 of the Constitution and the relevant sections of the Children's Act. In *E v E and Related Matters* 2019 (5) SA 566 (GJ) it was held that a presiding judge has a discretion to permit the filing of applications that have departed from the strict provisions

of Rule 43(2) and (3) and to direct parties, if it is deemed appropriate, to file supplementary affidavits.

[4] Section 28(2) of the Constitution, 1996.

[5] Act 38 of 2005.

[6] *S v M* (Centre for Child Law as Amicus Curiae)

[2007] ZACC 18.

[7] See paragraph [49]

[8] *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000

(3) SA 422 (CC) at paragraph [18].

[9] Footnote 5, *supra*, paragraph [25].

[10] 1994

(2) SA 325 (W) at 189 B/C-E.

[11] *Juta*, by Jacqueline Heaton

[12] Unreported case number 2012/06274 2012 JDR 1679 (GSJ)

[13] At paragraph [9]

[14] At paragraph [13]

[15] 2018

(4) SA 530 WCC

[16] At paragraph [50]

[17] Paragraphs [78]-[85] see Parenting coordinators: What is classified as their decision-making powers? De Rebus 2018 (September) DR 37.

[18] V v V 1998 (4) SA 169 (C).

[19] Section 28(1)(b) of the Constitution provides that every child has the right- “(1)(b) to family care, or to appropriate alternative care when removed from the family environment.”

[19] Section 28(1)(b) of the Constitution provides that every child has the right-

“(1)(b) to family care, or to appropriate alternative care when removed from the family environment.”

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