IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 748/2019

In the matter between:

NOT REPORTABLE

Date heard: 2 April 2019

Date delivered: 4 April 2019

DANE MALCOLM PRINGLE **Applicant**

And

NATASHA FOURIE **Respondent**

JUDGMENT

Goosen J:

[1] This application concerns the immediate short term best interests of a minor child. The applicant, who is the child's biological father, seeks an interim order awarding him primary care of the minor pending an investigation by the Family Advocate and an application to vary an existing court order in respect of residence of the minor.

[2] It is necessary to set out briefly the background to this application. The parties are both members of a close corporation, Unick Fisheries CC and carry on business in partnership. They were previously involved in a romantic relationship and a son, now aged 8 years, was born of this relationship. The parties are no longer in a relationship. In 2015, the applicant launched an urgent application in which he sought, *inter alia*, primary care of the minor child. The application was opposed. The application was ultimately settled between the parties and an order was made by this court on 1 March 2016. That order provides for shared residency of the minor child. For reasons which I will elaborate upon hereunder the order makes provision for periodic requested urine tests of the respondent to determine that she is not or has not used narcotic substances.

[3] It is common cause that both parties partook in the recreational use of cocaine prior to the birth of the minor child. It is also common cause that during her pregnancy the respondent refrained from the use of cocaine. It appears that this persisted for a period after the birth of the minor. However, it is common cause that the respondent again started using cocaine in October 2014. As a result of this, the respondent was admitted to the Riverview Rehabilitation Centre for a period of 25 days. Unfortunately, the rehabilitation was unsuccessful and in June 2015 the

respondent suffered a further relapse. Her use of narcotics resulted in an admitted addiction to the use of crack cocaine.

[4] It was this state of affairs that gave rise to the initial urgent application referred to above. In that matter, the best interests of the minor was investigated, *inter alia*, by the office of the Family Advocate. It was then determined that a shared residency arrangement was in the interests of the child since the respondent had remained drug-free for a lengthy period of time.

[5] The shared residency arrangement has continued since then, although it has been informally amended to allow that the minor spend alternating weeks with the parties. The business partnership has also continued, with the respondent maintaining an active role in the business. In the present application, the applicant seeks interim relief pending the variation of the order of 1 March 2016 by providing that the primary care of the minor be awarded to him. The interim relief, sought urgently, is premised upon the allegations that the respondent has again relapsed in respect of her drug use and is conducting herself in a manner that exposes the minor to risk of harm. What the applicant accordingly seeks is that the minor be placed in his primary care and that the respondent exercise supervised contact with the minor pending an investigation and final determination of the matter. The supervision is to be exercised by the au pair on specified days of the week.

[6] The paramount consideration in a matter such as this is the best interests of the minor child. This is to be determined having regard to the current circumstances of the child, taking into account measures that can reasonably be taken to protect the best interests of the child pending final determination of the matter.

[7] I have already pointed to some common cause facts which preceded the granting of the order on 1 March 2016. In respect of what has occurred thereafter there is also much that is common cause or at least not disputed. The applicant alleges that towards the end of 2017 he noted that the respondent's behaviour was erratic, in particular, that she was absent from work for several days at a time. He suspected then that the respondent was abusing drugs and alcohol.

[8] On 2 January 2018, the applicant and respondent's mother went to the respondent's home. They found her in an unresponsive state. They also found crack cocaine and a crack cocaine pipe. As a result, the applicant arranged for the respondent to be admitted to the Riverview Rehabilitation Centre. The respondent admits that a crack cocaine pipe was found and that she was admitted to the rehabilitation centre. She admits an exchange of WhatsApp messages between her and the applicant wherein she admits to the need to resolve a drug-related problem.

[9] It is common cause that the respondent spent some weeks at the rehabilitation centre whereafter she returned home. It appears that the respondent maintained her sobriety for a period of time thereafter. The papers are silent as to the care arrangement in respect of the minor child. It is to be presumed that the arrangement continued as per the shared residency agreement.

[10] The applicant alleges that in or about November 2018 he was informed by the respondent's sister that the respondent had admitted to her to having again relapsed. This, together with similar concerns expressed by the respondent's uncle caused the applicant to confront the respondent regarding her alcohol and drug abuse. He states that she admitted having relapsed but refused to again enter rehabilitation. The respondent denies this. She, however, admits that in December

2018 she did relapse and commenced using drugs. She states that this period is always difficult for her because it is the anniversary of her brother's death.

[11] According to the applicant the respondent was involved in the business of a game farm in 2018. This involvement was allegedly terminated in January because of the respondent's relapse. In January 2019 the respondent travelled to Coffee Bay in the Transkei. She travelled with her sister, Hayley, and Ms *Chilwan*, an employee of Unick Fisheries.

[12] The applicant was informed by the respondent's sister, as is confirmed by her, that the respondent was 'high' and that she was again abusing alcohol and drugs. The respondent planned to travel to the Transkei in order to engage in a cleansing ceremony. Over this period the minor child was in the applicant's care. On 22 January 2019 the respondent sent the following message to the applicant:

> "Hey, so I know you worried and have all the right to be but I want you to know that I'm on the right path and that I've worked through a lot in the Transkei. I'm ready to come home and get back on track and get my life back in full swing like it was last year. I know you may not believe me or have heard this before but I finally feel at peace in my heart and believe I can do this and beat my addiction once and for all. Just have a little bit more faith in me. Love you and thank you for always being there for me. Xxx."

[13] In the period that the respondent was in the Transkei, the applicant was in communication with the respondent's sister, Hayley. These messages, the content of which is confirmed, indicate that the respondent was using alcohol and/or drugs. The messages also reflect a concern about the respondent's behaviour. The

respondent's conduct in regard to taking drugs whilst in the Transkei is confirmed by *Chilwan*.

[14] The applicant states that the respondent has been absent from work for most of 2019. This is confirmed by the respondent albeit that she alleges that she has been assisting her father who recently underwent surgery.

[15] On 12 March 2019, the applicant and respondent had a business meeting with a third party businessman. The applicant noted that the respondent was behaving erratically, that she was twitching and appeared to be paranoid. After the meeting he and the respondent had a heated exchange. He told her that she needed to undergo drug testing. According to the applicant the respondent stormed off. A week earlier a similar meeting had been convened but the respondent did not arrive.

[16] Also on 12 March 2019, the parties' au pair informed the applicant that the minor child had walked into the bathroom that afternoon and found the respondent and a man, naked, in the bathroom.

[17] When confronted with this in a WhatsApp exchange the following day, the respondent admitted the presence of the man. She also explained that her behaviour at the meeting was caused by the fact that she had taken pain medication (Oxynorm) prescribed by her plastic surgeon who was treating her. She also stated that she had taken diet pills. She had apparently taken 2 of the Oxynorm pain tablets whereas only one was prescribed. She denied that she was taking drugs and said that she would undergo a drug test.

[18] It is the events of 12 March which resulted in the applicant seeking legal assistance resulting in the present application. It is common cause that on 14 March the applicant met with the respondent's attorneys. He requested them to persuade the respondent to again check into a rehabilitation centre. On 18 March he consulted his attorney. A letter was sent to the respondent's attorneys setting out proposals to avoid litigation. This involved a request that the respondent commits to a rehabilitation programme and satisfies the applicant that she is drug-free. It was proposed that the minor child remain in the care of the applicant and that the respondent would have supervised access. It was further proposed that a mediation process, as envisaged in the court order of 1 March 2016, be conducted.

[19] Although a mediator was to deal with the matter on 20 March 2019, the process was cancelled by agreement between the parties. On 20 March 2019, the parties' legal representatives met. Respondent's attorneys indicated that the respondent would consult a psychologist, Dr *van Staden*. The applicant's attorneys was informed that a urine test was conducted on 18 March 2019. A copy of the result was not furnished. I shall return to the test result hereunder.

[20] In an affidavit[1] deposed to by Chilwan on 20 March 2019, shortly before the commencement of this application, she states that the respondent had "frantically" asked her a few days earlier to give her a sample of urine. This allegation is admitted by the respondent. She did so, she says because she had taken prescription medication and that she had been advised by Dr *Hagen* that she would, therefore, fail a drug test.

[1] The applicant alleged in his papers that the respondent made certain threatening remarks, in front of Unick employees, about getting her friends, a certain Justin and Armand, to "sort out" the applicant. It is these threats that resulted in statements being made to the South African Police Services by Chilwan and Possett (another employee). The respondent admits making the remarks but denies that she was threatening.

[21] The respondent's opposition to the interim relief sought is premised upon a denial that she is presently using crack cocaine or similar narcotics. She ascribes her conduct to the effects of the prescription medication (Oxynorm) coupled with diet medication. This latter medication the respondent obtained from a personal trainer at the gym she attends.

[22] The respondent annexed to her answering affidavit a urine test result which indicates a negative result for cocaine. It was argued that the negative urine test for use of cocaine and the affidavit of Dr *Hagen*, a general practitioner, supports her denial of drug use. Dr *Hagen* stated that the taking of 2 Oxynorm tablets may explain the respondent's erratic behaviour. The opinion expressed by him is of little value. It is not based on any conduct observed by him or any pharmacological or other evidence. Nothing is known about the diet medication. There is also no explanation as to why a double dose of Oxynorm was taken. It is striking that the respondent's plastic surgeon declined to express any opinion regarding the effects of such dosage.

[23] The report of Dr *Van Staden*, the psychologist consulted by the respondent also does not assist. In it, he states that the respondent is not clinically dependent on substances. It is unclear what this means. It is not explained, more particularly in the light of the admission by the respondent that she is addicted to substances and has, on several occasions, relapsed i.e. again started using dependent producing narcotics.

[24] In dealing with the negative urine test result, the applicant annexes to his replying affidavit a brochure by Ampath Pathologists, the pathology laboratory that

conducted the test. It suggests that the detection period for cocaine in urine is 2-4 days. The brochure is of no evidential value in determining the issue. The negative result must be weighed against the other evidence presented. The applicant has tendered a substantial body of evidence. A letter from the respondent's mother, affidavits of the respondent's sister, *Hayley*, and *Chilwan*, which all point to ongoing drug use over a period. *Chilwan* reports that the respondent admitted to drug use at an office party in February. The respondent herself admits to drug use in December 2018 and January 2019. There is also the admission by the respondent that she asked *Chilwan* for a urine sample in order "to beat" the test. The reason given is not supported by *Hagen* who allegedly previously gave her the advice she relied upon. In my view, the evidence points tragically , on the probabilities, to a further relapse in the respondent's use of narcotics notwithstanding the negative urine test result on 18 March. There can, in my view, be no doubt that the several persons who report her use of drugs, including the respondent's mother and sister, are deeply concerned not only about the interests of the minor child but also about the welfare of the respondent. It is this which must guide the court in its assessment of the best interests of the child.

[25] It was argued that there is nothing on the papers to suggest that the minor child's welfare is at risk or that there is a threat of harm. I disagree. If indeed, as the weight of the evidence suggests, the respondent has relapsed in her use of crack cocaine or similar narcotics or even in the abuse of prescription medication, the risk to the welfare of the minor when he is in her care is self-evident. I am conscious of the fact that an interim change to the primary residence of the minor will, no doubt, cause some disruption in the minor's life. On balance, however, I am satisfied that it

will bring about some stability while the longer-term interests of the minor are considered

[26] I am satisfied that it will be in the immediate short term interests of the minor child if he primarily resides with the applicant. It is, in my view, necessary to order that the Family Advocate investigate and report upon the care and welfare arrangements of the minor. Having regard to all of the circumstances it will be appropriate to order that contact with the minor child be conducted under supervision as proposed.

[27] In the result, I make the following order:

1. That the Family Advocate is directed to, on an urgent basis, investigate and report on the care and contact arrangements relating to the parties' minor child *Seth Kyle Pringle* ("the minor").
2. That, pending the finalization of the investigation and receipt of the report by the Family Advocate:

    2.1 the applicant is awarded primary care of the minor and that the minor shall primarily reside with the applicant;

    2.2 the respondent will have contact with the minor as follows:

        2.2.1 supervised contact in the presence of the parties' au pair, *Kelly Ross*, on Monday, Wednesday and Thursday afternoon, with Ms *Ross* collecting the minor from school and with Ms *Ross* returning him to the applicant's residence at 18:00 the same evening;

2.2.2 supervised contact in the presence of Ms Ross or another party mutually agreed upon by the parties' every alternate Saturday and Sunday, with the person who supervises the contact collecting the minor from the applicant's residence at 08:00 and with that person returning the minor to the applicant's residence 18:00 the same evening; and

2.2.3 reasonable telephonic contact with the minor at all reasonable times.

3. That the relief sought under Part B of this application be and is hereby postponed *sine die*.

4. That the applicant be and is hereby granted leave to supplement his application papers upon receipt of the Family Advocate's report.

5. That the costs of the interim application are reserved.

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G.G. GOOSEN

JUDGE OF THE HIGH COURT

Obo the Applicant:	*Adv Gagiano*
Instructed by	*Anthony-Gooden Incorporated, 9 Bird Street, Central, Port Elizabeth* *Ref: Jag/MZ*
Obo the Respondent:	*Adv D.A Smith*

Instructed by	*D. Gouws Attorneys, 136 Cape Road, Mill Park, Port Elizabeth* *Ref: Jeanne Scheffer*