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**REPUBLIC OF SOUTH AFRICA
THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NR: 093505/2023

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED:
DATE: 07 November 2023

In the matter between:

C[....] D[....] N[....]

APPLICANT/RESPONDENT

and

M[....] D[....] N[....](BORN P[....])

RESPONDENT/APPLICANT

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 07 November 2023.

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

[1] This matter is a classical example of unnecessary litigation that can easily be avoided in family disputes involving children through either negotiation driven by adequate, polite, collegial, and non-positional interaction between different legal representatives or child-centred mediation. Each of the parties brought their own independent urgent application to this court basically on the same facts.

[2] To avoid confusion, I will refer to the parties as the 'mother' and 'father' respectively as opposed to the Applicant and Respondent as per convention. On the one hand, the father approached the court on an urgent basis to be awarded interim care and residency for the children who are at the centre of the parties' dispute. On the other hand, the mother brought a Rule 43 application, also on an urgent basis, wherein she seeks, among others, the return of the children to her care and residency.

[3] For convenience's sake, since both applications have the same case number, I directed that they should be heard at the same time because they raise the same issues. Despite efforts to unnecessarily overcomplicate issues that the court should determine in both these applications, apart from urgency, the court is simply required to determine which party should be granted interim care and residency of the two children pending the investigation by the Family Advocate and any other professional that the court may instruct to conduct some or other investigation. To also determine how the children's contact with the other parent should be regulated.

[4] On 10 October 2023, my brother Holland-Mutter J ordered that both these applications should be heard by the urgent court on 17 October 2023. However, he did not express any view regarding the urgency of any of these applications. He, nonetheless, ordered that the children should be placed under their mother's care.

[5] The matter came before me on 17 October 2023. However, after assessing the papers, it became apparent to me that the matter was capable of being resolved amicably between the parties. This was despite the fact that there were still outstanding issues between the parties with respect to certain aspects of the

evidence that they desired to lead, which evidence necessitated some of the witnesses testifying orally in court. The mother's counsel indicated that she was not ready to deal with some of the oral testimony that the father's counsel sought to lead.

[6] On that basis, I ordered that the matter should stand down for Friday, 20 October 2023 so that all the outstanding issues with respect to the intended oral testimonies should be addressed. I also requested the parties to try to find each other, or at the very least, narrow the issues that may need oral testimony. Various witnesses that were subpoenaed were accordingly warned to return to court on 20 October 2023.

B URGENCY

[7] Urgent applications are brought in accordance with Rule 6(12) of the Uniform Rules of Court. For the court to dispense with forms and services provided for in the Rules and permit the litigant to jump the queue, such a litigant must comply with the test provided for in this rule. First, the applicant must explicitly set out the circumstances that render the matter urgent. Secondly, the applicant must satisfy the court that there is an '*... absence of substantial redress in an application in due course*'.¹ It was held in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*, that:

'[w]hether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard'.²

[8] With respect to the father's claim of urgency:

[8.1] He alleges that the mother abuses alcohol, which he contends has emotionally impacted the children. Further, this conduct impacts the children's academic performance. This allegation is rooted in the incident that allegedly

¹ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

² *Ibid* para 7.

occurred on 17 September 2023. It was argued on behalf of the father that the children are experiencing emotional abuse due to their mother and grandmother's alleged alcohol consumption. The children have expressed concern over the drinking that is taking place at their mother's house.

[8.2] The father pointed out that the children have also complained to several adults about their mother and grandmother's drinking habits. Further, the report of Dr Oliviers also indicates that there is a problem with alcohol consumption at the mother's house.

[8.3] While not denying that she consumes alcohol, the mother denies that she abuses alcohol. She alleges that she has taken alcohol-related blood tests and is willing to take further tests to establish that she does not abuse alcohol. Both parties agree that there is a need for an investigation to establish what is in the best interests of the child.

[8.4] I am of the view that there is an urgent need for an investigation to be conducted to assess whether there is any emotional abuse to which the children are subjected. Surely allegations of abuse of alcohol should be taken seriously because this 'can' potentially lead to the abuse of children, which cannot be tolerated. As will be demonstrated below, the children have also expressed a view that when their mother is drinking, they are, at times, left with other drinking members of the maternal family, a factor that also needs to be urgently investigated to assess how it affects the children's wellbeing. I am not convinced that the investigation of the potential impact of alcohol on the well-being of the children can be deferred to another day. The father alleges that the children are subjected to alcohol abuse at the mother's house. I agree with the father that he will not obtain substantial redress in due course. This justifies this application being enrolled in an urgent court and for the court to dispense with forms and services provided for in the Rules.

[9] With respect to the mother's application:

[9.1] The mother's claim for urgency arises primarily from the fact that the father unilaterally decided to remove the children from her care. There is no allegation made that the children are currently not well-cared for. There is also no evidence that the children are abused and in need of urgent protection in the father's care.

[9.2] Given the purpose of Rule 43, I am not convinced that this application should have been brought to and entertained by an urgent court. The mother failed to place facts that can sustain the claim for urgency to warrant her application being disposed of on an urgent basis.

[9.3] Ordinary Rule 43 application is an adequate avenue that can provide the mother with redress in due course that is substantial. This will allow for all the relevant information to be adequately placed before the court, including the reports that will be commissioned from all the investigations that have been requested by the parties. Most importantly, this will allow the parties to adequately place their financial circumstances before the court for the determination of who needs maintenance and whether the party from whom maintenance is sought has the necessary means to pay such maintenance. Currently, there is no financial information that this court can consider.

[10] It seems to me that it is important that the circumstances of the children should be thoroughly investigated. This will provide much-needed clarity on whether the mother abuses alcohol, emotionally abuses the children, and prevents DDN from attending school. I think the father has demonstrated that his application is urgent.

C BACKGROUND

[11] The mother and father are married to each other but have not resided together as husband and wife for a period of six years. Two children are born from the marriage, LDN and DDN, both of whom are eleven years old.

[12] Since July 2022, the mother has been residing with the children. The father exercised contact with the children on alternative weekends. The children were born prematurely. LDN is diagnosed with attention deficit disorder and struggles with his

eyesight. DDN struggles with anxiety and is diagnosed with Legg-Calve-Perthes disease. The children had been held back one academic year.

[13] The children's mother currently resides with her own mother, the children's maternal grandmother. The children are currently attending primary school.

C CONTENTIONS OF THE PARTIES

[14] The parties' allegations in their respective applications are relatively the same and there is no need to deal with these applications separately. I state only material facts as far as the relief sought by each party in their respective applications is concerned.

i) Father's Case

[15] The father alleges that he launched his application before the mother lodged her Rule 43 application. It was submitted that the mother's application was ill-considered because it required an assessment of financial inquiry under circumstances where there was no proper financial disclosure by the parties. The father alleges further that the mother's application was lodged over the subject matter that was already before the court and amounted to the hijacking of his application. According to him, the mother should have simply brought a counterclaim to his urgent application. Nonetheless, the father is of the view that both applications should be heard at the same time.

[16] The father brought his application to obtain interim relief with respect to the children's primary residence because of concerns the children raised regarding their mother and maternal grandmother. On 17 September 2023, the mother's neighbour contacted the father through the telephone and advised him that the children fled the mother's house crying. The children indicated to the neighbour that the mother and the grandmother were drunk. The children requested the neighbour to call their father to come and collect them. It was argued on behalf of the father that the children complained to different people about their mother and grandmother's

drinking habits. Further, the children are exposed to emotional abuse by their mother and grandmother.

[17] The father contends that on 29 September 2023, he collected the children from the mother to protect them because of several concerning incidents that took place at the mother's house. Based on these concerns, the father believes that the mother should exercise her contact rights with the children under supervision. He is of the view that the mother did not realise that the children fled her house and sought assistance from the neighbour. The father questions the logic of the mother continuing to consume alcohol when the consumption thereof clearly upsets the children.

[18] The father contacted his legal representative who contacted the mother's legal representative about this incident. The latter indicated that the mother informed her that she was not drunk, but the maternal grandmother was intoxicated. The father submitted that when he was residing with the mother, they made a conscious decision not to leave the children in their maternal grandmother's care because of her excessive alcohol consumption. It was submitted during the oral hearing that the grandmother is aggressive towards the children.

[19] He contends that the children informed him that their mother and grandmother were angry at them for informing him that they were drunk. The father stated that the mother's abuse of alcohol makes it difficult for him to return the children to her house. He contends further that he is worried about the children's well-being considering their mother's drinking habit. The father is of the view that if this matter is not dealt with by this court on an urgent basis, the children will continue to be subjected to circumstances that are contrary to the ideals of the Children's Act.³

[20] According to the father, the mother made allegations that he abuses drugs. The mother requested that he should take a blood test to determine whether there were drugs in his system, which he took and sent the results thereof to the mother. However, the mother refused to take a blood test to examine whether her system

³ 38 of 2005.

had alcohol. On 22 June 2023, the father received a letter from the mother's legal representatives that basically stated that the mother does enjoy alcohol socially, which is not against the law, and that children are not prejudiced by their mother's consumption of alcohol.

[21] The father is also concerned that the children are not doing well at school. He was contacted by the officials at the children's school who were concerned with DDN's marks and his regular absence from the school. The school further noted that the doctor's notes that were submitted for DDN's absence were questionable. Further, DDN did not attain any marks for the second term and was absent from school for a period of 28 days. Further, there were no doctor's notes submitted for some of the days DDN was absent from school while some of the doctor's notes that were submitted do not correspond with the days that he was absent from school. The school also indicated that they would report DDN to the Department of Education because the school was not supplied with the correct medical certificates. The father was also informed that there were no assessments and assignments that were submitted for DDN. Further, DDN failed to take part in any of the tests at his school.

[22] This was during the period when DDN was under the care and residency of his mother. The father took steps to assist DDN with his schoolwork with a view to ensuring that he eventually submits all the required school assessments. Due to the father's intervention, DDN's performance in school improved. The father alleged that he never experienced any vomiting from the children when they were under his care.

[23] The father contends that he requested an investigation by an expert on the allegations of alcohol abuse by the mother. However, he could not afford the fees charged by the professionals who were pursued to conduct the contemplated investigation. He later learned that the mother procured the services of Dr Olivier without his consent to conduct the investigation.

[24] According to the father, he contributes to the children's maintenance needs. He pays for their monthly school fees and aftercare fees. Further, in his house, each of the children has his own bedroom where they can sleep when they are under his

care. The father is of the view that it will be in the best interests of the children for this court to intervene by awarding him interim care and residency pending the requested investigations. He is also of the view that by taking the children to reside with him, he was not taking the law into his own hands but protecting his children.

[25] It was argued on behalf of the father that this court should consider further evidence, some of which was obtained after some of the affidavits were commissioned and served. It was submitted further that the court must have a full picture and should not fall into the trap of adopting an overly formalistic approach by ignoring evidence that can assist it in making a decision that is in the best interests of the children. Further, the court should adopt an approach that is designed to protect the children because it appears that everyone may be acting out of self-interest. Even though several witnesses were subpoenaed, the father did not call any of them to give oral evidence.

[26] It was further argued in favour of the father that there is a need for this court to appoint a legal representative to represent the children. Further, the Family Advocate in the Pretoria office should be ordered to investigate this matter. It was also submitted that the Family Advocate, Rustenburg, should be ordered to cooperate with the Pretoria office and share whatever information that was collated relating to these children

ii. Mother's case

[27] The mother raised several points *in limine* in relation to the father's application which were not seriously pursued during the oral hearing.

[27.1] The first point *in limine* related to the fact that there were two applications before the court. Herein, the mother merely explained the circumstances that led to these two applications being brought to court.

[27.2] The second point *in limine* was that the father in his urgent application followed an incorrect procedure. The mother is of the view that the father should have instituted a Rule 43 application. She contends that she is prejudiced by the

procedure followed by the father. In that, in the father's application, she is deprived of the benefits of Rule 43 application. Further, should the court grant an order prayed for by the father in his application, it will be impossible to vary that order in terms of Rule 43(6). The mother is of the view that the issue should be determined based on her Rule 43 application, which she believes was the correct route to follow.

[27.3] The third point *in limine* related to the alleged non-disclosure of all relevant facts. According to the mother, the father failed to disclose the children's medical conditions.

[27.4] The fourth point *in limine* dealt with the question of urgency. The mother alleges that the father's application is not urgent.

[28] In terms of the mother's notice of motion, her Rule 43 application was intended to be heard on an urgent basis on 10 October 2023. This application was launched primarily to restore the mother's primary care of the children who have been under her care since July 2022. The mother resides at her mother's house. According to the mother, she attends to the children's medical needs, of which the father appears to be ignorant. Both children are developmentally challenged with unique needs. When the parties stayed together, the father administered corporal punishment to the children.

[29] On 17 September 2023, the mother collected the children from their father. Both children gave her a cold shoulder. DDN was rude and did not greet his maternal grandmother properly. There was no visible alcohol in the house when they arrived. According to the mother, usually, when the children return from their father, they are unruly and rude towards her and her family. DDN informed her mother that he wanted to go back to his father's house. The children later walked around the block.

[30] A few minutes later, the mother received a telephone call from the father who informed her that he received a call from the mother's neighbour. The neighbour informed the father that the children informed her that their mother and grandmother

were intoxicated. The mother contends that she was advised by her legal representative to take the children to a person who was not implicated in the father's allegations for that person to assess whether she was intoxicated. She took them to her sister's place. When they arrived, the father called and spoke to the children. DDN informed the father that neither the mother nor the grandmother was drunk and that he made a mistake.

[31] She alleges that the father orchestrated the situation and influenced the children to act the way they did. According to the mother, the father is influencing the children negatively against her. The father is attempting to build a case around the fact that the mother and the grandmother have an alcohol abuse problem. On 19 September 2023, the father's legal representative transmitted a letter to the mother's legal representative falsely alleging that the grandmother was under the influence of alcohol on 17 September 2023.

[32] On 29 September 2023, the children went to their father's house. They were supposed to return to the mother's house on 4 October 2023. The father indicated that he would not return the children to the mother. The father accuses the mother of abusing alcohol which the mother denies. In May and October 2023, the mother subjected herself to alcohol-related blood tests. Both tests showed results within normal parameters.

[33] The mother further alleges that DDN was absent from school for a considerable number of days in 2023 due to his medical condition. The child could not be sent to school because he was suffering from pain and constantly vomiting. Despite missing school, DDN's academic performance is good. On 22 June 2023, the school expressed concern about DDN's absence from school. The mother contends that the father is using DDN's absence at school as a weapon against her in their care and residency battle and to paint her as a bad mother.

[34] According to the mother, the father exposes the children to violence, especially against animals at his house. He allows children to shoot stray dogs and birds with air rifles at smallholding. The mother is not comfortable with the fact that the children display cruelty against animals. The mother contends that the father cannot take

care of the children on his own without the assistance of his parents. The father is also very ill. He does not take the necessary precautions given the nature of his illness and at times bleeds severely in the children's presence. She claims that her main concern is that the father cannot care for the children when they are ill.

[35] The mother alleges that she has a strong support structure to assist her in caring for the children, in the form of her mother who not only provided her with a place to stay but also assisted her financially. The mother also receives support from her sister and her husband who do not stay far from their mother's place. The mother's sister created some form of employment for her where she earns an income. However, the mother contends that if she is awarded the children's interim care and residency, the father should contribute R 6 500.00 towards the maintenance of the children. The father should also pay school fees, after-care fees, and the domestic worker's wages.

[36] The mother alleges that since their separation, the father established himself as the fun parent. He allows the children to do as they please, which parenting style does not assist the children during a demanding academic term. According to the mother, initially, the children were best of friends and got along well. However, since the parties separated, animosity developed between them. The mother contends that the father appears to also favour DDN over LDN. Given the fact that the parties indicated that they would apply for some of the subpoenaed witnesses to give oral evidence, the mother called the principal of the school that the children attend to testify. I deal with the testimony of this witness below.

[37] According to the mother, the father took the law into his own hands by taking the children and refusing to return them to her. This was based on simulated allegations of abuse of alcohol. Based on this, the father should pay the costs of this application.

[38] I think it is important to highlight that I found it regrettable that the father's medical condition was used as one of the factors that should indicate the urgency of this matter. It is important not to perpetuate the stigma with respect to the disease that the father is alleged to have contracted. We are living in a society where people

who contracted such a disease should never directly or indirectly be discriminated against. The fact that the father contracted the said disease has nothing to do with his parenting abilities.

[39] Indeed, there may be a case to be made that the father must be careful not to accidentally expose the children to the disease, but the matter should never be taken further than that. It is important also for legal representatives when advising and assisting their clients to be careful not to disclose the statuses of the opponents of their clients in legal documents that ultimately will become public records. Care must be given in family disputes because what is contained in court documents will become public records that children will access one day.

D THE LAW, PROCEDURE AND ANALYSIS

i) The best interest of the children

[40] Section 28(2) of the Constitution of the Republic of South Africa, 1996 (hereafter 1996 Constitution) provides that *'[a] child's best interests are of paramount importance in every matter concerning the child'*. In terms of section 7(1) of the Children's Act,⁴ when determining what is in the best interest of the child, the court is duty-bound to consider, among others, the nature of the personal relationship between the child and the parents or any specific parent;⁵ the attitude of the parents towards the child;⁶ the capacity of the parents to provide for the needs of the child, including emotional and intellectual needs;⁷ and the child's age, maturity and stage of development.⁸

[41] The nature of the relationship between the children and their mother does not appear to be good. This is clear from the mother's own affidavits in both these applications and arguments advanced on her behalf during the oral hearing. It would be an oversimplistic approach to assume that this relationship may have deteriorated

⁴ 38 of 2005.

⁵ Section 7(1)(a)(i) of the Children's Act.

⁶ Section 7(1)(b) of the Children's Act.

⁷ Section 7(1)(c) of the Children's Act.

⁸ Section 7(1)(g)(i) of the Children's Act.

because the children do not like their mother's alcohol consumption. This is an important matter that should be investigated to determine what may have strained the children's relationship with their mother and what can be done to improve their relationship.

[42] The parties also appear not to be on good terms. This may be due to the pending divorce and the circumstances that led to their separation. Unfortunately, it appears that their emotional challenges regarding the divorce may be affecting their ability and capacity to provide for the needs of their children, including their emotional and intellectual needs. There appears to be a serious lack of communication between the parties. They communicate through the children, which is not in the best interests of the children. Most worryingly, the mother alleged that the father favours DDN over LDN. The mother's affidavits also give the impression that she is closer to LDN as opposed to DDN. If the parties actively demonstrate favouritism for one or another child, this will have a negative impact on the relationship between the two children. The children are of an age, maturity, and stage of development where they can express themselves and for their views to be considered. The court was provided the report of Dr Nielen Olivier which records the children's views.

ii) Children's voices

[43] In terms of section 10 of the Children's Act:

'[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration'.

[44] While it may be argued that the children expressed themselves in various documents that were placed before the court, I am of the view that Dr. Olivier's reports represent the most objective piece of evidence of the children's genuine views in this matter.

[45] With respect to DDN, Dr Olivier observed that:

[45.1] he does not feel safe at his grandmother's place where his mother resides because the mother and grandmother drink too much wine. DDN also noted that his grandmother becomes aggressive when drunk while his mother is either overly friendly or distant. He noted, that he feels safe with his father who assists him with his homework and spends more active time with him. He indicated that he is worried about his mother when he is not with her.

[45.2] DDN prefers to stay with his father with whom he has a strongest bond together with his brother. DDN noted further that he does not trust his brother because he tells his parents stories. He regards himself as a peacemaker maker and views his brother as a troublemaker. Dr Olivier noted that DDN has health challenges and suffers from anxiety. This confirms the mother's version that DDN experiences health challenges that led to him not attending school on certain days. There is no dispute over the fact that DDN has serious medical challenges. According to the mother, DDN missed school due to illness. I have no reason to disbelieve the mother in this regard. DDN is also worried about his mother when he is not with him. He has many health issues and suffers from anxiety.

[46] With respect to LDN, Dr Olivier observed that:

[46.1] he is not sure whether he would like to stay with his mother. However, if forced to choose, he would choose his mother. He is distrustful of his brother. He enjoys spending time with his mother and father alike. He wants to protect his mother. Wants the parents to stop being aggressive towards each other. He also enjoys spending time with his father. He does not enjoy it when his father is too strict with schoolwork. His strongest emotional bond is with his mother. He also wishes that his brother could recover from his illness.

[47] When the matter adjourned on 17 October 2023 for 20 October 2023, I indicated to the parties that I would like to see the children, with a view to ascertaining their views. While judicial interviews are not necessarily common in South Africa, there are courts that have utilized them to assist them in better understanding child-related disputes before them. By allowing children to participate through the expression of their views in disputes that concern them, such children

are not providing evidence that should be evaluated. Rather, they are provided an opportunity to express their feelings, wishes, and desires. They are not providing testimony but are invited to provide the court with a sense of how they view the dispute between their parents and indicate how such dispute impacts them.

[48] While there is some value in allowing children to actively participate in disputes that concern them, Warshak cautions that:

'[g]iving children formal opportunities to participate in custody decisions simultaneously introduces risks to their emotional welfare. If we fail to understand the basis for their stated preferences, rather than be enlightened, we may be misled. If we delegate too much authority to children, rather than assist their coping, we may burden them with an inappropriate degree of power'.⁹

[49] Notwithstanding this note of caution, I am of the view that given the conflict over their care, it is better for children to have a sense that they have been involved and heard. It is important that they should be made to understand what will be happening as opposed to decisions that will alter their lives being made without their input.¹⁰ The desire to provide children with the opportunity to participate in disputes that concern them should not lead to placing an unnecessary burden on them to become decision-makers in such disputes.

[50] I am of the view that participation should be informed by the need to establish whether children are aware of the disputes that concern them and how they view such disputes. Most significantly, if they are of such a state of maturity and development to formulate an opinion on their desired outcome, they should be allowed space to express their views.

[51] The views and feelings expressed by the children may be unreliable. Such views may be influenced by one or both parents directly or indirectly or even any

⁹ Warshak 'Payoffs and Pitfalls of Listening to Children' (2003) 52 (4) *Family Relations* 373 at 374.

¹⁰ See Kelly 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10 (1) *Virginia Journal of Social Policy and Law* 129.

person who is close to them.¹¹ The potential for such influence should never discourage courts from allowing children to participate in disputes that concern them. Some of them can resist their parents' manipulative tactics and provide their independent thoughts to the court in chambers.

[52] Courts can certainly benefit from the participation of children in care and contact cases. This need not be in an open court. By ascertaining the views of children who are affected by the dispute that the court is called upon to determine, the court may be in a better position to understand the children's relationship with their parents. The court may obtain uncensored information relating to the children's level of comfort or discomfort with each parent, their relationship with other family members, and other aspects of the children's lives that parents themselves may not be aware.¹²

[53] There is evidence of a judicial interview being conducted in South Africa. In *McCall v. McCall*,¹³ King J, with the parents' consent spoke to the child in his chambers. The child expressed the desire to reside with his father, which views King J duly considered and honoured by ordering that the child should reside with his father. He reasoned that the child:

'... expressed statements and views came across to me as his own genuine and accurate reflection of his feelings towards his relationship with each of his parents. I am satisfied that I can and should give weight to his preference for his father so clearly and firmly expressed'.¹⁴

[54] The Supreme Court of Appeal has demonstrated some reluctance towards judges conducting child-related interviews in their chambers. In *F v F*,¹⁵ Maya AJA (as she then was) declined the invitation to canvass with the child her views on being

¹¹ See generally Mantle *et al* 'Whose Wishes and Feelings? Children's Autonomy and Parental Influence in Family Court Enquiries' (2007) 37 (5) *British Journal of Social Work* 785 at 794.

¹² See generally Wallerstein and Tanke 'To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce' (1996) 30 *Family Law Quarterly* 305 at 323.

¹³ 1994 (3) SA 201 (C) at 207-8.

¹⁴ *Ibid* at 208.

¹⁵ [2006] 1 All SA 571 (SCA).

relocated to another country. She noted that while the court must consider the child's wishes where the child is old enough to articulate her preferences, the fact that the child had expressed a view that she was not comfortable being interviewed by experts who possess the requisite skills and sensitivity to conduct such interviews meant that the child will be intimidated by being interviewed by five judges who are ill-equipped to conduct such interviews.¹⁶

[55] It seems to me that judges can indeed interview children in their chambers but must be aware of their limitations and not shy away from requesting assistance from those with relevant expertise and sensitivity. While different judges certainly have different experiences with respect to child-related matters, it seems to me that it is generally not ideal for any judge to conduct an interview with the child in his or her chamber on his or her own. There is greater value in including an adequately qualified professional in child-related matters to do the actual interview in the judge's chamber. Obviously, the judge would canvass issues that he or she wishes to establish in that interview beforehand with such a professional.

[56] In this matter, I requested the parties to allow me to interview the children, to which they agreed. The legal representatives recommended that I should not interview the children myself but allow them to propose a mutually acceptable and suitable professional who can assist me in obtaining the views of the children, to which I agreed. Mrs Schutte, who is a social worker, was recommended. Mrs Schutte and I met with the two children in my chambers. I played a passive role while she actively interacted with the children. She started by developing rapport with the children and reassuring them that they were in a safe space. She utilized a technique that allowed both children to reflect broadly on their lives and indicate the people whom they deem important. She allowed them space to provide clarity on their thoughts relating to the people in their lives and how they are currently cared for.

[57] We first allowed LDN in my chambers. In her interaction with LDN, it became clear that he was emotionally going through a difficult time due to the pending

¹⁶ Ibid para 25.

divorce between his parents. He indicated that the mother drinks a lot of wine and that he takes them to other people when drinking. However, he appeared to be a bit secretive and did not provide details of the mother's behaviour during and after the consumption of alcohol. He also noted that the maternal grandmother consumes alcohol excessively. He did not provide details of the grandmother's behaviour after alcohol consumption. He explained that his father does not drink, and he feels that he has provided a safer space for them. He is extremely concerned about the mother and maternal grandmother's drinking habits. He indicated to us that he wanted to reside with his father.

[58] After interacting with LDN, we released him and allowed DDN to enter my chambers. DDN appeared to be more intellectually developed and more engaging than LDN. He also informed us that the mother and the grandmother abuse alcohol. He informed us further that the mother often leaves them with her other family members who also consume alcohol. He indicated that their father makes time for them and is usually more involved with their studies. However, their mother does not assist them with their schoolwork. Further, he is usually bored at his mother's house, and he enjoys being at his father's house because there are fun activities that their father allows them to do. He wishes to reside with his father.

[59] Mrs Schutte indicated that she would have loved to have more time with the children to adequately assess them. She indicated further that in the little time she engaged with the children, it was clear that there was a need to explore whether they were experiencing trauma. She further indicated that there may be more that is taking place at the mother's house which merits thorough investigation. Most significantly, she also noted that there is a possibility that the father may inappropriately be influencing the children against their mother, which is an important aspect that must also be investigated. It is hoped that the children will not be punished for the views that are recorded in this judgment. Rather, the parties should take these views positively as part of the process of improving different relationships that are involved.

[60] The views that DDN expressed with respect to where he desires to reside are consistent with the views that Dr Olivier reported. While the views that LDN

expressed to this court are largely the same as those he is recorded to have expressed to Dr Olivier, there appears to be a contradiction with respect to where he desires to reside. He is recorded to have informed Dr Olivier that he desires to reside with his mother whereas he informed us that he desires to reside with his father. This contradiction may not be material considering the fact that Dr Olivier's report was issued on 23 May 2023. Much may have happened since LDN was interviewed by Dr Olivier. I am satisfied that LDN desires to reside with his father and that he is also deeply concerned about his mother and maternal grandmother's drinking habits.

[61] In terms of section 31(1)(a) of the Children's Act

'[b]efore a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development'.

[62] I am convinced that this matter warrants the court to seriously consider the views of the children. It would be irresponsible for the court, after personally interviewing the children with the assistance of a suitably qualified professional, to disregard their concerns relating to their mother's consumption of alcohol. It is seriously concerning that they also associated alcohol with most of their maternal family members. However, they did not say anything alcohol related about their mother's sister. I think this is not the time to use alcohol to punish the mother. But this should be an opportunity for the mother to critically self-reflect and honestly evaluate how her consumption of alcohol is affecting the children. It is hoped that the investigations that are going to be conducted will establish the extent to which the mother's consumption of alcohol impacts the children's lives.

iii) Holistic assessment of evidence

[63] It is generally accepted, as was stated in *Terblanche v Terblanche*, that this court as the upper guardian of all the minor children:

‘... it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.’¹⁷

[64] In *F.J v E.J*, it was held that:

‘this Court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child.’¹⁸

[65] The court was requested to exercise its inherent power to allow further evidence that was not part of the parties' respective affidavits. Apparently, some of this evidence was only obtained after some of the affidavits were commissioned and served. Witnesses were subpoenaed to provide oral evidence. I made *prima facie* views with respect to the parties' intention to lead oral evidence that I did not think was necessary. Notwithstanding this, a request was made to call the principal of the school attended by the children to provide oral testimony. It became immediately clear that this witness' testimony did not take the matter any further.

[66] Both the examination in chief and cross-examination did not lead to any evidence that sought to assist the court as to who, between the father and the mother, should be awarded the children's interim primary care. In fact, this witness testimony revealed the genuine concern that both parents have for their children's education. There is no need to say anything further about this witness' testimony. After this witness' testimony had been led, both parties correctly and wisely decided not to call any further witnesses because it was totally unnecessary to do so. The evidence provided in the papers was more than sufficient to assist the court in determining both these applications.

¹⁷ 1992 (1) SA 501 (W) at 504.

¹⁸ 2008 (6) SA 30 (C) (20 May 2008).

iv) Investigations

[67] In terms of section 29(5)(a) of the Children's Act, the court

'... may for the purposes of the hearing order that a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court'.

[68] In terms of section 55 of the Children's Act:

'[w]here a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to Legal Aid South Africa referred to in section 2 of the Legal Aid South Africa Act, 2014'.

[69] In terms of section 29(6)(a) of the Children's Act, *'[t]he court may, subject to section 55 appoint a legal practitioner to represent the child at the court proceedings'.*

[70] Both parties agree that an investigation is necessary in this matter to determine what would be in the best interest of the child, pending final determination of care and contact. They both agree that the Family Advocate, Pretoria should investigate this matter and furnish a report to the court. It was submitted on behalf of the mother that the Family Advocate, Rustenburg should be ordered to provide information in its possession regarding the children to the parties and the Family Advocate, Pretoria.

[71] The mother argued that there is a need to also involve the services of the social worker to conduct a forensic investigation into the best interest of the child and report back to the court. The parties suggested that Ms Irma Schutte be appointed as a social worker. It was submitted on behalf of the father that a legal representative in favour of the children should be appointed. It appears that what was contemplated herein was the appointment of a curator *ad litem*.

v) *points in limine*

[72] All the points that the mother raised *in limine* cannot be sustained and are accordingly rejected. The father's application is urgent and should be enrolled and heard as such. In his application, the father is not seeking final relief but interim relief pending the investigations that the mother also agrees should be conducted. The father was justified in not following the Rule 43 route given the urgency of this application.

E CONCLUSION

[73] The information I received from the children and the contents of Dr. Olivier's report necessitates this court, as the upper guardian of these children to intervene. The order made below should never be interpreted as a win or loss for either the mother or father. This is an interim order that is granted based on the evidence that the court evaluated in this matter and the children's views.

[74] I am of the view that each party should be held responsible for the payment of their own costs in all these applications.

ORDER

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

1. The father's application is enrolled and heard as one of urgency as contemplated in Rule 6(12) of the Uniform Rules of the above honourable court.
2. The mother's application is not urgent and is accordingly struck off the roll.
3. The father is awarded the interim care and residency of the children.
4. The mother is awarded the right to have contact with the children on every alternative weekend from Friday at 16:00pm to Sunday at 17:00 at her mother's

place, under the supervision of the mother's sister or any suitable person recommended by the *curator or curatrix ad litem*.

5. The mother and all those who will be in her mother's house when the mother is exercising her contact rights with the children must not buy and consume alcohol in front of the children.

6. The mother is entitled to electronic and telephonic contact with the children during weekdays between 17:00 and 19:00am.

7. The Office of the Family Advocate, Pretoria is ordered to carry out an investigation, forthwith, and to compile a report setting out its findings with respect to the circumstances to which the children are exposed at both the mother and father's respective residences and make recommendations on the best interests of the children as well as:

7.1 who, between the mother and father, should be awarded the primary care and residency of the children;

7.2 whether the parent who was not awarded the primary care of the children should be granted the right to exercise his or her contact with the children;

7.3 if contact rights should be granted, the circumstances under which such contact should be exercised.

8. The Office of the Family Advocate, Rustenburg, is ordered to provide the parties and the Office of the Family Advocate, Pretoria information in its possession relating to the children subject to these proceedings.

9. Mrs Irma Schutte is appointed to conduct a forensic investigation into the best interest of the children regarding their care, residency, and contact.

9.1 Mrs Schutte is ordered to communicate her findings with the Family Advocate.

9.2 Mrs Schutte is also ordered to compile a report that she will present to this court.

9.3 The parties shall equally share the fees payable to Mrs Schutte.

10. The matter is also referred to the office of Legal Aid South Africa, Pretoria, to appoint a suitably qualified professional to act as a curator or curatrix *ad litem* of the children subject to these proceedings.

11. The *curator or curatrix ad litem* is ordered to investigate this matter regarding the best interest of the children pertaining to the primary residence and contact and report back to this court. The *curator or curatrix ad litem* shall have the following powers:

11.1 Determine in whose care the children shall reside and the rights of contact to be awarded to the other parent in accordance with the best interest of the child;

11.2 Determine the necessity of therapeutic interventions and/or assistance for children with their parents or any other person who is important in their lives;

11.3 Determine the necessity of further measures to be put in place to safeguard the interests of the children;

11.4 The *curator or curatrix ad litem* shall be entitled, in the best interest of the children, in the interim and pending the final adjudication of this matter, to issue directives pertaining to the parental responsibilities and rights over the children;

11.5 To represent the children in all matters of a legal nature including but not limited to litigation and in the execution of this power he or she is entitled to commence and defend and/or be joined in any litigation and/or legal process should the best interest of the children so require;

11.6 To inquire or consult with whatever person necessary on the completion of her mandate;

11.7 To compile a report that contains all the facts and circumstances and make a recommendation therein regarding the children's primary residence and contact.

12. Each party to pay their own costs.

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Electronically submitted

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DATE OF THE HEARING: 20 October 2023

DATE OF JUDGMENT: 07 November 2023