

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1575/2021

In the matter between:

N[....] V[....]

Applicant

and

C[....] L[....]

Respondent

BEFORE: CHESIWE, J

HEARD ON: 26 MAY 2022

DATE RESERVED: 7 JUNE 2022, this upon receipt of the written supplementary heads of arguments on 3 & 7 June 2022 respectively.

DELIVERED ON: This judgment was handed electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 12h00 on 21 October 2022.

[1] This application involves the parental responsibilities and rights of the Applicant (the father) and the Respondent (the mother) over their two (2) year old minor child HVV (“the minor child”), born on 11 February 2019.

[2] The application came on an urgent basis on 16 April 2021, in which the Applicant sought relief in terms of Part A of the Notice of Motion with a return date of 20 May 2021. The application is opposed by the Respondent. The Court granted Part A of the Notice of Motion on 16 April 2021.

[3] Between the parties, various postponements were sought, as well as the report of the Family Advocate not being finalised. With the leave of the Court, the parties proceeded to file supplementary papers after they had received the report of the Family Advocate.

[4] The matter was eventually argued before this Court on 28 April 2022. Parties had to file their supplementary heads of argument as per the Court’s directive on 1 June 2022 and 3 June 2022 respectively. Based on the heads of argument, the matter was regarded as postponed to 7 June 2022 upon receipt of the Applicant’s supplementary heads of argument in reply and reserved on this date.

BACKGROUND

[5] The Applicant and the Respondent were involved in a love relationship in 2018. During that year, they resided together, but they were not married. The Respondent fell pregnant and the minor child was born on 11 February 2019. The Applicant in terms of Section 21 of the **Children’s Act**¹, hereafter to be referred to as “the Children’s Act”. has acquired parental responsibilities and rights. The relationship ended in 2019, allegedly due to the Respondent stealing approximately sixty thousand rand (R60 000,00) belonging to the Applicant.

[6] The Respondent moved out of the communal home during the course of the year 2020. Subsequent to the Respondent having moved out, the parties structured a parenting plan regarding contact rights of the Applicant. However, despite the

¹ Act 38 of 2005

structured parenting plan being in place, the Respondent frustrated the Applicant's contact rights.

[7] The Applicant then approached the Children's Court for assistance. The court on 19 March 2021 ordered as follows:

"2.1 The applicant shall enjoy contact to the child who shall visit him every alternative week for full week at a time (sic) ie 7 days commencing Friday 15:00 to the following Sunday 15h00 whereupon the child will be returned to the Respondent by the Applicant.

2.2 The visit will start this Friday, 19th March 2022 and the applicant shall fetch the Child from the respondent's custody and receive into his care for the duration of the contact ordered.

2.3 The parent not having physical custody of the child during the child's visit with the other parent for that respective week shall be entitled to telephonic/video contact with child between 18h00 – 19h00 daily.

2.4 The parent not having physical custody of the child during the child's visit with the other parent for that respective week in the event of (sic) the any of the applicant, respondent or child's celebrating their birthday, (sic) fathers or mother's day as the case may be, shall be entitled to 4 hours contact for such occasion.

2.5 The applicant is responsible for the transfer of the child to and from him for all visits.

Failure to adhere to this order may result in contempt and or criminal offence."

[8] The Applicant, after the Children's Court's order was issued, proceeded to exercise contact with the minor child, albeit the frustrations of contact caused by the Respondent.

[9] During April 2021, the Respondent relocated to Gqeberha, without informing the Applicant. The Applicant continued to experience frustrations of his contact rights with the minor child. The Applicant approached this Court and the Court order dated 16 April 2021 was issued. The Respondent was ordered to return the minor child from Gqeberha to Bethlehem.

[10] I pause to mention that the parties have had numerous applications since their relationship ended. The applications include the one which was before the Children's Court and the Maintenance Court in Bethlehem, including approaching the Magistrate Court in Qqeberha to enforce the Bethlehem Court Order. As well as an urgent application which as earlier indicated, was brought before this Court on 16 April 2021.

[11] The Court in this current matter, has to determine the minor child's primary residence and whether it is in the minor child's best interest to be in a shared residence which is more or less eight hundred kilometres (800 km) apart, this being the distance between Gqeberha and Bethlehem. The Applicant's rights as an unmarried father were already determined by the Children's Court in Bethlehem.

[12] Adv. Van Rooyen, Counsel on behalf of the Applicant during oral argument, submitted that the report of the Family Advocate was biased and misleading against the Applicant and did not look into the living arrangements of the Respondent. The Respondent is said to be stayed in a garage which seems to have been converted into a single room dwelling. It was further submitted by Counsel that blood test of the Respondent did not dealing in detail on the drug allegation as liver function tests and the hair follicle tests were not done.

[13] Counsel submitted further that the Family Advocate did not deal with the six different places that the Respondent has been moving to nor did the Family Advocate's report deal with the allegations of the use of anti-depressants, suicide threats, parental alienation and the so called body shots of the Respondent. Counsel in conclusion stated that the Applicant is the more stable parent and that it will be in the best interest of the minor child that she be placed in the primary care and residence of the Applicant.

[14] Adv. Mohono, Counsel on behalf of the Respondent submitted in oral argument that the Family Advocate's report is in the minor child's best interest. The Applicant being a construction worker, will rely on his parents to look after the minor child. Counsel further submitted that the minor child is emotionally attached to the Respondent. In as far as the residence of the Respondent is concerned, Counsel submitted that the Respondent provided the minor child with what she can afford and that there is nothing wrong with the garage dwelling.

[15] Counsel further submitted that the Respondent went for the alcohol test and went to Families South Africa (FAMSA) ² for parenting skills as opposed to the Applicant who had his father arrange parenting skills sessions. Further that the Applicant does not approach Court with clean hand as he misrepresented information with regards to the minor child's crèche as well as the allegations that Ms Burger was requested to be economical with the truth in respect of her relationship with the Applicant.

[16] The Applicant's contention in the founding affidavit is that the Respondent has been frustrating his contact rights with the minor child since they separated. Furthermore, the Respondent is unstable and has moved with the minor child from one place of residence to another five (5) times. The Applicant raised an issue with the Respondent's constant use of anti-depressant medication known as Cilift which the Respondent took 20mg daily as well as the Respondent negligently leaving the minor child at a settlement area with her seventy-five (75) year old father. The Respondent in her answering affidavit denied these allegations.

[17] The Respondent in her answering affidavit contends that the Applicant is not being honest with this Court as he told her that he will abscond with the minor child and that the Respondent would never see the minor child again. The Respondent denied the allegations against her, though she admitted to being on the Cilift 20mg.

SECTION 21 OF THE CHILDREN'S ACT – UNMARRIED FATHER

² FAMSA is non-profitable organisation, that was established on 6 October 1954 for purposes of initiating and co-ordinating resources to find ways of ensuring healthy, stable and independent families as well as marriages.

[18] The Applicant as an unmarried father, had his parental responsibilities and rights confirmed by the Children's Court and this was not disputed. The Applicant met the requirements as envisaged in section 21 of the Children's Act". The Court based its decision on the report of the Family Advocate indicating that the Applicant met the requirements of section 21(4).³ Therefore the Applicant's parental responsibilities and rights are not in dispute.

ROLE OF THE FAMILY ADVOCATE

[19] The role and mandate of the Family Advocate is trite and clearly set out in **Mediation in Certain Divorce Matters Act** ⁴ as amended. It plays an important role in ascertaining and presenting the minor child s' views to court.⁵ And when conducting an investigation it has to take into consideration all evidence produced by the parties and to promote the best interest of all minor children. In this case the minor child's best interest in respect of primary care, residence and contact are severely disputed by the parents, that is, the Applicant and the Respondent. In **Soller NO v G**,⁶ Satchwell, J stated as follows: "The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer."

[20] The Family Advocate may not take sides or attempt to usurp the court's discretion. The court is required to take into consideration any report produced by the Family Advocate, but is not bound by the recommendations of the Family Advocate.

[21] The First Family Advocate's report of 3 September 2021 at paragraph 9.3, states as follows:

"The relocation of the Respondent and the minor child resulted in the Applicant not being able to exercise (regular) daily contact with the minor child as the position was when they all resided within the Bethlehem district.

³ (Report dated 19 February 2021 and attached as annexure NVV2 page 48 of the founding affidavit)

⁴ Act 24 of 1987

⁵ See *Brown v O K Abrahams & Others* [2004] 1 JDR 0011 (C) at 414 -424

⁶ 2003 (5) SA 430 (W)

The undersigned is of the view that this cannot be seen to be used as a yardstick to fault the Respondent with. The manner in which the Respondent relocated and withheld certain information from the Applicant, was already viewed as contact frustration.”

[22] The Family Advocate goes further at paragraph 10.3.2 and recommends as follows:

“Contact for one long weekend per month where the Applicant exercise contact with the minor child from the Thursday to the Monday. It is recommended that the parties meet each other halfway in order to assist with curbing travelling costs. Possible place for handover could be Gariepdam or Colesberg.”

[23] The Applicant being aggrieved by the arrangement, raised issues with the Family Advocate’s report, as the investigation in respect of the residence of the Respondent was not conducted, including the alcohol and suicide allegations.

[24] On 18 November 2021, this Court ordered that the Family Advocate urgently supplement its report and to conduct a full investigation in respect of the Applicant’s and the Respondent’s home circumstance as well as the allegations that the parties levelled against each other.

[25] The supplementary report of the Family Advocate indicated that due to the minor child’s tender age, the Family Counsellor could not conduct a formal assessment, but instead conducted an informal observation of the child’s interaction with both parents.⁷ The Family Advocate in the first report page 767 of the second bundle, made the following observations:

“6.3.2 During the interaction with the mother, there was a positive interaction between the mother and the child.”

⁷ Section 10 of the Children’s Act 38 2005, provides for every child to participate in any matter concerning the child’s rights and to express his/her views.

At paragraph 6.3.3, *the report indicates that after fifteen minutes the child was looking for the father and the mother could not keep her attention any longer.*”

[26] Furthermore, the Family Advocate took into consideration the different collateral information obtained from the parties that were involved with the assessment of the Applicant, as well as the Respondent. And concluded that it is in the minor child’s best interest that primary residence be with the Respondent, based on the fact that the child has a stronger emotional bond with the Respondent.

[27] The supplementary report of the Family Advocate, dated 25 April 2022, on page 11 of the said report, highlighted as a matter of urgency that the high levels of conflict between the parties; the parent’s inability to communicate effectively; the minor child’s exposure to the parent’s conflict and hostile relationship, *“there is no longer time to waste and the minor child needs to be put in a situation where stability and security is of the utmost importance to ensure that her development needs are met.”*

[28] The above report concluded that the minor child’s best interests would be served if she is placed in the primary care and residence of the Respondent.

[29] The one sided report by Ms Suzette de Jager concluded that:

“To resolve the issues between the parents, I advise him to do face to face mediation to mediate a parenting plan. He is willing to do it, but foresee problems as the mother will storm out of such meetings.”

[30] As stated above, that the report is one sided. Ms Suzette de Jager only consulted with the Applicant and did not obtain the expressed view of the Respondent. It is for this reason that the Family Advocate did not take the report into consideration. On the other hand, this step taken by the Applicant can be viewed as an attempt to resolve the conflict between the parties. Any attempt by parents to resolve their conflict with regard to their minor child should be applauded and encouraged.

[31] Then there is the Respondent's report from FAMSA which also did not obtain the expressed view of the Applicant, the report also concluded that:

“we discussed how she and the other parent would go forward in co-parenting, bearing the best interests of the minor child concerned.”

[32] Even if the parties attend separate sessions, the common issue that comes out of this is that there is high conflict between them. It appears that none is prepared to compromise for the sake of the minor child. It would be ideal if both as parents to the minor child could have parenting skills methods to assist in minimising their conflict and work together in the best interest of the minor child. The Family Advocate's report indicate the same issue of both parents' failure to work together. These separate sessions the parties attended, are just a confirmation that their conflict will not be ending anytime soon. Both the Applicant and the Respondent must realise that the conflict imposed on each other, will have a negative impact on their minor child, be it her self-esteem, mental and physical well-being. It is therefore imperative that they resolve the conflict.

[33] In my view, if the parties' conflict continues unabated over a child who is only three (3) years, the Court will have no option, but to appoint a legal representative in terms of section 55 of the Children's Act which provides as follows:

“That if the court is of the opinion that it would be in the best interest of the child to have legal representation, the Court must refer the matter to the Legal Aid Board.”

ISSUES IN DISPUTE

[34] The Applicant submitted a memory stick with different videos involving the interactions between himself and the minor child and interactions between the Respondent and the minor child. Most of the recordings were done by the Applicant. I watched these videos and certain observations were made.

[35] The first video shows the Respondent talking with the minor child on a video call. The second video shows the Applicant at the gate of the residence of the Respondent and the Respondent refusing to open the gate. Two more videos show the Applicant in the vehicle with the minor child and the minor child was on a video call with the Respondent. The next video shows the Applicant playing with the minor child while waiting for the Respondent and in this instance, the parties had an easy engagement. Most important to note is that, there was no conflict. If the parties were able to have one engagement or interaction without conflict, I have no doubt that with a positive attitude from both sides, the parties will be able to relate as adults and as parents.

[36] However, with the following video, after such a matured exchange of the minor child in the previous video, the conflict emerged yet again. Both parties could not agree over the collection of the minor child. The Respondent refused to release the minor child, stating that she does not know where the Applicant was taking the minor child. This kind of disagreement is a setback. The parties could easily agree on the issues in dispute, but because of their constant conflict, it is difficult for them to agree on things that do not need to be argued on. For example, the Applicant could have given the address and the Respondent should have released the child.

[37] The Applicant raised the following allegations that, that the Respondent abused alcohol, is on anti-depressants, neglects the minor child, has been suicidal and moved to a different place of residence, as well as changes to the minor child's crèche more than four times. These are yet other issues in dispute.

[38] However, to dispute the allegations of alcohol abuse, the Respondent went for an alcohol test at Ampath Laboratories in Gqeberha. The results were analysed and the following was stated:

"I conducted a 5 panel urine drug test, without warning, and accompanied the patient into the bathroom to avoid any possibility of tempering with the sample. This all came back negative for any use of amphetamines, cocaine, methamphetamines, opioids and THC (dagga).

I further also did a blood test on her that included 10 drugs of abuse (TIK included) as well as a blood ethanol level. This all came back negative for any abuse. The blood ethanol level was at 0.013 with a complete abstainer expected to have a level of 0.010. This is marginally higher than someone with no ethanol exposure, but not a level where any alcohol abuse or overuse would be suspected."

[39] I must say, it is quite concerning that the Respondent went for the test at 11h00 and at that time of the morning, she had alcohol levels of 0.013. However, Counsel for the Respondent submitted that despite the alcohol level of 0.013, there was no indication of alcohol abuse nor any indication that on the day of the test, the Respondent could not stand up straight. Counsel mentioned that the Respondent may have possibly taken medication. Furthermore, blood tests did not show any indication of abuse of the drugs mentioned and with the Respondent having admitted being on Cilift 20mg. Though the Applicant wanted the tests to be taken from the Respondent's hair follicles, I am inclined to agree with Counsel for the Respondent that the Applicant requesting hair follicle tests is pursuing other issues. The blood test results are sufficient and have proven that the Respondent is not an abuser. To the extent that the pathologist mentioned that the Respondent was accompanied to the bathroom to avoid tampering of the sample and even went as far as taking a blood sample, this is quite sufficient.

[40] This particular issue raised by the Applicant that the Respondent is on anti-depressants and taking Cilift 20 mg daily, has already been admitted. The Respondent indicated that this medication was prescribed since age seventeen (17) as she was diagnosed with depression. The Applicant cannot use this against the Respondent as the Applicant already knew of the intake of Cilift 20mg when they were dating. The Respondent cannot be faulted for being on anti-depressant medication. In actual fact, the Respondent should be applauded for taking responsibility of her health instead of this being used against her.

[41] Another issue raised by the Applicant of nappy rash is neither here nor there. It is a well-known fact that babies develop nappy rash throughout periods of nappy use. Though annexure "**NVV6**" depicts severe nappy rash, which is concerning, but

it is not clear whether the nappy rash developed while the child was visiting the Applicant or whether the minor child was dropped off with the rash already having had developed. In my view, both parties are equally responsible for the minor child's wellbeing. The Respondent in her answering affidavit mentioned an incident where the Applicant did not want to change the minor child's nappy, instead he would get extremely nauseas and usually vomit. (page 286, para 10). No fingers can be pointed when it comes to the care of the minor child. Both parents are responsible in taking care of the child. Pointing fingers at each other to score points is not helpful more so for the best interests of the minor child. They should rather try to assist each other and fix each other's weak points when it come to the up-bringing of the child, as parenthood is indeed trial and error. Dr Janani Shankar,⁸ a psychiatrist said the following; *"Parenting is a trial and error method that brings higher responsibilities to the couple, where, sometimes parents make mistakes, which is fine as long as they are ready to learn from their mistakes."*

[42] What is of grave concern, is that which was stated on page 16, para 17 of the Applicant's founding affidavit. It reads as follows:

"...I heard a very disconcerting sound coming from HVV and I immediately ran to the room where the respondent and HVV slept. When I came into the room, I saw the respondent covered HVV's face with a pillow and a blanket. When the respondent saw me in the room, she pulled the pillow and blanket away from HVV. I immediately took HVV away from her and tried to comfort her."

[43] The Respondent's response to this is a vehement denial to the allegation levelled against her by the Applicant. In the Respondent's answering on page 290, para 17, the following is stated:

"I find it odd that this incident was never mentioned before; in his application for contact rights in the Children's Court..."

⁸ Dr Janani Shankar, psychiatrist published an article on Parenting Skills, the article was published 20 June 2022.

[44] The allegation that the Respondent left the minor child at an informal settlement and in the care of the paternal grandfather, who was at that stage was seventy-five (75) years old, would amount to the Respondent not acting in the best interest of the minor child. If the Respondent needs to go to work or run errands, the person to assist in this regard would be the Applicant. In the same breath, the Applicant cannot be faulted for being concerned about the minor child's safety and being in the care of a seventy-five (75) year old. Its indeed no secret that minor children are no longer safe. It is frequently recorded in the media on the disappearance of minor children in the country. Therefore, the concerns of the Applicant in respect of the minor child's safety at an informal settlement may be warranted (my emphasis).

MINOR CHILD'S STABILITY

[45] The Respondent, has in short space of time and in the minor child's two (2) years of life moved more than five times as well as changed the minor child's crèches four times. This is quiet concerning. The Respondent has not shown to move for better work opportunities or better accommodation. It appears in the papers that the Respondent's movement was in order to frustrate contact between the minor child and the Applicant. Section 7 (1) (k) of the Children's Act provides as follows:

"the need for a child to be brought up within a stable family environment and, when this is not possible, in an environment resembling as closely as possible a caring family.

[46] Furthermore, the constant moving and changing of the minor child's place of residence as well as the crèche, affects the minor child's stability in terms of section 7(1)(k) of the Children's Act, including the current arrangement that the minor child now attends crèche in Gqeberha for two weeks and then for two weeks the minor child is in Bethlehem. The minor child has to adjust to a new environment every two weeks. The parties as parents should ask themselves, if they were in the position that they are putting the minor child in, would it be acceptable to either of them, to be shuttled every two weeks to a new environment? This arrangement in my view is not

in the best interest of the minor child. Emphasis is on the minor child's need for stability, be it her education or living arrangement.

[47] Of the two parents in my view, the Applicant has shown to be the more stable parent. The Respondent may have a stronger emotional bond with the minor child, but with the constant moving of the Respondent, the minor child at age three (3), needs a stable home and/or stable parent be it the mother or the father.

MAJOR DECISIONS THAT AFFECT THE MINOR CHILD

[48] Section 31(2) of the Children's Act is clear on major decisions that affect a minor child which cannot be made without due consideration of the views and wishes of the other co-holder of parental responsibilities and rights, which in this instance the Applicant bears these responsibilities. The Respondent just kept on relocating with the minor child without taking into consideration the views of the Applicant. In **J v J**⁹, the Court considered, to what extent co-holders of parental responsibilities and rights can exercise these. The Court observed that under section 30 of the Children's Act, co-holders of parental responsibilities and rights enjoy a large measure of autonomy.

[49] With this constant relocation of the minor child, the Respondent must have regard to the interruption of the bond between the Applicant and the minor child. In **Jackson v Jackson**¹⁰, the Court emphasised the impact of relocation on the non-moving parent and it should be at the forefront of the relocating parent's decision. Section 7 (1) (e) provides as follows in respect of contact with the minor child that:

“ 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.

⁹ 2008 (6) SA 30 (C)

¹⁰ 2002 (2) SA 303 (SCA)

[50] Furthermore, the Respondent may have the right to move freely in terms of Section 21 (1) of the **Constitution**¹¹, Act 108 of 1996 which provides that: “*everyone has the right to freedom of movement.*” However, The Respondent has to take into considerations the provisions of the Children’s Act if she had the intention to move and changes in residence as she did. The mere fact that the minor child had gone through four crèches, confirmed the instability that the child was exposed to. It is known that crèche attendance is the foundation phase of any child. And to change crèches so frequently would indeed affect the minor child’s development.

ALLEGATIONS RAISED BY THE RESPONDENT

[51] The Respondent alleged that the Applicant failed to take the minor child off the nappy and the pacifier, failed to cut the minor child’s nails and maintain her hair. Furthermore, the Respondent alleges that the Applicant failed to communicate with her on issues that affect the child. The court has to take a dim view when parents constantly raise allegations against each, in order to discredit each other. In the report of the Family Advocate¹², the following is noted with regard to the allegations:

“In considering the remaining allegations identified by both parties as highlighted in Mrs Van Der Westhuizen report, that informs a lack of parental capacity and that could have a negative impact on the child’s safety, well-being and best interests.. both parties have the necessary capacity to provide effective care for the child and the concerns raised are those that can be effectively addressed through further professional assistance should the parties not be in a position to resolve it themselves.”

BEST INTEREST OF THE MINOR CHILD

[52] Ultimately, the allegations raised by both parties against each other whereas concerns should be centred around the minor child’s well-being, it is clear that the continuous litigation bears no consideration for what is in the best interest of the minor child.

¹¹ Act 108 of 1996

¹² Page 754 of Bundle 2 paragraph 8.3

[53] The best interests, standards and guidelines of the minor child are set out in section 7 of the Children's Act. It would probably be in the child's best interest if parties could adhere to these principles. Equally so, it is that these principles were emphasised in **McCall v McCall**¹³, where it was confirmed that it is the golden thread that runs through the best interests of a minor child.

[54] The Family Advocate in its first and second report, places more emphasis on the emotional bond between the minor child and the Respondent. However, this is not the only factor to take into consideration. A further factor that this Court has to take into consideration is, which parent is better able or more suitable to promote and ensure the child's physical, intellectual, moral, emotional stability, security and safety. This list is not exhaustive as stated in **McCall Supra**.

[55] It is indeed difficult in matters that involve a minor child's primary residence be decide on the basis of which home is better than the other. This Court is called to weigh the competing advantages and disadvantages of the circumstances of both parents. In **Ford v Ford**,¹⁴ Weiner, AJ suggested that it is unnecessary for the court to decide which of the two homes would be better. In **Godbeer v Godbeer**,¹⁵ Nugent J went a step further and stated that: "*The quality of [the children's schooling, the relative standard of living and so forth are quite peripheral.*"

[56] It ought to be noted that the Court takes a deem view at the conduct of the Respondent, to the extent that she would leave the minor child in the care of a seventy-five (75) year old. This alludes to not taking into consideration the minor child's safety, neither the minor child's best interests.

[57] Having considered the circumstances of both parents, in my view the Applicant appears to be the more stable parent and is able to provide the minor child with stability, safety, security, and proper accommodations. The Respondent does not have more or better parental responsibilities and rights. The parties have equal parental rights and responsibilities. Even necessary to mention, it is that the Applicant's parental responsibilities and rights in terms of section 21 were already

¹³ 1994 (3) SA 201 (C)

¹⁴ 2004 2 ALL SA 396 (W)- unreported

¹⁵ 2000 (3) SA 976 (W)

confirmed by the Children's Court in Bethlehem. The Respondent has been uncooperative since litigation started in Bethlehem. This Division, in the matter of **Van der Linde v Van der Linde**¹⁶, the Court said the following:

“Die begrip 'bemoedering' is aanduidend van 'n funksie eerder as 'n persona en is hierdie funksie nie noodwendig geleë in die biologiese moeder nie. Dit behels die teergevoelige gehegtheid wat voortvloei uit die aandag wat van dag tot dag bestee word aan die kind se behoeftes aan liefde, fisieke versorging, voeding, vertroosting, gerustheid, geborgenheid, bemoediging en onderskraging. Alleenlik die ouer wat hierdie behoefte kan bevredig sal daarin slaag om 'n psigologiese band met die kind te smee in welke ouer se sorg die kind kan ervaar dat sy bestaan nog veelbeduidend is, en wat met toegeneentheid beskut en beskerm word.”

PARENTAL ALIENATION

[58] Parental Alienation,¹⁷ is a psychological manipulation of a child into demonstrating unwarranted fear, disrespect and hatred whereby one parent employs tactics such as criticizing the other parent; stop the child from having contact with the other parent.

[59] The Appellate Division in **T v M**,¹⁸ acknowledged the dangers of Parental Alienation. In **Soller Supra**, the Court confirmed that Parental Alienation had occurred. The conduct of the Respondent on various occasions had been to frustrate contact between the child and the Applicant, to the extent that when the Respondent relocated to Gqeberha, she did not inform the Applicant that she was relocating with the minor child. In Gqeberha, the Applicant had to approach the Magistrate Court for assistance in order to exercise his parental responsibilities and rights. The Court went as far as to issue a warrant of arrest against the Respondent, whereupon the Applicant went to the South African Police to open a criminal case against the Respondent.

¹⁶ 1996 (3) SA 509 (O)

¹⁷ AS Hornby Oxford Dictionary 9 Edition, Oxford University Press 2015.

¹⁸ 1997 (1) SA 54 (A)

[60] Indeed, Parental Alienation is a complex issue as one parent believes he or she is acting in the minor child's best interests. Courts have to be conscious of any conduct of a parent who may in a subtle way alienate the other parent. Parental Alienation requires a close and careful scrutiny. The most common example of Parental Alienation is when a parent interferes or frustrate the other parent to exercise contact with the minor child. The Respondent went as far as to tell the presiding officer that the Children's Court's order of Bethlehem was fraudulently obtained whereby the presiding officer admonished the Respondent for making such serious allegations with regard to a court order that was properly obtained. The Court ordered the Respondent to have the minor child ready within two hours. The disrespect that the Respondent has shown towards the court orders confirms that she does not act in the minor child's best interest. The court order dated 16 April 2021 on page 126, went as far as to order as follows:

"The Applicant (C[....] L[....]) is directed to make contact with the Office of the Family Advocate, Bloemfontein, within a week of this order, to arrange for a meeting with the Family Advocate in order to assist with the investigation and to fully co-operate with the Family Advocate during such investigation, failing which the Applicant (C[....] L[....]) may be convicted of contempt of court."

[61] The Respondent's conduct is on the brink of Parental Alienation. The several court cases that the Applicant had to institute against the Respondent just so he can exercise contact with the minor child, is astonishing. Section 35(1) of the Children's Act states as follows:

"Any person having care or custody of a child who, contrary to an order of any court or to a parental responsibilities and rights agreement that has taken effect as contemplated in section 22 (4), refuses another person who has access to that child or who holds parental responsibilities and rights in respect of that child in terms of that order or agreement to exercise such access or such responsibilities and rights or who prevents (my emphasis) that person from exercising such access or such responsibilities and rights is

guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

CONCLUSION

[62] Indeed, it has been affirmed in several court decisions that the notion of mothers as primary care givers has diminished (**Van der Linder Supra**) and this to avoid unfair discrimination against either parent when deciding what is in the best interest of the minor child.

[63] Even if the Court is the upper guardian over all minor children, however, it is with great difficulty that a Judge who does not know the child, except reading in the pleadings about the child, has to decide on what is in the child's best interest as parents are emotionally unable to decide this for their child.

[64] The minor child is currently three (3) years. The volume of pleadings, with two arch lever files is disheartening. Of concern also for this Court, it is fact that the parties' constant litigation can only mean that without proper parenting skills, this may not be the final matter before this court. However, it would be in the minor child's best interest that as parents, parties attempt to go for mediation, or psychotherapy.

[65] With all that has been considered, in my view the minor child's best interests will best be served by the Applicant. The Applicant has shown (good cause) to be in a better position to take care of the minor child. The Applicant has shown stability and security for the minor child. The Court would therefore not follow the recommendation of the Family Advocate as it did not deal with the instability of the minor child and the obvious Parental Alienation, that is gradually being exercised by the Respondent as well as the instability which the Respondent has shown. Nor is the Court bound by the recommendations of the Family Advocate.

[66] The Applicant in the Notice of Motion prayed for the Respondent to have supervised contact. This court will not grant such a prayer as it is not necessary for

the Respondent to exercise contact under supervision, except to emphasise that the Respondent is not to disappear with the minor child when she exercise her contact.

[67] The Applicant in the written Heads of Argument requested that the Respondent be ordered to return to Bethlehem. Unfortunately, this court cannot order her to return to Bethlehem. That is tantamount to interfering with her rights of freedom of movement. The Respondent has to make that decision on whether she wishes to return to Bethlehem.

[68] The current arrangement between the parties of shared residence will remain in place until end of the year. The court order will be implemented as from 1 January 2023.

COSTS

[69] As this matter involved a family dispute, both parties are deemed to have acted in their minor child's best interest. Therefore, each party should pay their own legal costs.

ORDER

[70] Order is granted in terms of Part B of the Notice of Motion as follows:

1. It is declared that the parties are co-holders of parental responsibilities and rights in respect of the minor child **H[....] V[....]**, a girl born on the 11th of February 2019 and currently is 3 years old (hereinafter referred to as "**H[....]**");
2. The Applicant shall have care and primary residency of **H[....]** as contemplated in section 18(2)(a) read with sections 1, 18(3) and 21 of the Children's Act 38 of 2005 (hereinafter referred to as "the Children's Act");
3. The Respondent shall have contact rights in respect of **H[....]** every alternative weekends from Friday 14h00 till Sunday 18h00.

4. The Applicant is ordered to contribute half of the travelling expenses of the Respondent.
5. The parties shall equally share in the long school holidays and the short school holidays are to alternate between the parties.
6. The parties are to exercise three hours contact on the birthday of the minor child or that of the parties should such a day not coincide with the normal contact weekend or holiday.
7. Contact on Father's Day/Mother's Day for three hours, if such a day does not coincide with the normal contact weekend or school holiday
8. Regular telephonic/video call contact on a daily basis between the hours 16h00 till 19h00.
9. The parties are ordered to approach a family mediator if any disputes arise that involves the minor child, before approaching court.
10. The parties are ordered to attend parenting skills training, co-parenting and communication skills training.
11. Each party to pay their own costs.

CHESIWE, J

On behalf of the Applicant:

Adv. J van Rooyen

Instructed by:

McIntyre & van der Post Attorneys
BLOEMFONTEIN

On behalf of the Respondent:

Adv. KP Mohono

Instructed by:

Van Dyk Attorneys
BLOEMFONTEIN