IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE, KIMBERLEY)

Case No: 304/2006

Heard on: 29-31/03/2011 & 20-24/06/2011

Delivered on: 30/09/2011

In the matter between

Ms S **PLAINTIFF**

AND

Mr J G S **DEFENDANT**

JUDGMENT

PAKATI AJ

1. Having read the documents filed of record and heard full argument on 27 June 2011 by counsel for the parties (Advocate L van Niekerk for the plaintiff and Adv CH Botha for the defendant) I issued the following order on the same day:

> *"1. That the bonds of marriage subsisting between [the] plaintiff and [the] defendant be and are hereby dissolved.*
>
> *2. The parental responsibilities and rights with regard to the care of the minor child TJS born on 05 November 2001, as contemplated in sec 18 (2) (a) of the Children's Act, 38 of 2005, are awarded to the defendant and the plaintiff.*

3. The permanent residency of the minor child is awarded to the defendant.

4. That specific parental responsibilities and rights with regard to contact of the minor child as contemplated in sec 18 (2) (b) of the Children's Act are awarded to the plaintiff in the following manner:

4.2 Contact on alternative weekends from 17h00 on Friday to 17h00 on Sunday.

4.3 Public holidays to alternate between the parties.

4.4 Short school holidays to alternate between the parties.

4.5 Long school holidays to be divided into two and the child to spend one half of each long school holiday with the other parent.

4.6 At least three hours contact to be awarded to the plaintiff on the birthday of the minor child and that of the plaintiff and mother's day.

4.7 Reasonable telephonic contact.

5. That the parental responsibilities and rights with regard to guardianship of the minor child as contemplated in sec 18 (2) (c) and 18 (3) of the Children's Act are awarded to the parties jointly.

6. That the defendant will add the child as a beneficiary on his medical fund.

7. That the parties will share all medical and like expenses of the child not paid by the medical fund on a 50/50 basis.

8. That the parties will share on a 50/50 basis all educational expenses incurred in respect of the child such expenses to include school uniforms, school fees, school books, extra-mural activities, sports equipment as well as the costs incurred upon tertiary education.

9. That the joint estate be divided.

10. That fifty percent of each party's pension interest as at date of divorce in the Government Pension Fund is awarded to the other party.

11. Such pension interest will be paid out to the other party within sixty days of a request [therefore] being submitted to the pension fund.

12. Each party will ensure that a note [endorsement] is made on the record of the relevant pension fund that the other party is entitled to the above relief."

The issue of costs stood over for later determination.

These are my reserved reasons for the order made.

2. The parties were married to each other on 07 December 1991 in community of property. One child, TJS, was born out of this marriage on 05 November 2001.

3. The defendant opposed the application and filed a plea and a counter claim. In his counterclaim he basically seeks a similar order as the plaintiff except that he wants the child's custody to be awarded to him. On 29 March 2006 he filed an instruction to the family advocate to investigate which parent should be awarded custody of the minor child. The trial, which lasted about eight days, revolved almost exclusively around the issue of who is the parent most suitable to be the primary care-giver with whom the child will reside. All references to the child refers to TJS.

4. The parties also had in their custody two foster children, K and G, twin boys aged 16, who had been in their custody since they were five years. In a report (Annexure "E") compiled by Ms Riana Cronje, a clinical psychologist, on 13 October 2006 it emerged that in August 1997 the plaintiff was diagnosed with bipolar disorder and was referred to Dr Jordaan, a psychiatrist in Bloemfontein, where she was hospitalised. According to Ms Cronje the plaintiff resisted taking her prescribed medication which maintains a chemical equilibrium in the system, and experienced a relapse as a result. When she continued with the treatment her condition improved. At para 5 of her report she said:

"5. In November 1999 she had a relapse and I saw her on four occasions during that month. She agreed to take her prescribed medication.

6 In 2003 she became depressed due to clashes with management at school. She visited me on 13 November as well as on 03 December. It was suggested that she should be re-employed at another school. An appointment with her psychiatrist was scheduled for January 2004.

7 . I had no further contact with Mrs S until March 2006.

8. During appointments on 14 March 2006 and 17 March [2006] she discussed severe marital problems. She was very concerned about the children's future. She could give a good account of herself but came across as being agitated and very suspicious towards her husband. Mrs S was advised again to see a psychiatrist. She declined to do that."

5. In 2003 the plaintiff accused the defendant of sexually molesting their minor child, TJS, when she was about eight months old. She alleged that the child displayed inappropriate sexual behaviour and refused to be washed on her vaginal area. She also accused the defendant of having extra-marital affairs, abusing her physically, emotionally and psychologically in the presence of the minor children. She alleged that the defendant mistreated the children and would beat K for no apparent reason. Professor Annette Louw, who conducted a forensic psychological assessment on the minor child, who was five years old at the time, made the following finding on 10 August 2007:

"Based on the hypothesis formulated and investigated, it is my opinion that the allegations of sexual abuse against Mr S cannot be substantiated. It is clear from the above exposition that too many errors have been made and too many questions remain unanswered."

On the other hand the defendant claimed that on the contrary it was the plaintiff

who did not treat the children well.

6. When the family advocate, Ms Prettia Mmule Molokwane, conducted the investigation she was in possession of the reports by Professor Annette Louw and that of Professor Almoero Weyers, a clinical psychologist. By 17 September 2007 the family advocate's report was completed. She recommended that the permanent residency of the child be awarded to the defendant. The psychological report (Annexure "F") completed by Prof Weyers was filed on 21 September 2006 wherein he recommended that custody and control of the children be awarded to the defendant. During this interview he consulted with the plaintiff, the defendant, the two foster children and the child. At para 2 of his first report he made the following remarks:

> *"During the evaluation of Mr S, the impression was obtained that he is experiencing a lot of traumatic problems with Mrs S. She, for example, behaves in a destructive manner, assaults the children and accuses Mr S of molesting her minor daughter sexually. Sometimes she comes home late at night and shows bizarre behaviour. She previously received psychiatric treatment, but presently refuses medication and denies being ill. Regarding her pattern of behaviour, it seems that, at times, she has no contact with reality. For example, she chased the children out of the house and tore their clothing off. Mr S is very alarmed at the way in which Mrs S is handling the children. The impression is [gained] that Mr S has good insight in the needs of the children and that he is trying his utmost to ensure that they will not be caused any grief. It was also clear that all three children have a very positive attitude towards Mr S. TJS was very happy to see her father again and held on to him for quite a time."*

In para 4 to 7 he added:

> *"4. According to Mrs S's personality test, it seems that she is emotionally unstable and that medical risk factors are present. Her personality can summarily be described as impulsive, mercuric, excitable*

and intense. Her diagnostic test was completed in such a way that the validity thereof is questionable. This could be as a result of a confused state or insufficient insight. Other elements are indicative of acting out, moodiness/capriciousness and the presence of rather serious psycho-pathology. In the clinical interview with Mrs S, it became clear that serious problems are present. She is inclined to the projection of her own problems on others. The interview was characterised by a high extent of emotional [liability] and general denials. She denies that she [hallucinates] and that she is ill and refuses to use any medication in connection to that. Elements of paranoid ideas are present. Mrs S struggles to answer questions directly, wanders off the subject and laughs inapplicably. The clinical image she portrayed was that of an emotional labile person, who struggles to concentrate and is very suspicious. She has trouble in maintaining continuity in her thoughts and her general emotional conduct/behaviour is inapplicable/inconsequent. She talks deliriously/confused and continuously.

5. In contrast with the clinical image that was obtained of Mrs S, Mr S is a level-headed and well-balanced person. According to information [at] my disposal, it seems that Mrs S also causes serious problems in her situation at work. Action has repeatedly been taken against her, but it [leads] to no improvement of her general behaviour. The general impression of Mrs S is that she is emotional, highly unstable and is probably suffering from bipolar disturbance. Elements of a psychotic adjustment are also present with Mrs S. She previously received psychiatric treatment. Former psychotic episodes were mentioned in one of her medical reports.

6. Regarding the children, it is clear that their mother is an embarrassment to them in the presence of other children and that her behaviour destabilizes them scholastically and emotionally. They experience their mother as very quarrelsome and her general conduct as highly [unacceptable]. Contrary to this, they feel very [positive] towards Mr S and it seems that he is a very acceptable person. In spite of everything,

they still have positive emotions towards Mrs S.

7. If the situation is evaluated as a whole, it seems that Mrs S experiences serious problems even to the point of psychosis. It is clear that she experiences episodes during which she loses contact with reality. She maintains a very unstable relationship with the children and harms them emotionally, physically, scholastically and socially. Mrs S is under no circumstances capable of providing a stable parental home for the children. In contrast to this, Mr S has a good record in this regard. He seems to be stable and responsible and is very worried about the welfare of the children. The latter cannot be said of Mrs S. In this case, it is very important to protect the children. The only obvious/proper place is under the custody of Mr S. The fact that Mrs S denies that she is ill and refuses treatment makes her general situation even more risky. Therefore it is recommended that custody and control be given to Mr S and that Mrs S has the right of access to the children when she is emotionally more up to standard. She shows [insufficient] insight in the needs of the children, as well as in her own behaviour. Thus, the undersigned would not recommend that the children can stay over at their mother's place during weekends. If she should stabilise at a later stage, it could well be taken into consideration."

7. On 18 June 2009 the family advocate, Mr Ratshilumela David Ramanenzhe, filed a supplementary report which essentially reiterates the contents of the initial report of 17 September 2007 and its recommendations by Ms Molokwane. Prof Weyers was again requested to consult with the plaintiff, the defendant and the child for the purpose of updating his report earlier done in September 2006.

8. When she took the stand the plaintiff testified that the child is currently attending school at Herlear Primary School doing grade 5. She mentioned that before the child was born the defendant cancelled his medical aid and refused to re-instate it. She obtained medical aid of her own. She says the defendant disputed paternity but changed his attitude after the child was born. At home he did not

help her with anything. According to her the defendant only serviced the monthly bond payments.

9. The plaintiff stated that in 1991 the defendant started being very aggressive towards her and used abusive language in front of the children. At that stage the foster children were still staying with them. She claims that the defendant abused her as a result of which she sustained injuries and that he abused alcohol. The foster children had to be removed to Thusong Home because they also became violent towards her. In 1997 the defendant took her to Ms Cronje who referred her to Dr Jordaan. According to her Dr Jordaan did not do tests on her or interviewed her but instead listened to what the defendant told him. She testified that Dr Jordaan diagnosed her with a multiple personality disorder and when she picked up fights with the defendant, wanting to leave him, he diagnosed her with bipolar disorder.

10. The plaintiff went on to explain that the physical abuse carried on until 2006. A protection order was issued against the defendant. This led to him leaving the common home after he was arrested. In the beginning the child would be with the defendant for alternative weekends and for a week or two during December holidays. Later he stopped phoning the child and did not fetch her like he used to.

11. It is common cause that the defendant left the common home in 2006 and that an interdict was granted against him which prevented him from accessing the common home. It is also common cause that he pays monthly bond instalments of R1 765.00 on the house where the plaintiff and the child live even though he lives at his parental home in Galeshewe.

12. The defendant testified that his contact with the child was frustrated by the plaintiff. If she allowed him contact she would return claiming that she missed the child and wanted to take her out and promised to return her which never happened. She denied him access to the child's school reports. There were occasions when she would not register the child at school at the beginning of the year but when he did she would deregister her and take her to a different school. Her last destination was Herlear Primary School.

13. The defendant confirms that the plaintiff was diagnosed with bipolar disorder by Dr Jordaan whilst they were still living together. She only took her medication when she was at Hydromed Hospital in Bloemfontein otherwise at home she flushed the medication down the toilet, claiming that it made her fat. The plaintiff refused to go to hospital when she suffered a relapse. She had to be sedated in order to get her to hospital. Ms Cronje would call Dr Heever, their family doctor, and the police when she turns violent. She was treated at Curomed Hospital in Kimberley and later at Hydromed Hospital. When she returned from the hospitals the refusals and denials would start all over again.

14. The defendant says that during 2009 and 2010 when the child visited him he noticed some bruises on her body. The child complained that the plaintiff hit her with a rubber hose and pinched her. There were also instances where she exposed the child to unhealthy situations. For example, she took the child to hiking spots where she allowed strangers in her car whilst pirating as a taxi. On confronting the plaintiff she told him that he should not tell her what to do. She also used their Trivia vehicle, which had a problem with brakes, with their daughter who was still very young as a passenger.

15. The defendant added that in her manic stage the plaintiff was unable to manage her own affairs. For instance she distributed her salary amongst street kids in town. On another occasion she bought expensive furniture which they did not need and could not afford. The furniture was restored with the help of Ms Cronje and the plaintiff's uncle, Mr de Beer, a manager in one of the furniture stores. It was also his evidence that the plaintiff was very active in politics and on numerous occasions attended political meetings for long hours with the child. He disputed the plaintiff's allegation that he had another child who had a bad influence on their child. He explained that the child, whose name is S, is a neighbour's child who stays at her parental home. His sister looks after S. This is how the children got used to each other. He denies that S displays delinquent tendencies.

16. Prof Weyers testified for the defence. He was already retired when he testified. He was in the Unit for Professional Training and Services in the Behavioural

Sciences at the Free State University and had been training psychologists since 1978. He interviewed clients and compiled reports and testified in courts of law about custody matters since 1976. In later years he worked in cases in which family advocates were involved. In the first interview of the parties in this matter in September 2006 he used a sentence completion test, a scientific test which gave him more or less an idea of what the children's aspirations or needs were. He also referred to the reports of Charlene Laufs, Dr Jordaan and Ms Cronje. He also made use of background information from the family advocate, Dr Heever and the reports from the Northern Cape Education Department. He testified that he interviewed the parties and looked at their tendencies because tendencies tend to repeat themselves. He was the only expert who testified and his evidence was not challenged by the plaintiff.

17. On 18 April 2011 he interviewed the plaintiff, the defendant and the child to update his 2006 report and make a fresh assessment. Firstly, he used the personality test called 16PF which, when used, gives a skeleton picture of one's personality (an idea of what can be expected of a person and what he is doing now and a prognosis for the future). He loaded the results into a computer which generates a print out of the results. It is not possible to manipulate the results. Secondly, he used the MMPI 2 which stands for Minnesota Multiple Personality Inventory. The 2 stands for second or upgraded version. MMPI 2 is also a test used to measure psychopathology or an illness present. This test is very sensitive to faking any information. He testified further that he normally uses medical reports or reports compiled by the social workers before he makes a recommendation, which method was again followed in this case. When he ultimately makes a recommendation he takes into account the best interests of the child.

In the latest report Prof Weyers recommended as follows:

> *"3.1 It is my opinion that the situation of this family has not changed much since the last evaluation. Mr S still maintains the positive image of the anchor of the family. He is trustworthy, stable and one can depend on him. He also has a calm effect on the little girl and she depends more on*

him as her confidant. He also possesses positive traits that make him more acceptable and efficient as a parent. He shows good work security and his general actions show that he delivers on his responsibilities. In contrast to this, Mrs S impresses as a risky parent who is being characterised by a lack of emotional stability and a cognitive functioning that poses many questions. Her general actions are strange and lead to her suspension as a teacher. Her professional security is subsequently questioned. She also frustrates Mr S's contact to his daughter. It is my impression that Mrs S does not currently suffer from any depression mood. The possibility is not excluded that it could return in future and intensifies the already existent problematic aspects.

3.2 .....

3.3 It is therefore recommended that in future [the child] will live with Mr S and that he be awarded the primary parental responsibilities. Decision-making responsibility should be vested with Mr S. Reasonable contact rights should be awarded to Mrs S."

18. Prof Weyers said that if the diagnosis by Dr Jordaan was correct even though it did not influence him in his reports it explains many of the traits that he found in the behaviour of the plaintiff. It is like manipulative behaviour. He testified that it is very difficult for a child of this age (nine years), to live with a parent with these personality traits. This affects the interpersonal behaviour or relationship of the child and her performance as seen from her school reports. He testified that there is no continuity in the plaintiff's emotions which makes it difficult for the child who must rely on a stable emotional life of the parents. That brings a lot of stress to bear on her as lots of anxiety is produced in her and that disables her from developing a well balanced personality. After looking at the fifteen allegations levelled against her by the Department of Education he concluded that her behaviour gives him an idea of a person who is seriously mentally ill and it fits in well with her behaviour. His concern, *inter alia*, was that when the child gets older, around twelve to thirteen years, she might get more difficult and she will stand up to the plaintiff and the plaintiff will not cope with the stress. This

according to him will lead to the plaintiff suffering from bipolar depression. He testified further that if the child is prevented from going to the defendant she will start disliking the plaintiff and will probably get more afraid of her.

19. Prof Weyers testified that on the whole the basic personality of the defendant looks good and that if he is awarded care and custody of the child he will be a very good parent and will bring up his child very well. The plaintiff disputed the contents of this report, as she has done with all previous reports of the various professionals. She even disputed that she had symptoms of bipolar disorder.

20. Prof Weyers further testified that the child lacks confidence. He found that she is not emotionally mature as she should be at her age. During the interview the child requested to be with the defendant but did not want the plaintiff to know because she was afraid of her.

21. The family advocate, Mr Ramanendzhe, called the family counsellor, Ms Jeanette Rosaline Browers, who is attached to the component of the family advocates, to testify. Her duties in the office are to conduct enquiries in divorce matters where care and contact of minor children is concerned. In dealing with the children they usually use observation and informal interviews. In this method she uses incomplete sentences consisting of three parts. The first part is “all about me”, the second is “a letter to my daddy” and the third is “a letter to my mother.”

22. On 30 March 2011 Ms Browers went to the plaintiff’s house to verify some information she got from the child in 2009 when she last interviewed her. The plaintiff refused her entry into her home. As a result the only option was to visit the child at school the following morning. During the interview she realized that there was no one that the child idolizes or had no role-model which according to her was unusual. The child mentioned that she did not like it when her mother beat her up with a belt because she sustained bruises. The child also told her that she did not like it when her mother shouted at her and accused her of having taken her things. This was not disputed by the plaintiff. It was strange for Ms Browers that the child could not choose which parent she preferred to stay with.

She testified that in that case they do not pressurise the child to choose between her parents.

23. One of the exercises is to cause the child to draw some pictures. From these pictures Ms Browers noticed that the child drew the family in one row from which it could be inferred that she sees her family as a unit.

24. The issue to be determined by this Court is who should be granted care and custody of the minor child. The plaintiff testified that Dr Jordaan did not interview her and no tests were done. She maintained that she took the medication that was prescribed by Dr Jordaan and never deviated from the prescription. Miss van Niekerk for the plaintiff argued that no evidence was led by Dr Jordaan with regards to the tests done and no report by him was submitted in court. This argument ignores the fact that the evidence is compelling that from time to time the plaintiff suffered from some psychological attacks which caused her to be restrained and sedated and that afterwards medication was prescribed by Dr Jordaan. It is this medication that the plaintiff admits to have taken as ordered. She also admits that Dr Jordaan diagnosed her with bipolar. I should not be understood to be making a finding that the plaintiff indeed suffers from this particular disorder.

25. In response Mr Botha argued that whether the plaintiff suffers from bipolar disorder is neither here nor there because the defendant is not relying on that in order to be awarded care and custody of the child. He contended further that indeed Dr Jordaan did not testify and therefore no reliance can be placed on the reports he compiled. In my view, Mr Botha was too kind to the plaintiff because he may as well have added that some form of mental defect has been established in the plaintiff that shows that she is unable to manage property and which makes her less worthy to be awarded the main custodianship of the child.

26. The plaintiff at no stage set this matter down for trial. It was always the defendant's attorneys who did so. The matter was set down for trial in 2008.The plaintiff's new attorneys, Engelsman, Magabane Inc, only came on board the day before the trial. The matter could not proceed. By that time the reports by the

family advocate were outdated and the plaintiff refused to go back to Dr Jordaan for reassessment. The report by Prof Weyers had to be updated. Prof Weyers testified that it is a usual ploy for mothers in custody matters to accuse the other party of sexual molestation of the child as a delaying tactic. It was therefore convenient for the plaintiff not to proceed with this matter because she had in the meantime custody of the minor child and an interdict against the defendant prohibiting him from accessing the common home.

27. Prof Weyers' evidence shows that he investigated this matter properly. He was not bias in favour of the defendant. He was very sympathetic towards the plaintiff. He was a reliable witness. I accept his evidence. It is clear from the defendant's evidence that he has a good relationship with the child which was confirmed by Prof Weyers. He did not present the plaintiff as a bad person. He was just concerned about the welfare of the child and the health condition of the plaintiff. The recommendation of the family advocate was also not challenged by the plaintiff and is consistent with that of Prof Weyers.

28. The evidence shows that the plaintiff lacks emotional maturity and is psychologically unstable. She is not capable of providing a stable parenting home. Prof Weyers' report is consistent with the way the plaintiff conducted herself in court. She had no order of thoughts and lacked concentration. She could not think consistently in an organised way. She struggled to answer questions directly and she would wander off the subject and would request that even simple questions be repeated. She was evasive and gave elaborate explanations. She would laugh inapplicably and this happened continuously. She portrayed herself as a good person and always puts the blame to other people. She admitted that she has been suspended from school by the Department of Education but she gets her full salary. Plaintiff is also, no doubt, a liar.

29. The fundamental principle consistently applied by South African courts in custody disputes is entrenched in s28 (2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child. See **JACKSON v JACKSON 2002 (2) SA 303 (SCA**) at 307i – 308A. See also **P v P 2006 (5) SA 94 (SCA)** at 99J

30. With regards to costs Mr Botha on behalf of the defendant requested the court to make an order that the plaintiff pay the costs of the last week of June, 20 to 24 from her half of the joint estate after the division, and not from the proceeds of the joint estate. He said it should have been very clear to her as well as her legal representatives that the court could not grant her care and custody of the minor child after Prof Weyers' report was compiled. Ms van Niekerk requested the court to order that each party pay her/his own costs.

31. While there is merit in what Mr Botha contended the fact of the matter is that the plaintiff tried to do the best for her child. In custody matters there is no winner or loser. In truth the fact that the case was somewhat dragged out merely went to confirm that the plaintiff lost her sense of reality and was an extremely difficult witness but should not be punished for her genetic condition.

It is for the foregoing reasons that I made the order in para 1 of this judgment.

ORDER

Each party is to pay her/his own costs.

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BM PAKATI
ACTING JUDGE
NORTHERN CAPE, KIMBERLEY

Appearing for the Plaintiff
Adv L van Niekerk instructed by Engelsman Magabane Inc, Kimberley

Appearing for the Defendant
Adv CH Botha instructed by Van de Wall & Partners Inc, Kimberley