



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

Case No: **717/2022**

In the matter between:

PETER HENRICO

Applicant

and

DANIELLA ROEN SPIES

Respondent

BEFORE: CHESIWE, J

DATE RESERVED: 29 June 2022, upon receipt of the written supplementary heads of arguments on 8 July 2022 respectively.

DELIVERED ON: This judgment was handed electronically by circulation to the parties' representatives by email. The date and time for hand-down are deemed to be at 12h00 on 7 December 2022.

- [1] The Applicant launched an urgent *ex-parte* application on 17 February 2022 for the temporary suspension of the parental responsibilities and rights (**PRR**) of the Respondent. The application is opposed by the Respondent.
- [2] The relief sought by the Applicant was granted on 17 February 2022 with a return date of 31 March 2022. On the return date, the rule nisi was again extended to 8 April 2022 for the report of the Family Advocate and for the parties to file further papers.
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- [3] On the 28 April 2022 the Respondent filed a counter-application seeking the immediate restoration of her **PRR** and the return of the minor child to her primary care and residence.
- [4] On 15 June 2022 both applications were heard, wherein the Legal Counsels proceeded with oral arguments. The parties were requested to file their written heads of argument on 29 June 2022 and 8 July 2022 respectively. The matter was therefore reserved on the latter date.

BACKGROUND

- [5] The Applicant and the Respondent are the biological parents of **PH**. The parties have been involved in litigation over a period of two years.
- [6] The parties were not married to each other, but were in a romantic relationship and **PH** was born out of that relationship. The parties separated in 2020 after several attempts to reconcile were unsuccessful.
- [7] After the relationship ended, the Respondent started to frustrate the Applicant's contact with **PH**. The Respondent moved from the known address in Reddersburg to an unknown address. Thereafter, she sent the Applicant a message that her new partner will be changing **PH's** surname and adopting the minor child.
- [8] The Applicant instituted legal action in the Magistrate Court in Reddersburg on 15 September 2020, under case number 14\1\4-11\2020. The court granted an order as follows:

"My understanding, therefore, is that the parental responsibilities and rights in terms of section 21(1)(a) of the Children's Act and there is no need for a court order to determine or confirm this. In this case of a dispute, the procedure in sub-section 3 (a) and (b) should be followed. The application for such an order is not granted."

- [9] On 10 December 2020, the Applicant approached this Court, under case number 4697/2020 for **PRR** concerning contact of which the court granted the usual alternative contact on alternative weekends, including reasonable daily telephone contact. In spite of the said court order, the Respondent continued to frustrate contact between the Applicant and the minor child.
- [10] On 17 February 2022, the Applicant launched an urgent application under case number 717/2022 and this is the case before this court. The Applicant's contention in this matter is that the Respondent disappeared with the minor child and he could not trace the Respondent and the minor child; that the Respondent physically abused **PH**; the Respondent neglected **PH**; that the Respondent abuses alcohol and that the Respondent is addicted to narcotics.
- [11] The Respondent proceeded to launch a counter application on 26 April 2022, which the Applicant opposed seeking the following relief:
- “1. The immediate restoration of my full rights and responsibilities with regard to the minor child;*
 - 2. The immediate return of the minor child to my primary care and residence;*
 - 3. A contribution towards my costs for travelling to and from Bloemfontein for the necessary consultations with my attorney of record, attendance of appointments with the Family Advocate, and attendance of court;*
 - 4. That an investigation to be lodged into the illegal removal of Phillip from my care during or about December 2020 by the Applicant and Giepie Good child;*
 - 5. An investigation to be lodged into the Applicant's fitness to possess a firearm;*
 - 6. Maintenance in the amount of R3000,00 per month payable by the Applicant to the Respondent on the first day of the month following the date of this order and monthly on each first day of the month thereafter;*
 - 7. An order that the maintenance amount increases at a rate of 10% per annum on the anniversary of this order;*

8. *An order barring the Applicant from any further litigation against me with relation to the minor child without leave of the Honourable Court, and without notice to the Family Advocate;*

9. *Costs of suit.*”

[12] What this Court has to determine is whether the minor child was a child in need of care and protection as stipulated in the Regulations of the Children’s Act; whether the minor child’s primary care and residence should be restored to the Respondent and; whether the Respondent’s parental responsibilities and rights should be terminated.

[13] The Applicant in the Founding Affidavit contends that he was concern about the whereabouts of PH as the Respondent had a tendency to disappear with the minor child, including the suicides attempts of the Respondent and that prompted him to launched the application. The Respondent in her opposing affidavit denied that allegation and raised allegations against the Applicant that he was controlling and abusive towards her.

LEGAL FRAMEWORK FOR UNMARRIED FATHERS

[14] The legal framework of unmarried fathers, section 21 of the **Children’s Act** ¹, provides as follows:

“The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

- (a) if at the time of the child's birth he is living with the mother in a permanent life partnership; or*
- (b) if he, regardless of whether he has lived or is living with the mother-*
- (c) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;*

¹ Act 38 of 2005

- [15] In terms of section 21(1)(a), the parties stayed together before and after the minor child was born. Therefore, the Applicant acquired parental responsibilities and rights with regards to the minor child. In the papers, it appears that the parties are not in dispute over the acquired **PRR** of the Applicant. The Applicant therefore automatically acquired his parental responsibilities and rights. The court on 10 December 2020 confirmed these **PRR** including guardianship.
- [16] Therefore the issue of the Applicant's **PRR** was settled and this court need not deal with that.

CARE AND PROTECTION OF MINOR CHILD

- [17] Based on the urgent application brought by the Applicant before this Court on the removal of the minor child because the Respondent disappeared with the minor child and the child was in desperate need of care and protection, the Applicant in the founding affidavit states that:

“8.2 The court would have noted that at that point in time I was left completely in the dark as to the whereabouts of my minor child and I truly and honestly feared for his wellbeing.

8.3 With the help of my attorney we proceeded to institute an application on the same terms, seeking the same relief from this Honourable Court. ...

8.4 The court would have noted from the aforesaid application that Ms Spies and the location of my minor child were still unknown to me when the application was instituted.”

- [18] The Respondent in the opposing affidavit denied the allegations levelled against her. Respondent mentioned an incident where the Applicant caused the minor child to sustain a large third-degree burn on the right hand, due to the Applicant having left the minor child unattended near a braai fire. Further that the minor child had separation anxiety after having spent time with the Applicant. The Respondent mentioned that the Applicant doubted whether the child was his, though a paternity test was never conducted. Respondent also stated that the relationship between them was abusive and controlling and that

the Applicant threatened that he would keep the minor child away from her. Respondent denied that the minor child needed care and protection.

- [19] Section S3(1) (Consolidated Regulations Chapter II) of the Children's Act provides as follows:

"a person authorised by a court order a designated social worker or a police official who removes a child and places such a child in temporary safe care –

In terms of a children's court order contemplated in section 15.1 (2) of the Act or (footnote)

Without a court order in terms of section 15.2 (1) of the Act (footnote) must complete a form identical to form 30 and submit it to the temporary safe care as soon as it is practicable.

The person or police officer referred to in sub-regulation (1) must (a) give the relevant parent, guardian, caregiver, next of kin social worker, religious counsellor

approved by the designated social worker, access to the child at all reasonable times, subject to the terms of the court order and provided such court order and provided such access is in the best interest of the child; and

notify the designated social worker immediately of any difficulties with such placement and any change in the child's residential address."

- [20] The minor child was removed from the care of the Respondent on 18 December 2020 with the assistance of the South African Police Service (SAPS), by a certain Gieppie Goodchild. According to the Respondent, no court order was shown, and neither was she given grounds for the removal in terms of section 153(1) of the Children's Act which is clear on the removal of a child. Even if it is a police officer, he/she must be authorised to do so. The court order dated 10 December 2020 (**Annexure C** on page 103) did not authorise the Applicant to remove the child, but rather for him to exercise his parental responsibilities and rights and that depended on the report of the Family Advocate. However, due to the circumstances at that time the Applicant had to act in what was the

minor child's best interest. The Applicant correctly at that stage had to consider the safety of the minor child. The Applicant cannot be faulted for having acted swiftly to prevent any harm that may occur to the minor child.

- [21] On 27 January 2021 PH was returned to the Respondent with no explanation or any reason for the return of the minor child. On 22 February 2022, the minor child was removed again by (5) five members of the SAPS with a certain Captain Abel and in the presence of a Candidate Attorney who was named by the Respondent. The Applicant in the founding affidavit explained that the child was removed as a result of the Respondent continuing to frustrate his contact rights as well as the alleged neglect of the minor child.
- [22] The Applicant under case number 717/2022 whereupon the Applicant had approached the court on an urgent *ex parte* basis, the Court ordered the temporary suspension of the Respondent's parental responsibilities and rights of the minor child including placing the minor child in the temporary care of Ms X. The Applicant's founding affidavit mentioned that the Applicant was concerned that the Respondent tends to disappear with the minor child for long periods, to which the Respondent explained that she was angry with the Applicant, it was for this reason that she did not want the Applicant knowing her whereabouts. The Applicant's conduct can also not be faulted due the suicide allegations against the Respondent and it may due to such serious allegations that the court ordered the removal of the minor child.

SUPPORTING AFFIDAVIT OF MS X.

- [23] The supporting affidavit of Ms X in the main application,² briefly confirmed that she is a teacher and is able to provide the minor child a place of safety and a comfortable environment.
- [24] At the time, the Court ordered for the child to be placed in the safety of Ms X, her place was not registered as a place of safety. She indicated as follows in her supporting affidavit ³:

² At page 124

³ At page 129

"I am in the process of applying to be registered as a temporary place of safety and undertake to provide the Honourable Court with confirmation of such registration as soon as it becomes available."

[25] The Court in ordering such was obviously doing it in the minor child's best interest and this cannot, therefore, be faulted. . As the upper guardian of all minor children, a Court has to take into consideration any information that appears to put the child in danger or at risk. It maybe as well that Ms X's place was at that stage the better option for PH and it was in his best interest to be place in Ms X 's care. Even if, Ms X was not registered as a temporary place of safety, she still had a duty to keep the Respondent updated about the minor child. The Respondent was not informed in terms of Regulations 153(2) as to the whereabouts of the minor child, and to the extent that Ms X went to visit her family without informing the Respondent. The Regulations in the Children's Act are clear as to the removal and travelling of a minor child who was placed in safety. In spite of the Respondents faults and short comings, she was to be informed of the minor child's movements.

[26] The Applicant was granted leave to file a supplementary affidavit with new information obtained from various parties pertaining to the alleged abuse of the minor child. It is in this supplementary affidavit that the identity of Ms X was disclosed ⁴

[27] The following is noted in Ms X's supporting affidavit on page 158:

7.

"I did not know the Applicant before this. I have, however, in the past few weeks, had several discussions with the Applicant about Phillip, his current condition, his medical condition, his development, challenges and progress made etc.

8.

Since 17 February 2022, I have cared for Phillip. I provided him with a loving home, with much-needed attention, attended to his medical needs and consultations, had

⁴ (Supporting affidavit of Charlotte-Anne Potgieter on page 154)

Phillip attend my school and made a great effort to provide more than the necessary care, love, affection and stability that Phillip deserves."

- [28] Ms X, now known to be Charlotte-Anne Potgieter, confirmed that she did not know the Applicant, nor the minor child as a consequence that the minor child was put in the safety of a total stranger. It may have been traumatic for the child to be put in the care of a stranger. This is not a new thing as many children are frequently placed in places of safety or foster care with strangers. In most instances the place of safety maybe the immediate available place of safety for a child. At this point, I would pause to mention that Ms Potgieter must be applauded for having achieved an improvement in 44 days of the minor child's development stages. According to Dr de Abreu, the minor child had severe developmental delays, and was diagnosed Autism. That means the minor child needed the utmost care for a child diagnosed with Autism.

ALLEGATIONS OF ABUSE OF THE MINOR CHILD

- [29] The Applicant alleged that the minor child was physically abused and neglected. To support this allegation, the Applicant attached a supporting affidavit of Ms Michaela Hawhorne⁵, which reads as follows:

"Gets spanked and/or slapped ever so often. This has happened to such an extent that no normal and unaggressive approach bears any fruit anymore. The minor child has become unresponsive to such discipline and acts almost like a donkey, by not reacting at all when he gets subject to the punishment bestowed upon him.

- [30] Furthermore, the Applicant attached the confirmatory affidavit of Mr Willie Struweg, father to the Respondent's second child Christiaan, that confirmed that the Christiaan sustained swelling on the left side of his head and fracture of the left parietal bone.⁶ With such serious injuries of the Respondent's second child, the Applicant had reason to believe that **PH** is also at risk.

⁵ Annexure "E1" page 108 paragraph 10.2 of the Applicant's supplementary affidavit.

⁶ Annexure "SPH5" page 182 of Volume 1.

[31] The removal of a child should be a last resort and be justified in an emergency. There should be a reason to believe that the child faces imminent danger or serious harm. Indeed, section 152 allows any police officer or social worker to remove the child without obtaining an authorised court order from the Children's court. In this instance, the Applicant approached this Court as upper guardian for the removal of the minor child.

[32] The person who removes the child in terms of Section 151 (7) should complete the following important tasks:

"a) without delay but within 24 hours inform the parent, guardian or primary caregiver of the child of the removal of the child, if that person can readily be traced; and

b) not later than the next court day bring the matter to the clerk of the children's court for referral to a children's court in terms of section 68."

(c) The grounds for removal of a minor child are further listed as follows in section 150(1) of the Act and include situations where the child:

a) has been abandoned, orphaned or is without visible means of support;

b) displays behaviour which cannot be controlled by the parent or caregiver;

c) lives or works on the streets or begs for a living;

d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;

e) has been exploited or lives in circumstances that expose the child to exploitation;

f) lives in or are exposed to circumstances which may seriously harm that child's physical, mental or social well-being;

g) maybe at risk if returned to the custody of the parent, guardian or caregiver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;

- h) *is in a state of physical or mental neglect; or*
- i) *is being maltreated, abused, deliberately neglected or degraded by a parent, a caregiver, a person who has parental responsibility or a family member of the child, or by a person under whose control the child is.*

[32] In comparison to the stated injuries of Christiaan in the confirmatory affidavit of Mr Willie Struweg, wherein Christiaan was removed from the Respondent, the alleged abuse and injuries of the minor child in this matter were not proven. However, it should not be a matter of “*wait and see*” what will happen. If there is any allegation of abuse of a minor child, no matter how small, it has to be taken seriously and investigated. The Courts in child abuse and/or neglect matters, take a dim view of such allegations and will with no doubt order that the child be removed. Even if the Respondent denied the allegations that she abused the minor child, I doubt that the Applicant would have returned from the USA for information that was not true. The Respondent on the other hand also alleged that the Applicant abused the minor child. The third-degree burn was one of the alleged abuse. The Respondent further makes mention of the abuse she endured while in a relationship with the applicant.⁷

[33] The general rule is that a child remains in the care of the usual caregivers during any investigation, unless that is not appropriate because of the safety of the child, as in this instance. It is indeed a drastic measure to remove a child and it is for this reason that the Children’s Act gives stringent rules and provides penalties in terms of sections 152(5) (6) and (7) to limit the power of any person or social worker who intends to remove a child.

[34] Section 152(4) is clear when a minor child is to be removed and the following has to be taken into consideration:

- “(a) *The best interest of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken*

⁷Oposing affidavit paragraph 2.80 page 252

into account, including the possible removal of the alleged offender in terms of section 153 from the home or place where the child resides, and the safety and well-being of the child as the first priority.”

[35] The Applicant’s supporting affidavits of Ms Sune Espag⁸, reads as follows:

“...I have personally witnesses (sic) the Minor child in a state of neglect in that his clothes are too small and dirty.”

[36] In paragraphs 7 and 8 on page 119, the following is noted:

“I am in a position to personally confirm that Ms Spies abuses alcohol and Marijuana.”

... and have noted how broken and damaged her teeth are.”

[37] In the supporting affidavit of Christelle Geel page 440 paragraph 7.1.3 the following is noted.

“...during the infancy of the minor child, the Respondent and I did on one occasion that I can recall, whilst the minor child was sleeping and with no one else around, decided to go to a local pub for alcoholic drinks.”

[38] Ms Christell Geel in paragraph 7.1.4, goes further and states as follows:

“Today I am fully aware of the risk this poses to the wellbeing of the minor child and am not proud to state that I took part in such conduct.”

[39] Part of the Occupation Therapist’s report Zanelle Blignaut on page 186, volume 1 reads as follows:

“His behaviour is anti-social, makes poor eye contact and ignores the presence of the therapists in the room ... and becomes aggressive with actions of hitting, grinding teeth and screaming very quickly if he does not get his way.”

⁸ In paragraph 5 page 118

[40] Ms Michaela Hawhorne, supporting affidavits,⁹ further confirmed the abuse and neglect of the minor child and states:

"I see Ms Spies on a daily basis and personally witnessed the manner in which she cares for the minor child. Ms Spies, unfortunately, does not provide the Minor Child with the necessary care. The Minor Child is at present and in my opinion, being neglected."

[41] In paragraph 10.2, Ms Hawhorne paints a discontent picture of the physical abuse as follows:

"Gets spanked and/or slapped over so often. This has happened to such an extent that no normal and unaggressive approach bears any fruit anymore. The Minor Child has become unresponsive to such discipline and acts almost like a donkey, by not reacting at all when he gets subjected to the punishment bestowed upon him." (My Emphasis

[42] Two of the Respondent's friends who have no interest in the matter confirmed in their supporting affidavits that the Respondent has been neglecting the minor child since his baby days. They could have easily kept quiet to shield and protect the Respondent, instead as friends, they acted in the minor child's best interest. To the extent that they gave confirmatory statements to confirm the neglect and abuse.

[43] Having considered the above supporting affidavits in my view the minor child was indeed neglected and abused by the Respondent. And there was no other alternative than to remove the minor child from the Respondent's care.

FAMILY ADVOCATE'S REPORT

[44] The Court Order granted on 17 February 2022 was made in order to investigate the minor child's best interest. The Family Advocate filed a report on 7 June 2022. Before dealing with the report, it is only appropriate that I deal with the intention of the establishment of the office of the Family Advocate.

⁹ In paragraph 8 on page 109 of the Applicant's supplementary affidavit.

- [45] The Office of the Family Advocate is established by the provisions of the **Mediation in Certain Divorce Matters Act 24 of 1987**. The purpose of the Act is to provide for mediation in certain divorce mediation, read with section 21(3)(a) of the Children's Act which deals with disputes between unmarried parents of a minor child. Its main role and function are to evaluate the parties concerned and the relevant circumstances at an enquiry and in ascertaining and presenting evidence of a child's expressed views to the court. (*Brown v Abrahams*).¹⁰ However, the court is required to consider the report of the Family Advocate but is not bound by its recommendations.
- [46] The Family Counsellor, Me Marlize Pretorius had a telephone interview with certain individuals regarding the minor child's living circumstances. According to Me Pretorius, Me Alicia Willemse a teacher at Brakejan Pre-Primary School mentioned that the minor child did not attend school for a full week due to reasons of ill health or the Respondent being out of town. The school had requested the Respondent to take the child for occupational therapy, which she did not do. The Teacher furthermore, observed that the child wore the same clothes as he had on the previous day. The primary school teacher had to cut the minor child's nails as these were too long.
- [47] Mrs BR Spies, mother to the Respondent mentioned to the Family Counsellor that she is aware the Respondent smokes marijuana though not every day as she can still function well after using the marijuana and that she is calm and collected after using marijuana. The Court do take cognisance of the fact that Marijuana has been legalise and cannot discredit the Respondent for that.
- [48] Me Ingrid Zwane is a social worker at ENGO, an organization that renders services to the community in Reddersburg and the Respondent is known to ENGO. Ms Zwane indicated that at the time of the removal, the minor child was not in imminent danger. Though the Respondent was provided with parental guidance and professional counselling and was to receive or undergo a psychiatric evaluation, Ms Zwane concluded that the lack of cooperation is an

¹⁰ [2004] 1 ALL 401 (CC)

indication of the Respondent not being able to accept structured social work services due to failure to report when she changed her address.

[49] The Family Counsellor's report as per the Court's order,¹¹ states as follows:

"11.11 According to the Children's Act, section 7(1), (c), (l)(ii) and (m) – "(C) the capacity of the parent, or any specific parent, or any other care-giver or person in the needs of the child, including emotional and intellectual needs; needs to be taken into consideration."

"The father has a concern about the mother's parental capacity. He thinks that Phillip is in a state of neglect and physical abuse by his mother. He also alleged that the mother did not give attention to Phillip's developmental problems that need attention. The father is concerned that the mother has a drug and alcohol problem. The fear that the mother could disappear with Phillip is also of concern and the mother has threatened people who are involved in the matter."

[50] According to the Family Advocate's report, from the investigation the following was evident:

- a) *Phillip's nails were not always cut and his clothes were dirty and too big when he was removed from his mother's care. His ears were also not clean. Physical care and grooming will need some attention when he is living with his mother. Miss X attended to his grooming after removal from the mother and at the moment the father attends to it.*
- b) *The Paediatrician however found Phillip's physical aspect to be in good order. That he was in a state of neglect could not be confirmed by the paediatrician.*
- c) *It was evident from the investigation that the mother did not give attention to Phillip's specific developmental problems such as his speech delay by taking him to an Occupational Therapist in 2021 when the school in Brakpan also made her aware of the problem and requested such assessment. When the father started making an appointment in Gauteng, the mother relocated back to the Free State and Phillip never attended Occupational Therapy under the mother's care. It was only after he was removed from the mother's care. It was only after he was*

¹¹ In paragraph 11 on page 546

removed from the mother's care in February 2022, that he received Occupational Therapy treatment.

- d) A concern is that the mother never worked and it does not appear that she has any aspiration to find employment and generate an income. The father is the only parent supporting Philip financially.*
- e) The mother acknowledged that she still uses Marijuana, but she denied the use of Tik. She did not go for drug testing as per the court order. The father was indicated to pay for it. The mother's delay in going for a drug test is of concern to the undersigned. She has not made effort in finding out how and where she should go. The mother would benefit from attending rehabilitation treatment for marijuana use.*
- f) This makes the undersigned worried about the mother following any court order, or it could be that the mother is using stronger drugs than just marijuana. Collateral reference could not confirm the mother's use of Tik, only about marijuana use. The mother apparently smokes marijuana outside the house or at other people's places. It remains uncertain if she exposes Philip to her use of marijuana. She is mostly described as calm when using marijuana.*
- g) The undersigned is of the view that the mother has a dependency on marijuana, although she denied it in totality. She uses it a few times per week. It is difficult to determine how her marijuana use impacted Philip. She was described by some collateral to be pre-occupied with other things, other than the children. She however denied such allegations. The mother would benefit from attending rehabilitation treatment for cannabis use disorder. In any event, the use of Marijuana is not against the law.*
- h) It was found during the investigation that the mother has occasional episodes of intoxication at external places such as at a pub or a friend's house. Philip was never spotted with the mother when it was reported that she was intoxicated. Someone else was taking care of him when the mother went out to drink and visit friends although there is no evidence to suggest she uses alcohol regularly daily for instance. The mother was however banned from the local pub for behaviour other than intoxication which involved a male person. The mother is in denial of having an alcohol problem.*

- i) *There was also the allegation that the mother would leave Philip with other people and neglect her parental responsibility. The mother denied it and collateral references from the maternal family confirmed that they only...*

[51] While the Family Advocate undoubtedly plays an important role and presenting evidence of the expressed views of the minor child, in this instance, the minor child is too young to give an expressed view in terms of section 10 of the Children's Act. So does the Family Advocate not take sides of parties or attempt to usurp the court's discretion. (See **Van der Berg v Le Roux**)¹²

[52] The Family Advocate may have conducted a full investigation into the minor child's best interests but did not take into consideration the serious allegations raised against the Respondent. Specifically, the first-hand allegation from Ms Michaela Hawthorne that the child was beaten to the effect that the child had a donkey reaction (See supporting affidavit, annexure "E1" on page 111). Furthermore, the evidence that the Family Advocate obtain from the different collaterals about PH's physical condition as well as his developmental stages, that the Respondent never took serious. Bearing in mind that the child was diagnosed with Autism.

[53] The Family Advocate's report understates the conduct of the Respondent as shortcomings. The minor child has no reason to suffer due to the Respondent's shortcomings as a parent. The Respondent admits to taking marijuana. The Respondent's mother admits to the same and even goes further that it keeps the Respondent calm. Indeed, the Respondent may have been young when she conceived the minor child as she was 17 years at the time, but that does not mean her conduct towards the minor child should be pardoned by this Court or by the Family Advocate.

[54] ENGO made findings as far back as 2020 and recommended interventions, but with no compliance to these recommendations, nor any cooperation from the side of the Respondent. The Respondent has shown at that her parental skills are not suitable for the minor child and has treated the ENGO's recommendations as not important. Both the Respondent and the Applicant

¹² (2003) 3 ALL SA 599 (NC)

may have their shortcomings as parents, but the conduct and behaviour of the Respondent certainly as stated in the papers, prevails over how the Applicant conducts himself in the circumstances. The Respondent had as recently as 2020 attempted suicide and was admitted at Pelonomi Hospital. The Respondent admits that her suicidal behaviour stems from her high school days. Indeed, The Respondent needs intervention which can continue while the minor child is not in her care. The child does not need perfect parents, but parents that are able to do their best when it comes to the interests of their minor child.

[55] Having considered the above, I am inclined not to agree with the recommendation of the Family Advocate as in my view, the Respondent is in dire need of professional assistance and guidance. The minor child cannot be exposed to physical abuse and neglect. Section 7(1)(l) clearly states as follows:

“the need to protect the child from any physical or psychological harm that may be caused by –

- (i) subjecting the child to maltreatment abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or*
- (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person.”*

[56] The Family Advocate’s report further refers to the issue of the Applicant returning to the United State of America (USA) and not having support in the USA. According to the Family Counsellor (page 533, Volume 2), the Applicant explained to the Family Counsellor that if he relocates, it will be in the future. The Family Counsellor cannot assume that the child’s relocation is before Court. Indeed, for the relocation of the minor child, the Applicant will have to approach this court for such an order. Oral submissions were made on behalf of the Applicant by his Legal Representative, that he will remain in the Republic of South Africa (RSA) to ensure that the minor child is properly taken care of. In my view, the Applicant could have easily stayed in the USA and not cared to come to the RSA to bring this matter before Court. In any event, if the Applicant intends to relocate with the minor child, he has to approach Court with a

separate application for relocation. Therefore, the current application does not deal with the relocation of the minor child.

[57] The Applicant prays that the Respondent's **PRR** be temporarily suspended, pending all investigations. In my view, that is a drastic step, despite the Respondent's shortcomings. The Court cannot temporarily suspend the Respondent's **PRRs**, specifically her right to excise contact with the minor child. With this, the ENGO office has confirmed that it will provide a holistic preventative and early intervention program that will *inter alia* include: parental guidance; monitoring the child's progress and attendance to a therapy appointment. It is therefore not in the minor child's best interests to suspend or terminate the Respondent's parental responsibilities and rights. Instead, the Respondent must be allowed contact with the minor child, albeit through ENGO and under supervision. The supervised visits are informed by the uncertainty around the Respondent's conduct and behaviour. Furthermore, the Respondent failed to protect the child from being beaten by her ex-partner in her presence. One such incident is noted on page 297: "He started shouting and PH while he shook him. Subsequent thereto, he picked PH up by his wrist and threw him on the bed, shouting at him that he would beat him to death....." (My Emphasis)

At page 518, paragraph (f) volume 2 The Following is noted: "If Christian cried, her ex would take it out **on PH.....**"

[58] The Respondent failed to protect the minor child from the physical abuse of her then ex-partner though she eventually left the relationship. And this is the same Respondent who had threatened the Applicant about the ex-partner adopting the minor child without the Applicant's consent.

COURT APPLICATION

[59] The Respondent's counter-application is basically to restore her parental responsibilities and rights; the return of the minor child into her care; contribution towards her travelling costs to Bloemfontein; an investigation into the removal of the minor child; an investigation into the fitness of the Applicant to possess a firearm; and to bar the Applicant from any further litigation without leave of the Court and notice to the office of the Family Advocate.

- [60] The Respondent in the founding affidavit prayed for condonation for the late filing of her founding affidavit. As the matter involves a minor child, condonation for the late filing was granted. (*Terblanche v Terblanche*)¹³
- [61] The Respondent in her founding affidavit denied all the allegations against her. The Respondent in turn alleged that the Applicant physically abused her, controlled her as well as subjected her to emotional and financial abuse. The Applicant in the opposing affidavit towards the counter-application denies the allegations by the Respondent. The Applicant contends that the Respondent's counter-application does not contain an affidavit supporting the relief sought and further that the Respondent failed to comply with the court order dated 17 February 2022.
- [62] Having considered the main application and the serious allegations raised therein, in my view the counter-application ought to be dismissed. Nor can this Court direct an investigation into the Applicant's fitness to possess a firearm.

CONCLUSION

- [63] Section 7 of the Children's Act sets out the standard for the best interest of a minor child. The Court is to have due regard for these provisions. The Act has in place provisions and programmes designed to protect and strengthen family bonds. However, in the end, the interests of a minor child are paramount. Overtime, the courts have prohibited unfair discrimination towards the fathers, specifically unmarried fathers, (the Applicant in this case). The judicial preference for mothers as caregivers has greatly diminished. Furthermore, that "mothering" is a function that is not necessarily inherent to women. (*Van der Linde v Van der Linde*).¹⁴
- [64] In *Ford v Ford*,¹⁵ the Court held that when deciding the best interest of the child the court is not only to view the disruption of the child's relationship with the mother any different from the disruption of the relationship of the child with the father. The minor child has been exposed to the negative conduct of the

¹³ 1992 (1) SA 501 (W)

¹⁴ 1996 (3) SA 509 (O) at 514-515, Hatting J

¹⁵ 2004 (2) ALL SA 396 (W)

Respondent. The Respondent's friend confirmed how they left the child alone at night and went out partying. That in itself shows how the Respondent viewed her parental responsibilities and rights. Certainly, the Respondent was still young when she fell pregnant, but that should not be justification for neglect of the minor child.

[65] The allegations that the Respondent used marijuana and alcohol and failed to do the necessary test cannot be disregarded by this Court, including suicide attempts. On two occasions, this Court made orders in favour of the Applicant and this says a lot about the conduct of the Respondent. It is in the best interest of the Respondent that she subjects herself to the programmes offered to her by ENGO. That she attends counselling sessions with therapists for the suicide attempts. The allegations raised against the Applicant according to the experts' report have never placed the minor child at risk. The conduct of the Respondent towards the minor child far outweighs the conduct of the Applicant. The fact that the minor child was picked up with his wrist and thrown on the bed by the Respondent's ex-partner and it happened in her presence, not even mentioning the beatings the ex-partner subjected the minor child to, the Court cannot flout the conduct of the Respondent as sheer shortcomings. The Respondent's conduct is unacceptable.

[66] The minor child at this stage need stability. The constant removal from one parent to another parent is not in the child's best interests. The Applicant and Respondent need to realised that the minor child is only three years and their protracted litigation is not helpful. Is not dispusted that they love their child, but their conduct is undesirable, especially the Respondent. The minor child needs matured and well thinking parents and not parents that are in constant conflict with each other. Especially that the child has been diagnosed with Autism. He will need more attention than the normal child at his age.

[66] The Court can therefore not accept the report of the Family Advocate as indeed it was focused on the relocation of the minor child to the USA. Furthermore, the Family Advocate did not take into considerations the serious allegations of neglect and abuse of the minor child. These cannot be regarded as short comings of the Respondent. It's no secret that minor children in our country on

daily basis are faced with abuse, neglect and other forms of harm, be it from parents of family members. Therefore, the Court cannot have a wait and see approach when it comes to a minor child.

[67] The Applicant in his prayers requested that a *curator ad litem* be appointed for the minor child. It is in the child best interests that from now onwards he is protected from any further litigations and assessments. All issues concerning the minor child would therefore be dealt with by the curator.

[68] In my view, it would be in the child's best interest that he remains in the care and primary residence of the Applicant and that the Respondent exercises her parental responsibilities and rights concerning contact through the assistance of ENGO.

COSTS

[69] The Applicant has not prayed for any costs order against the Respondent. The Respondent on the other hand has prayed for costs, despite the fact that she is making use of Legal Aid, including her travelling cost to travel to Bloemfontein. I would therefore use my judicial discretion and upon consideration of the family dispute. In my view, both parents acted in the minor child's best interest. It is therefore proper that any costs incurred that each party pays their own costs.

ORDER

[70] Accordingly, the following order is made:

1. The rule nisi issued on 17 February 2022 (as amended) be and is hereby confirmed, subject to the variations provided for in this order;
2. The minor child, **PH** ("the minor child") shall remain in the care of the Applicant, as provided for in the order of this Court dated 17 February 2022 and in terms of section 23(1)(b) of the Children's Act 38 of 2005 ("the Children's Act");
3. In terms of section 23(1)(a) of the Children's Act, the Respondent shall exercise contact with the minor child as follow:

- 3.1 Telephonic WhatsApp call contact every evening between 18h00 and 19h00.
 - 3.2 To exercise supervised contact with the minor child at ENGO on Monday, Wednesday and Friday between the hours 14h00 till 16h00.
4. Legal Aid is hereby ordered to appoint a *curator ad litem* for the minor child, who will have the following specific powers and duties:
- 4.1 To represent the best interests of the minor child by advancing all arguments for and on behalf of the minor child relevant to this matter, as well as related matters;
 - 4.2 To represent the minor child in all matters of a legal nature, and to ensure that the minor child's best interests and wellbeing are upheld at all times;
 - 4.3 To consult with any professional and expert, or other persons who are involved with the families, the minor child, or the Respondent's medical care;
 - 4.4 To approach this Court to amend the power/duties of the *curator ad litem*;
 - 4.5 To collaborate with the current appointment experts, including Dr Nelson De Abreu and Ms Zanelle Blignaut or any other medical professional treating the minor child, and to facilitate their involvement;
5. The *curator ad litem*, with the assistance of medical professionals, shall in addition have the following duties and powers:
- 5.1 To monitor and report on the rehabilitation and therapeutic healing of the Respondent;
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- 5.2 To monitor and report on the commitment of Respondent to the minor child;
- 5.3 To monitor and report on the commitment of the Respondent to her psychological and psychiatry therapy;
- 5.4 To stipulate how, when and where bonding therapy between the Respondent and the minor child is to take place, which must include general parenting and an attachment program provided by the State or non-governmental organization, to restore the relationship between the minor child and the Respondent, until such time that it is restored to the satisfaction of the *curator ad litem* and the relevant involved experts;
- 5.5 To stipulate how, when and where and if contact between the Respondent and the minor child can take place;
- 5.6 Any party, including the *curator ad litem*, may approach this Court on supplemented papers, to address the future exercise of parental responsibilities and rights pertaining to the minor child;
- 5.7 The Respondent shall have the right to approach this Court for the placement of the minor child in her care provided that she has complied, to the satisfaction of the *curator ad litem*, with the terms of this order, and in addition thereto with the following:
 - 5.7.1 The Respondent has admitted herself into an accredited substance use rehabilitation facility;

- 5.7.2 The Respondent has submitted herself to the treatment of a psychiatrist on or before 31 December 2022 to receive treatment for alcohol and narcotic dependence which will include psychiatric treatment and medication;
- 5.7.3 The Respondent will have abided by any out-patient programmes and recommendations thereafter made by the relevant treating professional/s (“the rehabilitation programme”);
- 5.7.4 The Respondent will have fully cooperated with the rehabilitation program for the full period stipulated by the treating professional/s and until otherwise determined by the *curator ad litem*, the treating professional/s shall submit monthly reports of the Respondent’s progress and prognosis to the *curator ad litem* (who shall serve on all parties and file same for the Court’s benefit);
- 5.7.5 Unless the Respondent’s medical professional/s advised otherwise, the Respondent has diligently complied with all medication regimens prescribed by the treating professional/s and provided the curator ad litem with proof thereof;
- 5.7.6 The Respondent has subjected herself to random alcohol and narcotic testing at the *curator ad litem*’s request, which the Respondent shall attend to within 24 (twenty-four) hours of the request being made by the *curator ad litem*;
- 5.7.7 The Respondent has completed two comprehensive parenting courses, one pertaining to general parenting and the other as an attachment programme to restore the parent-child bond; and
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- 5.7.8 The Respondent abstains from the use of alcohol and other psychoactive substances when the child is in her presence unless prescribed by the treating professional/s;
- 5.8 In such event, the *curator ad litem* shall file a report to all parties concerned as well as to this Court.
- 5.9 For this purpose, the curator ad litem and the relevant social workers and treating professional/s shall be entitled to interview all the relevant and necessary parties, including the parties to this application, friends and family as well as the minor child and the minor child and the Respondent's treating professional/s without having to obtain the parties' prior permission thereto.
- 5.10 The Respondent's Counter-Application is dismissed.
- 5.11 Each party to pay their own cost.



S. CHESIWE

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