

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 6540/2023

In the matter between:

S[...] **B[...]**

Applicant

and

C[...] **B[...]**

Respondent

CORAM: LOUBSER, J

HEARD ON: 6 DECEMBER 2023

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 11 DECEMBER 2023

[1] This application concerns the care and primary residency of two very young girls, A[...] aged 4, and H[...] aged 2 years. They are the children of the applicant and the respondent, who were divorced in this Division on 26 October this year. In terms of a Deed of Settlement between the parties, made an order of court on the day of the divorce, the primary care and the permanent residency of the children were awarded to the respondent. The

applicant was awarded contact rights, *inter alia* the right to take the children with him on alternative weekends.

[2] The applicant approached this court on Sunday 3 December 2023 with an urgent application concerning the children. The court postponed the application to 6 December to allow for the filing of further affidavits.

[3] The applicant moves for the following relief: That the order of the Children's Court dated 14 November 2022 be set aside, that a private social worker be ordered to conduct an investigation pertaining to the exercise of care and contact by the parties, and that a *rule nisi* be issued, returnable on 29 February 2024, calling on the respondent to show cause why the rights of primary care and residence of the children shall not be awarded to the applicant with contact rights to the respondent, to be exercised under the supervision of a social worker. Further to this, that the applicant's obligation to pay maintenance in respect of the children per the Deed of Settlement, be suspended pending the final determination of the application, and whilst the children are in the primary care of the applicant. Finally, that pending the investigation by the private social worker, the applicant be awarded the primary care and residence of the children with immediate effect.

[4] It appears from the application papers that the applicant approached the Children's Court on 10 November 2023 on an urgent basis for a declaratory order that the children are in need of care and protection in terms of section 151 of the Children's Act 38 of 2005, and that they be placed in the temporary safe care of the applicant. Further, that a private social worker be appointed to forensically assess A[...] and to submit a report to the court. In his founding papers in the Children's Court, the applicant said that in recent weeks, he noticed that A[...] did not want to go back to the respondent. He did request a forensic assessment from the respondent to establish the reasons for this reluctance to go to the respondent, but the respondent failed to take any steps.

- [5] It further appears that on the day of the Children's Court proceedings, the presiding magistrate ruled that a social worker report must first be obtained, and the court then ordered a departmental social worker on 14 November 2023 to do the investigation. The application was then postponed to 12 January 2024 by the court.
- [6] In the present application, the applicant says that the respondent eventually agreed to an assessment of A[...] on 14 November 2023, on condition that it is done by a certain private social worker. Before that could take place, however, A[...] disclosed to the applicant and his present partner on 18 November 2023, that one C[...] had touched her private parts. C[...] is a 20-year-old family member of the respondent, who had moved in with the respondent and the children after the parties had separated. This happened with the blessing of the applicant.
- [7] The following day, 19 November 2023, the applicant then opened charges against C[...] at the police station, and he notified the respondent of the events. The applicant mentions that the respondent then again agreed to a forensic assessment, and he further mentions that C[...] no longer resides at the respondent's house. He also mentions that a forensic assessment will now be conducted by a social worker of the SAPS, and that he was told by the police that no other assessment will be allowed.
- [8] In her answering papers the respondent says that she was not aware of any sexual abuse in her house, that is, until 19 November 2023. She claims that she was never reluctant for an assessment, and she points out that she had already on 31 October 2023 signed a form consenting to play-therapy for A[...]. She further says that she is best suited to care for the girls, and she denies that the children are neglected. They are always provided for, she says. If the need arises, her mother here in Bloemfontein can also assist at home.
- [9] Now it is clear that there is presently not a good relationship between the respondent and A[...]. According to the applicant, A[...]'s reluctance to return to the respondent became severe since August/September this year.

Elsewhere he says that A[...] has undergone a complete personality change since August 2023. We do not know what the reasons are, but it could probably be attributed to the alleged sexual abuse. For this the respondent cannot be blamed, because according to her, she simply was not aware of the abuse. When she became aware, she immediately took steps to chase C[...] out of the house.

[10] Despite the applicant's accusations that the unsatisfactory relationship between the respondent and A[...] is due to the respondent's neglect of the child, the fact remains that the applicant was satisfied to sign a deed of settlement only a month and a half ago that the primary care and residence of the children be awarded to the respondent. It is clear that the continued reluctance of A[...] to go back to the respondent, then caused the applicant to seek relief from the Children's Court a mere two weeks later. That Court ordered an investigation to be done by a social worker, and her report is still pending.

[11] This court is presently in no better position than the Children's Court to determine the real reason for A[...]’s behavior, because there is not yet a report by a social worker. The applicant complains that the social worker has so far only visited the respondent's house, and she has not even bothered to consult with himself. His misgivings in this respect is premature, because the social worker has obviously time until 12 January 2024 to finish her work and submit a report.

[12] The real question is whether the applicant has shown sufficient grounds upon which this court should interfere with the proceedings in the Children's court at this point in time. We know that after those proceedings were instituted, it was revealed that A[...] was allegedly abused sexually. The pending forensic assessment of A[...] by the police will hopefully shed more light on this aspect, but to blame the respondent for this state of affairs, is in my view going too far. There is no evidence before me that the respondent had known of the alleged abuse or that she could have prevented it. There is also not persuasive evidence before me on the facts that the respondent had dragged her feet to have A[...] forensically assessed. On the contrary, on 31

October 2023 she had already consented to play-therapy with the child. In the premises, I come to the conclusion that no sufficient grounds have been shown for this court to take the children away from their mother immediately and before the Children's Court had occasion to decide the matter on the basis of the social workers' report. Meanwhile, nothing stands in the way of any of the parties to also request a private social worker to investigate and to submit a report. It is not necessary for this court to make an order to such effect.

[13] It follows that the proceedings in the Children's Court must be allowed to run its course. This court does not need to interfere with that process at this stage. The Deed of Settlement must also remain in place until the Children's Court has pronounced itself on the matter.

[14] In the premises, the urgent relief sought by the applicant cannot succeed. As for costs, this court cannot blame the applicant that he felt the need to seek relief in the best interests of his children. Because the children are of such tender age, the respondent can also not be blamed for opposing the application. In the premises, each party should pay their own costs.

[15] The following order is made:

1. The application for urgent relief is dismissed.
2. There is no order as to costs.

P.J. LOUBSER, J

On behalf of the applicant:
Instructed by:

Adv. J Ferreira
Phatshoane Henney Inc
Bloemfontein

On behalf of the respondent: Adv. K Naidoo
Instructed by: JL Jordaan Attorneys
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