IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE

(2) OF INTEREST TO OTHER JUDGES

(3) REVISED

CASE NUMBER: 50346/17

DATE:11/1/2018

C S Applicant

V

R G Respondent

JUDGMENT (Reason)

MABUSE J:

[1] The applicant in this matter is C S. For purposes of convenience and distinct ion, I will refer to her as "S". She is the biological mother of a minor child called "N G" . The respondent, R G, to whom I shall refer as "R", for purposes of convenience and distinction, is the biological father of N.

[2] The reason for the distinction is as follows. On 4 August 2017 R brought an application against S on an urgent basis. He was therefore the applicant while C was, in that application, the respondent. That application was brought under case number 50346/17 of this Court. The said application concerned the said child.

Following the said application, the Court on 4 August 2017 granted R, as the applicant, the following relief, against S , the respondent :

"THAT:

1. *The primary care and residence of N G, born on 13 January 2010 ("minor child"), shall be with the Applicant, pending investigations by the Office of the Family Advocate ;*
2. *The Respondent will immediately make available and provide to the Applicant all school related items of the minor child;*
3. *The Office of. the Family Advocate investigate the best interests of the minor child with specific reference to her primary residence , care, contact and guardianship and to make a recommendation in this regard ;*
4. *Pending investigations, the Respondent is awarded the following rights of contact with the minor child :*
   - *4.1 Every alternative Saturday and/or Sunday from 10h00 - 13h00 under the supervision of the Applicant , or a person so nominated by the Applicant at the residence of the Applicant or a public venue to be nominated by the Applicant ;*
   - *4.2 Telephonic contact at any reasonable time .*
5. *The relief sought in part B of the notice of motion be postponed sine die;*
6. *The Applicant and Respondent be granted provisional leave to supplement their papers as necessary for the hearing of Part B once the Family Advocate's recommendations are made available;*
7. *The costs of the hearing of Part A of the application to be reserved for the hearing of Part B of the application.*

BY ORDER

REGISTRAR"

[3] The Court order therefore speaks for itself that ever since 4 August 2017, N has been in the care of R and that S only had contact rights which rights she was entitled to exercise in accordance with paragraph 4 of the aforementioned Court order; that the relief that was awarded to R on 4 August 2017 was not designed to be of a permanent nature. This is clear in particular from paragraphs 1, 2 and 4 of the aforementioned Court order . In brief, the Court on 4 August 2017 awarded the primary care and residence of N to R while the Family Advocate was empowered and authorised, in paragraph 3 of the said order, to investigate the best interests of the said child with specific reference to her primary residence, care, contact and guardianship, and having done so, to make recommendations in this regard. Later in this judgment I will deal with the Family Advocate and his or her powers.

[4] Both parties received the much awaited Family Advocate's report, S in particular on 5 December 2017. Having received and perused the said report, S's attorneys immediately addressed a letter and sent the proposed report to R's attorneys for R's comments. In that letter they requested R's attorneys obviously to place the letter before R so that he could peruse it and, having done so, give them instructions whether or not he accepted the Family Advocate's recommendations. At the same time, and buoyed by the recommendations of the Family Advocate with regard to the best interests of the minor child with specific reference to her primary residence, care, contact and guardianship, S's attorneys made a humble request that the minor child be returned to her care under certain conditions.

[5] In a letter dated 5 December 2017, R's attorneys wrote and informed S's attorneys that R did not accept the Family Advocate's report and was not prepared to accept it. On 7 December 2017 R 's attorneys wrote a follow-up letter to S's attorneys. In this follow-up letter R's attorneys made it clear that they did not believe that it would be in the minor child's best interests if she was returned to S's care. Furthermore they indicated that they too did not accept the recommendations of the Family Advocate. It is of cardinal importance to point out that in their letter dated 5 (is it not 7?) December 2017, R's attorneys had fully set out the respects in which they did not agree with the Family Advocate ' s report.

More later about such respects.

[6] When the attempts at resolving the parties' disputes amicably failed to produce the desired results, S's attorneys launched an application, now, armed with the Family Advocate's report, for the following relief:

"1. That the normal rules pertaining to forms services and time periods be disposed of and that this application be regarded as urgent as provided for in Uniform Rule 6(12);

2. That the minor child, N G, be returned to the primary care and residence of the applicant;

3. That both parties be granted full parental rights and responsibilities with regards to guardianship pertaining to the minor child;

4. That the applicant be granted primary care and residence of the minor child subject to the respondent' s right of contact with the minor child;

5. That the respondent be granted contact as set out and stipulated in the Family Advocate's report dated 5 December 2017;

6. That the respondent e ordered to pay the costs of this application;

7. Further and/or alternative relief "

[7] R was not amused by the application brought by S . The said application came, for good reasons in my view, under severe criticism by R. In the first place it was brought under case number 50346/17, the case number in which R was the applicant and S the respondent. In S's application, though under the same case number, S called herself the applicant while she referred to R as the respondent. It is for this reason that in his opposing affidavit R referred to S as a *quasi-applicant.*

[8] In her heads of argument, Adv E de Lange, appearing for S, dealt with this conundrum as follows. The first urgent application, here she referred to the urgent application that R had launched on 4 August 2017, consisted of Part A and Pa rt B. In Part B of the application the respondent, here referring to R, sought an amendment of the settlement agreement concluded by and between the parties on 8 May 2015 and which settlement agreement was confirmed by the Court

when it granted a decree of divorce on 12 May 2015 . According to Ms de Lange Part A of the said application had made provision that the parties may set Pa rt B down after the finalisation of the Family Advocate's report. Part B of the said application was accordingly postponed *sine die* and has not been set down by either of the parties. The application by S did not, in my view, amount to re-enrolment of Part B of R' s urgent application.

[9] Ms de Lange was quick to point out , and in fact to just if y S ' s launching of her application and failure to re-enrol Part B of R' s urgent application, that it was import ant to notice that the relief set out in Part A did not make any provision for a return date on which S could oppose that relief set out in Part A, after receiving the Family Advocate' s report. The order that the Court granted on 4 August 2017 merely provided for Part B of R's urgent application to be set down. That the said order that was granted on 4 August 2017 had not provided for a fixed return date when S could challenge the granting of Part A, was correct. Whether or not that is the correct interpretation of the Court order of 4 August 2017 will be decided later.

[10] S 's conduct of launching her application elicited severe criticism from Adv L van der Westhuizen, who appeared for R. For her part Adv van der Westhuizen criticised S for electing to file a separate urgent application under the same case number of an urgent application wherein the respondent, in other words R, in fact was the applicant. She developed her criticism of S by stating that the Court order of 4 August 2017 granted by Manama J, and in particular in paragraphs 5 and 6 thereof, made provision that part B of that application be postponed *sine die* and furthermore that the parties be granted leave to file supplementary affidavits once the Family Advocate's report became available. She criticised S, under the circumstances, of deeming it fit to approach this Court on a brand new urgent application in which she called herself as the applicant and R as the respondent in the same case number. It was for this reason that she too referred to S, in this instant application, as the *quasi* applicant.

[11] She labelled S 's conduct in launching her application as an irregularity . She pointed out that failure to re-enrol Part B of R's urgent application as an act which, for practical purposes, will cause Part B still to be pending. She argued

furthermore that R will suffer extreme prejudice if S's fatally defective step was excused and if this current application was finalised. She opined that the finalisation of S's application constituted an irregular step and a gross irregularity. For the aforegoing reason at the hearing of S's application, Ms van der Westhuizen, on behalf of R, raised a point *in limine* of *lis pendence.*

[12] **THE ORDER OF 4 AUGUST 2017 PROVIDED NO RETURN DATE**

It is not correct, as was argued by Ms de Lange, that there was no return date . This return date was, for obvious reasons, not fixed but determinable. It could not be fixed as it was not known how long it would take the Family Advocate to prepare a report, or, put otherwise, the date on which such a report would be available was unknown. That return date would then be fixed upon receipt of the Family Advocate's report. Secondly, it is also not correct that on such a return date, only the relief sought in part B would be the subject of the application. It is clear from paragraph 1 of the order of 4 August 2017 that the issue of primary care and residence of the minor child would still be argued. At the pain of repetition, the said paragraph reads as follows:

"1. The primary care and residence of N G, born on 13 January 2010 ("the minor child") shall be with the Applicant, pending investigations by the Office of the Family Advocate."

This, in my view, makes it abundantly clear that the award to R of the primary care and residence of the minor child was of interim nature and that it would still be the subject of a further debate upon receipt of the report by the Family Advocate. Therefore the argument by Ms de Lange lacked merit.

[13] **THE APPLICATION BY S WAS AN IRREGULARITY**

That argument by Ms van der Westhuizen can be answered simply by reference to what the Court in J v J 2008(6) SA CPD 30 at page 37 paragraph 20 stated. The Court had the following to say :

“20. As the upper guardian of minors, this Court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view

to deciding the issue which is of paramount importance; the best interest of the child."

In Terblanche v Terblanche it was stated that when the Court sits as upper guardian in a custody matter, ... then it cited the following passage with approval:
"… it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of in formation, of whatever nature , which may be able to assist it in resolving custody and related disputes."
In **AD & DD v DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as intervening party 2008(3) SA 123 CC,** the Constitutional Court endorsed the view of the minority judgment in **De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae) 2007(5) SA 184 (SCA) par. 32 at page 200 E,** that :
"The interests of minors should not be "held to ransom" for the sake of legal niceties. It further held that *...,* the best interests of the child should not be mechanically sacrificed on the altar of justification of formalism."

[14] Accordingly I accept the approach adopted in the aforegoing authorities. Whether S brought a brand new application or should simply have re-enrolled Part B of R's urgent application, the overriding factors, in my view, therefore, are firstly , that the Court was dealing with the best interests of the minor child which should take precedence over formalism; secondly, what this Court dealt with in this current application was merely a continuation by S of what R had started on 4 August 2017 . Therefore, the parties were not confused with what substantially they were dealing with; the two applications were not fundamentally unrelated to each other. Thirdly , the parties were each given an opportunity to argue the matter in terms of paragraph 6 of the Court order of **4** August 2017 and, fourthly, no party has claimed and proved prejudice by the steps taken by S ; fifthly, the parties, in both applications , dealt with identical issues; and sixthly, following the

receipt by them of the Family Advocate's report, the parties dealt fully in their affidavits with such a report and thereby complied with paragraph 6 of the Court order of 4 August 2017. In my view, the reason for re-enrolling Part B of the urgent application of 4 August 2017 has since fallen away..

[15] **THE FAMILY ADVOCATE'S REPORT**

The granting of the Court order on 4 August 2017 was made subject to the investigations by the Family Advocate. In paragraph 3 of the Court order of 4 August 2017 the office of the Family Advocate was specifically mandated by the Court to investigate the best interests of the minor child with specific reference to her primary residence, care, contact and guardianship. He or she was also requested, as it is his or her duty to do so, to make recommendations in that regard. Before dealing with the Family Advocate's report it is only apposite that I dealt firstly with the institution called the Family Advocate.

[16] The Family Advocate is established by the provisions of the Mediation in Certain Divorce Matters Act 24 of f1987 ("the Act"). The purpose of the Act is to provide for mediation in certain divorce proceedings, and in certain applications arising from such proceedings, in which minor or dependent children of the marriage are involved, in order to safeguard the interests of such children; and to amend the Divorce Act in order to provide for the consideration by a Court in certain circumstances of the report and the recommendations of the Family Advocate before granting a decree of divorce or other relief and to make the provisions of s 12(1) and (2) of the said Act applicable to any enquiries instituted in terms of this Act and to provide for matters connected therewith.

[17] The Family Advocate is appointed in terms of s 2(1) of the Act. The said section 2(1) provides as follows:

"The Minister may appoint one or more officers in the public service at each division of the Supreme Court of South Africa to be styled the Family Advocate, to exercise the powers and perform the duties granted or assigned to the Family Advocate by or under this Act or any other law and the Minister , or any person authorised thereto in writing by him, may appoint one or more persons, whether or not they are officers in the public service, at any such division to act as Family

Advocate or Family Advocates for the duration of a specific divorce action or an application or for more than one such action or application."

[18] Section 2(2) states as follows:

"No person shall be appointed as Family Advocate unless he is qualified to be admitted to practise as an advocate in terms of the Admission of Advocates Act , 1964 (Act No. 74 of 1964}, and the Minister deems him to be suitable for appointment as a Family Advocate by reason of his involvement in or experience of adjudication or settlement of family matters."

Section 3 of the Act deals with the appointment of the Family Counsellor s. It provides as follows:

"3(1) Subject to the provisions of this section the Minister may appoint at each division of the Supreme Court of South Africa one or more suitably qualified or experienced persons to be styled the Family Counsellor, to assist the Family Advocate with an enquiry in terms of any applicable law."

[19] Section 4 deals with the powers and duties of the Family Advocate. It provides as follows:

"4(1) The Family Advocate shall -

(a) after the institution of a divorce action; or

(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child , made in terms of the Divorce Act, 1979 (Act No. 70 *of 1979), if so requested by any party to such proceedings or the Court concerned, institute an enquiry to enable him to furnish the Court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matters as is referred to him by the Court.*

4(2) The Family Advocate may-

(a) after the institution of a divorce action; or

(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of or access to, a child, made in terms of the Divorce Act, 1979, if he deems it in the interest of any minor or dependent child of the marriage concerned, apply to the Court concerned for an order authorising him to institute an inquiry contemplated in subsection (1).

4(3) Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a Court, appear at the trial of any divorce action or the hearing of any application referred to in {l){b) and (2)(b) and may adduce any available evidence relevant to the action or application and to cross-examine witnesses giving evidence thereat."

[20] The purpose of the Family Advocate is to promote and protect the best interests of the minor or dependent children in legal parental responsibilities and rights dispute. The professional component of the Office of the Family Advocate consists of lawyers, that is the Family Advocate, who in terms of the Admission of Advocates Act No. 74 of 1964, is qualified to be admitted and to practise as an advocate, and who by the Minister of Justice, is deemed to be suitable for appointment as the Family Advocate by reason of his involvement in or experience of adjudication or settlement of disputes relating to minor or dependent children in family matters and social workers (who are in terms of section 3 of the Act, called Family Counsellors) . This Office of the Family Advocate operates in multi-disciplinary teams in order to ensure a holistic and qualitative approach to the best interests of the child throughout the dispute resolution or in the Court's adjudication process . The legislative mandate of the Family Advocate is in consonant with the provisions of s 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") which states that:

"A child's best interests are of paramount importance in every matter concerning

a child."

At the same time section 9 of the Children' s Act 38 of 2005 ("the Children's Act") provides that : *"In all matters concerning the care, protection and wellbeing of a child the standard that the child's best interests is of paramount importance, must be applied."*

Section 7 of the Children's Act sets out the factors that must be taken into consideration by the Court in the pursuit of the best interests of the child's standard. These factors are too numerous to enumerate in this judgment. It is crucially important, though, that the facts must appear uppermost in the Court's mind when it determines the best interests of a minor or dependent child .

[21] The powers of the Family Advocate are:

21.1 to institute an inquiry so as to be able to provide the Court with a report and recommendation on any matter concerning the welfare of the minor child e.g. as in this current case, the primary residence, care, contact and guardianship of N ;

21.2 to appear at the trial or hearing of any application concerning the best interests of the minor child;

21.3 to adduce any available evidence ;

21.4 and to cross-examine witnesses giving evidence .

See in this regards 4(3) of the Act.

[22] The powers and duties of the Family Advocate as set out in the Act have been extended by the provisions of the Children's Act. According to the Children's Act, it is compulsory for parties to attend mediation by Family Advocate in parental rights and responsibility disputes. Section 33(5) of the Children's Act provides that:

"(5) In preparing a parenting plan as contemplated in subsection (2) the parties must seek-

(a) the assistance of a Family Advocate, social worker or psychologist; or

(b) mediation through a social worker or other suitably qualified person."

It is of paramount importance to point out that the Family Advocate cannot be subpoenaed to Court as a witness to testify on behalf of any party even if his or her recommendation favours either of the parties to a dispute. Secondly, the recommendation of the Family Advocate is designed to assist the Court in its adjudication of a matter or dispute between the parties and to arrive at a particular order; the recommendations itself lacks the force of law unless it is incorporated in a Court order. Finally, the Family Advocate is a neutral institution and cannot act as a legal representative of either of the parties on any matter.

[23] As indicated earlier, the Family Advocate was mandated by paragraph 3 of the Court Order dated 4 August 2017 to prepare a report in order to assist the Court in its adjudication of the dispute between the parties herein. The aspects that the Family Advocate was required to investigate and to make recommendation on were clearly set out in the said paragraph 3. Other than as set out in the said paragraph 3, no limits to his or her powers were set. He or she was left to do his or her work as he or she deemed it fit. The Family Advocate did his or her work and furnished the parties with the copies of his or her report. S received hers on 5 December 2017. I have somewhere *supra* already narrated the history of further developments after she had received the report.

[24] **THE FAMILY ADVOCATE'S REPORT**

A copy of such a report was annexed to S 's founding affidavit as 'CS13'. The Family Advocate who compiled the said report was Shantelle Cordelia Roschelle Dames .

24.1 She stated as in paragraph 3 of her report:

"3

Stappe geneem deur hierdie kantoor:

3.1 Die partye word gesamentlik in onderhoud betrek op 13 September

2017.

3.2 Die minderjarige kind word op 13 September 2017 waargeneem.

3.3 Op 20 *September 2017, word daar deur Mnr. Hattingh, gesinsraadgewer, 'n besoek by die minderjarige kind se skoal afgele ten einde met hoar ouderdomstoepaslik in onderhoud te voer, hierdie onderhoud vind nie plaas nie weens die Applikant wot die kind verwyder by die skoal* om *'n doktersafspraak na te kom, sien hierin Bylae "A" paragraaf* 5 *daarvan.*

3.4 Onderhoud met die minderjarige kind op 22 September 2017, deur Mnr. Hattingh, by die minderjarige kind se nasorgsentrum.

3.5 Door word insae verkry in die volgende:

3.5.1 Die hofdokumente;

3.5.2 E-pos skrywes deur die Applikant se regsverteenwoordigers, gedatteer 21 November 2017 en die minderjarige kind se skoolvorderingsverslag vir skoolkwartaal 1 tot 3;

3.5.3 E-pos skrywes deur die Applikant se regsverteenwoordigers, gedatteer 21 November 2017 en 'n skrywe vanaf Me C Davel, spelterapeut , gedateer 13 November 2017, welke terapeuties betrokke is by die minderjarige kind."

24.2 In paragraph 4 the report continues as follows:

"4

Ek versoek Mnr K Hatt ingh, 'n geregistreerde Maatskaplike werker en voltydse Gesinsraadgewer om my behu/psaam te wees met die ondersoek. Ek bewys die Agbare Hof beleefd nosy verslag hierby aangeheg gemerk Bylae "A" , welke verslag my behu/psaam was ten einde tot my aanbeveling te kom."

24.3 In paragraph 5 he or she continued as follows:

"5

Die dispuut:

Die residensie van die minderjarige kind word in dispuut geplaas."

24.4 And in paragraph 6 of her report he or she continued with the backgrounds or the facts. In paragraph 7 he or she has the following to report:

"7

Onderhoud en waarneming van die minderiarige kind, sien hierin Bylae "A" paragraaf 4 tot 6 daarvan:

7.1 Die minderjarige kind ervaar die skeiding vanaf die Respondent emosioneel swaar en het 'n intense behoefte om met die Respondent herenig te word.

7.2 Dit word ook deur die kantoordame, Me Bel/ors, bevestig dot die dogter aan hoar te kenne gegee het dot sy no die Respondent verlang."

[25] In paragraphs 4-6 of Annexure A to the Family Advocate's report which is a report by Kenneth Hattingh it is recorded as follows:

"4

4.1 Na afloop van die gesamentlike gesprek met die betrokke partye op 13 September 2017, was die minderjarige kind nie bereid om van hoar moeder te skei ten einde die ondergetekende in stoat te stel om met hoar 'n onderhoud te voer nie.

4.2 Dit was duidelik dot die minderjarige kind uitermatige skeidingsangs toon en get raumatiseerd , voorkom .

5.1 *'n Onderhoud met die minderjarige kind by hoar naskool, is gereel vir 20 September 2017.*

5.2 *Met aankoms by die skoal het die naskooljuffrou die ondergetekende egter in kennis gestel dot die vader die minderjarige kind dokter toe geneem het aangesien sy siek was.*

5.3 *Die moeder is telefonies geskakel en het aangedui dot sy wel die vader versoek het om die minderjarige kind terug te neem no die naskool no die doktersafspraak ten einde die ondergetekende in stoat te stet* om *die onderhoud met die kind te voer.*

5.4 *Die ondergetekende het die vader ook geskakel, moor hy het aangedui dot hy nie kennis gedra het van die ondergetekende se afspraak vir 'n onderhoud met die kind nie en dot die ondergetekende eerder ham in kennis moes stet, aangesien hy huidig die party is wie residensie ten opsigte van die minderjarige kind geniet.*

5.5 *Die ondergetekende het die moeder sowel as die vader in kennis gestel dot 'n ander afspraak gereel sat word.*

6.1 *Tydens die onderhoud met die minderjarige kind, N , by Siembamba Nasorgsentrum, op 22 September 2017, was sy baie skaam en teruggetrokke en was dit duidelik dot dit nie vir hoar maklik is* om *oar hoar gevoelens en ervaringe te kommunikeer, nie.*

6.2 *Wat egter wel duidelik no vore getree het uit die inhoud wot N tydens die onderhoud verskaf het, en dot sy huidig getraumatiseerd is* om *van hoar moeder verwyder te wees en 'n intense behoefte het om met hoar moeder herenig te word.*

6.3 *Mev. Juanel Bellors, die kantoordame van die Naskoolsentrum, het aangedui dot sy waargeneem het dot N ongeveer twee weke tevore een middag alleen by 'n sandput gesit het en duidelik emosioneel onsteld voorgekom het.*

6.4 Mev. Bellors het aangedui dot die minderjarige kind aan hoar meegedeel het dot sy no hoar moeder verlang .

6.5 Mev. Bellors dui aan dot sy die vader geskakel het om hom in te lig van die minderjarige kind se emosionele welstand waarop die vader reageer het dot N probeer om hulle te manipuleer en dot hulle maar hoar moet los sodat sy self die situasie verwerk .

6.6 Beide Mev. Bel/ors en Mev. Angelique Fouche, N se naskoolopsigter, het aangedui dot N skaam en teruggetrokke voorkom by die skoal en nie maklik kommunikeer nie."

[26] A valuation of the child is contained in paragraph 8 and is reported as follows:

8

EVALUASIE:

8.1 Dit is duidelik vanuit hierdie ondersoek, dot die minderjarige kind met hoar moeder as hoar primere emosionele bindingsfiguur en primere versorger identifiseer.

8.2 Die minderjarige kind ervaar die skeiding van hoar moeder traumaties en ervaar 'n intense behoefte om in die sorg van hoar moeder herstel te word.

8.3 Die moeder toon 'n positiewe ingesteldheid teenoor die minderjarige kind en die uitoefening van hoar ouerlike verantwoordelikhede en regte ten opsigte van die minderjarige kind .

8.4 Die moeder toon ook ' n sensitiwiteit vir die minderjarige kind se emosionele behoeftes.

8.5 Die feit dot die vader volhou met sy aansoek om residensie ten opsigte van die minderjarige kind te bekom, ten spyte van die ooglopende trauma wot die minderjarige kind ervaar om van hoar moeder geskei te wees, skep vrae oor sy behoorlike insig en sensitiwiteit vir die minderjarige kind se emosionele behoeft es.

8.6 Die moeder is in stoat om *in die minderjarige kind se f isiese-, emosionele- en intellektuele versorgingsbehoeftes te voorsien.*

8.7 Die tydelike ontwrigting wot die minderjarige kind mag ervaar deurdat hoar residensie terug gewysig word na die moeder weeg nie swaarder as die langtermyn voordele wot dit vir die minderjarige kind sat inhou om *herenig te word met hoar primere versorger en primere emosionele bindingsfiguur, nie.*

8.8 Die minderjarige kind verwoord 'n uitgesproke behoefte om *herstel te word in die primere sorg van hoar moeder.*

8.9 Die moeder is in stoat om *aan die minderjarige kind die nodige f isiese-, en emosione!e sekuriteit te bied en* om *die minderjarige kind se inte llektuele , emosionele, sosiale en ku/turele ontwikkelingsbehoeftes effektief aan te spreek .*

8.10 Die moeder is in stoat om *aan die minderjarige kind die nodige stabiele en versorgende gesinsomgewing te bied.*

8.11 Aangesien die moeder hoar verhouding met hoar ver!oofte beeindig het, is daar geen voortgaande risiko dot die minderjarige kind aan ieder konflik of geweld tussen die moeder en hoar verloof de, blootgestel kan word, nie.

8.12 Gegewe die minderjarige kind se emosionele trauma is dit die ondergetekende se mening dot uitgebreide kontak regte vir die vader nie ondersteun word nie."

[27] The social worker made recommendations as follows in paragraph 9 of her own report:

"9

AANBEVELING:

In die Jig van al die bogenoemde, is dit die ondergetekende se mening dot dit in

die beste belong van die minderjarige kind blyk te wees dot:

9.1 Volle ouerlike verantwoordelikhede en regte behou word deur beide part ye.

9.2 Residensie ten opsigte van die minderjarige kind toegeken word aan die moeder.

9.3 Die spesifieke ouerlike verantwoordelikheid en reg van kontak met die minderjarige kind , toegeken word aan die vader, as volg:

9.3.1 Kontak met verwyderingsregte elke alternatiewe naweek van 'n Vrydagmiddag 17h00 tot Sondagmiddag 17h00.

9.3.2 Telefoniese kontak op 'n Dinsdag en Donderdagaand , tussen 18h30 en 19h00 .

9.3.3 Telefoniese kontak op die Sandoe wot nie val op die moeder se naweekbesoeke , nie.

9.3.4 Kontak met verwyderingsregte elke alternatiewe, roterende kart skoal vakansie en die roterende, alternatiewe gedeelte van die long skoolvakansies . Kersfees en Nuwejaar behoort onderskeidelik en alternerend tussen die partye te roteer.

9.3.5 Kontak met verwyderingsregte op Vadersdag.

9.3.6 6 Kontak met verwyderingsregte op die vader se verjaarsdag.

9.3.7 Kontak met verwyderingsregte op elke alternatiewe, of alternatiewelik, 'n gedeelte van die minderjarige kind se verjaarsdag .

[28] The Family Advocate himself or herself made the following recommendations:

" 9

AANBEVELING:

Na deeglike oorweging van al die relevante f eite, die Hofdokumentasie tot my beskikking en die aangehegte Bylae A, word derhalwe aanbeveel dot :

9.1 dot die spesifieke ouerlike verantwoordelikhede en regte ten opsigte

van sorg en voogdyskap deur beide partye behou word;

9.2 residensie van die minderjarige kind word toegeken aan die Respondent;

9.3 spesifieke ouerlike verantwoordelikhede en regte ten opsigte van kontak toegeken aan die Applikant so vervat in Bylae A, paragraaf 9.3 in geheel."

It will be recalled that in this reports both by the Family Advocate and the Family Counsellor the parties were referred to as in the urgent application launched by R.

[29] A certain advocate Maryna Steenekamp, of Legal Aid South Africa, wrote a letter on 5 December 2017 in which she indicated that she supported the recommendations in the Family Advocate ' s report. She also had obtained a copy of the Family Advocate's report from the Office of the Family Advocate on 5 December 2017 .

[30] Attached to the application as Annexure 'CS16' was a report by Claudie Davel, child counsellor, what is of paramount importance in her report is that she made it very clear that:

"The intention of play therapy was never to assess N's needs and wishes regarding primary residency and visitation with her parents, although she has shared some of these wishes spontaneously during consultation."

[31] The criticisms that R or his attorneys levelled against the Family Advocate's report are contained in Annexure 'CS11 '. There are several of such criticisms. In my view , these criticisms are unfair and base less. This Court is at large to consider the contents of the report holistically and to determine, whether in its view, the report deals comprehensively with the interests of the minor or dependent child. The Court must be satisfied with the steps that the Family Advocate took in the compilation of the report. If there should be a doubt that one step in the compilation of the report was missed or not properly done, the Court should find that there was no genuine basis for the Family Advocate's recommendations. The Family Advocate ' s recommendations must be based on

objective facts discovered by the Family Advocate or Family Counsellor and such facts must be contained in the report. The Court must be ab le, on reading the report, to establish how the Family Advocate reached his or her recommendations.

[32] The Family Advocate's report will always be a debatable issue from the perspective of a disgruntled party, especially where its recommendations do not satisfy such a party. The one party who is not favoured by such a report, especially its recommendations, will always look at such a report with an askance eye in order to find faults in it. The purpose of the Family Advocate's report is not so much to please the parties as it is to place information before the Court in order to guide it to make a finding on the best interests of the minor or dependent child. It is accordingly the Court itself that must complain about the deficiency in the report. It is therefore only if the Court is not satisfied with such a report that it may order an alternative method to obtain an alternative report. This is so because no party will be satisfied with the report that does not favour him or her. If a Court were to allow the parties' unrestricted criticism of the report to supercede its discretion, such criticism of the Family Advocate's report by the parties will never cease. The question therefore is not whether, in the eyes of the parties, the Family Advocate's report is defective or not, but whether or not, for the purposes of establishing . the best interests of the minor or dependent child, such a report serves it s purpose and whether the Court is satisfied with it, despite the perceived short comings . Moreover, there is no genuine reason, in my view, why such a report should not be placed on the same pedestal as the reports referred to in section 63 of the Children's Act.

[33] This Court was satisfied with the report that the Family Advocate submitted according to the Court order of 4 August 2017, for the following reasons. The Family Advocate took all the necessary steps to obtain information it placed before the Court; the Family Advocate who is appointed as such by reason of his involvement in or experience of adjudication or settlement of family matters, a practising advocate who is in turn suitably qualified or experienced, worked in conjunction with a Family Counsellor . The Family Advocate who prepared the

report in question is, in my view, indisputably steeped in the knowledge of the applicable law and authorities that deal with minor children. This knowledge is manifested in the fact that in her report she referred to relevant caselaw and legislation. In her report she cited the following cases and paragraphs in support of her findings:

"Fletcher v Fletcher 1948 (1) SA 130 (A):

> *"In regard to the factor of uprooting , it may ... be necessary in a particular case to remove children from the custody of the parent who has been looking after them, but, ... it is undesirable to increase the shock inevitably occasioned through their parents' quarrel by disturbing the current of their lives more than is necessary ...".*

McCall v McCall 1994 (3) SA 201:

> *"the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo."*

Soller NO v G and Another 2003 (5) SA 430 (W):

Waar hoar Edele Satchwell R die rot en funksie van die Gesinsadvokaat as volg uiteensit:

> *"The Family Advocate, are required by legislation, reports to the Court on the facts which were found to exist and makes recommendations based on professional experience. In so doing the Family Advocate acts as an advisor to the Court and perhaps as a mediator between the family who has been investigated... The Family Advocate is not appointed the representative of any party to a dispute - neither the mother, father or any child . In the sense, the Family Advocate is required to be neutral in approach in order that the wishes and desires of disputing parties can be more closely examined and the true facts and circumstances ascertained . The function of the Family Advocate has been described 'to be of assistance to a Court by placing facts and considerations before the Court. The Family Advocate should make a balanced recommendation and should not take sides against one party in favour of the other." (Whitehead v Whitehead 1993 (3) SA 72 (S E)."*

In my view there exists fundament ally no genuine reason why this Court should show lack of conviction in the Family Advocate's report. This Court accepts, without question, the recommendations of the Family Advocate with regard to the primary residence, care, contact and guardianship of the minor child, N G. In my view, it was in the best interest of the said minor child that she be returned to S; that S be granted primary care and residence of the said minor child subject of course to R's right of contact with the minor child . I therefore confirm the Family Advocate ' s report.

[34] Ms van der Westhuizen, in rejecting the Family Advocate's report for the reasons set out in Annexure 'CS11', proposed, on the basis of the judgment of my brother Msimeki J, in the unreported judgment of Barend Kearny v Charne Esterhuizen, case number 19685/2014, that an independent and external social worker and/or a child psychologist be appointed to investigate the very same aspects the Family Advocate in this matter had been mandated by the Court to do. Ms de Lange was against this proposition. She argued, among others, that such a trend would result in an unending process. I agree with her. With the greatest respect, I do not agree with the approach adopted by my brother, Msimeki J, in the aforementioned matter. The reasons why the Court rejected the Family Advocate's report in that matter do not appear from the record. Simply because the Family Advocate's report favoured either of the parties, did not necessarily mean that it must be rejected. It goes without saying that either of the parties will be dissatisfied with such recommendations. But that is not enough. The Court it self should consider the report holistically and if it is not satisfied with such a report, indicate the aspects on which it is not satisfied with the report. The parties are entitled to know the full reasons why a Court does not accept a Family Advocate's report. The Family Advocate himself or herself is entitled to know where he or she went wrong so that he or she should correct the mistakes . The judgment of my brother does not, in my view, furnish reasons why the Family Advocate's report in that matter was rejected and for that reason I am respectfully

not keen to follow it in this judgment. I therefore found that the proposition by Advocate van der Westhuizen to refer the matter to an independent and external social worker or psychologist was not a plausible one.

[35] On 29 December 2017, the Court granted the following order and promised to furnish its reasons later:

"1 . R G is hereby ordered to return the minor child to C S on 29 December 2017;

2. Both parties are hereby granted full parental rights and responsibilities, as per the settlement agreement dated 6 May 2015;

3. C S is hereby granted primary care and residency of the minor child as per the settlement agreement dated 6 May 2015;

4. R G is hereby granted rights of contact with the minor child as per the settlement agreement dated 6 May 2015;

5. Each party is hereby ordered to pay its own costs of both applications ;

6. Reasons for this order will follow in due course.

BY ORDER

REGISTRAR"

The aforegoing are therefore its reasons for the said order.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant: *Adv. E de Lange*

Instructed by:	*Michca J van Vuuren Attorneys*
Counsel for the respondent:	*Adv. L van der Westhuizen*
Instructed by:	*F van Wyk Attorneys*
Date heard:	*20 & 22 December 2017*
Date of Court Order :	*29 December 2017*
Date of Reasons:	*11 January 2018*