IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no: 2624/11
Date Heard:15/9/11
Date Delivered:22/9/11

In the matter between:

DEAN LYNTON MULLER **APPLICANT**

Versus

ADELE GROENEWALD **RESPONDENT**

JUDGMENT

SMITH J:

[1] The Applicant seeks an order directing the Respondent to submit to psychological examinations by Dr Heather Rauch and Mr Ian Meyer on 22 and 23 September 2011 respectively.

[2] The application has been brought pursuant to an action instituted by the Applicant for variation of a court order granted by the Southern Divorce Court in divorce proceedings between the parties on 20 September 2006 and in terms of which the Respondent was declared to be the custodian parent of the minor children, with the Applicant being granted visitation rights. The family advocate has filed a notice indicating

that he is not in a position to comment on the relief sought and that he would abide by the court's decision.

[3] The main issue in the pending action is the suitability of the Respondent as the custodian parent of the minor children, namely Teagan, a 9 year-old daughter and Kaylin, a 6 year-old girl. The Respondent has only filed appearance to defend and has yet to file a plea in the main action.

[4] The Applicant had arranged for the minor children and himself to consult Dr Heather Rauch, a clinical psychologist, on 27 May 2011 as a result of which she had filed a preliminary report. While she states that she needed to consult the respondent before a final recommendation could be formulated, she concluded that:

> "However, given the concerns raised by Mr Muller that have been specified as well as the initial impressions gained from the minor children, it is believed that such concerns are most valid and if confirmed, can undoubtedly be detrimental to the general well being of every child. Initial observations from the consultation with Teagan and Kaylin raised sufficient concern to warrant a full cycle social investigation. Teagan's defensiveness about and nervous circumstances is a significant concern. Both girls seemed to have a poorly established sense of themselves and themselves in relation to their family. My Muller's psycho-social circumstances have been explored and they are highly favorable. He is clearly a competent, dedicated father. Mr Muller's mother, Rica is an invaluable support system to her son but also to the girls. She not only cares for them physically but has taught them many basic life skills.

He had also consulted with Mr Ian Meyer, a clinical psychologist, on 9 June 2011 and Meyer has made, *inter alia*, the following findings:

> "In this preliminary assessment the examiner extensively interviewed the applicant, in addition to drawing on information derived from the assessment of the two minor children, who were not personally interviewed by the current examiner. The examiner has to date not consulted with the applicant's mother or

> any other relevant collateral witnesses because he does not want to do so prior to being instructed to embark upon a full custody evaluation. Nevertheless, based on the examiner's findings to date, it would appear that the applicant is a competent father who has a good support system to take adequate care of his two minor daughters.
> In the examiner's opinion, based on the reports of the applicant, underpinned by the findings contained in the report of Dr Rauch, it would appear that the applicant has reason to be concerned about the well-being of his daughters. Consequently it is necessary that a comprehensive custody evaluation be undertaken prior to being able to opine on the relative parental capacity of the parties or making any custodial recommendations."

[6] On 21 July 2011 the Applicant's attorneys wrote to the Respondent indicating that he intended to institute proceedings in the High Court for variation of the custody order. The preliminary reports of Mr Meyer and Dr Rauch were annexed to the letter. They also requested that the Respondent avails herself for assessment by these experts on 22 September 2011.

[7] The letter also stated that she was entitled to have her own medical advisors present and tendered her travelling and accommodation costs in Port Elizabeth. The letter further stated that if she did not confirm her willingness to submit to the assessment by 28 July 2011 an application for an order compelling her would be launched in the High Court. The Respondent's attorneys, Greyvensteins, replied on 25 July 2011, effectively stating that she refused to submit to the examination and stating, *inter alia,* that:

> "Our client will not be forced to attend the offices of your experts and any application brought to compel her will be opposed. The family advocate is more than capable of doing a detailed report if such application was brought."

[8] The Applicant subsequently caused a notice in terms of Rule 36(2)

of the Uniform Rules of Court to be served on the Respondent.

[9] Mr *De La Harpe,* who appeared for the Applicant, submitted that although Rule 36(2) is on the face of it only applicable to proceedings where damages in respect of bodily injuries are claimed, the judgment of Leach J in **Mann and others v Leach 1998 (2) ALL SA 217 ECD 222**, is authority for the submission that the Rule is applicable to psychological examinations also. I deal with this contention later on in my judgment.

[10] The Respondent has persisted in her answering papers with her refusal to submit to the examinations on the basis that the matter should be referred to the family advocate who will in all probability appoint independent experts. She averred further that the experts commissioned by the Applicant are not independent and their preliminary conclusions indicate that their objectivity had already been compromised.

[11] Regarding the applicability of Rule 36(2), I am in agreement with Mr *Dyke,* who appeared for the Respondent, that the facts of the **Mann** case are distinguishable. In that case the plaintiff claimed a substantial amount from a deceased' estate under section 2 of the Maintenance of Surviving Spouse Act, 27 of 1990, based on her state of health, her eyesight and capability to drive. Leach J examined several authorities before concluding that:

> "All these authorities therefore lead me to conclude that this court has the inherent power to direct a party to submit to having his or her privacy invaded by

> submitting to a medical examination. But that, of course, does not mean that it will always exercise its discretion in favour of the party seeking the order."

See **Mann and others v Leach** *supra* at page 223 H-I.

[12] He held however that:

> "The view that the inherent jurisdiction of the court should only be sparingly used to direct a party to submit to a medical examination is, in my opinion, correct. It should not be exercised as a matter of course merely because the rules omit to make provision for the relief sought. Instead, this court will only come to an applicant's assistance outside the rules when satisfied that justice cannot be properly done unless the relief is granted.
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> See **Mann and other v Leach** (supra) at page 224 B-C.

[13] He granted the relief on the basis that without such an examination the real truth could not be ascertained and that justice between the parties would not have been properly done.

[14] In this matter the trial court will have the power in terms of the common law and s. 29 of the Children's Act, 38 of 2005 (the Children's Act), to order, at the appropriate time, that a report and recommendations by a social worker, the family advocate or any other suitably qualified person must be submitted to it. In terms of s. 29(5)(a) of the Children's Act:

> "a matter specified by the court must be investigated by a person designated by the court."

[15] One can well understand the Respondent's reluctance to submit to the examination under circumstances where the Applicant had instructed

his experts without any reference to her and where the preliminary reports appear to contain certain *prima facie* findings favouring the Applicant's case.

[16] The trial court will in my view ultimately be guided by reports filed by the family advocate and other experts designated by it for these purposes. The major difference in my view between the facts of this matter and the circumstances confronting Leach J in the **Mann** case is that in matters where the interest of minor children are of paramount concern and the court is called upon to exercise its jurisdiction as upper guardian of the minor children, the procedures provided for in terms of the common law and the Children's Act provide for a far more inquisitorial and active role for the court. The trial court will therefore have extensive power to subpoena witnesses. In the **Mann** case there was no other procedure available to the court to ensure that the necessary expert evidence is placed before it. The suitably qualified experts who will undoubtedly be appointed by the trial court will be persons whose independence and objectivity will be beyond reproach. While it does appear that the experts consulted by the Applicant are indeed suitably qualified, the fact of the matter is that they remain the Applicant's expert witnesses and under these circumstances I am not inclined to compel the Respondent to submit to the psychological examinations.

[17] Mr *Dyke* has submitted that costs should be awarded on the

attorney and client scale. I am however of the view that there is no basis for such a punitive costs order.

[18] In the result the application is dismissed with costs.

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J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate De La Harpe
Attorneys for the Applicant	:	Wheeldon Rushmere & Cole 119 Hill Street GRAHANSTOWN 6140 Tel: 046 622 7205 Ref: Mr Brody
Counsel for the Respondent	:	Advocate Jooste
Attorneys for the Respondent	:	Netteltons 118A High Court GRAHAMSTOWN Ref: Mr Nettelton/Sam
Date of hearing	:	15 September 2011
Date Delivered	:	22 September 2011