

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

**Case No: 3076/2019**

In the matter between:

**B[...] A[...] H[...]**

**First Applicant**

**D[...] B[...]**

**Second Applicant**

And

**L[...] D[...] P[...]**

**Respondent**

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**JUDGMENT**

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**BESHE J:**

[1] It often happens that once a couple that was involved in an intimate relationship part ways, children associated with them become the subject of haggling. This is one such matter. At the centre of the dispute or haggling is an 11 year old boy. Haggling about him are:

1. The child's mother's former boyfriend (first applicant);
2. The child's mother who is the second applicant;

3. And the former boyfriend's mother with whom the minor child is currently staying together with the minor's 4 year old half-brother (born of first and second applicant), on the one hand; and

4. The child's biological father (respondent) and his wife on the other hand.

[2] The application comprises of parts A and B. serving before me is Part A.

[3] In Part B first applicant will seek an order that:

1. He be granted full parental rights and responsibilities in regard to the minor child as contemplated in *Section 23 and 24 of the Children's Act*<sup>1</sup>;

2. An order that the minor child shall primarily reside with him; and

3. The second applicant and the respondent (the biological parents) will be entitled to have reasonable contact with the minor child.

[4] Part A with which I am seized seeks an order in *inter alia* the following terms:

1. That the Family Advocate be ordered to investigate, prepare and submit a report to this court on the best interest of the minor child in relation to the relief sought in Part B of the notice of motion;

2. That the proceedings in the Children's Court, held at Alexandria in regard to an investigation as contemplated in *Section 155 of the Children's Act*, be stayed, pending the outcome of this application (Parts A and B);

3. That the minor child remain in the temporary care of **M[...]** **E[...]** **H[...]** (Being the mother of the second applicant's former boyfriend) until Parts A and B of this application are finalised.

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<sup>1</sup> Act 38 of 2005.

[5] The parties seem to be in agreement to a large extent that an order as sought in Part A of the application should be issued – in terms of which the Family Advocate is ordered to investigate, prepare and submit a report to this court on the best interest of the minor child. The stay of proceedings serving before the Magistrate, Alexandria. There are agreed as to what should happen as regards costs of the application. Where they disagree, is as regards where the primary care of the minor child should go pending the finalisation of the application. To this end the respondent is making a counter-application seeking an order in relation to Part A that the minor child continues to reside with first applicant's mother only until the last day of the school term. That pending availability of Family Advocate's report and re-enrolment of the matter the minor child shall primarily reside with him.

[6] First applicant's mother resides at Kenton-on-Sea. The minor child also goes to school at Kenton-on-Sea.

[7] First applicant currently resides in Jeffreys Bay but will be moving to Port Elizabeth next year. Second applicant resides in Port Elizabeth. So is the respondent, his wife and their two sons.

[8] The minor child has been staying with first applicant's mother and his younger brother since June 2018.

[9] It is trite that a child's best interest is of paramount importance in every matter concerning the child.<sup>2</sup>

[10] For purposes of the proceedings before the Magistrate's Court, being to determine *inter alia* whether the minor child in question together with his younger brother are children in need of care, an investigation was conducted by a social worker, Ms Sojola who duly placed a report before the said court. The report forms part of the papers in the present matter. The best interest of the minor children has not been directly addressed in that report. Hence a report by a Family Advocate, as both parties seem to appreciate, will be of great assistance in determining merits of the respective orders sought by the parties in Part B. The function of the Family Advocate is to assist the court by placing objective facts and balanced

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<sup>2</sup> See section 28 (2) of the Constitution, Section 9 of the Children's Act.

recommendations before a court after having conducted an in-depth investigation on the best interest of the child concerned.

[11] Pending the availability of such a report and recommendations, courts are usually reluctant to upset the *status quo ante* concerning the care of minor children – subject of course to what appears to be in the best interest of the child concerned. In my view this is because of the likelihood that the Family Advocate’s report may prompt an order calling for yet another change in care of the minor child. This recurring disruption can hardly be in the best interest of the minor child. Especially when one has regard to the factors that impact on what may be the best interest of the child – those being *inter alia*; the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from another child or caregiver he has been living with.<sup>3</sup>

[12] I do not propose upset the *status quo ante* in the present matter. Especially in view of the fact that it has not been suggested that it is not in the best interest of the minor child to be cared for by first applicant’s mother. However, in a bid to ensure that the rights of the respective parties are delineated without undue delay and most importantly a determination is made as to what is in the best interest of the child, in ordering an investigation by the Family Advocate, I will request that it be conducted as a matter of urgency. In addition thereto, I propose to order that respondent be allowed reasonable access to child.

**[13] Accordingly the following order will issue:**

**(a) The Family Advocate is ordered to investigate, prepare and submit a report to this court on the best interest of A[...] G[...] B[...], a male born on 3 November 2008 relating to the relief sought in Part B of this application. The Family Advocate is requested to do so as a matter of urgency.**

**(b) The proceedings serving before the Children’s Court for the district of Alexandria regarding an investigation as contemplated in *Section 155 of the Children’s Act 38 of 2005* regarding the child referred to in (a) above be stayed pending the outcome of Part B of this application.**

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<sup>3</sup> Section 7 of the Children’s Act.

(c) That the minor child remains in temporary care of Ms M[...] E[...] H[...] pending the finalisation of the application.

(d) That the respondent be allowed reasonable access to / contact with the minor child concerned.

(e) That costs of this application be determined at the hearing of Part B of the application.

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**NG BESHE**  
**JUDGE OF THE HIGH COURT**

**APPEARANCES**

For the Applicants	:	Adv: N Molony
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For the Respondent	:	Adv: Gagiano
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Date Heard	:	12 November 2019
Date Reserved	:	12 November 2019
Date Delivered	:	14 November 2019