R v A and Another (3446/2017) [2017] ZAECPEHC 54 (2 November 2017) – Not Reportable

Court: Eastern Cape Division, Port Elizabeth

Case No: 3446/2017

Date(s) heard: 31 October 2017

Delivered: 2 November 2017

Judge: Goosen, J

DESCRIPTION

Children's Rights – Primary Care – section 150 of the Children's Act, 38 of 2005 – the applicant who had no biological or legal ties with the child sought that primary care should vest with her – the court found that it would only remove the child from the care of the biological parents if there was an immediate necessity to protect the child

SUMMARY

(Par 12 - 17) The applicant in this matter had no biological or legal ties with the minor child. However, she would from time to time take care of the child who was eight months old at the time. The applicant's mother was in a relationship with the second respondent's father. She also knew the first respondent since 2014. She argued that the respondents' relationship was characterised by alcohol and drug abuse even when the first respondent was pregnant with the minor child. She stated that the first respondent was not interested in taking care of the child and would regularly leave the child with her when she went out to drink with the second respondent. On top of that, she argued that the respondents' relationship was violent in nature and that the child was often neglected. The respondents contended that the applicant had a troublesome history of mental illness and that she was obsessed with the child.

(Par 18) The court had to determine whether to remove the child from the respondents' care pending an investigation as to whether the child was a child in need of care as envisaged in terms of section 150 of the Children's Act, 38 of 2005 ('the Act'). (Par 20 - 25) The applicant made a serious allegation that she noticed a wound on the child which was probably caused by a cigarette burn. However, a forensic nurse assessed the child and found that a light accidental bump probably caused the wound. (Par 30 - 31) Furthermore, all medical assessments conducted on the child did not support any of the applicant's allegations of neglect and abuse. According to the court, there was no immediate risk of harm on the children and no basis to alter the status *quo* existed. The respondents had recently relocated from Port Elizabeth to Gauteng to stay with the second respondent's mother. The court found that it would only grant the removal of the children if it was satisfied that there was some immediate necessity to protect the child.

(Par 38) Reference was made to ***C v Department of Health and Social Development, Gauteng and Others 2012 (4) BCLR 329 (CC)*** **at para 65 and 67** where the Constitutional Court dealt with the removal of children in terms of section 151 and 152 of the Act. (Par 44 - 48) Accordingly, the child was left under the care of the respondents. Various experts were appointed to investigate the matter further in order for a final relief to be granted. The applicant was ordered to pay all the costs of the experts.

Summarised by: Tshepo Munene (Admitted Attorney of the High Court of South Africa)

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 3446/2017
Date heard: 31 October 2017
Date delivered: 2 November 2017

In the matter between

J. L. V. R. Applicant

And

C. A. First Respondent

F. S. Second Respondent

JUDGMENT

GOOSEN, J.

[1] On 11 October 2017 Beshe J issued a rule *nisi* in an *ex parte* application relating to the welfare and care of a minor child. Although the issued the rule makes provision for certain relief to operate as an interim interdict pending the return date, it is common cause that no immediate relief was granted by Beshe, J.

[2] The issued order provides as follows:

1. That the Rule Nisi is granted upon the First and Second Respondents to appear before this Honourable Court on Tuesdays, 17 October 2017 at 09h30 or as soon as practically possible thereafter as Counsel may be heard to show cause why the following order should not be made final:
    1.1 That the minor child X. S. (currently 8 months old) be removed from the care of his natural mother and father, the above named Respondents, as soon as practically possible, but no later than close of business on Tuesday 17 October 2017, to be placed in the care of the Applicant or such other suitable person this Honourable Court deems appropriate, pending the finalisation of this application;
    1.2 The First and Second Respondent make the detail of their current whereabouts, including the whereabouts of the minor child available to this Honourable Court, as soon as practically possible, but no later than 12H00 on Wednesday, 11 October 2017;
    1.3 The Sheriff of this Honourable Court with the assistance of the members of the SAPS as well as a suitably qualified professional with the appropriate experience in Family Law related matters be directed to remove the minor child from the First and Second Respondents and place the minor child in the care of the Applicant or such other suitable person this Honourable Court deems appropriate.
    1.4 The First and Second Respondent be interdicted and restrained from removing the minor child from the jurisdiction of this above Honourable Court, pending the finalisation of this application;
    1.5 The minor child be declared a child in need of care and protection in terms of section 150 of the Children's Act, Act 38 of 2005;
    1.6 The Applicant or such other suitable person this Honourable Court deems appropriate be granted an Order in terms of section 32 of the Children's Act, Act 38 of 2005 to be declared to be the person in who's (sic) temporary primary care the minor child may reside pending the finalisation of this application;
    1.7 That, alternatively to paragraph 1.6 above, that the minor child be placed in the temporary safe care of the Applicant or such other suitable person this Honourable Court deems appropriate in terms of Section 151 of the Children's Act, Act 38 of 2005;
    1.8 That the First and Second Respondent shall exercise contact with the minor child as recommended by the social worker appointed pending the finalisation of this application.
    1.10 (sic) That directing Jackie Griessel (a private social worker)to forthwith schedule an enquiry and investigation into the removal of the minor child terms of Chapter 9 of the Children's Act.
2. That paragraphs 1.1 – 1.7 above shall operate as an interim order and interdict with immediate effect.
3. That an order directing that the First and Second Respondents be served with this order by the Sheriff of this Honourable Court via email and personally.
4. That the remainder of the relief as stipulated in paragraph 4 – 8 of the Notice of Motion dated 9 October 2017, stand over until Tuesday 17 October 2017.

[3] Paragraph 2 of the above order does not reflect the order actually granted since no interim orders were issued. It is fortunate that the applicant's representatives were well aware of this since, at face value, the order sanctioned the immediate removal of the minor child from the care of his biological parents. How it occurred that the order was granted in this form is unknown. It ought to serve as a cautionary tale however so as to ensure that legal representatives and court officials should be astute to avoid such errors. Paragraph 1.10, so I was advised by applicant's counsel, captures the intention of the court, namely that an investigation be conducted by an independent private social worker prior to the granting of the interim relief sought.

[4] The matter came before me on the scheduled return date. The first and second respondents appeared in person. I was informed that they, now resident with the second respondent's mother in Benoni, had instructed an attorney who was preparing opposing papers. I stood the matter down to enable the attorney to properly come on record in the matter so that the further proceedings could be properly regulated.

[5] For reasons unknown this did not occur. I was nevertheless furnished with certain statements/affidavits deposed to by the respondents, a letter addressed to the applicant's attorneys by SJ Botha attorneys and a further letter written by Dr Louis Smith, reflecting the results of an examination of the minor child.

[6] After hearing submissions by Mr *Dyke,* for the applicant, and the respondents I formed the view that an independent medical examination of the child should be ordered so that the court could be placed in a position to determine the veracity of a central claim made by the applicant, namely that she had observed evidence of a cigarette burn on the child's back. This claim served as foundation to the allegations of neglect and

abuse which, according to the applicant, would warrant intervention by the court to remove the child from the care of the parents and place him in the applicant's care, pending the enquiries envisaged in the court order.

[7] The parties entered into discussions regarding the appropriate person to appoint and, on 18 October 2017, I accordingly issued the following order by agreement between the parties:

> 1. That Dr Christina Rollin be and is hereby ordered and directed to conduct a full examination of the minor child, X., and to pay specific attention to the potential cause of the lesion/mark on the minor child's right back and report your findings to this Honourable Court on or before Monday, 14h00 on 30 October 2017.
> 2. That Ms Jackie Griessel prepare a recommendation as to the removal of the minor child, X. from the care of the Respondents pending the resolution of the further relief sought in this matter.
> 3. That Dr Heather Rauch be and is hereby ordered and directed to conduct an enquiry into the fitness of the applicant to be granted temporary parental rights and obligations in terms of the Children's Act, alternatively Applicant's fitness to be appointed as a place of safety pending the outcome of the relief sought.
> 4. That paragraph 1.1 of the Order of Beshe,J issued on 11 October 2017, is amended to read:
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> > "1.1 That the minor child, X. S. (currently 8 months old) be removed from the care of his natural mother and father, the above named Respondents, as soon as practically possible and be placed in the care of the Applicant or such other suitable person this Honourable Court deems appropriate, pending the finalisation of this application;"
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> 5. That paragraph 1.1, as amended, and paragraphs 1.3 to 1.8, and paragraph 4 of the order of Beshe, J. on 11 October 2017 stand over to Tuesday 31 October 2017 for final determination.

[8] In accordance with paragraph 5 of the above order the final determination of the issue set out in the order was postponed to 31 October 2017 before this court. I should state that by final determination was meant only whether or not to render the relief set out in paragraph 1.1 of the rule *nisi* operative with immediate effect.

[9] A report prepared by the Dr Christina Rollin, as envisaged in paragraph 1 of the order of 17 October 2017 has now been filed. So too has a report filed by Dr Heather

Rauch. No further report by Ms Griessel was filed. Her earlier report is however before the court

[10] The respondents remained unrepresented in these proceedings. The statements or affidavits previously submitted remain in the form as submitted. It appears that the respondents are unable to afford the services of counsel. Their attorney has still not formally come on record. I am given to understand that this may be on account of the fact that he has been removed from the roll of attorneys. Whatever the circumstances, I proceeded to deal with the matter albeit that the respondents are unrepresented. For reasons which will become apparent hereunder no prejudice can flow from this since there will be sufficient opportunity in the further proceedings for the respondents to secure legal representation before the final hearing of the matter.

[11] As has been stated above, the application was launched on an urgent *ex parte* basis. The order granted on that occasion made provision for service to be affected by email, apparently because the whereabouts of the respondents and the minor child were unknown to the applicant. It is now common cause that prior to the launch of these proceedings the respondents relocated from Port Elizabeth to Benoni in Gauteng where they now reside with the second respondent's mother. This raises the question of this court's jurisdiction. On behalf of the applicant it was submitted that this court has jurisdiction since the minor was, at the time of the launching of the application ordinarily resident within the jurisdiction of this court. In the light of the statements made by the respondents, in submission from the bar, that they have relocated permanently to Gauteng to seek work there, I am not certain that the position articulated by the applicant is correct. However, given that the matter concerns the interests of a minor child I shall assume that at the time of commencement of these proceedings this court had jurisdiction and that it retains such jurisdiction. I make no

final pronouncement on the issue since that matter is for the court hearing the matter in due course to determine.

[12] The applicant founds her interest in the matter upon the fact that she has from time to time since the birth of the minor child, acted as a 'baby-sitter', taking temporary care of the minor child. The extent to which she has done this is a matter in dispute as is the precise circumstances in which this has occurred. According to the applicant her observation of the conduct of the respondents has led her to conclude that the respondents are not interested in the welfare of the child and are neglectful of him. It is this, together with specific allegations of alleged abuse that caused her to initiate these proceedings.

[13] The applicant has no biological or legal relationship to the respondents or the minor child concerned. It appears from the papers that the applicant's mother is in a relationship with the second respondent's father. She has known the first respondent since 2014. At that stage first respondent was married. According to the applicant the first respondent was divorced in March 2016, allegedly because of the relationship between her and the second respondent.

[14] The first respondent has two children born of the erstwhile marriage. The allegation made by the applicant is that the circumstances in which the first respondent found herself at the time of the divorce were investigated by the Family Advocate's office. This investigation established that the first respondent was in an abusive relationship with the second respondent and that these circumstances would negatively affect the interests of her minor children. Accordingly upon divorce the primary care of the children born of her marriage was awarded to the first respondent's ex-husband and

the first respondent was only permitted to exercise supervised access to her minor children.

[15] The applicant states that the relationship between the first and second respondent has been characterised by reckless behaviour, which has included alcohol and drug abuse. This occurred, so she alleges, even when the first respondent was pregnant with the minor child who is the subject of the present application.

[16] The applicant states that since the birth of the minor child, who is now 8 months old, he has regularly been left in her care. This is so because the first respondent is allegedly not interested in looking after the minor child and, apparently, because the first and second respondent regularly went out to drink.

[17] The allegations set out in the applicant's founding affidavit paint a troubling picture of alcohol abuse and an abusive and often violent relationship between the first and second respondent and alleged neglect of the minor child. These allegations are disputed by the first and second respondent. They are also disputed by the second respondent's father who has deposed to an affidavit. Furthermore, the respondents allege that the applicant is herself a troubled individual with a history of mental illness who has become obsessed with the minor child. According to the respondents the applicant has repeatedly requested that she be permitted to adopt the minor child. Concern about the applicant's alleged obsession with the minor child caused the second respondent's father to raise the matter with applicant's other and, ultimately, to arrange, in consultation with the second respondent's mother, that they relocate to Gauteng.

[18] I do not consider it necessary to traverse all of these allegations and counter allegations. The reason lies therein that I am presently faced with having to determine only a very limited issue, namely whether to grant an interim order removing the minor child from the care of the first and second respondents pending an investigation into whether the child is a child in need of care as envisaged in terms of section 150 on the Children's Act 38 of 2005 and the relief consequent thereupon. It was in order to resolve this limited issue that the precaution was taken to issue the order directing investigation of specific aspects of the matter as is set out above.

[19] The central trigger to the present application is to be found in the fact that the respondents together with the minor child relocated to live in Johannesburg where they are presently living with the second respondent's mother. The fact that they are residing with the second respondent's mother was, it appears, unknown to the applicant, and hence the concern about the respondents caring for the child on their own. The applicant alleges that the respondents left Port Elizabeth "surreptitiously", although it is unclear on what basis the applicant contends that they ought to account to her for their movements.

[20] Another allegation central to the claim that the child should be removed from the respondent's care concerns an allegation relating to physical abuse and neglect. In this regard the applicant alleges that she observed a cigarette burn on the child's back when the child was in her care. It is appropriate to set out the allegation fully as it appears in the founding affidavit.

> 47.7 On the 10th of September 2017 when the child was in the care of the First Respondent I took his clothing to my house to wash and saw a burn mark on his baby grow. I then investigated further and noticed that there was more than one baby grow with these burn marks and holes in them;

47.8 When I inspected the minor child's body to determine whether or not he had any burn marks on his body I discovered and traced the burn mark on his baby grow to the mark on his back, which reflected a red blister which can only be from a cigarette burn;

47.9 I enclose herewith copies of the photos I have taken of the blister on the minor child's back as well as the hole in his baby grow. These photos were taken on the 10th and 19th of September 2017. Copies of the photos are annexed hereto marked "VLR 5 to 2 VLR 11".

[21] The report filed by the social worker, Ms Griessel, prior to the previous hearing indicates that the child was examined by her. Griessel was unable to determine whether the mark observed on the minor's back was indeed a cigarette burn mark.

[22] The investigation conducted by Dr Rollin however addresses this allegation specifically. Dr Rollin is a forensic nurse employed by the Sexual Assault Clinic in Benoni. She has experience in conducting forensic investigations into injuries for presentation to court. She investigated the concerns relating to the well-being of the child, including possible physical neglect of the child (as reflected in his possible low weight percentile) and the lesion/mark on the child's back.

[23] In relation to the alleged physical neglect as indicated by the child's low weight percentile, the report indicates that upon examination "I observed a healthy, well-nourished and appropriately developed a child". Rollin states that while the child is below average in weight and stature for his age there is no indication that this is as a result of malnourishment or neglect.

[24] In regard to the red mark or lesion on the child's back, she states that the lesion "appears to be a healing bruise". She notes that the "epidermis…does not appear to be broken and therefore one can rule out a healed abrasion, burn wound or any injury causing injury to the epidermal layer of the skin". Dr Rollin's conclusion is that the

lesion is likely one caused by accidental means and that physical neglect and or physical abuse was not the cause of the lesion.

[25] This finding, it should be stated, raises very serious questions about the veracity of the specific allegation made by the applicant that she observed a blister on the child's back and that this was the consequence of a cigarette burn. In the light of the independent medical evidence this allegation appears, at minimum, to be highly exaggerated.

[26] As already indicated, in addition to the report of Dr Rollin there is the report of Dr Heather Rauch. Dr Rauch was appointed to enquire into the fitness of the applicant to be granted temporary parental rights, alternatively to be appointed as a place of safety pending the outcome of the final relief. In this regard it should be mentioned that the respondents had made allegations regarding mental illness on the part of the applicant as well as allegations relating to alcohol and drug abuse. It is common cause that the applicant is presently under psychiatric treatment and has been booked off work. A short report by Dr Crafford, the treating psychiatrist, indicates that the applicant has been treated by him for Bipolar Spectrum Disorder, Adult Attention Deficit Hyperactivity Disorder, Panic Disorder and Obsessive Compulsive Disorder. She is presently on medication to which she has responded well and has been referred for psychotherapy.

[27] Dr Rauch's report does not address the mental state of the applicant save to record that she is under the psychiatric treatment because of a stress related disorder and that she is presently off work for this reason. Dr Rauch reports that the applicant is fit to exercise temporary care of the minor child.

[28] As indicated the only question to be determined at this stage is whether an order should issue removing the minor child from the care of the respondents and placing the child in the care of the applicant on an interim basis. The fact that Dr Rauch concludes that the applicant is indeed fit to care for the child does not weigh the balance in favour of granting the order. This much was conceded by Mr *Dyke.* Whether such order should be granted is to be determined on the basis of the immediate short-term best interests of the minor child.

[29] The founding papers do not address the particular circumstances of the child in the home of the paternal grandmother in Benoni. Indeed the case made out by the applicant is predicated upon neglect and abuse of the minor child at the instance of the respondents. It is upon this basis coupled with the conduct of the respondents, namely the abuse of alcohol and the instability of their circumstances and the nature of their relationship that the applicant seeks a determination that the child is a child in need of care.

[30] The allegations of neglect and abuse of the minor child are denied by the respondents. The independent medical assessment of the child does not support the allegations. There is accordingly, in my view, no evidence to support a finding that the minor child is presently under immediate risk of harm and accordingly no basis to alter the *status quo* on that basis.

[31] To order that the child should be removed from the care of the respondents to be returned to Port Elizabeth to be cared for by the applicant, pending the enquiry, would undoubtedly cause trauma to the child and disruption of his life. Such an order may also very well significantly prejudice the parents in the exercise of their parental rights and obligations. To grant such order this court would need to be satisfied that there is

some immediate necessity to protect the child from harm which may eventuate during the course of the investigation into the longer term best interests of the child.

[32] The allegations concerning the conduct of the respondents, in particular those in relation to their relationship and the abuse of alcohol are also denied. They make the point that they now reside in the home of second respondent's mother where such abuses are not tolerated.

[33] The applicant places heavy reliance upon the fact that the first respondent is only permitted supervised access to her minor children born of her erstwhile marriage. As I understood it, it is suggested that this indicates that the first respondent is not fit to exercise full parental rights in respect of the child and for this reason the child must be removed from her care.

[34] The reliance placed on the restricted access to first respondent's children, in my view, goes too far. The findings made by the Family Advocate when investigating a different circumstance may be relevant to the final determination of the issues raised in this matter but they are not determinative of the issue presently to be decided. First we have here to do with a different set of circumstances and, most importantly, the immediate best interest of a minor child. There is nothing in the Family Advocate's report upon which the applicant relies which points to any immediate risk of harm that the minor child in this matter may face. In any event the envisaged interim order envisages that the child be removed also from the care of the second respondent who is the biological father and in respect of whom the Family Advocate's report makes no finding as to the restriction of his parental rights.

[35] The report by Ms Griessel, who conducted interviews with the respondents and second respondent's mother and visited the home in Benoni does not raise any

specific concerns about the immediate welfare and care of the minor child. She records that due to the fact that she has not investigated both the applicant and the respondents she is unable to make a recommendation. She however recommended that the child be examined medically to determine the cause of the mar on the child's back.

[36] The best interests of the child are of paramount consideration. He is an 8 month old child in the very earliest stages of bonding with his parents. He is reported to be well-nourished and healthy and there are no indications of physical abuse. In my view his immediate best interests favour him remaining in the care of his biological parents. Whether his longer term interest coincide is a matter which can only be determined after full and proper consideration of all relevant circumstances.

[37] The Children's Act 38 of 2005 deals with the protection of children in need of care. It provides for a comprehensive child protection system which relates to the designation of child protection services and organisations. Section 110 contains a set of provisions relating to the reporting and investigation of abused or neglected children or children in need of care. Provision is also made in terms of section 151 for the removal of the child, pursuant to such investigations, whether on a permanent or temporary basis. It is these provisions upon which the applicant seeks to rely in obtaining the relief set out in the notice of motion.

[38] In C v Department of Health and Social Development, Gauteng and Others 2012 (4) BCLR 329 (CC) the Constitutional Court was called upon to consider this legislative framework. The Court found that sections 151 and 152 are unconstitutional inasmuch as they do not provide for automatic judicial review of a decision to remove a child

pursuant to the sections. That aspect of the matter is not presently relevant. What is of relevance however is the Court's conclusions in regard to the process envisaged by sections 151 and 152 and how those inform the approach to be adopted to the question of removal of a child. The Court (per Yacoob J) said the following (at para 65 and 67):

> [65] It will have been noted that children can only be removed if, amongst other things, they are found in need of care and protection. The act defines that a child is deemed in need of care and protection if the child:
> "(a) has been abandoned or orphaned and is without any 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 is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
> (g) may be at risk if returned to the custody of the parent, guardian or care-giver 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 of 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 care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is."
>
> [67] In summary, it must be said that the conditions that must be fulfilled before a child can be removed are indeed stringent. A child can never be removed unless a court concludes or the designated social worker or police official reasonably believes that the child is in need of care and protection. And that term is carefully expanded in the Act. Once this requirement is established the Children's Court may order removal of the child only if this is necessary for the safety and well-being of the child. A court cannot do so if removal is merely desireable.
> (Emphasis added)

[39] These latter remarks are particularly apposite. As I have indicated the facts before this court presently do not establish that the safety and well-being of the child require immediate removal. At best for the applicant a case is made out that it may be

desireable to intervene in the present care arrangements of the minor child. That, however, is not sufficient to warrant immediate removal of the child.

[40] The Children's Act contemplates intervention to secure the safety and well-being of children in need of care by designated child protection agencies. The protective measures include intervention by a court to suspend or terminate or transfer of any or all of the parental responsibilities and rights. Such intervention, section 135 provides, may be initiated by the director general, a provincial head of social development or designated child protection organisations. Whether such intervention ought to be a countenanced outside of the ambit of the provisions of the Act is a matter that the court in due course will be called upon to determine when the final relief is decided. I shall assume for present purposes that there is no bar to the applicant utilising the procedures presently envisaged to obtain relief in the form of a protection order as contemplated by the Act.

[41] It is with this in mind that I intend to make certain further orders I consider necessary to regulate the further conduct of this matter.

[42] In this regard I have in mind section 55 of the Act. That section empowers a court, in appropriate circumstances, to refer the matter to Legal Aid South Africa to facilitate appointment of a legal representative to represent the interests of a minor child.

[43] In the present matter it is clear that the respondents are not vested with any means to secure legal representation which they may require to represent their interests in the matter. Thus far they have relied upon legal assistance informally given and have filed affidavits setting out, so far as they have been able to, their opposition to the application. Their interests however, in a matter such as this, are not coterminous with

the interests of the minor child. Nor can the interests of the applicant, expressed as a conduct taken in order to protect the interests of the minor child, necessarily be coterminous with the interests of the minor child. I have already indicated that the particular relief sought by the applicant is very far reaching inasmuch as it contemplates the permanent removal of the minor child from the care of his parents and the child's relocation with obvious impact on the rights and responsibilities of the respondents as well the child's rights. In these circumstances I consider that it is appropriate to direct, in terms of section 55, that the matter be referred to Legal Aid South Africa so that appropriate arrangements can be made to appoint a legal representative to the minor child who will be authorised to secure the appointment of a *curator ad litem* to represent the minor child in the further proceedings which will follow.

[44] In order to facilitate the proper investigation of the matter I consider that it is necessary to direct that independent experts be appointed to conduct appropriate investigations and evaluations of the circumstances of the minor child as well as the respective parties. Although it was suggested that the Office of the Family Advocate be appropriately directed I am not persuaded that section 4 of Act 24 of 1987 permits of an order in a case such as this. The power to make certain specific orders relating to investigations envisaged by section 151 and 152 of the Children's Act is conferred upon a Children's Court as is defined by section 42 of that Act. This court's powers derive from its inherent jurisdiction and as the upper guardian of minor children at common law. On this basis it is appropriate to order that independent experts be appointed, preferably by agreement between the parties but where such agreement cannot be reached upon direction of this court. The costs of such experts would, given the nature of these proceedings, need to be borne by the party seeking relief until

such time as the court making a final determination decides the issue of the costs attendant upon the application.

[45] I have already indicated that I do not intend to issue an order which alters the *status quo* in relation to the care and welfare of the minor child. The question that arises is what to do with the rule *nisi* as presently formulated. Paragraphs 1.2 and 1.4, 1.8 and 1.10 of the order of 11 October 2017 are, given the course of the litigation, no longer relevant. In the absence of an order rendering paragraph 1.1 of the rule operative immediately no purpose is served by paragraphs 1.3 and 1.7 of the order. Paragraphs 5 and 6 of the Notice of Motion dated 9 October 2017 concern service of the papers and the supplementing of applicant's papers at the stage of the interim relief and no order need be made in that regard. It is of course for the applicant to effect appropriate amendments to the notice of motion should she be so advised.

[46] In the light of the conclusions to which I have come all that is presently required is that the rule *nisi* be extended to a date which takes account of the further orders I intend to make. In extending the rule however it is necessary, for the reasons set out at the commencement of this judgment, to make an order deleting paragraph 2 of the order of 11 October 2017.

[47] In regard to the costs of the application it is my view that no order should presently be made.

[48] I therefore make the following order:

1. The rule *nisi* issued on 11 October 2017, as amended by order of 18 October 2017, is hereby extended to TUESDAY 12 DECEMBER 2017.

2. Paragraph 2 of the Order of 11 October 2017 is hereby deleted.
3. This matter is referred to Legal Aid South Africa, Port Elizabeth Justice Centre in terms of section 55 of the Children's Act, Act 38 of 2005 to facilitate the appointment of a legal representative to the minor child and /or the appointment of a *curator ad litem*.
4. That a duly qualified psychologist and social worker be appointed, by agreement between the parties or upon direction of the Court where agreement cannot be reached, to conduct an investigation into the care and welfare of the minor child and to report thereon to the Court on or before the extended return date or such later date as the Court may direct;
5. That the costs occasioned by the appointment of the aforementioned experts shall be costs borne by the applicant pending allocation of such costs upon determination of the cause.
6. The Registrar is directed to deliver a copy of this Order to the offices of Legal Aid South Africa, Port Elizabeth Justice Centre.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Applicant
Adv. B. Dyke SC
Instructed by Kaplan Blumberg Attorneys

The Respondents in person