

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

F. MARCANDONATOS

10 March 2025

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024-110088

In the matter between:

T. M. N

Applicant

and

Y. N

Respondent

*This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 10 MARCH 2025*

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JUDGMENT

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**MARCANDONATOS AJ:**

**INTRODUCTION**

- [1] The Applicant and the Respondent were previously married, from which marriage, twin girls were born, who are 6 years old.
- [2] The parties were divorced on *02 March 2022*.<sup>1</sup>
- [3] The Applicant and the Respondent entered into an Agreement of Settlement, made an Order of Court simultaneously with the Decree of Divorce on *02 March 2022*,<sup>2</sup> having provided, in respect of the children, *inter alia*, that:-
- 3.1. the Applicant and the Respondent retain full parental responsibilities and rights in terms of Section 18(2)(c) and (3) of the Children's Act, 38 of 2005;
  - 3.2. primary residence and care of the children remains with the Respondent;
  - 3.3. the Applicant would have unrestricted contact with the children.
- [4] During *November 2023*, the parties attended a mediation session with Advocate Karen Green regarding the structuring of the Applicant's additional contact with the children and reached agreement as recorded in a Minute, *inter alia*, that:-<sup>3</sup>
- 4.1. the Applicant's interim extension of alternate weekend contact to the children would commence on a Thursday evening to a Sunday and that he will take the children to school every morning;

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<sup>1</sup> Annexure "FA1": CL 02-39 to CL 02-40

<sup>2</sup> Annexure "FA2": CL 02-41 to CL 02-65

<sup>3</sup> Annexure "RA1": CL 02-220 to CL 02-224

- 4.2. the parties will appoint a suitably qualified professional to conduct a forensic investigation and provide an evaluation and Report on the issues raised by each party; and
- 4.3. the Applicant and the Respondent will appoint a parenting co-ordinator to assist them in parental communication.
- [5] During *February 2024*, the parties agreed to appoint Dr G Del Fabbro to conduct a forensic assessment.<sup>4</sup>
- [6] Tania Holtz was appointed as the parenting co-ordinator, however, during *August 2024*, the Applicant terminated the appointment.<sup>5</sup>
- [7] On *27 September 2024*, the Applicant launched this Application on an urgent basis seeking relief in terms of Part A and Part B.<sup>6</sup> In terms of Part A, *inter alia*, the Applicant sought that:-
- 7.1. Dr G Del Fabbro finalises the forensic assessment commenced by her, regarding the best interests of the children;
- 7.2. the Respondent give her full co-operation to Dr Del Fabbro;
- 7.3. pending the outcome of Part B of this Application, that the children reside with the Applicant and that the Respondent was to have certain defined rights of contact to be supervised by a social worker.
- [8] On *08 October 2024*, when the Application was enrolled on the urgent Roll for the hearing of Part A, the Honourable Judge Dlamini dismissed Part A for “*lack of urgency*”. Unfortunately Dlamini J has not uploaded the Order to CaseLines.<sup>7</sup>

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<sup>4</sup> FA: CL 02-18 to CL 02-20, paras 20 to 24 and AA: CL 02-158, par 44

<sup>5</sup> AA: CL 02-149, par 9, and RA: CL 02-196 to CL 02-197, par 12,

<sup>6</sup> NOM: CL 02-2 to CL 02-18

<sup>7</sup> Respondent's PN: CL 07-47, par 6.2

- [9] Notwithstanding the foregoing in respect of the dismissal for lack of urgency by Dlamini J of Part A, both parties continued to co-operate with Dr Del Fabbro and in consequence, Dr Del Fabbro published her Report dated *05 February 2025*, with her findings and recommendations.<sup>8</sup>
- [10] Prior to the publication of Dr Del Fabbro's Report, the Applicant applied for and enrolled Part B, for hearing by Notice, dated *24 January 2025*.<sup>9</sup>
- [11] A date for the hearing of Part B was allocated for *17 February 2025*, which came before me.<sup>10</sup>
- [12] Prior to either Counsel addressing me I, having read the papers, raised the following:-
- 12.1. that consequent upon Part A having been dismissed for lack of urgency on *08 October 2024*, it is common cause that neither party has filed Supplementary Affidavits, meaning that the Affidavits as they stand indicates that the Notice of Motion and Founding Affidavit is dated *27 September 2024*,<sup>11</sup> the Answering Affidavit is dated *02 October 2024*,<sup>12</sup> and the Replying Affidavit is dated *03 October 2024*;<sup>13</sup>
- 12.2. in the intervening period, Dr Del Fabbro has provided her Report dated *05 February 2025*;<sup>14</sup>
- 12.3. it is not clear from the Report of Dr Del Fabbro what happened during the intervening period and frankly I am surprised that neither party filed Supplementary Affidavit;

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<sup>8</sup> CL 03-2 to CL 03-29 (Dr G. Del Fabbro's Report)

<sup>9</sup> CL 08-8 to CL 08-12

<sup>10</sup> CL 08-17 to CL 08-23

<sup>11</sup> CL 02-37

<sup>12</sup> CL 02-173

<sup>13</sup> CL 02-218

<sup>14</sup> *supra* footnote 8

12.4. if nothing else, it is common cause that the matter involves the best interests of minor children;

12.5. I am seized of the matter and against the backdrop of the foregoing, I cannot, in the best interests of the minor children, properly consider the matter on the papers as they stand and I therefore directed that the matter stands down to **27 February 2025** for argument and that each party files a Supplementary Affidavit and Supplementary Heads of Argument, if required, that Dr Del Fabbro provides a letter amplifying the dates and times of her consultation with each person she interviewed and/or assessed as set out in paragraph 3 of her Report,<sup>15</sup> it having been agreed that the Applicant would file his Supplementary Affidavit by 16h00 on **22 February 2025**, the Respondent would file her Supplementary Affidavit by 10h00 on **25 February 2025** and costs for the day (**17 February 2025**), are reserved.

[13] On **27 February 2025**, the matter was argued before me, virtually.

### **APPLICANT'S BRIEF SUBMISSIONS**

[14] The Applicant avers that he has serious concerns regarding the Respondent's abuse of alcohol, her erratic and at times aggressive behaviour (*particularly in the presence of the children*) levelled by her against the Applicant and his family members from time-to-time and the manner in which the Respondent conducted herself in the presence of the children, as well as the events of **06 September 2024** and the Applicant questions whether the Respondent is in fact fit to take proper care of the children.<sup>16</sup>

[15] On **18 September 2024**, he received an anonymous phone call on his landline from a woman identifying herself as Mrs Govender, who advised him that during a party hosted by the Respondent at her home (*the former common home*) on the

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<sup>15</sup> CL 03-6

<sup>16</sup> FA: CL 02-24, par 45

evening of Friday, *06 September 2024*, a fight broke out, that firearms were brandished and that the South African Police Services ("*SAPS*") were called to the scene. The children were in the Respondent's care on the night in question.<sup>17</sup>

- [16] On Saturday *21 September 2024*, the Applicant read an SMS text message, pertaining to the events of *06 September 2024*, sent to him from an untraceable number and which stated, *inter alia*, that the Respondent's boyfriend had brandished a firearm, that he was pushed outside the house where he proceeded to kick and hammer the glass door and that he then fired his firearm (*a few times*). The sender of the message also described the Respondent as being "*shitfaced drunk*" at the time and described how the party goers were locked inside the Respondent's home and that the *SAPS* arrived at the house but that the Respondent told the *SAPS* that she did not intend pressing charges.<sup>18</sup>
- [17] The Applicant's attorney addressed an urgent letter to the Respondent's attorney on *21 September 2024*. The following day the Respondent's attorney replied in a letter conceding that an altercation did take place at the Respondent's home on *06 September 2024* and furthermore that *SAPS* were called to the house, but the Respondent denied that any firearm was discharged during the altercation.<sup>19</sup>
- [18] On Monday *23 September 2024*, the Applicant met with a man known to him as "*Robert*", who had worked as a bartender at the party hosted by the Respondent on *06 September 2024*, who informed the Applicant that, he left the party at around about 22h00 before the incident happened, when he (*Robert*) thereafter followed-up with the Respondent for money that she owed him, the Respondent told him that there had been a fight at her party and that a gun was brandished after he had left the party, the Respondent was drunk at the party and that the

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<sup>17</sup> FA: CL 02-24, par 47

<sup>18</sup> FA: CL 02-25, paras 49 and 50, and CL 02-83, Annexure "FA7"

<sup>19</sup> FA: CL 02-25 to CL 02-26, paras 53 and 57

Respondent was keeping bad company, however, no Confirmatory Affidavit was submitted by Robert.<sup>20</sup>

- [19] On Tuesday, *24 September 2024*, the Applicant met with Villen Moodley, one of the guests at the party hosted by the Respondent on *06 September 2024*, who advised the Applicant and confirmed in a Confirmatory Affidavit by Villen Moodley, that:-<sup>21</sup>

- 19.1. he was at the party;
- 19.2. a commotion broke out during the party between some of the male guests and that he saw one of the men involved pull out a firearm and that the aforesaid person was in an extremely aggravated state and shouting "*I will shoot you*", which occurred inside the Respondent's home where the children were in the Respondent's care;
- 19.3. guests involved in the commotion then left the Respondent's home and were outside in the road when another commotion broke out between them and Mr Moodley and heard a gunshot;
- 19.4. someone called the *SAPS* and they did arrive;
- 19.5. after the incident the Respondent refused to provide the name and cell phone number of the man that had brandished the firearm;
- 19.6. the Respondent was drunk at the party;
- 19.7. the children were at home at the time upstairs.

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<sup>20</sup> FA: CL 02-30, par 76,

<sup>21</sup> FA: CL 02-31, paras 78 & 79 and CA: CL 02-117 to CL 02-119, annexure "FA16"

## RESPONDENT'S BRIEF SUBMISSIONS

- [20] The Respondent says that she does not abuse alcohol.<sup>22</sup>
- [21] In respect of the anonymous phone call the Applicant submits he received from Ms Govender, the Respondent says that no weight can be attached to the "*tittle-tale*" of an unknown individual, some two weeks after the event.<sup>23</sup>
- [22] The Respondent submits that in regard to the SMS text message the Applicant received from an untraceable number and annexed as annexure "FA7", that same is inadmissible hearsay evidence containing untruths and does not even have the full telephone number.<sup>24</sup>
- [23] As far as the letters exchanged between the Applicant and Respondent's attorney, the Respondent submits that the first letter from the Applicant's attorney dated *21 September 2024* was received three days after the Applicant first learnt about the altercation at my home with no explanation for the delay and she confirms that she did not witness a firearm being brandished and that she did not hear any firearm being discharged.<sup>25</sup>
- [24] The Respondent submits that in regard to Robert the bartender and the Applicant's averments in regard thereto, that same is absent a Confirmatory Affidavit from Robert and constitutes hearsay evidence and should be struck.<sup>26</sup>
- [25] The Respondent submits that Villen Moodley is married to her friend and admits that he and his wife attended the party, but says that they were seated at a table in the corner of the garden without a direct line of sight to the front door of her home. She also states that she does not know whether Villen Moodley met the Applicant but she denies his account of the events and says that it is inaccurate. The Respondent says that she did not witness anyone brandishing a firearm or

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<sup>22</sup> AA: CL 02-160, par 52.1

<sup>23</sup> AA: CL 02-161, par 54.1

<sup>24</sup> AA: CL 02-162, par 56

<sup>25</sup> AA: CL 02- 163, paras 59.2 and 61.1

<sup>26</sup> AA: CL 02-167, par 71.1



heard anyone threatening to shoot anyone else, whether inside or outside her home. No gunshots were fired in her home and she did not hear gunshots being fired outside either. She denies that she was drunk and states that, at the time, the children were safely ensconced in bed fast asleep. They were not in any danger and did not wake at any time as a result of the commotion.<sup>27</sup>

## THE INVESTIGATIONS, FINDINGS AND REPORT OF DR DEL FABBRO IN BRIEF

[26] The expertise of Dr G. Del Fabbro appears from her *Curriculum Vitae*.<sup>28</sup>

[27] Both the Applicant and the Respondent voluntarily participated in the assessment process.

[28] *Ex facie* the Report, the assessment process by Dr G. Del Fabbro spanned for the period *August 2024* to *February 2025*, included psychometric testing and sessions with the Applicant, the Respondent, the minor children, interviews and collateral sources and information provided by the Applicant and the Respondent. Dr G. Del Fabbro amplifies on the dates of the appointments in a letter dated *20 February 2025*, following this Court's request.<sup>29</sup>

[29] Dr G. Del Fabbro's evaluation, highlights three areas of concern in respect of the Applicant and the Respondent:-<sup>30</sup>

29.1. alcohol use;

29.2. co-parenting challenges; and

29.3. parental alienation.

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<sup>27</sup> AA: CL 02-168, par 72

<sup>28</sup> CL 03-39 to CL 03-45

<sup>29</sup> CL 03-6, par 3 and Applicant's SA: CL 02-329 to CL 02-330, Annexure "SA5"

<sup>30</sup> CL 03-18 to CL 03-19, par 12

[30]

30.1. **Alcohol use**

Dr G. Del Fabbro states that the Applicant and the Respondent underwent a hair follicle test for both alcohol and recreational drug use. The Applicant's results were normal, showing mild alcohol use and no drug use. The Respondent's results were concerning as her alcohol levels were severely above the acceptable standards for testing (*146 pg/mg*). The cut-off for alcohol testing is 5pg/mg, which places the Respondent in the chronic excess alcohol use classification during the period *26 June 2024* and *24 September 2024*. Furthermore, in respect of the Respondent's psychometrics, these results also raised serious concerns about her use of alcohol.<sup>31</sup>

30.2. **Co-parenting**

30.2.1. Dr G. Del Fabbro states that co-parenting between the Applicant and the Respondent presents a mind field of potential challenges given their contrasting and volatile personalities and that their profiles suggest a high likelihood of conflict, manipulation and difficulty in establishing a stable and supportive co-parenting relationship evaluating various challenges stemming from the Applicant and Respondent's personality.

30.2.2. In respect of challenges stemming from the Applicant's personality, Dr G. Del Fabbro highlights defensive denial and reluctance to acknowledge issues, irrational expectations and need for control, difficulty with long-term commitments, potential for volatility and aggression and fear of appearing weak.

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<sup>31</sup> CL 03-20

30.2.3. In respect of the challenges stemming from the Respondent's personality, Dr G. Del Fabbro highlights, emotional volatility, manipulation and blame shifting, impulsivity and poor decision making, attention seeking behaviour and a potential for substance abuse.

30.2.4. In the result, Dr G. Del Fabbro evaluates overlapping challenges to include communication break down between both the Applicant and the Respondent, lack of trust and inconsistent parenting and thus finding that the combination of the Applicant and the Respondent's personalities creates a highly challenging co-parenting scenario and that without significant intervention and a willingness from both parties to address the issues, the children's wellbeing is at risk and that therapy, mediation and clear legal agreements outlining co-parenting responsibilities are crucial, and that close monitoring of the children's emotional and behavioural wellbeing is also essential.<sup>32</sup>

### 30.3. **Parental alienation**

Dr G. Del Fabbro concludes, together with collateral sources of information she was provided, such as video calls, WhatsApp communication records and video footage reviews, that it is clear that the Respondent displays some of the behaviours listed as criteria she highlights in her Report for parental alienation and concludes that it is urgent that the Respondent cease with these behaviours in the best interests of the children, which may necessitate supervision and parental counselling to achieve this, which would also benefit from the close monitoring by a Case Manager.<sup>33</sup>

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<sup>32</sup> CL 03-21 to CL 03-23

<sup>33</sup> CL 03-23 to CL 03-26

**EVENTS DESCRIBED BY APPLICANT SINCE 03 OCTOBER 2024**

[31] The Respondent approached *SAPS*:-

- 31.1. on *16 December 2024* demanding that the Applicant be arrested due to allegedly being in contempt of Court resulting in the *SAPS* attending the Applicant's home to carry out the arrest, however, with the intervention of the Applicant's attorney, *SAPS* did not follow through with the arrest and the children remained in the Applicant's care, however, the Respondent had accompanied *SAPS* to the Applicant's home and sat outside in the police vehicle;<sup>34</sup>
- 31.2. on *17 December 2024*, at approximately 08h00, *SAPS* again advised that the Applicant would be arrested if the children were not returned to the Respondent and the children would be placed in a *SAPS* vehicle and transported to the Respondent's home by force, and on the strength of the Applicant's attorney's advice, he returned the children to the Respondent to avoid adverse consequences and trauma, which would likely be occasioned by him being unlawfully arrested and the children being removed from his care by members of *SAPS*;<sup>35</sup>
- 31.3. on *24 January 2025*, the Respondent raised another incident and once again threatened to have the Applicant arrested by *SAPS* demanding that the Applicant returns the children to her;<sup>36</sup>
- 31.4. on *23 February 2025*, the Respondent sent the Applicant an e-mail alleging that the Applicant was in contempt by leaving the children with a stranger and providing the Applicant with 24 hours to provide an undertaking that if that happens again, that the Applicant "*will be listening virtually from jail*".<sup>37</sup>

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<sup>34</sup> Applicant's SA: CL 02-256, paras 56 and 57

<sup>35</sup> Applicant's SA: CL 02-256 to CL 02-257, paras 58 and 59

<sup>36</sup> Applicant's SA: CL 02-264, par 69

<sup>37</sup> Applicant's further SA: CL 02-445, paras 7 and 8

[32] The Applicant further describes evidence entailing the Respondent instructing the children to spit on the Applicant, which was videoed by the Applicant during which video the Applicant says that the Respondent also audibly runs the Applicant down to the children as a liar.<sup>38</sup>

[33] The Applicant also states that on *09 February 2025*, he received abusive WhatsApp messages from the Respondent in which she stated, *inter alia*, as follows:-<sup>39</sup>

33.1. *"I'm challenging that insufficient report"*

33.2. *"2.30 or you will get arrested"*

33.3. *"If you bilateral make Any decision I will make sure u in jail So tell me Will you be dropping them off or not"*

33.4. *"It's not legal It's recommendations from Someone I believe you paid off"*

33.5. *"If you keep the children u will go to jail"*

33.6. *"That report is BS"*

33.7. *"U fucking loser In life and in general".*

[34] The Applicant further describes the Respondent's threat of suicide on *17 February 2025*, pursuant to a telephone call he received from the Respondent.<sup>40</sup>

[35] In answer to the Applicant's description of events referred to hereinabove she avers that:-

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<sup>38</sup> Applicant's SA: CL 02-260, par 65.5

<sup>39</sup> Applicant's SA: CL 02-266 to CL 02-267, par 76

<sup>40</sup> Applicant's SA: CL 02-268 to CL 02-270, paras 81 to 85

- 35.1. in respect of the Respondent's attempts to have *SAPS* have the Applicant arrested, that in essence nothing turns on these allegations, the children spent an equal amount of time over *December* in her care and the care of the Applicant and in fact the children were in the care of the Applicant for an extra day and that it is the Applicant who unilaterally imposes contact "*directives*" contrary to what had been agreed and that the Applicant clearly reneged on terms agreed to during mediation and did not comply with the terms of the second agreement made an Order of Court, hence her request that the children be returned into her care;<sup>41</sup>
- 35.2. in respect of the Applicant's averment that the Respondent instructed the children to spit at the Applicant, she denies any allegation of abuse in her position as parent with whom primary residence vests;<sup>42</sup>
- 35.3. in regard to the Applicant's averments of the abusive WhatsApp messages addressed by the Respondent to the Applicant, the Respondent admits sending the Applicant the WhatsApp messages as described by the Applicant but explains that she was aggrieved by the content of Dr G. Del Fabbro's Report, particularly her recommendations and the thought of having the children taken from her;<sup>43</sup>
- 35.4. in respect of the threats of suicide described by the Applicant, the Respondent avers that this was in a desperate attempt to settle the matter as she was and remains fearful of the children being taken from her and that the children are her life and the idea of losing them terrifies her.<sup>44</sup>

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<sup>41</sup> Respondent's SA: CL 02-28 to CL 02-29, paras 122 to 127 and CL 02-30 to CL 02-31, paras 140 to 144

<sup>42</sup> Respondent's SA: CL 02-30, paras 135 to 137

<sup>43</sup> Respondent's SA: CL 02-34, paras 158 and 159

<sup>44</sup> Respondent's SA: CL 02-34, paras 161 to 163

## RECOMMENDATIONS BY DR G. DEL FABBRO

[36] On the back of Dr G. Del Fabbro's investigations and findings she concludes that:- <sup>45</sup>

- 36.1. given the information regarding the Respondent's inconsistent prioritization of the children's needs, her negative behaviour towards the Applicant in their presence (*including verbal and physical aggression*) and the potential risks associated with her alcohol consumption, primary residence of the children is strongly recommended to be with the Applicant;
- 36.2. the Respondent's access to the children should be structured, supervised (*at least initially*) and therapeutic so as to rebuild a healthy parenting child relationship whilst ensuring the children's safety and emotional wellbeing with the specifics of the access to be determined in conjunction with the children's therapist and a Case Manager to possibly include, supervised visitation initially gradually transitioning to less restrictive access as the Respondent's demonstrates consistent, positive change, therapeutic visitation where the therapist is present during visits to facilitate positive interactions and address any emerging issues and specific times and locations for visits to minimize conflict with the Applicant;
- 36.3. the Respondent participates in a comprehensive alcohol treatment programme, which is mandatory to include individual therapy, group therapy (*for example AA*) and random alcohol testing (*urine, blood and hair follicle*) for a prolonged period (*at least 12 months*), with results provided to the Court and Case Manager, and given the Respondent's history with DBT she should re-engage with DBT therapy and address her emotional regulation challenges and learn healthier coping mechanisms and any

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<sup>45</sup> CL 03-26 to CL 03-29, par 13

relapse in alcohol use or failure to actively participate in treatment will directly impact her access to the children;

- 36.4. both parties must participate in co-parenting therapy with a therapist specialising in high conflict families and parental alienation and that mediation should be the required first step for resolving any disputes before resorting to Court intervention;
- 36.5. individual therapy for both children with a child psychologist specialising in parental alienation is crucial, the Respondent must participate in a programme or therapy focused on parental alienation, its impact on children and strategies for ceasing alienating behaviours with a Court Order explicitly prohibiting specific alienating behaviours and that a Case Manager is essential to monitor compliance with the Court Orders, facilitate communication and ensure the children's wellbeing who is to play a crucial role in observing interactions, addressing concerns and providing Reports to the Court;
- 36.6. the Applicant should commence individual therapy to address his own communication style and learn strategies for co-parenting with a high conflict individual;
- 36.7. the children's therapist should work with them to address these issues and build resilience and that parent/child interaction therapy may be beneficial for both parents and the children to improve parent/child interactions and strengthen the attachment bond;
- 36.8. care and contact arrangements, treatment plans and related Orders should be reviewed frequently, example every three to six months by the Court, based on Reports from therapists, Case Manager and other professionals;



36.9. as the children mature, their wishes regarding custody and access should be given increasing weight and any concerns about the children's safety or wellbeing must be immediately investigated and addressed.

[37] The Respondent in concise of Heads of Argument dated *13 February 2025*, contends that the Report published by Dr G. Del Fabbro on *05 February 2025* is fundamentally flawed and of no assistance to the Court to determine whether the best interests of the children would be served by up-ending the current residence and contact regime and states further that the opinion of expert witnesses is admissible whenever, by reason of their special knowledge or skill, they are better qualified to draw inferences than the judicial officer and that the principles applicable to the admissibility and evaluation of expert opinion evidence is trite i.e. the Court must be convinced that the witness is competent to testify on the subject and the Court must be appraised of all the facts, data and assumptions as well as the reasoning upon which the opinion is based and an expert's opinion and recommendations remains just that, and do not displace the decision of the Court who is called upon to determine the issue. The Respondent in the result submits that the Report of Dr G. Del Fabbro does not meet the requirements of an expert Report and the contents thereof is inadmissible and even should the Court accept the Report into evidence, little weight can be attached to the opinions and recommendations, much of which is conjecture, deduction or speculation, unsubstantiated by observations and factual findings recorded in the Report. In the final result, the Respondent seeks that the Application be dismissed with costs, including Counsel's fees on Scale C.<sup>46</sup>

[38] The Applicant on the other hand avers, having regard to the recommendations of Dr G. Del Fabbro, that the draft Order as prepared and appended to the Applicant's Heads of Argument dated *14 February 2025*, is appropriate.<sup>47</sup>

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<sup>46</sup> Respondent's concise HOA: CL 09-54 to CL 09-59

<sup>47</sup> Applicant's HOA: CL 09-64 to CL 09-94 and CL 09-95 to CL 09-99, annexure "HOA1"

## BEST INTERESTS OF THE MINOR CHILDREN

- [39] This matter is not about the Applicant nor the Respondent. It is about two minor children, currently in the care of the Respondent. As is envisaged in Section 28(2) of The Constitution, a child's best interests are of paramount importance in every matter concerning a child. This principle should take precedence over constant and endless conflicts between the Applicant and the Respondent.
- [40] This Court sits as upper guardian for minor children, with the primary obligation to prioritise their protection and welfare.
- [41] As the upper guardian of the minor children, this Court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view of deciding the issue, which is of paramount importance – i.e. the best interests of a child.
- [42] In the matter of **T v T**<sup>48</sup>, the Court stated that when a Court sits as upper guardian in a custody matter:-

*“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 information of whatever nature, which may be able to assist it in resolving custody and related disputes.”.*

- [43] Significantly, the Court must consider all relevant circumstance and ensure that a child's best interests is paramount. In **P v P & Another**<sup>49</sup>, the Court stated that a Court does not look at a set of circumstances in isolation. The Court stated:-

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<sup>48</sup> 1992 (1) SA 501 (W) at 504(c)

<sup>49</sup> 2002 (6) SA 105 (N) at 110 (c) to (d)

*"I am bound, in considering what is in the best interests of G, to take everything into account which have happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order."*

- [44] In **AD & DD v DW & Another** (*Centre for Child Law as Amicus Curiae*)<sup>50</sup>, the Constitutional Court endorsed the view that the interests of minor children should not be held ransom for the sake of legal niceties.
- [45] The level of acrimony between the parents of the minor children herein, has reached a critical and dangerous level. It is clear that the dispute is about the care of the children, which must be viewed through the prism of the Constitution and of course also in relation to the Children's Act, 38 of 2005.
- [46] The main dispute between the parties and the issue now, is the residency of the minor children and if there is to be change in respect of their residency in favour of the Applicant, the contact to be exercised by the Respondent and the terms thereof.
- [47] Accordingly, whilst it is clear that the residency of the children is not the only source of dispute, there is no co-parenting between the parents, due to the lack of effective communication brought about by the high conflict. Much of the acrimony arises, to a large extent, out of the fact that the parties do not talk to each other, they do not respect each other and at the very end, the Respondent conducts herself in a callous manner against the Applicant and it is clear that whilst this continues, the parties will not resolve their differences, all in the face of their knowledge that this results in an adverse effect to the disadvantage of the children.
- [48] The papers are lengthy. I do not make findings on all the allegations.

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<sup>50</sup> 2008 (3) SA 183 (CC) par 3

- [49] That said, in my view the allegations as described by the Applicant hereinabove in respect of the event on *06 September 2024*, Respondent's attempts and threats to have Applicant arrested by *SAPS*, the Respondent's threats of suicide, the manner in which she treats the Applicant and her alcohol levels, are serious allegations. The Respondent has not dealt with the serious allegations adequately, despite having had the opportunity of doing so either in her Answering Affidavit or in her Supplementary Affidavit as Ordered to be filed by me. The Respondent does not deal with the merits but instead raises technicalities, including in respect of the incident of *06 September 2024*, the Report by Dr G. Del Fabbro and dismisses both without any corroborative evidence and which technicalities are of no assistance to this Court sitting as upper guardian in a matter pertaining to the best interests of two children, more so when viewed against the backdrop of this Court's obligations arising therefrom.
- [50] The Respondent's hair follicle results of 146 pg./mg as to her alcohol levels indicating chronic excess alcohol use during the period *26 June 2024* to *24 September 2024* and the psychometric tests conducted by Dr G. Del Fabbro in respect thereof, the co-parenting challenges and parental alienation described by Dr G. Del Fabbro, raises serious concern as to the wellbeing and safety of the minor children whilst in the care of the Respondent and as stated by the Applicant's Counsel, this Court cannot adopt a "*wait and see*" approach.<sup>51</sup>
- [51] The Respondent relies on a letter from her Counsellor, Nadia Townshend, annexed as annexure "YN10",<sup>52</sup> which is undated. Therein Ms Townshend advises that she has worked with the Respondent since *March 2023* having consistently demonstrated a profound commitment to her mental health and wellbeing, her journey has not been without challenges, however, over the past few months she had a made a remarkable transformation by stopping her alcohol use and committing to sobriety but, this is contradicted by what is stated by the Respondent that on learning her alcohol levels pursuant to the tests

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<sup>51</sup> MB v NG (17885/2020) [2024] ZAGPJHB 1539

<sup>52</sup> Respondent's SA: CL 02-79, annexure "YN10"

conducted by Dr G. Del Fabbro, she abstained from alcohol for only a period of 2 months.<sup>53</sup>

[52] It is this Court's view that it is reasonable to expect the Respondent to back-up the letter from Ms Townshend and what the Respondent says about her alcohol consumption and that she denies abusing alcohol. The same holds true in regard to the events of *06 September 2024*, in terms whereof, once again, the Respondent relies on technicalities as opposed to providing factual evidence in support of what she states and thereby be of assistance to this Court.

[53] In *L [REDACTED] v L [REDACTED]*,<sup>54</sup> the Court found that:-

*"No Court can be expected to approve the sacrifice of a child on the alter, of the parent's selfish desires."*

[54] Furthermore, in *M [REDACTED] v M [REDACTED]*<sup>55</sup> is the Constitutional *locus classicus* on the best interests of the children, the criteria and guidelines expressed by King J at 204(i) to 205 (A) to (F) are rather instructive and are as follows:-

*"In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by:-*

*A reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:-*

(a) *the love, affection and other emotional ties which exists between parent and child and the parent's compatibility with the child;*

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<sup>53</sup> Respondent's SA: CL 02-47, par 242

<sup>54</sup> 1948 (4) SA 109 (c) at par 114

<sup>55</sup> 1994 (3) SA 201 (CC)

- (b) *the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;*
- (c) *the ability of the parent to communicate with the child and the parent's insight into, the understanding of and sensitivity of the child's feelings;*
- (d) *the capacity and disposition of the parent to give the child the guidance which he requires;*
- (e) *the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;*
- (f) *the ability of the parent to provide for the education well-being and security of the child, both religious and secular;*
- (g) *the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;*
- (h) *the mental and physical health and moral fitness of the parent;*
- (i) *the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;*
- (j) *the desirability or otherwise of keeping siblings together;*
- (k) *the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;*
- (l) *the desirability or otherwise of applying the doctrine of same sex matching, particularly here, where a boy of 12 (and Roan is almost 12) should be placed in the custody of his father; and*

(m) *any other factors which is relevant to the particular case with which the Court is concerned.*"

- [55] Having regard to the foregoing and having taking into consideration the Report and recommendations of Dr G. Del Fabbro as well as this Court's concern in respect of what can be best described as the cavalier, flippant and lacklustre attitude of the Respondent and the manner she has chosen to deal with or rather not deal with the serious allegations and findings made in respect of, her alcohol consumption, parental alienation and co-parenting challenges and her neglect of doing enough to change her behaviour in the face of the very serious allegations made of her, it is in my view that it is in the children's best interests that their residence is with the Applicant, as this Court cannot permit a situation to endure whereby we wait and see how the crisis will unfold and wait before taking any action, instead of having a pre-crisis plan in place, before disaster strikes.

## **COSTS**

- [56] The Applicant argued that if this Court finds that both the Applicant and the Respondent approached this Court in the best interests of the children, where this stops is on *05 February 2025*, upon the publication of the Report by Dr G. Del Fabbro by which time the Respondent had the expert opinion stating what is in the best interests of the children, however, the Respondent refused to adhere thereto and instead seeks that the Application be dismissed with costs. The Applicant therefore wants the Respondent to pay the costs, alternative the costs from *06 February 2025*.
- [57] The Respondent on the other hand argues that the Application is without merit and hence ought to be dismissed with costs.
- [58] It is this Court's view that the parties were married to each other. They are the parents of two children who need both parents in their lives. They have an on-going relationship and both should look at the interests of their children. To

burden the Respondent with a costs order would, in my view, be unjust and an appropriate Order is that each party pay his/her own costs.

## **CONCLUSION**

[59] In the result, I make an Order in terms of annexure “X” hereto.





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**F. MARCANDANATOS**  
Acting Judge of the High Court  
Gauteng Division, Johannesburg

**Heard:** *27 February 2025*

**Judgment:** *10 March 2025*

Appearances

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