

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

CASE NO.: 2501/2022

In the matter between:

L[...]¹ V[...]

Applicant

and

L[...]² V[...]

Respondent

JUDGMENT

NONCEMBU J

[1] This is an application for a referral of the matter to oral evidence in terms of rule 6 (5) (g) of the Uniform Rules of Court. The application is brought by Mr V[...] who is the respondent in the main application. For the sake of convenience, I shall refer to the parties as they are referred to in the main application.

[2] The notice of motion in the matter, having been issued on 22 August 2023, was served on the applicant's attorneys and the Family Advocate's office on 24 August 2023. Due to the short timeframe within which the application was served. Counsel for the applicant submitted that they had insufficient time in which to file their answering affidavit and heads of argument. They therefore elected to only argue the matter in court after filing their notice of opposition.

[3] The office of the Family Advocate submitted that they would abide by the decision of the court.

[4] The main application from which this application emanates concerns the relocation of the applicant together with SV, a 4-year-old child born of the now dissolved union between the applicant and the respondent. The parties were granted a decree of divorce incorporating a deed of settlement by this Division sitting at Gqeberha under Case No. 1586/2021 on 14 April 2021.

[5] In the main application the applicant seeks, in variation of the deed of settlement, a relocation with SV from Kirkwood where the parties currently reside, to Hopetown in the Northern Cape, said to be more than 600km away from Kirkwood. The main application is opposed by the respondent who also filed a counter-application seeking *inter alia*, that he be granted primary care (residence) of SV in the event that the applicant should relocate to Hopetown.

[6] Both parties have full parental responsibilities and rights in respect of SV, and residence and primary care of SV is shared between them in terms of the divorce settlement¹. Before the main application was issued the parties had attempted mediation which, unfortunately, did not succeed.

[7] As part of the terms of the deed of settlement, it was agreed between the parties that in the event that one of the parties should relocate from the Kirkwood municipal area before 2026, SV would reside with the party remaining behind (in Kirkwood).²

[8] In the course of the main application the office of the Family Advocate was appointed by agreement between the parties to conduct an investigation into the care and contact of SV and to make a recommendation to Court in this regard.

[9] The Family Advocate's report which was primarily based on an investigation and a report compiled by one Mrs Van Vuuren, a Family Counsellor within the office

¹ Clause 3.1 of the deed of settlement.

² Clause 2.1.14 of the deed of settlement.

of the Family Advocate recommended, *inter alia*, that the applicant be permitted to relocate to Hopetown with SV and that SV primarily resides with the applicant in Hopetown subject to the respondent's right of reasonable contact. The report further recommended specific contact arrangements for the respondent until SV reached 5 years, as well as from the age of 6 years.

[10] The respondent recorded his rejection of the said report and its recommendations and consequent thereupon, launched the current application. As a basis for rejecting the report, he contends that the report is wholly superficial and gave very little consideration to the best interest standard as contemplated in section 7 of the Children's Act.³

[11] To that end, the respondent appointed Mr Mark Eaton, a clinical psychologist to do an evaluative investigation of the Family Advocate's report and to prepare a report thereon for the Court.

[12] In his report, Mr Eaton made numerous observations pertaining to shortcomings in the Family Advocate's report. These include the fact that the report makes no recommendations for contact when the child is between the ages of 5 years and 1 day short of 6 years of age (a whole year); as well as the fact that Mr Smit, with whom the child would be staying if relocation is granted, was not met and evaluated, nor was his background investigated. His relationship with SV was not observed, and the report (in relation to him) was based solely on descriptions from the applicant.

[13] In conclusion to his investigations, Mr Eaton reported that:

13.1 The Family Counsellor had not fully investigated some of the relevant facts and factors required in such an application; facts and factors that would necessarily have significant impact on the best interests of a young 4-year-old minor child.

³ Act 38 of 2005.

2.2 The assumption upon which the Family Counsellor's opinion about the relocation and primary residence was based appeared to be founded on illogical or unsupported reasoning as described in the body of his report.

2.3 As the Family Advocate's report had relied heavily on the Family Counsellor's investigation, findings, expert opinion and recommendations; the apparent methodological omission and errors of logic extend to the Family Advocate's report of 18 May 2023."

[14] Having considered the report by Mr Eaton as well as his accompanying affidavit, counsel for the applicant submitted that in light thereof, they are not persisting with the order per recommendation of the Family Advocate. They however, are of the view that oral evidence is not the proper manner of dealing with the issues raised, and suggested a workable solution in the form of the appointment of a joint independent expert to further investigate the matter and report to court.

[15] The respondent takes issue with the manner in which the said proposition was brought forth; first on the basis that no affidavit was filed to court pertaining to same, nor was there any application brought for a consideration of the proposal which was couched in the form of a draft court order. The respondent contends that no such procedure is provided for in the rules nor on any available legal authorities.

[16] It is noted that the issue of a referral to oral evidence was first intimated to the applicant in a letter dated 9 June 2023 by the respondent. In the said letter the respondent indicated that they do not accept the recommendation of the Family Advocate, and that they intend obtaining a report from an independent clinical psychologist. It is upon that basis that Mr Eaton was the appointed and the report he prepared formed the basis upon which the application for referral to oral evidence was premised.

[17] In addition to the aforementioned report, the respondent also referred to a factual dispute pertaining to the motive and implication of clause 3.1.14 of the deed of settlement.⁴

[18] In my view, the latter does not raise an issue warranting a referral to oral evidence as it is an issue that can easily be dealt with by Court applying the Plascon-Evans principle.⁵

[19] With regards to Mr Eaton's report, the report itself states that it is premised on an evaluative exercise, to assist legal parties and counsel to make informed decisions regarding the recommendations made by the Family Advocate in the matter.

[20] True to its purpose, what the report does is point out shortcomings in the report of the Family Advocate and sets out pertinent aspects which ought to have been investigated by the Family Counsellor, but were not so investigated. Mr Eaton did not go further and investigate the outstanding aspects nor any of the circumstances of the parties and relevant persons. As such he made no recommendations with regards to what is in the best interests of SV.

[21] As such, the applicant took no issue with his report. To draw a conclusion therefore, that Mr Eaton's report raises factual disputes is ill- advised and quite fallacious. In the absence of any factual disputes therefore, there is no basis for a referral of the matter to oral evidence. All that the report does is point out shortcomings and omissions in the Family Advocate's report. These can only be remedied by supplementing the Family Advocate's report as it would be difficult for a Court to make a determination on the best interests of SV based solely on that report as it stands.

[22] Rule 6 (5) (g) provides:

⁴ Which prohibits the relocation of SV before the end of 2026.

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1964 (3) SA 623 (A) at 634E and 635 A – C.

“When an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular but without affecting the generally of the foregoing, **it may direct that oral evidence be heard on specific issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definitions of issues, or otherwise.**” (Emphasis intended).

[23] The import of rule 6 (5) (g) is that where there is a material and bona fide dispute of fact that cannot be decided on the papers, a court is faced with three alternatives: it may dismiss the application, or direct that oral evidence be heard on specified issues, or refer the matter to trial. A court is not restricted to the listed remedies and may make any order it deems fit and which is directed at ensuring a just and expeditious decision.⁶ Stemming from the above, it is crystal clear that the purpose of a referral to oral evidence is to resolve material disputes of facts. As indicated earlier in this judgment, no issue has been taken with Mr Eaton’s report by the applicant and the report itself raises no disputes of fact but shortcomings in the Family Advocate’s report.

[24] Quite tellingly, even the notice of motion in the application for a referral to oral evidence makes no mention of disputes of fact that required a resolution. A closer perusal of the notice of motion reveals that what is being sought in the oral evidence from the Family Counsellor is to elicit that which is not apparent from her report, ie. the basis for her findings⁷ ; the gap in the report pertaining to contact arrangement for a period of 1 year (between 5 and 6 years old)⁸ ; the role in which the loss of a mother was employed in the evaluative exercise⁹; how SV’s voice was solicited in

⁶ *M R v N R* (A151/2022) [2023] ZAWCHC 15 (13 February 2023).

⁷ Paragraph 1.1 of the notice of motion.

⁸ Paragraph 1.2 of the notice of motion.

⁹ Paragraph 1.3 of the notice of motion.

order to obtain her views¹⁰; and factors/ considerations employed in the weighing up process envisaged in section 7 of the Children's Act¹¹.

[25] All these are the aspects which Mr Eaton notes as having not been taken into account/ consideration, or at the very least, such consideration is not apparent in the report- hence the report is said to have short-comings.

[26] It is also on this basis that the applicant suggests that at the very least, it appears from Mr Eaton's report that the Family Advocate's report needs to be supplemented. It is also on the same basis that they suggest that a joint independent expert be appointed to investigate the outstanding aspects in the aforementioned report and report back to court.

[27] The purpose of the Family Advocate's report is not so much to please the parties as it is to place information before the court in order to guide it to make a finding on the best interests of the minor child involved. If the court is not satisfied with the content of the Family Advocate's report an alternative method to obtain further information is necessary.¹²

[28] The Family Advocate should make a balanced recommendation subsequent to an investigation regarding the best interests of the minor child with specific reference to her primary residence, care, and contact.¹³It has been affirmed in several court decisions that a mother's role as primary caregiver has diminished and the relevant facts, opinions and circumstances regarding the care of the minor child and the child's parents must be assessed in a balanced fashion. The standard is to be applied in a flexible manner.¹⁴

¹⁰ Paragraph 1.4 of the notice of motion.

¹¹ Paragraph 1.5 of the notice of motion.

¹² *LB v WB* (5393/2019) [2020] ZAFSHC 90 (7 April 2020) at 42-43.

¹³ *Soller N.O. v G and Another* 20023 (5) SA 430 (W) (referred to in *LB v WB* supra).

¹⁴ *Minister of Welfare and Population Development v Fitzpatrick* [2000] ZACC6; 2000(3) SA 422 (CC) at 428A.

[29] As appears from Mr Eaton's report, this was not done in the present matter and the report points to material shortcomings in the Family Counsellor's report. One therefore can readily conclude that the report by the Family Counsellor, and by extension that of the Family Advocate, does not place sufficient information before court to assist it in making a determination with regards to what is in the best interests of SV pertaining to her residence, care and contact.

[30] Section 7 of the Children's Act provides as follows:

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely:

(a) The nature of the personal relationship between-

(i) The child and the parents; and

(ii) The child and any other caregiver or person relevant in those circumstances.

...”

[31] It is not in dispute that the nature of the personal relationship between SV and Mr Smit, the applicant's fiancée and the person with whom SV is contemplated to stay with in the event that the relocation application is granted, was not investigated and thus taken into consideration in the Family Advocate's report. He is without a doubt a very relevant person in the relocation application, as such a failure to consider his circumstances is a serious omission in the Family Advocate's report.

[32] This is but one material aspect without which the court cannot be in a position to make a determination with regards to what is in the best interests of SV. A referral to oral evidence will not cure the said omission. It therefore follows that the only equitable remedy on the circumstances of the present matter is to have the report of the Family Advocate supplemented.

[33] Section 9 of the Children's Act provides that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

[34] Both the main application and the counter- application have the effect of circumscribing the parental responsibilities and rights of each of the parties in respect of SV (as contemplated in section 28 (1) (b) of the Children's Court). In terms of section 29 (1), such an order can only be granted if it is in the best interests of the child.

[35] Section 29 (5) provides that the court may for purposes of the hearing order that-

“(a) report and recommendations by a Family Advocate, social worker or other suitably qualified person must be submitted to the court.

(b) A matter specified by the court must be investigated by a person designed by the court;

(c) A person specified by court must appear before it to give or produce evidence; or

(d) ...”

[36] In *casu* the information contained in the report culminating in the recommendation by the Family Advocate is clearly insufficient for the court to determine whether or not the recommendation is in the best interests SV.

[37] In the circumstances therefore nothing precludes this court from directing that a further expert report to supplement that of the Family Advocate as contemplated in Section 29 (5) (a) and (b) be obtained.

[38] In the circumstances, a referral of the matter to oral evidence is untenable and cannot be sustained.

[39] Consequently, I make the following orders:

(a) The application for a referral to oral evidence in terms of rule 6(5) (g) is dismissed with costs.

(b) Mr Wesley Kew, a registered clinical psychologist is appointed and authorised to carry out an investigation/evaluation forthwith regarding the following aspects:

(i) Whether it will serve in SV's best interests as recommended by the Family Advocate in their report dated May 2023 to be permitted to relocate with the applicant to Hopetown and if so, what care, contact and primary residence arrangements are in the best interests of the parties' minor child (SV).

(ii) In the event that SV's relocation to Hopetown as recommended by the office of the Family Advocate in their report dated May 2023 is not supported by Mr Kew, then and in that event, what care, contact and primary residence arrangements are in the best interests of the parties' minor child.

(iii) The minor child's current psychological functioning and general welfare and her psychological functioning and welfare if she is to relocate with the applicant to Hopetown.

(c) Mr Kew is to compile a report setting out his findings and recommendations regarding the aspects listed in paragraph (b) *supra* and he is to make such report available to the parties' legal representatives.

(d) Mr Kew is authorised to take the following steps to carry out the investigations/evaluations and to compile a report, namely:

- (i) To guide him in his investigation and recommendation by considering and applying the provisions of section 7(1); 10 and 33 of the Children's Act, 38 of 2005.
- (ii) To conduct an interview and make clinical observations of the minor child in an age appropriate manner on reasonable notice to the applicant and respondent, whilst the child is in the applicant's care and whilst the child is in the respondent's care.
- (iii) To conduct interviews with the applicant and respondent on reasonable notice.
- (iv) To conduct interviews with family members of the applicant and the respondent, including but not limited to Mr Smit, on reasonable notice.
- (v) To conduct interviews with persons identified in the reports of the Family Advocate and the Family Counsellor on reasonable notice.
- (vi) To conduct interviews with the minor child's teachers in Kirkwood on reasonable notice.
- (vii) To investigate the school the applicant intends to enrol the minor child in, if she is permitted to relocate with the applicant to Hopetown and to interview the teacher(s) at the school, on reasonable notice.
- (viii) To conduct interviews with relevant collateral sources on reasonable notice.
- (ix) To appoint a social worker to investigate and report on Mr Smit's home environment and social environment in Hopetown, on the terms as requested by Mr Kew.

(x) To observe the minor child interacting in the home environment of both the applicant and the respondent.

(xi) To observe the minor child interacting with Mr Smit in the applicant's home environment at Kirkwood.

(xii) Pending the outcome of his report and recommendation, to request the applicant and the respondent to approach a judge in chambers to extend his powers or duties in order to fulfil his mandate.

(xiii) To prepare a final report and make a recommendation in respect of any issue concerning the welfare and/ or affecting the best interests of the minor child.

(e) Advocate Rawjee or Attorney Judy Theron is hereby appointed and authorised to conduct a mediation and/or conflict resolution process as contemplated in rule 41A of the High Court Rules, between the applicant and the respondent in respect of issues concerning the welfare of, and/or affecting the best interests of the minor child, in the event that a dispute arises pending the investigation of Mr Kew and also upon finalisation of Mr Kew's report and recommendation and each party is to be liable to pay 50% of the mediation costs and the mediator's fees.

(f) In amplification of the provisions of rule 41A, Advocate Rawjee or Attorney Judy Theron is authorised to take the following steps to carry out the mediation and/ or conflict resolution process as contemplated in paragraph (e) *supra*:

(i) To conduct interviews with the applicant and respondent on reasonable notice and for reasonable periods.

(ii) To have insight into any report(s) prepared by Mr Kew in terms of this order and to conduct interviews with him regarding the aspects mentioned in his report and any recommendation made by him.

- (iii) To assist the applicant and the respondent in reaching agreements relating to the care and contact of the minor child upon recommendation of Mr Kew.
- (iv) To assist the applicant and respondent in preparing a parenting plan regarding the care, contact and primary residence of the minor child, should such a plan be deemed appropriate and/ or necessary, upon recommendation of Mr Kew.
- (g) The applicant and respondent shall participate in and facilitate the evaluation/investigations of Mr Kew and the rule 41A mediation of Advocate Rawjee or Attorney Judy Theron on reasonable notice.
- (h) The applicant and the respondent are each to be liable to pay 50% of the fees and expenses of Mr Wesley Kew and the social worker to be appointed by Mr Kew in terms of this order.
- (i) Mr Kew's report and recommendation and any parenting plan agreed upon by the parties are to be served upon the office of the Family Advocate, Gqeberha for comment or if necessary, a supplementary report.
- (j) Pending the finalisation of Mr Kew's report and recommendation and adjudication thereof, the parental responsibilities and rights, care and contact and residence of the minor child will be shared between the parties as per the deed of settlement dated 16 July 2021, under case number 1586/2021 (excluding the mediation of SV's care and contact specifically addressed in this order).
- (k) The applicant's application and the respondent's counter-application are postponed sine die pending the outcome and finalisation of Mr Kew's report and recommendation.

(l) The costs of the applicant's application and the respondent's counter-application are reserved.

(m) The applicant or the respondent is permitted to enrol the applicant's application and the respondent's counter-application according to the practice directives of the Eastern Cape High Court after Mr Kew's report and recommendation are finalised and transmitted to the parties, and only in the event that the parties fail to reach an agreement and /or parenting plan by way of mediation as directed in this order.

V P NONCEMBU
JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the applicant	: <i>M Veldsman</i>
Instructed by	: Anthony-Gooding Inc Gqeberha
Counsel for the Respondent	: <i>T Rossi</i>
Instructed by	: Greyvensteins Attorneys Gqeberha
Date of hearing	: 31 August 2023
Date judgment delivered	: 15 September 2023