

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

Case No: 1126/2022

In the matter between:

D[...] W[...] A[...]

APPLICANT

And

C[...] A[...]

RESPONDENT

JUDGMENT – RULE 43 APPLICATION

MAKAULA ADJP:

A. Introduction:

[1] This is an opposed urgent application brought by the Applicant in terms of rule 43 of the Uniform Rules of Court seeking the following orders.

“1. Dispensing with the forms and service provided for in the rules of this Honourable Court and disposing of this matter as a matter of agency in terms of Rule 6 (12).

2. That a qualified psychologist be appointed from the following proposed names, as provided by the office of the family advocate:

2.1 Wendy Nunn;

2.2 Tersia Kroukamp;

2.3 Niki Zietsman.

[2] That the appointed psychologist is tasked with the responsibility to develop a professional relationship with the children and to assist them to understand and process their life experiences, the changes in their family system and to developing coping mechanisms to adequately deal with these aspects.

[3] That the psychologist be allowed to engage with the applicant and respondent when it is deemed necessary and to provide input to the parties, but the parties shall not be entitled to feedback from the child psychologist which would normally be deemed to be confidential.

[4] That the costs of appointing the child psychologist be paid by the applicant's medical aid and any excess not covered by the applicant's medical aid to be paid by the applicant.

[5] That a parenting coordinator be appointed as a matter of agency, as recommended by the family advocate, to:

“5.1 Facilitate contact arrangements between the parties and the minor children;

5.2 Attempt to mediate disputes between the parties regarding contact arrangements; and

5.3 In the absence of an agreement between the parties, that the parenting coordinator be able to issue a directive to avoid the dispute between the parties having a negative impact on the minor children.

5.4 That the appointed parenting coordinator shall have the right to liaise with the appointed child psychologist when having to issue directives in the children's best interests and to seek input from the child psychologist and similarly the child psychologist can liaise with the parenting coordinator on

aspects pertaining to the children to amend and slash or extend contact arrangements to meet the children's needs.

5.5 That the respondent be directed to submit to psychological evaluation to determine her ability to care for and act in terms of the minor children's best interests.

5.6 And that the respondent, should she oppose this application to pay the costs of the application.

An order that the applicant be granted leave to supplement these papers, if necessary, in the event of the matter being opposed.

5.7 Further or alternative relief”.

B. Background facts.

[6] The parties are embroiled in divorce proceedings, which are pending before this court. This is a second rule 43 application, the first having been adjudicated by my brother Lowe J. The application relates to the welfare of their two minor children, G[...], and E[...] A[...]. The Applicant is the father and the respondent is the mother and primary caregiver. The applicant contends that the impact of the divorce to their children has adversely affected them emotionally and psychologically this application.

[7] The mantra that “*when love ends war begins*” resonates in this matter. Like in most divorce matters, this one is no exception. It is a developing phenomenon in divorce matters that animosity and hatred between spouses affect the children. I have dealt with quite a number of Rule 43 applications wherein parties fight like cats and dogs, each claiming to be doing so “*in the best interests of their children*”. Inevitably, such fights do not turn out to be in the interests of the children, far from it, because they become toxic and defeat the same noble intention of saving the children from the ravaging effects of the desolation of their marriages. This tendency should cease. This court is inundated by applications involving children who are

used in settling scores between divorcing parents. It cannot be that parents who clamor to have the best interests of their children, fight like there is no end. I am constrained to think that legal representatives are not doing much to help ease such situations, all in the name of carrying out instructions.

[8] As previously stated, this is the second Rule 43 application in this matter. My brother Lowe J. Bemoaned the sentiments I dealt with above albeit in a different way. He said the following in this regard.

“Turning to the contact to be maintained between the respondent and his two children, as I have already said, it is appropriate that respondent have access to the children, both applicant and respondent being suitable parents. Whilst their relationship presently inter se is, it would seem fraught with emotion and probably dislike, both applicant and respondent must be encouraged to deal with this themselves internally or in a different forum, and not to let this spill over into their time with the children”.

[9] The emotions and probably dislike has engulfed the parties to an extent that they are miles apart and yet they are having the same interest and welfare of their children. They are clamoring for the best interests of their children but from their respective vantage positions.

[10] It is common cause from both parties that the children are affected in one way or the other by the acrimonious divorce. In the main, the applicant sought intervention by a psychologist who shall provide an assessment, and treatment to both children especially the eldest, G[...]. Attached to that would be an appointment of a parenting coordinator. The applicant relies on the recommendation of Mrs Duckitt, a Family Advocate who dealt with the parties and the children. The nub of the application is found in paragraphs 23 to 33 of the founding affidavit under urgency. Instead of dealing pertinently with the issues raised, the respondent retorted that “... the applicant had been aware of her stance since last year and he has been threatening to bring this urgent application for more than two months.” The respondent deposed to 115 paragraphs contained in 37 pages dealing with the animosity between them (basically giving factual disputes.) The relevant response to

the issues raised in the founding affidavit is contained in six pages. Lowe J, like all other courts do, which I am in agreement with, dealt with the tendency of parties to file prolix papers in rule 43 applications. In the context of dealing with a cost order, he bemoaned this by stating.

“...this is more so, having regard to the prolixity of the papers which is apparent, and the fact that I was only prepared to hear the matter and did not strike it from the roll, having regard to the best interest of the children, and also taking into account the substantial areas of dispute between the parties, which could easily have been articulated in far less time and space.”

It seems the respondent did not heed the warning Lowe J sounded in this regard. Less could have been said in a few paragraphs.

[11] As previously stated, the crux of the application is the appointment of a psychologist and a parenting coordinator to evaluate the state and frame of mind of the children regarding the applicant's visitation rights and related issues. The family advocate made the following recommendations in this regard:

“5.5.8.1 Mrs Duckitt is of the view that the children should remain in the Plaintiff's primary care and that the contact between the defendant and the children should be structured in such a manner that the children's needs are put first. Mrs Duckitt informs that the practical difficulties of the distance between the parties must be considered and a contact structure developed that addresses challenges from the children's perspective.

5.5.8.2 It is evident that the parties are not able to communicate effectively to make arrangements and it is therefore crucial that a neutral parenting co-coordinator be appointed as a matter of urgency to facilitate arrangements and to issue directives if need be. Ms. Daleen Biljon has confirmed her availability to act as parenting coordinator.

5.5.8.3 Mrs Duckitt is of the view that a therapist should be appointed for the children by the Honourable Court, if the parties are not able to reach

an agreement regarding a therapist. It is also essential that the parenting coordinator has the power to liaise with the children's therapist and the therapist with the parenting coordinator. Mrs Duckitt is further of the view that the parties should receive individual therapy.

5.5.8.4 Mrs Duckitt informs that the recommendation is made with the hope that the parties can start a new journey as co-parents, develop their capacity and provide for their children's needs in a more positive manner."

[12] The response of the respondent to the appointment of a psychologist is contained in the correspondence she had with the applicant regarding the refusal of G[...] to go with her father when he came to fetch them. As apparent from the papers, there are sharp disputes regarding what occurred, and the exchanges between the parties which also involved the mother of the respondent. I shall not deal with that for purposes hereof. The respondent referred to how the incident traumatized the children at school and at home. She even referred to a report by Adv Urban in the other Rule 43 application which documented the children's refusal to participate in further intervention by the Family Advocate Mr Duckitt or professionals of similar ilk. The respondent's view in this regard therefore was.

"For so long as this possibility remains, it will not be in the children's interest to traumatize them further by the introduction of yet another expert."

[13] The respondent further stated:

"I again reiterate that I would have no objection if the children are introduced to a psychologist specializing in children's needs willingly The idea of picking up a child as if she is a puppy, and not a thinking and feeling human being and then forcefully take that child away from their home for a number of days, or to visit a psychologist against their will, is ludicrous *and definitely not the manner in which our children have been raised up to this stage.*" (Emphasis added).

[14] The underlined portion indicates how emotive this dispute is as noted before. There are a sharp disputes about what occurred and I shall make no finding as to who is telling the truth. However, it speaks to the reason why a child psychologist needs to be appointed. It is inevitable that the applicant as the non-primary caregiver, has to be allowed to fulfill his parental duties and to spend time with the children. It is inconceivable that a child psychologist would haul a child away from home kicking and screaming. They are trained to deal with children and by the nature of their profession, the welfare of children is core. This issue has nothing to do with the sentiments of primary care being given to the applicant. Instead it is a preliminary step for such determination.

[15] The respondent stated that she and her attorneys have made it clear that she had no objection that a psychologist be appointed once they are sure that the children would not be exposed to other experts. I do not understand what is meant by being exposed to "*other experts*". The appointment of a child psychologist is essential to assess the children and make a determination about their mental state and would provide therapy if necessary.

[16] The emotions of the parties keep creeping up and turn to cloud the issues. For example the respondent made the following remarks:

"For the appointment to be meaningful the contact between the psychologist and the specific child should happen on the conditions set out by the specific therapist. It must not be as the applicant indicate that I cannot get them to go that I am not competent to have primary care or that this can yet be another bullying tactic of the applicant to threaten me with contempt of court proceedings." (*Sic*)

[17] The last portion / sentence clearly clouds the issues and cannot be a consideration why a therapist should not be appointed. Gleaning from the version of the respondent only, it is clear that these children are traumatized by the toxic relationship between their parents, which permeates to the core of their parenting functions. I am not in the least finding fault with any of the parties. As previously stated all that is apparent is that the children, especially G[...], are adversely affected

by what is happening between their parents which ultimately affects them. That is paramount and cries out for a psychologist to be appointed to deal with the situation. The concern by the respondent that she does not want the children to be dragged out of home and be exposed to many experts, shall amply be dealt by the child psychologist within whose realm that resides as aforesaid.

[18] In paragraph 6 and 7 of the Notice of Motion, the applicant sets out the duties to be performed by the parenting coordinator. The order sought in this regard does not prescribe who should be appointed. Furthermore, this court, if it decides to grant the orders sought in these two paragraphs, is not bound that. It may vary the duties in order to cater for the interests of both parties. I wish to mention upfront that my understanding of the role of the parenting coordinator is to not to prescribe or resolve the issues the parties have against each other but to assist them to navigate their parental responsibilities towards the children. Put differently, if such hatred adversely affects their duties and responsibilities towards the children then the parenting coordinator would knock sense to them and give directions which would benefit the children.

[19] The respondent categorically stated that she had no objection to the appointment of a parenting coordinator but that should occur once the issue of primary care has been determined. What is not clear from her, is when that will be when the children are adversely affected by their behavior currently. Primary care, as previously stated, has nothing to do with resolving the problems which are prevailing and which both parties are unable to resolve. The respondent has indicated that she has no objection to such an appointment provided his/her role is clearly defined and the costs of that person's involvement will be for the applicant to bear.

[20] The respondent mentioned the involvement of Adv Anusha Rawjee. She stated that Adv Rawjee said:

...“indicated her availability to assist in future until such time as the divorce is finalized, if the applicant and I have challenges concerning contact arrangements ... (h)er approach would be to mediate and if we cannot reach

an agreement that she was willing to issue a directive, if the court grants her this power.”

[21] Based on these views, I need not say anything further than stating what has been suggested by the family advocate and agreed to (in one way or the other) by the parties, that it is essential, for the benefit of the children, that a parenting coordinator be appointed.

[22] Regarding paragraph 8 of the Notice of Motion, I find no reason to order the respondent to undergo therapy or psychological evaluation. If such an evaluation is necessary and would benefit the parties, they must both undertake to do so on their own. I therefore make no finding in this regard.

[23] The problems which beset the rights of visitation, telephonic communication and related issues raised by the respondent in her counter application, would be resolved once the parenting coordinator is appointed. I am not in the list downplaying the issues raised by her in any shape or form. But I am of the firm view that I should not interfere with the order of my brother Lowe J in this regard. The reasons upon which the counter application is premised are highly contentious. Each party is pulling to his/her direction even in respect of the issues which are sought to be amended. I therefore, do not wish to deal with those issues, which would be resolved once a psychologist and parenting coordinator are appointed.

[24] The application was brought by way of urgency by the applicant. If one looks at the orders sought, there was no reason, bearing in mind the disputes between the parties, for the applicant to have brought the application in such unreasonable time frames. He knew and ought to have known that the application was to be opposed, and therefore should not have self-created so stringent truncated time periods on an issue which, was based on Lowe J's judgment and the recommendations of Mrs Duckitt made in November 2022.

[25] This court is not going to be able to craft the duties of the psychologist and the parental coordinator. For that reason, I called upon the parties' representatives to

come up with the names of the psychologist and parental coordinator and their duties. I am indebted to the parties representatives in this regard.

[26] Consequently, I make the following order:

1. That Ms. Kaitlin Yendall, a counselling psychologist, is hereby appointed and tasked with the responsibility to develop a professional relationship with the minor children, to assist them with understanding and processing their life experiences, the changes in their family system and to engage in a therapeutic process with them when necessary.
2. That the psychologist be allowed to engage with the applicant and respondent when necessary. The parties shall not be entitled to feedback from the psychologist whose findings are deemed confidential.
3. Neither of the parties shall initiate contact with the psychologist, except for bringing court orders to her attention by email wherein the other party shall copied in.
4. The psychologist may in so far as it is in the best interest of the children engage with the applicant and/or the respondent.
5. The costs Ms. Yendall shall be paid by the applicant's medical aid and by the applicant if the medical aid does not cover the expenses.

Mediator:

6. That *pendente lite* Attorney Matilda Smith be appointed as mediator with the powers to make binding directives.
7. The mediator shall mediate disputes *pendente lite* between the parties regarding contact with the children, duration of such contact, place of contact, telephonic contact between the children and either party, extra-curricular

activities and the payment thereof. In the absence of successful mediation, the mediator may make a ruling which shall bind the parties.

8. Either party may seek the guidance and/or direction of the mediator by initiating the process via email wherein the other is copied in. However, in the mediator's sole discretion she may speak to either party in the absence of the other.

9. The mediator is authorized and encouraged to seek guidance on any issue involving the children from Ms. Yendall in her professional capacity.

10. The mediator may if necessary assist the parties in drafting and finalization of a parenting plan, should primary care be agreed upon prior to the hearing of the divorce action.

11. Costs shall be costs in the cause.

M MAKAULA
Acting Deputy Judge President of the High Court

Appearances:

For the Applicant: Ms O.T. Olowookorun

Instructed by: Bukky Olowookorun Attorneys

For the Respondent: Adv Lilla Crouse

Instructed by: Howard Collen Inc

Date Heard: 20 June 2023

Date Delivered: 26 September 2023