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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 5334/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

J [...] G [...] M [...]

Applicant

And

I [...] H [...] M [...]

1st Respondent

THE FAMILY ADVOCATE, BLOEMFONTEIN

2nd Respondent

HEARD ON: 15 DECEMBER 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 20 December 2022.

[1] In this urgent application, the applicant seeks an interim order to exercise supervised sleepover contact with his minor daughter IM ('the minor child') aged 14 years old for the period 23 December 2022 to 29 December 2022 at Victoria Bay in

Cape Town. He also seeks an order that the second respondent ('the family advocate') be directed to investigate and make recommendations regarding the best interests of the child pertaining to alternative weekends and long school holidays sleepover contact with the minor child under adult supervision.

[2] The minor child was born on 23 October 2008 approximately three years before the applicant and the first respondent were married. The parties are presently embroiled in an acrimonious divorce and rule 43¹ proceedings instituted by the first respondent as a result, they have been living apart since 26 March 2019 and the first respondent has been the primary care-giver of the child since then.

[3] It is the applicant's case that the application is urgent because: the first respondent has refused to allow him to exercise sleepover contact with the child for the upcoming vacation in Cape Town without a valid reason or even a counter suggestion. The sleepover contact has been recommended by the educational psychologist, Dr Zendre Swanepoel who conducted an investigation on the aspect of the applicant's contact rights as requested by both the applicant and the first respondent.² The first respondent is apparently of the view that due the pending criminal proceedings against the applicant, he is not competent to have sleepover contact with the minor child and this is despite the fact that for over two years after the allegations surfaced, the first respondent did not deny him contact with the minor child she even allowed him to sleep with the minor child in the same room in their guestroom, to take the child to school and extra classes, attend her sporting activities and to also assist her with home-work. In fact, from 10 September 2021 he had contact with the minor child on every weekend for sleepovers until he was incarcerated on 15 September 2021 after his bail was revoked. The situation has not changed since then.

[4] The applicant admits that there has been a delay in launching this application, he explains that there is a good reason to delay coming to court in that, he was advised by his attorneys to first try and resolve the matter amicably with the first respondent before approaching the court. The application was only launched when it

¹ Of the Uniform Rules of Court.

² The psychologist's report is attached to the applicant's founding affidavit as Annexure "FA1."

became clear that the first respondent was adamant in denying the applicant his rights to have sleepover contact with the child. Annexures “FA2,” “FA3” and “FA8” are copies of the correspondences between the parties’ legal representatives dated 2 November 2022 and 4 November 2022, respectively.

[5] The applicant states that he has already purchased the flight tickets for the minor child therefore, he cannot obtain suitable redress at a hearing in due course as at that time the horse would have bolted.

[6] On the other side, it is the first respondent’s case that this application stands to fail on the ground of lack of urgency or that the urgency is self-created for the reason that, the applicant has launched an urgent application based on a psychologist’s report which he received over three (3) months ago on 16 September 2022, since then he has done nothing in terms of approaching the court to enforce his rights in that regard. Furthermore, there is nothing in the applicant’s papers to indicate that if the relief sought is not granted namely, if the minor child does not spend the holidays with the applicant her emotional being will be affected.

[7] I am in agreement with the first respondent’s contentions. Rule 6(12) allows for the abridgment of the court rules but it is not there merely for the taking.

[8] In *East Rock Trading 7 (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited and Others*³ the court held that where there has been a delay in launching an urgent application, it is for the applicant to

“explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter

³ (11/33767) [2011] ZAGPJHC 193(delivered on 23 September 2011) paras 5 to 9.

qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.”

[9] The delay of three months is extreme. The applicant has not even made an attempt to explain the delay from the date of receipt of the psychologist's report, 16 September 2022 to the date of enrolling this application on the urgent court roll on 15 December 2022. The delay cannot be countenanced.

[10] As far as the applicant's apprehension that he cannot be afforded a substantial redress in due course is concerned, it is undisputable that the issue relating to sleepover contact with the minor child requires an investigation by the family advocate. In the applicant's founding affidavit, paragraph 15 (9.3 of the applicant's rule 43 opposing affidavit) he avers that he had requested that the minor child be evaluated by a psychologist and in the notice of motion, prayer 3 thereof he asks for an order that the family advocate must conduct an investigation in this regard.

[11] It does not end there. It is the applicant's case that in the report, the sleepover contact with the minor child under adult supervision, is recommended.

[12] The psychologist's report does not bear out these contentions. See the indexed pages 37 to 38 at paragraphs 11.2 to 11.5. The psychologist has not only alluded to the gravity of the offences the applicant was charged with but also the fact that when the minor child visits the applicant she should not sleepover and that the issue of sleepover contact under adult supervision should be investigated. It is also important to note that the psychologist's report was compiled before the applicant was convicted.

[13] In attempt to remedy this anomaly, during the hearing of the matter Mr Louw, counsel for the applicant handed up a two (2) page document from the bar stating that it was a supplementary report compiled by the psychologist pursuant to the applicant's conviction and it reinforces the applicant's contention that he may

exercise sleepover contact with the child under adult supervision. It was also argued that the minor child has expressed her wish to spend the holidays with the applicant, she even wrote him a letter in that regard.

[14] It must be borne in mind that the right of the non-custodial parent to exercise contact with a child is not absolute, the court adjudicates the issue on the basis of whether the contact would be in the best interest of the child and not the 'wants' of the child or those of the non-custodial parent.⁴

[15] The applicant's belated supplementary report does not assist this court in its quest to determine the best interest of the minor child in relation to sleepover contact. Despite the psychologist's conclusions in the initial report that the issue of sleepover contact under adult supervision should be investigated, no investigation has been carried out since then. Furthermore, in terms of section 10 of the Act, the court must give due consideration to the views expressed by the minor child when determining whether the suggested contact regime will suit the minor child's best interests.

[16] Bizarrely, in the supplementary report, an assertion is made that the minor child would be able to sleepover with the applicant during the holidays and this is despite the fact that there is no indication in this report that the minor child was interviewed on this aspect and that these are her views. The court cannot rely on an expert's opinion which is not substantiated by a factual basis.

[17] It is for these reasons above that I conclude that no proper case has been made out for the granting of the order sought by the applicant. The application ought to fail.

[18] There is no reason why the costs should not follow the result.

[19] In the premises, I make the following order:

⁴ See section 28(2) of the Constitution Act No, 108 of 1996; *McCall v McCall* 1994 (3) SA 201 (CPD).

1. The application is dismissed with costs.

N.S. DANISO, J

APPEARANCES:

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