

In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 4316/2013

In the matter between :

Dominic Ettore Barbieri

Applicant

and

Michelle Gayle Barbieri

Respondent

Judgment

Lopes J

[1] This is an application in which the applicant seeks an order compelling the respondent to make herself available for interviews and assessments with a specialist psychologist, on her own and without the benefit of any legal representative accompanying her.

[2] The parties were married to each other in 1999. They have three minor children aged 14, 11 and 5 years respectively. The respondent instituted divorce proceedings against the applicant in December of 2011. Prior to that and in

November of 2011 the parties had consented to an order that, pendentelite, the primary place of residence of the children would be with the applicant. The divorce trial is set down for hearing on the 3rd June 2013. In the divorce proceedings each party contends that the primary place of residence of the children should be with them.

[3] In order for the court hearing the divorce action properly to assess the best interests of the children, with regard to the primary residence order sought by each party, consultations were arranged with each of the parties' experts so that they could interview and conduct psychometric testing on each of the parties and their minor children. At a Rule 37 conference the respondent confirmed that she would co-operate with the applicant's expert, Dr Olivier, and that she was able to attend consultations from the 23rd to the 27th April 2013.

[4] In correspondence between the parties' attorneys, the applicant had agreed to co-operate with the respondent's expert Dr Duchon and undertook to make himself available for consultations and psychometric testing by her on the 13th April 2013. To that end he signed a document prepared by Dr Duchon agreeing to submit to an interview with her, and giving her the right to disclose all or any of the information given to her by the applicant. The applicant presented himself and the children for those interviews, and the assessment by Dr Duchon is complete.

[5] The respondent then refused to attend the consultations with Dr Olivier, and the applicant brought an application seeking to compel her to do so. That application was heard before me as an urgent application on the 24th April 2013. The respondent initially gave various reasons why she would not attend the consultations, but eventually the respondent's attorneys advised the applicant's attorneys that the respondent would not attend those consultations either then or in the future. Her concern, as expressed by her counsel, Mr *Stokes* SC, was that she might have to answer questions relating to her finances, which were designed to show that she could not afford to have primary care of the children.

[6] I dealt fully with the respective arguments advanced by the parties' representatives in a judgment handed down on the 24th April 2013 wherein, inter alia, I ordered that the respondent was to submit herself to interviews and assessments with Dr Olivier on the 26th and 27th April 2013.

[7] The next day the respondent's attorneys lodged an application for leave to appeal against the order which I had made on the 24th April 2013. They took the view that the application for leave to appeal suspended the operation of my order and accordingly the respondent would not present herself for the interviews.

[8] The application for leave to appeal was heard on the afternoon of the 25th April 2013 and I granted an order dismissing the application for leave to appeal and further ordering that the order granted by me on the 24th April 2013 was to be

effective, notwithstanding that the respondent may apply for special leave to appeal from the Supreme Court of Appeal by way of petition.

[9] What then happened is that the respondent presented herself at the rooms of Dr Olivier the next day, accompanied by her attorney. Dr Olivier telephoned the applicant's attorney and told her that the respondent's attorney had informed her that she intended to sit in on all of the assessments, psychometric testing and interviews to be conducted by Dr Olivier. Dr Olivier was of the view that in those circumstances she could not continue with the assessment because, to do so, would place her in breach of her professional rules of conduct.

[10] On the 3rd May 2013 the applicant then launched this application seeking to join the respondent's firm of attorneys as a second respondent, compelling the first respondent to make herself available for interviews and assessments with Dr Olivier, directing that no-one save the respondent may be present during that assessment, and interdicting and restraining the respondent's attorneys from being present.

[11] As part of his application the applicant has put up a memorandum of advice written by Dr Miranda B Bergh, a clinical psychologist based in Pretoria, which records the necessity for interviews, testing and assessments to be conducted privately and not in the presence of third parties. Dr Bergh confirmed her views in a confirmatory affidavit. In her memorandum Dr Bergh sets out comprehensive and

compelling reasons why the psychological evaluation and testing is rendered nugatory if conducted in the presence of a third party.

[12] The respondent did not initially respond to this affidavit, but on the 16th May 2013 when the matter came before me, an answering affidavit was provided. In addition, a short answering affidavit was also deposed to by the respondent's legal representative. In her affidavit, the respondent recorded that she attended the interview with her attorney against her will and under compulsion of my court order. She claims that she does not have the necessary knowledge to understand the true extent of her constitutional rights, and she is not qualified to understand the impact and extent of the order which was granted.

[13] In my judgment on the original application I recorded that I was fully aware of the fact that there may well be a breach of the respondent's right to privacy as enshrined in the constitution, if she is compelled to answer questions asked of her by a psychologist. It was, however, my view, that the best interests of the children had to trump the constitutional rights of the parties to their privacy. This was particularly so where the respondent had agreed via her legal representatives to consult with Dr Olivier, and the applicant had already agreed and carried out his side of the agreement by attending on the respondent's expert witness. I pointed out in my judgment that I am enjoined by the provisions of the Children's Act to apply the standard that the best interests of children is of paramount importance in all matters concerning their care, protection and well-being.

[14] MrStokes referred me to the judgment of Howie J in *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (ECD). That case concerned the right of a plaintiff to legal representation at a medical examination in terms of Rule 36(1) of the Uniform Rules of this Court, and related to an action for bodily injury. In my view that case is entirely distinguishable from the present one. The court was not enjoined to apply the same criteria which I am to apply.

[15] My primary concern is that if the respondent does not attend the consultations and undergo the psychometric testing the trial court will have difficulty in assessing the expert reports with a view to a proper finding as to where the children should primarily reside. This is relief which the respondent herself seeks. If there are indeed any problems revealed in the psychometric testing and questioning by the psychologists, those are matters of which a court making such a decision should be made aware.

[16] If I am to decline to order the respondent to attend the consultations unaccompanied by her attorney, the consultations will not take place. Setting a precedent that parties attending such consultations are entitled to be accompanied by their attorneys, could effectively destroy the entire mechanism on which the assessment of parties and their suitability as parents exercising the care of, and contact with children is based. It is a routine matter in our courts that if there is a dispute about the suitability of either parent to perform these tasks, that

experts (psychologists and the like) are consulted and meaningfully contribute to the decisions which are taken in our courts. If the experts were to desist from holding consultations on the basis that parties always wished to be represented at those hearings, the ultimate result may well be that parties refuse to consult with experts. That cannot be in the best interests of the children, in this case in particular, and children in general. An expert is an independent party whose function is to assist the court. A party's own expert may, in these circumstances, ask questions as invasive of a party's rights, as the opposing expert may do. The fact that parties are interviewed by both experts often has the desirable effect of encouraging settlements of the parties' dispute.

[17] I am also mindful of the submission by Ms *Julyan* SC that the applicant will be prejudiced in the presentation of his case, because he has submitted himself to examination by the respondent's expert, but the respondent, despite having agreed to do so, has reneged on her undertaking.

[18] With regard to the submission that information obtained by the experts for use by the court in determining the best interests of the children could be used in proving other aspects of one or other of the parties' cases, the trial court will no doubt be able to disabuse its mind of such facts, where appropriate. The best interests of the children are paramount, and are the principal reason for my decision.

[19] Unfortunately, due to the fact that the trial is set down to be heard in approximately ten days time and the consequent urgency for this decision, I have not had the opportunity to consider and research the authorities as fully as I would like to have done.

[20] I do not believe that it is either necessary or desirable that the respondent's attorneys be joined as a party to the application or that any relief should be granted against them.

[21] In the circumstances I make the following order :

- (a) the application for joinder is refused;
- (b) the respondent is directed to make herself available for interviews and assessments with Dr Louise Olivier, on such terms as Dr Olivier considers appropriate, on dates to be determined by Dr Olivier on reasonable notice to the respondent. No person may be present during the assessments and interviews to be conducted by Dr Olivier, unless Dr Olivier considers it appropriate;
- (c) the costs of the amended notice of motion, supplementary affidavits and the respondent's opposition are reserved for determination by the trial court in the proceedings under case no 14085/2011.

Date of hearing : 16th May 2013

Date of judgment : 17th May 2013

Counsel for the Applicant : Ms J A Julyan SC with Mr S I Humphrey (instructed by Benita Ardenbaum Attorney)

Counsel for the Respondent : Mr A Stokes SC (instructed by Shepstone & Wylie)