

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case Numbers: 524/2003
6055/2003

In the matter between:

MARLIESE TOWNSEND-TURNER First Applicant

DEREK ROYSTON TURNER Second Applicant

and

BRUCE ANDREW MORROW Respondent

JUDGMENT DELIVERED ON THIS 8th DAY OF OCTOBER 2003

KNOLL, J:

There are two applications before me. In the first application (case number 524/2003), the applicants seek an order that they be granted the right to defined access to the first applicant's minor grandchild, G. The orders sought by the applicants in the first application read as follows:-

"2.1 That applicants be granted reasonable access to the minor child, G... as follows:

2.1.1 For one week during each long school holiday and for three days during the short school holidays, by timeous prior arrangement with the respondent.

2.1.2 For one weekend each month commencing on a Friday at 18h00 until Sunday at 18h00;

2.1.3 For one afternoon every second week on a week day;

2.1.4 Telephonic access at all reasonable times.

2.2 That the applicants shall be entitled to exercise the access set forth in paragraph 2.1 above, in the event that G relocates temporarily or permanently to another jurisdiction, at such location.”

In the second application (case number 6055/2003), the same applicants seek an order declaring the same respondent to be in contempt of an order granted, on the 18th of June 2003 by this court, during the conduct of the first matter. Furthermore, they request this court to impose upon the respondent a suitable fine or punishment.

The parties are referred to herein as first and second applicant and respondent respectively, and where it is necessary to distinguish between the two applications, this will be done.

These matters have a long history and the papers filed are voluminous.

On the 4th of June 1996, G was born of the marriage between the respondent and first applicant's daughter, Tanja. At his birth, Tanja was diagnosed with cancer and she died during September 1999.

The second applicant is a former husband of the first applicant, who currently lives with the first

applicant and is regarded by G as his grandfather. Tanja's natural father died when the former was 3 years old.

It is common cause that before Tanja's death, both applicants enjoyed access to G when the families visited each other. For some months preceeding Tanja's death, respondent, Tanja and G resided with the applicants at their home in Muizenberg. Immediately after Tanja's death respondent and G moved back into their own home in Greenpoint.

In March 2000, respondent formed a relationship with Louise Van Zyl. The couple currently live together as a family unit and, it is common cause, that G is very close to Ms Van Zyl and regards her as his mother although he is aware that his natural mother has died.

It is common cause that the relationship between the respondent and the first applicant deteriorated after Tanja's death. It is also common cause that respondent allowed the first applicant very limited contact with G until approximately September / October 2000, whereafter respondent allowed her only telephonic access and 1 hour per week of supervised access. Later, at the first applicant's request, she was permitted to spend one weekend in three with G on an overnight basis.

The respondent has business interests in Portugal and is required to go there for some periods of time each year. In or about May 2001, respondent, Ms Van Zyl and G resided in Portugal for some months although there is a dispute as to the exact length of time. During this period, it is common cause that the first applicant visited Germany while the Morrow family were visiting relatives there and first applicant spent approximately 6 days with the family and G.

After the family's return from Portugal in 2001, the applicants again enjoyed access to G as they had prior to the Portugal visit. From April 2002 to October 2002, the family returned to

Portugal. First applicant was permitted telephonic access and she corresponded with G. Again she visited with the family in Hamburg, where they visited with relatives, for nine days.

During October 2002 there was an acrimonious telephone conversation between Ms Van Zyl and the first applicant relating to allegations by respondent and Ms Van Zyl that first applicant had, in an inappropriate manner, interfered with respondent's staff at his business. It is common cause that, after Tanja's death, the respondent took over the business built up by her. The parties are not in accord as to the details of the telephone conversation and the reasons therefore, however, they are *ad idem* that there were further difficulties in the relationship between them to the extent that first applicant was not permitted further contact with G.

On the 28th of January 2003, the applicants launched the first application as a matter of urgency. The matter was set down for the 6th of February 2003, on which date it was postponed by agreement, with agreed dates as to the filing of opposing and replying affidavits, and the family advocate was asked to report to the court on the issue of the applicants' access to G. During March 2003, the respondent filed opposing papers seeking the dismissal of the application, but in the event of the court being of the view that there should be resumed contact between the applicants and G, that it should be guided by the opinion of a clinical psychologist. A reply was filed by the applicants on the 18th of March 2003.

On the 24th of March 2003 the matter was again postponed by agreement to the 30th of April 2003. On the 24th of March 2003, the family advocate, Adv Van der Westhuizen, filed a memorandum recommending that the parties, especially the first applicant, be evaluated by an independent clinical psychologist. Mr Van der Westhuizen nominated, *inter alia*, Dr Rosa Bredenkamp and recorded in his memorandum that the parties had

agreed to co-operate with regard to this recommendation. He ended his recommendation by stating that there should be no interim access granted.

On the 30th of April 2003, the matter was again postponed by agreement to the 16th of May 2003.

On the 13th of May 2003, a supplementary affidavit was filed by the first applicant, alleging delaying tactics and un-cooperative behaviours on the part of respondent which impacted, *inter alia*, on the ability of the family advocate to properly investigate the matter. The supplementary affidavit further recorded correspondence and attempts by her attorneys to persuade Dr Bredenkamp that the matter was urgent and urging her to expedite her report.

It is further recorded in the supplementary affidavit that on two occasions, namely the 24th of March and the 16th of May 2003, the respondent had not been available for the hearing. On the first occasion he was overseas, and on the second returning from a business trip and was in Uppington. It was alleged by her that the respondent, in an obstructionist manner, had canceled appointments with the family advocate and had objected to G being subjected to a meeting with all parties and the family advocate as also a meeting between Dr Bredenkamp and the first applicant.

She recorded, that because of the delay in the matter, various requests had been made by her attorneys for interim access. These requests were initially rejected outright by the respondent, but he later agreed to consider them if advised by the professionals that it would be in G's best interests.

On the 16th of May 2003, the matter was again postponed by agreement, as indicated

due to the unavailability of the respondent. The hearing was set as the 27th of August 2003. By agreement the question of interim access was set down for hearing in the third division on the 30th of May 2003.

An opposing affidavit to the applicants' supplementary affidavit was filed by the respondent on the 23rd of May 2003. Respondent opposed the grant of interim access and indicated that, in any event, the family had planned to take a holiday in New Zealand, respondent's country of origin, to celebrate his mother's 70th and G's 7th birthday. The family planned to return on the 10th of July 2003.

On the 28th of May 2003 the first applicant filed a reply to respondents supplementary opposing affidavit, seeking interim supervised access.

A further memorandum by Mr Van der Westhuizen was filed, on the 28th of May 2003, indicating that he remained of the view that no order for interim access should be made pending the finalisation of Dr Bredenkamp's and his report and the hearing in this matter. He expressed, however, that should the respondent, in his discretion, allow contact between first applicant and G on an interim basis, he would have no objection.

On the 30th of May 2003, the matter with regard to interim access was postponed by agreement to the 17th of June 2003. The family advocate was requested to file his report by the 13th of June 2003. On the 17th of June 2003, Mr Van der Westhuizen filed a further memorandum stating that he had obtained Dr Bredenkamp's report and had arranged a meeting for the 13th of June 2003 with the first and second applicants to discuss this report with them. Mr Van Der Westhuizen reported that first applicant had become extremely emotional at this meeting and, accordingly, he was not able to complete the meeting which was postponed until the 18th of June 2003. It was then

understood that the legal representatives of the parties would seek a further postponement of the matter on that day. Mr Van der Westhuizen reiterated that in his opinion, no interim access order should be made.

On the 30th of May 2003 Dr Bredenkamp completed her report, which was sent to the family advocate. She recommended that access at specific times be allowed to first applicant under the supervision of a social worker until there was no more need for that and that week ends or sleep overs should be dictated by G's expressing a readiness for them. She furthermore expressed the view that the parties should resolve the conflict between them and that the matter should be settled out of court because G was suffering from this conflict.

On the 18th of June 2003, a further order was granted by agreement that first applicant could exercise interim supervised access to G for two hours on a Friday afternoon between 15h00 and 17h00 at the respondent's home in the absence of Ms Van Zyl and the respondent. A social worker, recommended by Dr Bredenkamp would supervise such access and report back to the psychologist, who would monitor the access. It was agreed that the costs of supervision were to be paid by the first applicant. Telephonic contact was ordered between the hours of 18h00 and 18h30 pm on a Wednesday evening. Certain conditions and alternative arrangements were attached to these orders and a number of undertakings given by the applicants.

On the 24th of July 2003, the applicants launched the second application as a matter of urgency. The allegation is made therein that the respondent willfully failed to comply with the provisions of the interim access order made on the 18th of June 2003. An affidavit opposing this application was filed by the respondent on the 29th of July 2003 and replied to on the 30th of July 2003. On the 7th of August 2003, by agreement, the

second application was postponed to the 4th division to be heard at the same time as the first application on the 27th of August 2003.

The family advocate filed a further memorandum in this matter on the morning of the 27th of August 2003. It is apparent from this report and annexures thereto that subsequent to the second application, there were three concerted access periods, namely, on Friday the 8th of August, Friday the 15th of August and Friday the 22nd of August. The first two were supervised by Ms Loedolf, the duly appointed social worker, and the last by Dr Bredenkamp and Ms Loedolf.

Dr Bredenkamp produced an addendum to her previous report to Mr. Van Der Westhuizen. In this addendum, she described how both parties were prepared by her in consultation to deal with the access visits on a proper basis. She noted that when G was informed about his granny coming to visit him at his house, he crept up closely to his father, became fidgety and conspicuously anxious. She stated that the respondent acted appropriately to allay G's anxiety. She furthermore reported that the contact had taken place as agreed, other than that the second two contacts were held later in the afternoon because of extra classes that G had to take after school. Ms Loedolf reported that the initial contact was somewhat strained but that, at the second contact visit, both the first applicant and G were more relaxed and interacted in a positive way. The last visit was to commence at 15h15 pm. Just after 15h00, G left with his nanny to fetch something for lunch at the café. They only returned at approximately 15h30. In the interim, the first applicant had come inside the house and was very upset about the time delay. According to Ms Loedolf and Dr Bredenkamp she struggled to contain her emotions but with the assistance of Dr Bredenkamp, first applicant calmed down. As soon as she realised that G was late for the visit, she indicated to Dr Bredenkamp that

she would bring the lateness to the attention of her legal team. Dr Bredenkamp expressed the view that she thus showed how difficult it is for her to be relaxed and flexible about the visits and to contain her own emotions. Instead she interpreted the lateness as a conspiracy of the respondent and Ms Van Zyl against her. Dr Bredenkamp found it very difficult to reason with her. The first applicant's emotions did not go unnoticed by G. When he asked his granny how her day was, she replied "*it was fine up till now.*" Dr Bredenkamp expressed the view that it is not impossible that G could have interpreted this as "*everything was fine until you arrived.*" G refused to hug his granny. Dr Bredenkamp expressed the following view:-

"I can appreciate the fact that Mrs Townsend-Turner wanted some physical contact with her grandchild, but instead of just allowing him to spontaneously do what he feels right for him; he is confronted with her, and not his need to make physical contact. However, it was clear that G picked up that something is the matter with his grandmother and that he wanted to sooth her in a way, but at the same time having no mechanism to set her at ease he started on concentrating on the game Mrs Townsend-Turner brought along."

Dr Bredenkamp expressed the opinion that it should not be expected of such a young child to deal with adult emotions that he doesn't understand and then to have to contain such emotions. During the course of the access visit, the first applicant phoned her home to make sure that her mother was being taken care of after which she started crying with relief. G noticed this and asked "*what*"? First applicant answered that "*she had to sort out something*". Ms Loedolf was of the view that G had picked up on the first applicant's emotional state and had seemed troubled by it.

Dr Bredenkamp expressed the view that the contact visits at G's house were unnatural and difficult for both the first applicant and G. Furthermore, she noted that they only played games

together and did not have much say to each other with regard to personal things, for example, there was no discussion as to G's school or friends or anything else. Her view was that this indicated the estrangement between them, but also a lack of attachment or bond. She felt that G would have enjoyed playing games with anybody else as well. Furthermore, Dr Bredenkamp reported that she had had some contact with a Ms Amie Rodes, G's occupational therapist. After one of the access visits with his grandmother, the latter reported to have found G to have behaved more childishly and been more difficult than was normally the case. Furthermore, Ms Van Zyl's son Ettiene, had observed that G had behaved aggressively towards him after one of these visits, which was not G's manner.

Dr Bredenkamp expressed the view that it is clear that the contact visits are very stressful for the adults and that G is aware of this and negatively affected by this. Furthermore, it is apparent from the report of Ms Loedolf that G is experiencing divided loyalties. In the presence of the first applicant he laughed and maintained a close physical contact with her from time to time. He appeared, at least, to enjoy her first two visits. After her visits however, he expressed to his parents and apparently to his teacher and occupational therapist that he did not enjoy the visits. Ms Loedolf, in my view, appears to have correctly assessed the situation as being one where the little boy is trying placate both adult factions. After one of the visits, Ms Van Zyl told Ms Loedolf that G had climbed under his blankets and said "*I wish this would all end.*" Furthermore, he had been reluctant to come home from school on those Friday afternoons of access with first applicant. Having observed the inter-reaction and the effects of forced access on G and the first applicant, Dr Bredenkamp recommended that "*two options should be considered*". The first is that all contact should be terminated until such time that both parties have put their animosity and distrust about each other to rest and are able to act in a civil manner towards each other. According to her, this would only seem to be possible once Tanja's estate has been finalised. She had contacted the executor of the

estate, who informed her that a number of financial aspects of the estate are still to be settled. She recommended that the tension between the parties should be resolved because it puts unnecessary strain on G, who finds himself caught in the middle. She expressed the view that because of his young age, it cannot be expected of him to carry on seeing his grandmother under the present circumstances as by now he must have realised that conflict between the adults in his life had something to do with him, whilst he is most definitely not the problem.

The second option is that the court should decide about the rights of a grandparent to see her grandchild under these difficult circumstances and that, in the event of the first applicant having a right to have an ongoing relationship with G, supervised access should be granted for a year, whereafter G should be allowed to lead the way in deciding whether he wished to have contact with his grandmother or not. Finally, she expressed the view that it is evident that harm had been caused to the grandmother / grandchild relationship as a result of the family circumstances, which will not be easily restored. Furthermore contact created a lot of stress to all parties, G included. She could not foresee that things would change much in future and expressed the opinion that it would be unfair and unjust to G to carry on with trying to help him and his grandmother to rebuild their relationship under the present circumstances. She recommended that the adult parties should lay to rest their differences and start interacting with each other in such a way that it will make it possible for G to have a relationship with his grandmother under less stressful circumstances. She again expressed the view that the parties should attempt to settle the matter out of court.

Mr Van Der Westhuizen essentially expressed the same views as Dr Bredenkamp, emphasising that, in his view, based on consultations with the first applicant as well as the reports that he has had, the first applicant is concerned about her own interests in having access to G and not G's interests. Furthermore, he submitted that there was no evidence to suggest that she played a

significant parenting, or any other role, in G's life, or that a bond existed between them to the extent that severance thereof would cause harm to G. He submitted that the fact that the first applicant was unable to control her emotions in front of G was detrimental to the latter's well being. Mr. Van Der Westhuizen ended his report with the following remarks:-

"Grant is a well adjusted boy who seem (sic) to enjoy being with his friends and people he can relate to which is age appropriate. Nothing constructive came of his visits with the applicant, which is not surprising, and there was no interaction between him and the applicant that could be described as positive or beneficial. The normal situation would be that access is allowed when and if G so desires, and that he not be forced into having access with the applicant for her benefit."

Accordingly, he recommended that no access rights be granted to the applicants, that the first applicant receive therapy to help her cope with her emotional difficulties and that the respondent facilitate visits and contact between G and the applicants at G's request.

Mr. Van Der Westhuizen stated in his memorandum that this was not a final report and more time was needed. He explained in court that what he had meant was that he had only received Dr Bredenkamp's addendum shortly prior to the hearing and he had had insufficient time to prepare a full report setting out, *inter alia*, his experience in consultations with the parties. He stated that his recommendations would not change in a final report.

Certain discussions were held between the court and Advocates Louwrens, Van Der Westhuizen and Weyer in chambers prior to the hearing. The object of these were to attempt to find common

ground and facilitate settlement of the matter out of court. I expressed the view that the parties should attend mediation in an attempt to resolve the conflicts between them and that first applicant should attend counselling to assist her to understand her own role in the ultimate refusal of the respondent to grant access to G.

Counsel attempted to reach an out of court settlement, but were unable to do so. At the hearing they indicated that both parties were prepared to attend mediation and that the court should order this. Furthermore first applicant was prepared to attend counselling. There was some debate as to the terms of any mediation order, culminating in the parties and Mr Van Der Westhuizen reaching an out of court settlement in this regard, which they wish to have incorporated in this court's order.

The dispute between the parties related only to the main issue of whether access should be granted or not. Both Mr. Van Der Westhuizen and Ms. Weyer for the respondent submitted that no access should be granted. Mr Louwrens, for the applicant, submitted that access should be granted, alternatively, that the matter should be postponed for the family advocate to do a further evaluation, as he had indicated he wished to do in his memorandum. In the interim, he submitted that this court should allow the applicants defined supervised access but not on the previous basis. Furthermore, a postponement would allow the first applicant to be counselled and mediation to take place, whereafter the court could make a final decision on the access. He relied, in the main, on Dr Bredenkamp's second option and her recommendation in her initial report that supervised access should be allowed.

Before I turn to the facts of the instant case, it is necessary to deal with the legal situation.

There is currently nothing to be found in the South African common law which indicates that anyone has the "right" to access to a minor child, other than the parents of children born of a

marriage. This principle is expressed in the decision of the then Appellate Division when considering the rights of a natural father of an illegitimate child to access as follows:-

“According to the law, as it is, the right to access depends for its existence on parental authority. A father such as appellant, does not have that in the eyes of the law. But he may be granted access if that is in the best interests of his child.” (B v S 1995 (3) SA 571 (A) at 579 H).

Howie JA, as he then was, writing for the full court in B v S (supra), summarised the position in South African law in regard to fathers of illegitimate children to be the following at 583 G:-

“.....current South African Law does not accord a father an inherent right of access to his illegitimate child. It recognises that the child’s welfare is central to the matter of such access and that access is therefore always available to the father if that is in the child’s best interests.”

The learned judge of appeal expressed the view that if there were sound sociological and policy reasons for affording such fathers an inherent right, the matter must be dealt with legislatively.

On the 4th of September 1998, the Natural Fathers of Children Born out of Wedlock Act No. 86 of 1997 (“the Act”) commenced. Section 2 of the Act regulates the position of such a father, granting a court, on that father’s application, the power to “*make an order granting the natural father access rights to the child on conditions determined by the court.*” Furthermore, in terms of section 2 (2) such order can only be made if the court is satisfied that it is in the best interests of the child.

These legislative provisions accord with the common law as set out in B v S (supra). It should be noted that the legislature has not seen fit to grant an unmarried father an inherent right to access, but only the right to apply to court for such right.

In B v S (supra) at 581 J - 582 A, the then Appellate Division expressed the following view:-

“... no parental right, privilege or claim as regards access will have substance or meaning if access will be inimical to the child's welfare. Only if access is in the child's best interests, can access be granted. The child's welfare is thus the central, constant factor in every instance. On that, access is wholly dependent. It is thus the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one is to speak of an inherent entitlement at all, it is that of the child, not the parent.”

The South African Law Commission, in its Working paper 62, project 100 investigated the granting of visitation rights to grandparents of minor children.

At the outset, the commission points out that parental authority (insofar as it is relevant to this case) is vested in the mother and father of a child born in wedlock and, on the death of one of the parents, it then vests solely in the surviving parent.

Earlier decisions of our courts illustrate that a court, as upper guardian of a minor, had the power to interfere with the parental authority (which included the right to custody) in exceptional cases, which “*exceptions must be few and must rest on clear grounds and the grounds must be founded in considerations of danger to the life, health or morals of the child*”. (Calitz v Calitz 1939 AD 56 at 64).

In Van Der Westhuizen v Van Wyk and Another 1952 (2) SA 119 (GW) the court held that in the absence of danger to health or moral life, a court did not have the power to interfere with the parental authority and to remove a child from the parent in whom parental authority vested in order to give custody of that child to a third party.

In Bam v Babha 1947 (4) SA 798 (A) Centlivres, JA, while distinguishing the matter of Calitz v Calitz (supra) at 806, expressed the view that it was not clear that Tindall JA in that matter intended the grounds upon which a court could interfere with parental authority to be exhaustive. He took the view that the best interests of the child were paramount. (See also Rowan v Faifer 1953 (2) SA 705 (EDLD); Petersen en 'n Ander v Kruger en 'n Ander 1975 (4) SA 171 (C)).

In the matter of Short v Naisby 1955 (3) SA 572 (D and CLD) Henochsberg AJ, as he then was, expressed the following view at 575 B - C:-

“It seems to me, however, that the court has no jurisdiction to deprive a surviving parent of her custody at the instance of third parties, except under its power as upper guardian of all minors to interfere with their custody, but then only on special grounds. Such special grounds include danger to a child's life, health or morals, but those are not the only grounds on which a court will interfere. Good cause must be shown before a court will interfere, but good cause is not capable of precise definition.”

In S v L 1992 (3) SA 713 (E) at 721 Mullins J expressed the view that the powers of the Supreme Court as upper guardian of minor children, are not unlimited in the sense that the court may not interfere with a decision made by the guardian of the child merely because it disagrees with that decision.

Although none of the above cases deal with the access of a third party to a minor child, apart from B v S (supra), what they serve to illustrate, in my view, is that our courts have always been reluctant to interfere with the parental authority, except in special circumstances. Decisions as to with whom a child should have contact, lie in the hands of the person or persons vested with parental authority.

This court has been referred to a number of articles stating and debating the law in a number of foreign jurisdictions with regard to grandparental access to a minor child. In all of these jurisdictions it has been recognised that any intervention in a family may have unsettling effects on the dynamics of that family which may in turn effect the welfare and interests of the child. I am in respectful agreement with this conclusion which accords with the approach adopted by South African Courts and in my view, accordingly, a court must exercise circumspection before intervening. (**Schoonmaker III et al: Constitutional Issues Raised by Third Party Access to Children: Family Law Quarterly Volume XXV, Number 1, Spring 1991 at page 95; Wiertz - Wezenbeeck; Visitation Rights of Non-Parents and Children in England and the Netherlands: Family Law Quarterly, Volume 31, Number 2, Summer 1997 at page 355; Labuschagne and Van der Linde: Sosiale Toegangsreg van Grootouer en Kleinkind; Stellenbosch Law Review 2002 (3) at page 415; Kaganas and Piper: Grandparents and the Limits of the Law: International Journal of Law and the Family 4, (1990), page 27; South African Law Commission Working Paper (supra) chapter 2 page 10; Fernandez: Grandparent access: A Model Statute: Yale Law and Policy Review Vol 6: 109 1988; Douglas and Lowe: Grandparents and the Legal Process: Journal of Social Welfare Law page 89).**

There has been much academic debate surrounding this area of the law in all

jurisdictions. What emerges from this, in my view, is that there has been a growing recognition of the important role grandparents can play in the development of the child, particularly with the high divorce rates and the changing face of the family in Western society. Whereas the common law in the jurisdictions referred to in the articles above, did not favour the view that any non-parents should have inherent rights to access, but that they should have the *locus standi* to apply for such rights in certain special circumstances, legislation has increasingly been promulgated to regulate the question. However, few have gone so far as to allow grandparents an inherent right of access. In all the jurisdictions, the best interests and welfare of the child is of paramount importance. This has been retained in the legislation. What emerges too, is that courts in foreign jurisdictions, will generally not allow access by a grandparent where there is conflict between the grandparents and parents of the minor child as such contact would seldom be in the child's best interests. The law with regard to grandparental access in foreign jurisdictions is in a state of flux.

The South African Law Commission Report (*supra*) at page (iii) recommended legislation to the effect that a) if a grandparent of a minor child is denied access to the child by the person who has parental authority over that child, such grandparent may apply to court for an order granting him or her access to the child and the court may grant the application on such conditions as the court may think fit; b) the court shall not grant access to a minor child unless it is satisfied that it is in the best interests of the child; and c) the family advocate be involved in such cases. The Commission held the opinion that the present common law position in terms of which parents have the exclusive right to decide to whom and under what circumstances to grant access rights or visitation rights, does not in all cases meet the current needs of society and that adjustment of our law by way of legislation regarding this matter is necessary.

The matter of B v S (supra) was decided after the publication of the Law Commission Report. Although dealing specifically with the rights of a father to access to his illegitimate child, in my view, the effect of this decision is that any third party may approach the court to have rights of access granted to him or her if such rights of access are in the best interests of the child. In common law, apart from the direct blood relationship between father and child, the father of an illegitimate child is in no different position to any third party seeking access to a child. He has no inherent rights to access any more than a grandparent does.

Both counsel for the parties and Mr Van der Westhuizen are ad idem that the aforesaid view is the current state of the common law in South Africa.

No legislation has followed upon the Law Commission recommendation to date and this court must therefore follow the common law.

B v S (supra) at 584 I laid down that, in considering this issue, where a “*parental couple’s access (or custody entitlement) is being judicially determined for the first time - in other words where there is no existing court order in place - there is no onus in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial.*” Furthermore, it was held, at 585 E, that because the welfare of a minor is at stake, a court should be very slow to determine the facts by way of the usual opposed motion approach i.e. in accordance with the principles set out in Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A). “*That approach is not appropriate if it leaves serious disputed issues of fact relevant to the child’s welfare unresolved*”.

In the instant matter, this court has had the benefit not only of the papers, but also of the expert assessment of Dr Bredenkamp, Ms Loedolf and the Family Advocate, Mr Van der Westhuizen. I

intend to approach this matter, having regard to these objective reports as also those facts on the affidavits that are common cause. It is, in my view, not in G's interests to draw this matter out by ordering oral evidence on the disputed facts and, it is in any event, not necessary to decide the disputed facts as will appear below.

A brief resumé of the facts with regard to access to G leading up to this application, is set out above. The real disputes relate to the reasons why access to G has been problematic.

It is common cause that the first respondent has, at times, allowed the applicants access to G. He has adopted the attitude on the papers, which is not disputed, that he has tried to maintain a healthy relationship between G and the applicants. Certain concerns caused him to limit and sometimes refuse that access.

It is common cause that G is the only grandchild of the first applicant and that his late mother was the first applicant's only child. Furthermore, the first applicant admits to being understandably emotional after the death of her daughter. Respondent felt that her emotionalism when she saw G, unsettled the little boy and made it difficult for him to settle back into his own home. This attitude, in my view, is understandable, given that G had been moved from his own home to the applicants' home and then back to his home again after his mother's death. It was necessary that he be given stability and routine and security at that time.

It is, furthermore, common cause that the first applicant removed certain photographs of herself that belonged to her and a box of cards relating to Tanja's childhood from respondent's home. There is a dispute as to whether she did so with permission or not. It is not important, in my view, whether this dispute be resolved. What is important is that the respondent is clearly aggrieved by what he viewed as an intrusion into his privacy.

It is common cause that relations became strained between the first applicant and the respondent due to disputes specifically regarding a family trust. Matters deteriorated and the respondent and the first applicant were not communicating effectively. This led to the first applicant, on her own admission, telephoning G's school and attempting to visit G at school, despite her knowledge that the respondent did not wish her to have access to him. This type of situation led to an incident, during May 2000, where first and second applicants came to G's school, resulting in respondent phoning the police and second applicant shouting abuse at the respondent when he drove away from the school. Precisely why the police were called and what happened on that occasion is in dispute. It seems to me, however, that the details of this dispute are not important but what is important is that this incident occurred at G's school, which is clearly not in G's interests.

The respondent alleges numerous incidents where the first applicant contacted his domestic staff or office staff, which he regarded as an intrusion on his private and business affairs. The reasons why they were contacted are in dispute. Again, the dispute itself is not important, in my view, what is important is that contact was made with these people against the respondent's wishes, which is not disputed. This clearly soured relations between the respondent and the first applicant.

It is common cause that there was an incident where the first applicant slapped the respondent in full view of his staff at his business premises when she arrived there uninvited. It is also common cause that during this incident a plate glass door was broken because of force applied to it by the first applicant. It is common cause that the reason first applicant approached the respondent at his business premises was because access to G had been denied her. It is not disputed that, in an attempt to allay further scenes, the respondent allowed G to see the first applicant at G's home. This was shortly before they left for overseas in 2002.

The first applicant does not deny that when the respondent, Ms Van Zyl and G went to Portugal she phoned and said that she could not “survive” without seeing G and that she furthermore borrowed money from the family trust to visit G overseas. It is common cause that she wished to visit the family in Portugal. It is not denied that the respondent and Ms Van Zyl found this an unwarranted intrusion into their holiday and business time and as a compromise suggested that they meet in Hamburg.

The first applicant admits to telephoning G every second day but expresses the view that this is not excessive or unusual.

There are numerous allegations by the respondent of inappropriate remarks made to G when the first applicant had access to him which are denied by the first applicant. There are, however incidents where she admits that she made, what in my view, are inappropriate statements to a young child. There was an incident where the respondent, because of business commitments did not bring G through to see her as he had indicated he might. Instead of addressing herself to the father’s remissness, she phoned G to express her disappointment. This upset the child. Furthermore, after the first applicant had been asked to curtail her calls to G, she did not comply and there was a call overheard by a friend of the respondent, one Mary Slater, during which the first applicant admitted she had told G not to tell his parents that she had phoned him. This caused additional acrimony as respondent and Ms Van Zyl felt that they had worked hard to maintain open communication with G and that it placed him in an invidious position when he was told not to communicate things to his parents.

Another incident which the first applicant admits to is that she threw a packet of sweets over a garden wall for G’s nanny to give to G. This was necessary according to her because of the lack of contact with G. Again there was no attempt to follow appropriate channels. Had she wished to give G a gift, it was not appropriate for her to do this behind his parents’ back.

It is quite clear from what is common cause that the relations between the parties were extremely strained and that this impacted on G. The first report of Dr Bredenkamp confirms this.

In her initial, full report, Dr Bredenkamp refers to the various roles which can be played by an extended family member where a family situation changes after the death of a parent. She also refers to G's current developmental needs. She did personality tests on both the first applicant and the respondent. She also interviewed the second applicant and Ms Van Zyl. She spent some time with G, *inter alia*, assessing his relationship with the first and second applicants. It is important to note, in my view, that Dr Bredenkamp interpreted G's attitude to his grandmother as being a positive one. She concluded that the first applicant forms an integral and important part of G's life, that G likes to visit his grandmother who fulfills the role of a fun and "activity" partner and that G experiences warmth and emotional affection from her. The second applicant plays a secondary role. G wished his family to get rid of their "stuff". She furthermore stated that G's relationship with his grandmother is less of a problem to him than the ongoing fights in the family. This is a typical situation where G had been caught in the middle. She expressed the following opinion:-

"Children caught in the middle react differently to conflict between family members, but, in general, a history of aggression and conflict in the family has been strongly and consistently associated with emotional, behavioural and social problems in children. School aged children are much more likely than their younger counterparts, to have a range of reactions, starting with guilt. Children this age often feel responsible for the conflicts of their family members."

Her recommendations in her initial report were that supervised access should be granted to the

applicants in a structured way, along the lines of what was ordered by this court during June of this year. However, she repeatedly expressed the view that the conflicts in the family were those of the adults and that the parties should take every step to resolve the conflict between them. G was suffering as a result of these conflicts.

She furthermore recommended that the first applicant should refrain from intruding herself into the respondents' domestic and business life and that she should avoid conversing about G's deceased mother.

Dr Bredenkamp, in analysing the personality of the first applicant, described her as not having a personality disorder, but of having a personality style which is best described as "compulsive, narcissistic, schizoid and aggressive". Despite this rather unflattering description of her personality, Dr Bredenkamp was of the view that she could play a positive role in G's life should she show more sensitivity to G's needs. Dr Bredenkamp agreed with the experience of the respondent that the first applicant was an intrusive person who "can consume one's life and invade one's private space". This was Dr Bredenkamp's own experience with the first applicant. She based this impression on the first applicant's numerous phone calls to her, even after hours, despite an undertaking from Dr Bredenkamp to keep her informed. On these occasions, Dr Bredenkamp found that she interfered with her work schedule and intruded on her time with other patients. The first applicant often broke down and cried and took on the role of the injured party. She even became distrustful of Dr Bredenkamp's motives. Dr Bredenkamp reported that there was a situation where she was almost forced to give an opinion on supervised access before she had had an opportunity to interview G. She found this totally unacceptable and in her opinion it showed the first applicant's intolerance with a sensitive issue regarding the minor child. She described the first applicant as having a difficult personality.

I am of the view, having read the report of Dr Bredenkamp as well as her subsequent addendum

and having heard the family advocate, as also having paid regard to those aspects which are common cause on the papers, that the first applicant's behaviour towards the respondent, Ms Van Zyl and G, has been unduly intrusive and insensitive to their needs.

It is my view that it is clear from the common cause facts, Dr Bredenkamp's report and the problems that arose during the third access visit, that the first applicant does not fully appreciate what is in the best interests of G. She is rather more concerned that her own needs be fulfilled. The way she reacted to a 7 year old child when he arrived late and she was upset about it was not appropriate. I bear in mind that she has not been able to explain her reaction or deal with this report. However, it was never suggested by Mr Louwrens that there was any inaccurate reporting of this access visit. It is also clear that, as indicated by the respondent and Dr Bredenkamp, the first applicant has difficulty in controlling her emotions.

I agree with Mr Van der Westhuizen that the ideal situation is that a normal relaxed access to his grandmother and the second applicant, on a regular basis, at the instance of G or at the suggestion of respondent should happen. This clearly cannot happen until the first applicant takes responsibility for her role in the conflict and understands why the respondent has refused her access to G in the past. Furthermore, there is a pressing need for the adults to try and resolve their conflicts and to build up an atmosphere of tolerance of each other, and respect for each other's points of view. Accordingly, I intend to make the order with regard to the mediation which the parties have agreed to. The parties are furthermore, encouraged to use mediation, or a counsellor, to resolve any future issues with regard to applicant's relationship with G. The adversarial nature of court actions and their cost tend to deepen the divide.

The first applicant must understand that the respondent as G's father, is entitled to make decisions with regard to his child. This court has not been left with the impression that the respondent, at any stage, acted with anything but real concern for his child's best interests. It is,

in my view, clear that the respondent has been greatly troubled by the situation and would encourage a healthy relationship between his son and the applicants. Furthermore, it is clear from the report of Dr Bredenkamp and, indeed from the admissions made by the first applicant, that Ms Van Zyl is an important person in G's life, that she has taken the place of his mother and that they have a close and good relationship. Any negative remarks about or attitudes to Ms Van Zyl by the applicants that come to G's attention will have a detrimental impact. The first applicant must trust that the respondent's decisions for his family and for G are taken in the best interests of that family and G and she must show respect for his decisions. If she wants a relationship with G, which is to be encouraged, she must refrain from involving herself in the respondent's family and work life. She must accept that the respondent and G have the right to get on with their lives and to build strong family relationships in their nuclear family, in the interests of G's security. She must also accept that her role in G's life is ancillary to that of this nuclear family. She must behave towards G, and in G's presence in a manner which is appropriate to his age and which will not confuse him, or in any way, place him in a situation where he is required to feel divided loyalties. She must understand that she must respect respondent and Ms Van Zyl's wishes with regard to the giving of presents etc. to G, whether or not she agrees with them.

Although this court has sympathy for the position of the first and second applicants, and particularly the difficult emotional times that the first applicant has been experiencing, after careful consideration, I am of the view that in the light of the conflict within the family and the difficult relationships at present, it cannot be in G's best interests to allow the applicants access to him and so place him in the middle of a situation which will confuse him and lead him to feel guilt and divided loyalties. The abnormality of judicially sanctioned enforced visitation has been shown not to be desirable in this matter. I am in agreement with Mr Van der Westhuizen that any relationship between G and the applicants should be allowed to develop spontaneously and in an atmosphere of accord between the parties. The first applicant must refrain from pushing

the issue and the respondent and Ms Van Zyl must be encouraged to allow such spontaneous contact but only when the relations between the adults have been mended to the extent that contact might take place in a manner that would benefit G.

Accordingly, it is my view that the application must be dismissed.

I turn to consider the application that respondent be found guilty of contempt of court in not complying with this court's order.

It is well established that an applicant for committal must show:-

1. that an order was granted against the respondent; and
2. that respondent was either served with the order or was informed of the grounds of the order against him and could have no reasonable ground for disbelieving the information; and
3. that respondent has either disobeyed it or has neglected to comply with it.

Once it is shown that an order was granted and that respondent has disobeyed or neglected to comply with it, wilfulness will normally be inferred. (Consolidated Fish (Pty) Ltd v Zive and Others 1968 (2) SA 517 (C) at 522 E - H; HEG Consulting Enterprises (Pty) LTD v Siegwart and Others 2000 (1) SA 507 (C) at 518 E). In Clement v Clement 1961 (3) SA 861 (T) at 866 A it was further held that a person's disobedience must not only be wilful, but also *mala fide*.

In all the aforementioned cases and those which they follow, it was held that once it is shown that an order was granted and that respondent had disobeyed or neglected to comply with it, both wilfulness and *mala fides* would be inferred. The onus would then

be on the respondent to rebut such inference on the balance of probabilities.

In Uncedo Taxi Service Association v MTWA and Others 1999 (2) SA 495 (E) at 500 H - 502 G, the correctness of placing an onus on a respondent has been questioned in the light of the present Constitutional dispensation. The view was expressed in that matter that it would be more appropriate to speak of an evidentiary burden resting on the respondent to demonstrate his *bona fides* and the fact that the disobedience of the court order is not wilful or *mala fides*.

This question has not been argued before me in the instant matter, and in my view, it is not necessary to decide it because of my view of the facts. The decision in this matter is based on the undisputed facts and those alleged by the respondent as is required of this court in motion matters. (Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd (supra)).

It is common cause that, on the 18th of June 2003, this court issued an order by agreement between the parties allowing the first applicant interim supervised access to G at specified times and that various ancillary orders were made to regulate this process. It is furthermore, common cause that the respondent was aware of this order and its terms.

The applicants maintain that the respondent was:-

4. in wilful default of paragraph 1.5 and 5.3 of the order in that he failed to ensure that G was available for first applicant's access on Friday the 18th of July 2003; and
5. in wilful default of paragraph 2.1 of the order in that he failed to allow applicants

telephonic access to G on Wednesday the 16th and Wednesday the 23rd of July 2003; and

6. in wilful default of paragraph 4.2 of the order in that he breached his undertaking to consult with G and Dr Bredenkamp to, prepare G for the applicants' access to G.

With regard to the default alleged in paragraph a) above, it is common cause that it was envisaged by the order, if paragraph 1.5 and 5.3 are read together, that the first physical access to G should take place on Friday 18 July 2003. It was furthermore, common cause that this did not occur.

With regard to paragraph b) above, it was common cause that respondent did not make G available for telephonic access on either the 16th or 23rd of July 2003.

With regard to the default alleged in c) above, it is common cause that the respondent only consulted with Ms Loedolf and G after the launch of the contempt application on the 24th of July 2003.

It was common cause that G had returned to South Africa with the respondent and Ms Van Zyl on the 10th of July 2003 and that thereafter Ms Van Zyl had taken G for a holiday to their beach house in Hermanus until G returned to school on 21 July 2003. Respondent explained that the reasons for this were firstly that G had been cooped up on their return and that they felt that it would be good for him to have the space to run around at the beach house, and, secondly, the respondent had received correspondence from Dr Bredenkamp on his return from New Zealand which left him confused as to the implications of the court order of the 18th of June. He explained that he immediately sought advice in this regard, but his attorney was away until the 28th of July. Accordingly, he contacted Mr Van der Westhuizen, who indicated to him that matters should be cleared up with Dr Bredenkamp. He attempted on a number of occasions to contact Dr Bredenkamp without success. He discussed the taking of G to

Hermanus with Mr Van der Westhuizen, who raised no objections. In the absence of his attorney, he also consulted a clinical psychologist, Dr Chris Petty, to advise him. This explanation is supported by correspondence.

Respondent explained that on the 11th of July 2003, the day after he returned to South Africa, he saw a copy of Dr Bredenkamp's letter of the 2nd of July 2003 addressed to the Family Advocate. It is necessary to refer briefly to this letter, a copy of which, it is common cause, both parties received. It is apparent from this letter that it was written by Dr Bredenkamp on receipt of the said court order by her. She begins the letter by stating that *"in accordance with the agreement between the parties the process will proceed in the following manner"*. In eleven separate paragraphs, she sets out her view of how the matter will proceed. She notes that she will meet with the first and second applicants during the week of the 14th of July to prepare them for the first contact with G, as is envisaged by the order. She notes that she will do the same with the respondent, Ms Van Zyl and G. She then states the following at numbered paragraph 6:-

"Dr Bredenkamp will have individual sessions with G to test his preparedness and willingness to meet with his grandmother before the actual access will take place. The date of the first visitation will be determined during these sessions; whereafter arrangements for access will commence. Both parties will be informed when the first visit on a Friday will take place."

Numbered paragraph 10 of her letter is also relevant. She suggests that after a period of three months she and the social worker should meet with the family advocate and the attorneys to provide personal feedback on the access process and progress made. At that stage, further recommendations about access will be put to the legal teams.

The respondent was concerned about the letter and the implications thereof, as he did not understand the court order to require individual sessions with G to test his preparedness and willingness to see his grandmother. He harbored reservations about G seeing his grandmother given the first report of Dr Bredenkamp, and her description therein of first applicant's personality. The letter left him with the impression that Dr Bredenkamp appeared to have changed her mind with regard to the access agreed upon. He immediately attempted to find some clarity, starting on the evening of the 11th of July. It is clear to the court that the respondent was concerned not to be in contempt of the court order. At the same time, he wished to have clarity on the position before subjecting G to the access. It is thus clear that he accepts that the non-compliance with the court order with regard to physical access was intentional but, denies that it was *mala fides*. In my view, it is apparent from the facts alleged by the respondent that he acted *bona fides* throughout in attempting to clarify the position. He acted also on the advice of the family advocate. It has been held that even where a respondent's misunderstanding of the position or opinion was unreasonable, that such unreasonableness per se does not indicate the absence of bona fides. (Noel Lancaster Sands Edms. Bpk v Theron en Andere 1974 (3) SA 688 (T) at 691 H - 692 G).

In the light of there being no express mention of the date on which access is to commence, read with Dr Bredenkamp's letter as to the manner in which the order would be implemented, it cannot, in my view, be said that the respondent's opinion that the matter needed to be clarified was unreasonable, neither was his reliance on Mr Van der Westhuizen's advice.

Furthermore, the respondent states that with regard to the telephonic access, he was of the opinion that the court order meant that telephonic access should only commence after physical

access had taken place.

Paragraphs 2.1 to 2.5 of the court order, dealing with telephonic access, again make no reference to an express date when such access should commence. Paragraph 2.1 provides that the first applicant shall be entitled to have telephonic contact with G in the alternate weeks which fall in between G's access period with the first applicant. The respondent interpreted this to mean that telephonic access would not take place until after physical access had taken place. His interpretation of this order can also, in my view, not be regarded as unreasonable. It is not necessary to go into the question of whether the interpretation is correct or not for this reason. I am of the view that the respondent has shown on a balance of probabilities that, even if he were to have been in breach of this part of the order, that such breach was not intentional, neither was it *mala fides*.

As indicated, it is correct that the respondent did not attend any meetings with Dr Bredenkamp until after the launch of this application. Part of the reason for this was that G was not available until after the 21st of July. His removal of G to Hermanus has been, on the probabilities, in my view, shown to have been *bona fides*. I am not of the view that he deliberately did so to frustrate the terms of the order. He was assured by the family advocate that his removing G would not be a problem under the circumstances.

Dr Bredenkamp was appointed to advise the court and the family advocate in this matter at the request of the family advocate. It is not unreasonable, in my view, to have accepted the family advocate's advice under these circumstances.

I am in agreement with the respondent's submission that the applicants and their

attorney were also of the view that Dr Bredenkamp's letter of the 2nd of July 2003 contained certain misconceptions of the court order. However, these misconceptions were not pointed out to Dr Bredenkamp by the applicants until a letter addressed to her on the 24th of July 2003. Their correspondence to her prior to that dealt only with their objection to her indication in numbered paragraph 10 of her letter that some 3 months were required whereafter she would make recommendations as to further access. There was a concern that the matter should be dealt with finally on the 27th of August when it was set down for hearing. This correspondence was sent to the respondents' attorneys on the relevant dates by facsimile. Furthermore, it is not disputed that at no stage did the applicants' attorneys directly contact the respondents' attorneys, to enquire as to the reasons for the apparent non-compliance with the order and/or to put him to terms in this regard. Prior to the 24th of July 2003 when this application was launched, the only indication which the respondents' attorneys had as to any actions being taken by the applicants in this regard, was contained in a letter of the 17th of July 2003 addressed to Dr Bredenkamp, a copy of which was faxed to respondents' attorneys indicating that, in the applicants' view, the respondent and Ms Van Zyl had failed to comply with the court order and that they would consult with their client to take the necessary legal steps to enforce the provisions of the order. To the knowledge of the applicant, Mr Weiner, the respondent's attorney who had been dealing with the matter was overseas. I am of the view that the applicants' attorneys would have been well advised to have directly addressed the respondents' attorneys in correspondence with regard to any intention to initiate contempt of court proceedings prior to the launch of the proceedings. Indeed, it appears from their letter to Dr Bredenkamp, dated the 24th of July 2003, that they consulted and received instructions to bring the contempt of court application on the 24th of July 2003. Had they at that stage contacted the respondents' attorneys, the application may have been unnecessary.

For the reasons set out above, I am of the view that the respondent was not in contempt of the court order in that, even if he were in default thereof, I am of the view that he was not acting wilfully or *mala fides*. Accordingly, the application must be dismissed.

I turn to deal with the question of the costs of both applications.

In the matter of Bethel v Bland and Others 1996 (4) SA 472 (W) Wunsh J set out what he considered to be the correct approach to costs in applications involving questions as to the best interests of a child. I am in respectful agreement with the following summary thereof at 475 E - I by the learned judge:-

- “1) *Generally speaking, a successful litigant is entitled to his or her costs.*
7. *While it is quite true that a custody dispute should not be seen as an adversarial contest in the ordinary sense, but rather as an enquiry into the best interests of the child, it cannot be denied that in most cases the litigants are advancing their own preferences and seeking satisfaction of their love of the child. Often, too, the papers contain many attacks on the character and conduct of the opponents.*
8. *On the other hand, it is also a consideration that a party should not be discouraged from putting up a case which he or she, on broadly reasonable grounds, thinks to be in the interests of the child for fear of having costs awarded against him or her if unsuccessful. By the same token, a party who is, on what turn out to be good grounds, confident that his or her case will prevail, should not be discouraged from taking or resisting action because of the costs which he or she will incur.*
9. *However bona fide and concerned a party may be, if his or her opponent's judgment of the issue prevails, it is not, in the absence of circumstances*

justifying it, fair that the opponent should be mulcted in his or her own costs.”

Mr Louwrens submitted that the applicants had no choice but to launch an application to court to ask for the court’s assistance to gain access to their grandchild. He submitted that the application had resulted in some progress being made insofar as there has been an agreement reached with regard to mediation. He submitted that without this application, the parties would not have agreed to attend mediation. I cannot agree with this latter submission as mediation was never suggested at any stage by the applicant, neither was the invoking of the assistance of an independent counsellor prior to the launch of the application. Had the applicants suggested such a course, there is nothing to suggest that the respondent would have opposed it.

Mr Louwrens furthermore submitted that, with regard to the first application, each party should pay his or her own costs. He suggested that this would assist in building the relationship between the parties. Ms Weyer, on the other hand, while accepting that it might smooth the relationship were each party to pay their own costs, submitted that the respondent had been put to considerable costs by what was, in effect, three substantive applications all initiated by the applicant. She furthermore submitted that given the wide orders sought by the applicant in the first application, the respondent had had no option but to oppose the matter. She further submitted that the litigation had only succeeded in increasing the hostilities between the parties and that all moneys expended thereon by the respondent meant that less money would be available for G’s needs.

I have considered the arguments of counsel, the undisputed facts of the first application and the findings of this court. Although the launch of the proceedings in this court may be understandable, given the soured relations and attendant difficulties in communication between the parties, and respondent’s refusal to allow the first applicant access to G, first applicant has, in

my view, shown little insight or sensitivity to G's needs in so doing and throughout the proceedings. It would have been preferable had she explored other options to facilitate improved family relationships before she sought the assistance of the court.

Furthermore, although the applicants' frustrations with the slowness of court process are also understandable, the pushing for interim access prior to the finalisation of the matter was not advisable and ultimately led to more difficulties and problems for G. Although the applicants had some measure of success in that application, it arose out of the respondent's preparedness to be guided by Dr Bredenkamp's advice.

I agree with Ms Weyer that the access order sought was very wide and, if granted, would cause quite considerable inroads into G and his family's choice of their free time pursuits, time with friends, family holidays etc. What is of more importance, however, in my view, is that the respondent was genuinely concerned about what he perceived as the negative impact access to his grandmother was having on G. This negative impact was exacerbated by the conflict between the adults, however, his concerns also related to the over emotionalism of the first applicant and her inappropriate behaviours towards G. It is quite apparent that while he was concerned to try and maintain a healthy relationship between the first applicant and her grandchild, he was not prepared to allow such relationship to upset his son. His concerns were to an extent borne out by the assessment of the first applicant's personality style by Dr Bredenkamp and the first applicant's demonstrated lack of sensitivity to the needs and emotions of this young child.

As indicated, it is my view that the first applicant has, in her dealings with respondent and G been driven by her own needs and preferences rather than G's best interests. Although it is fully understandable that the first applicant wished to and still wishes to maintain contact with her grandchild, there seems to have been little concern for the effect of such contact on G in the

emotion-charged and conflictual family circumstances or of her, sometimes inappropriate behaviour towards him.

In my view, in all the circumstances, the respondent cannot be faulted for opposing the application and placing his concerns before this court.

It is undisputed that the respondent has caused two postponements of the main application as he was absent on agreed court dates. However, I am not of the view, that the matter would have been able to proceed on those dates, in any event, as neither Dr Bredenkamp nor the family advocate had completed their reports.

Having anxiously considered all the relevant factors, I am not of the view that the circumstances of the first application are such that the court should depart from the general principle that the costs follow the result.

The contempt of court application was brought somewhat precipitately, in my view, and without proper communication between the attorney for the applicants and the respondent, which may have made the application unnecessary. In addition, once the respondent's explanation had been received, it was quite apparent that his default had not been *mala fides* or wilful. Despite this, the applicant persisted in that application, seeking that the respondent be punished for his alleged contempt. In my view, there are no grounds on which the respondent should be mulcted in costs on the second application.

In the result the following orders are made in these matters:-

10. The first application, (case no. 524/2003) is dismissed.
11. The second application, (case no. 6055/2003) is dismissed.

12. The first and second applicants are ordered to pay the respondent's costs in both applications, jointly and severally, the one paying, the other to be absolved.
13. The parties are to attend mediation, as directed by the appointed mediators and in terms of this order, in order to reach resolution on the areas of conflict between them, or the manner of dealing with such conflicts appropriately in general, and, in particular, so as not to impact negatively on G's welfare.

- 4.1 There shall be two co-mediators appointed by the Office of the Family Advocate within seven days of the granting of this Order, should the parties themselves not be able to agree on the mediators from the list of mediators made available to them through the office of the Family Advocate.
- 4.2 The mediators are requested to mediate the issues of conflict between the parties, which issues the parties shall themselves identify at the mediation.
- 4.3 If, in the opinion of the parties and the mediators, the issues of conflict have been sufficiently resolved, then and in that event the mediators may attempt to mediate the issue of access with the parties.
- 4.4 If after four sessions of mediation, or three months, whichever occurs first, the mediators in their sole discretion should conclude that the issues of conflict are not capable of being mediated, they shall file a certificate to this effect with the office of the Family Advocate.
- 4.5 The costs of the mediation shall be shared equally between the Applicants and the Respondent.
- 4.6 It shall be in the discretion of the mediators when the mediation sessions shall be held, save that such sessions shall commence within 2 weeks of the granting of this Order,
- 4.7 Termination of mediation shall take effect on the filing of a certificate as

contemplated in 4.4 above, or, in the event of the conflicts being capable of mediation, at the discretion of the mediators in consultation with the parties.

KNOLL J