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

Reportable: YES/NO Of Interest to other Judges: YES/NO Circulate to Magistrates: YES/NO

Case no: 441/2020

In the matter between:

B Applicant

and

K Respondent

CORAM: VAN ZYL, J

HEARD ON: 30 NOVEMBER 2023

DELIVERED ON: 13 MAY 2024

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[1] The parties hereto got married to married to each other on 10 January 2015 and were divorced by an order of this Court on 9 March 2022, which divorce order incorporated a Deed of Settlement concluded between the parties on the same date.

[2] One minor child was born from the marriage relationship between the parties, a boy, born on 3 March 2017 ("the minor child").

[3] In order to protect the identity of the minor child the identity of the parties is not revealed. I will refer to the mother as "*the applicant*", who was the plaintiff in the divorce action, and to the father as "*the respondent*", who was the defendant in the divorce action.

[4] This is the extended return date of a rule *nisi* which initially served on an urgent and *ex parte* basis before one of my colleagues, when, *inter alia,* the following order was made:

> "2. That a Rule *Nisi* be issued herewith...
>
> 2.1 The Respondent is ordered and directed not to assault, insult, threaten, harass, verbally abuse, physically abuse, emotionally abuse and/or to [*sic*] intimidate the Applicant and/or the minor child.
>
> 2.2 The Respondent is ordered not to enlist the help of another person to commit any of the acts mentioned in prayer 2.1 *supra.*
>
> 2.3 The Respondent is interdicted and restrained from being within a distance of fifty (50) metres from the Applicant's person.
>
> 2.4 It is declared that the Respondent's contact rights, as set out in paragraph 3.3 and 3.4 of the Deed of Settlement and which was made and Order of Court on 9 March 2022, be suspended pending the finalization of an Application to be instituted for the Amendment of the Respondent's contact rights.

2.5 It is declared that pending the finalization of the Application referred to in prayer 2.4, *supra,* that the Respondent will exercise his contact rights with the minor child as follows:

2.5.1 Telephonic contact once a week at 19h00 UK time on a Friday;

2.5.2 Supervised and/or supported contact.

2.6 The Applicant is ordered to issue the Application for the Amendment of the Deed of Settlement referred to in prayer 2.4 *supra* within a period of thirty (30) days from dated of the confirmation of the Rule *Nisi* as a Final Order of Court.

2.7 The Respondent is ordered and directed to pay the Applicant`s costs.

3. That prayers 2.1 to 2.5 *supra* shall serve as an interim interdict against the Respondent with immediate effect until the return date.

4. ..."

[5] Although lengthy, it is crucial to repeat the terms of the aforesaid Deed of Settlement, dated 9 March 2022, in respect of the respondent`s rights of contact which was made an order of Court under the above case number in the divorce action between the parties:

"2.

That primary residence of the minor child be awarded to the Plaintiff.

3.

That specific responsibilities and rights with regard to contact with the minor child as contemplated in Section 18(2)(b) of the Children's Act, Act 38 of 2005 be awarded to the Defendant in the following manner:

3.1 The Defendant to have reasonable telephonic and/or audio-visual contact with the minor child via Zoom/Whatsapp call/Whatsapp video call for at least one (1) hour every second day between 18:00 and 19:00 South African time.

3.2 **<u>Contact in South Africa during 2022:</u>**

3.2.1 The minor child to visit the Defendant in South Africa for a period of two (2) weeks during the minor child's long school holiday in August 2022;

3.2.2 The minor child shall be accompanied to South Africa by an adult family member as agreed upon by the parties or the Plaintiff;

3.2.3 The parties to be jointly liable for the flight costs of the minor child in August 2022;

3.2.4 The Plaintiff to have sleepover contact with the minor child on the first weekend of the August 2022 visit;

3.3 **<u>Contact in South Africa from 2023 onwards:</u>**

3.3.1 The minor child to visit the Defendant in South Africa for a maximum period of three (3) weeks over the minor child's long school (summer) holiday, such contact to coincide with the minor child's academic term and/or school calendar for the year;

3.3.2 The minor child shall be accompanied on the flight to and from South Africa by an agreed-upon adult family member until he reaches the age of ten (10) years old, thereafter the minor child shall be accompanied to and from South Africa by an agreed-upon adult family member, *alternatively* the parties shall arrange for the minor child to travel to and from South Africa on a direct flight using unaccompanied minor services;

3.3.3 Should the Plaintiff accompany the minor child to South Africa then and in that event the Plaintiff shall be entitled to sleepover contact with the minor child during the first weekend of such visit;

3.3.4 The parties will be jointly liable for the minor child's flights to and from South Africa, including any fees incurred because of the use of the unaccompanied minor services;

3.4 **<u>Contact in the UK from date of Court Order:</u>**

3.4.1 The Defendant shall have the right to reasonable and unsupervised contact with the minor child at such times as the Defendant visits the United Kingdom, for any period not exceeding four (4) weeks at a time, subject to the following:

3.4.1.1 Should such contact occur during the minor child's school term, the Defendant shall exercise contact as follows:

3.4.1.1.1 Contact shall occur after school hours and the minor child is to be returned home to the Plaintiff before 18:00 pm.

3.4.1.1.2 The Defendant may attend extra-mural activities and transport the minor child to and from such activities;

3.4.1.1.3 Sleepover contact every weekend;

3.4.1.2 Should the contact occur during any of the minor child's school holiday periods (excluding the long school holiday), the Defendant shall exercise unrestricted contact with the minor child;

3.5 The Defendant shall give the Plaintiff at least one (1) calendar month's prior notice of his intention to travel to the United Kingdom to exercise his contact rights;

3.6 The Defendant's contact rights towards the minor child in the UK, as specified herein above, is subject thereto that contact with the minor child on Christmas day will alternate between the parties;

3.7 The Plaintiff will provide all information relating to the physical, educational and emotional care of the minor child to the Defendant;

3.8 Video call/Skype/Zoom or other electronic contact with the minor child with the Defendant on the birthday of the minor child and the Defendant;

3.9 In the event that the Defendant visits the minor child in the United Kingdom on the birthday of the minor child, the minor child's birthday is to be shared equally between the parties.

4.

Should the Defendant in future take up residency in the United Kingdom, the Defendant shall be entitled to reasonable contact with the minor child.

5.

That a Parenting Plan annexed hereto marked as Annexure "X", be incorporated into the Settlement Agreement and made an Order of Court."

[6] The aforesaid Parenting Plan, *inter alia*, determines as follows:

"Passport and Traveling:

3.1 The parties shall ensure that the child's passport is at all times valid to enable him to travel internationally and they shall timeously take all such steps which may be necessary to renew the child's passport.

3.2 If the child is to travel with the consent of both parents, each parent shall sign all the necessary affidavits, visa applications, consents and other documents which may be necessary to enable the child to travel."

[7] The respondent is opposing the application and is seeking an order that the rule *nisi* be dismissed with costs on an attorney and client scale.

Background:

[8] The applicant is a citizen of the United Kingdom ("the UK") by birth. After the divorce of her parents during 2011, she however remained in South Africa with her mother. During 2020 the applicant decided to move back to the UK, together with the minor child. The respondent remained in South Africa. Summons in the divorce action between the applicant and the defendant was issued in February 2020 and, as previously stated, they got divorced after having concluded a Deed of Settlement on 9 March 2022.

[9] The parties have been having a very acrimonious relationship, especially in respect of contact rights of the respondent with the minor child. This resulted, *inter alia,* in numerous

correspondence between the applicant`s attorney of record and the respondent`s attorney of record.

[10] At paragraph [40] of the founding affidavit the applicant stated that "*on 18 August 2023, the Respondent addressed various WhatsApp-messages to me stating that he no longer has a South African Attorney of Record, that he will appoint a new Attorney of record in the United Kingdom and that he is departing for the United Kingdom on Thursday, 24 August 2023*".

[11] With reference to the last-mentioned event, the applicant stated at paragraph [13] of the founding affidavit under the heading of "*urgency*" as follows:

> "For reasons which will become more evident from the averments contained in paragraphs hereunder I fear that the Applicant will arrive at my house and remove the minor child, that he might assault me and that he will remove the minor child from the United Kingdom. For this reason, I urgently require the assistance of the Honourable Court to grant me the relief sought."

<u>THE MERITS:</u>

[12] I will succinctly deal with the most relevant averments made by the respective parties.

<u>The founding affidavit:</u>

[13] In addition to the above-mentioned averments which the applicant made in support of the alleged urgency of the

application, the applicant relies on, *inter alia,* the following allegations in her founding affidavit:

1. The respondent physically assaulted the applicant by hitting her in the face with an open hand during 2016.

2. The applicant at the very next paragraph of the founding affidavit, paragraph 21, avers as follows:

> "I was afraid that history will repeat itself and that the Respondent will, considering his short temper, continue assaulting me, or the minor child for that matter, in future. As such I arrived at the conclusion that it was no longer in the best interest of myself and/or the minor child to remain in such a toxic and abusive relationship and for these reasons I have issued a Summons out of the Free State High Court on 3 February 2020 under Civil Case Cover number 441/2020."

3. During June 2022 the applicant, in compliance with the Deed of Settlement, applied for a passport for the minor child so that he could visit the respondent in South Africa during his 2022 school holidays. It was not possible to obtain a passport timeously for the minor child, because of a certain backlog with the applicable state department, which cannot be contributed to the applicant.

4. Thereafter the relationship between the applicant and respondent deteriorated and the respondent kept on abusing the applicant verbally, threatening and harassing her, which averments are, according to the applicant, substantiated by copies of WhatsApp messages attached to the founding affidavit.

5. The respondent subjects the applicant to constant emotional onslaught and abuse, while the respondent, knowing very well that the applicant is not available, would then repeatedly phone the applicant in order to create the impression that the applicant is ignoring his calls and does not allow him to exercise his contact rights, whereafter he complains about it. When she informs the respondent that they are at home and available to answer his phone calls, he ignores them. The applicant mentioned examples of when this, according to her, happened, starting with examples of 19 December 2021 and 30 December 2021, respectively.

6. The respondent is accusing the applicant of committing a criminal offence and of bribery. He is threatening the applicant with contempt of court proceedings and he is further threatening the applicant by informing her that she will be arrested should she set foot in South Africa.

7. The applicant has repeatedly informed the respondent that his accusations are not true and requested him to stop his false accusations, to stop harassing her and intimidating her.

8. The applicant has been severely traumatized as a result of the physical abuse she was subjected to during the existence of their marriage relationship and she is being treated for Post-Traumatic Stress Disorder, while the respondent`s continued harassment is not beneficial to her health and is causing substantial stress for her.

9. According to the applicant it is evident from the Whatsapp messages that she has been subjected to unprecedented harassment and emotional abuse. The planned visit to the UK is nothing else than a step-up in his approach to harass the applicant and she is afraid that his conduct will escalate to physical altercations and that he might even assault the applicant as he has done in the past.

10. The respondent is abusing the present order to harass the applicant and the minor child.

11. Even if the applicant`s fear of a physical assault does not materialize, the applicant still needs the urgent intervention of the Court since she can no longer tolerate the respondent`s continued emotional and psychological abuse, threats and harassment.

12. An amendment to the Deed of Settlement requires the urgent intervention of the Court in as far as the respondent`s contact rights are concerned. Alternatively, should the Court be of the view that it does not possess the necessary jurisdiction to grant such an order, or that another Court will be better suited to consider the aforementioned relief, that the respondent`s contact rights be suspended pending the finalisation of an application to be instituted in an appropriate Court. The existing Order is no longer in the best interest of the minor child.

13. The applicant believes that with one or two contact sessions the respondent will behave, but the moment he is allowed to take

the minor child with him for an extended period of time, the risk of him assaulting the minor child will increase significantly.

14. The applicant is concerned that should the respondent be allowed to take the minor child with him in the UK, he will not return the minor child but rather attempt to return with the minor child to South Africa.

15. The applicant is concerned that should she return to South Africa the respondent will refuse to return the minor child.

16. The time, duration and amount of telephonic contact no longer serves the best interest of the minor child.

17. The applicant has already consulted with a solicitor in the UK and they are in the process of preparing an application to amend the respondent`s parental rights and obligations in order to ensure that the best interest of the minor child is ultimately served.

<u>The answering affidavit:</u>

[14] The respondent relies, *inter alia,* on the following allegations in his answering affidavit:

1. The application was launched without any reason, it was not urgent, it amounts to an abuse of process and as such the rule *nisi* should be discharged and the Court should grant a punitive costs order against the applicant.

2. The Whatsapp messages attached to the founding affidavit do not warrant the Order granted against the respondent.

3. This Court does not have jurisdiction to grant an order in respect of the care and contact rights relating to the minor child. The only Court which currently has such jurisdiction is the Court in the UK where the minor child resides.

4. The respondent has indeed departed to the UK. He, however, never had any intention of removing the minor child from the applicant`s care, assaulting the applicant or removing the minor child from the UK.

5. The applicant blatantly and dishonestly distorted the facts pertaining to the slap with an open hand during 2016. The applicant slapped the respondent twice as though it was a joke and the respondent asked her to stop immediately, that it was not funny and that it hurts. When the applicant thereafter tried to slap the respondent a third time, he caught her wrists and in a serious manner again requested her to stop slapping him. The applicant then slapped the respondent for a third time in the face. This slap was so hard that both the respondent`s eyes started watering with tears. The respondent then instinctively slapped the applicant with an open hand in the face. This was not a very hard slap and was merely done to show her that she should stop with her actions. He could see that the applicant did not expect that he would ever lift a hand to her and she started crying. The respondent immediately consoled her, they talked things over and it was never an issue again.

6. There was no abuse or toxic behaviour from the respondent`s side during the marriage relationship. The applicant was not subjected to physical abuse during the marriage relationship and such allegations are untrue and made with the intent to mislead the court.

7. The applicant blatantly disregards the Divorce Order by failing to comply with the terms of the Deed of Settlement. Although the respondent is currently in the UK, the applicant is refusing to allow the respondent to have contact with the minor child. This conduct amounts to parental alienation. The applicant does not want to allow any relationship between the respondent and the minor child. The applicant should not be heard by the Court whilst in Contempt of the Divorce Order.

8. The reason why the respondent has not been having physical contact with the minor child is due to the applicant`s failure to comply with the terms of the Deed of Settlement, specifically with regard to the contact in South Africa during 2022. Although the respondent has telephonic / audio-visual contact with the minor child, this contact has been problematic due to the applicant`s conduct in frustrating such contact as far as possible.

9. According to the respondent the WhatsApp messages attached to the founding affidavit do not depict abusive conduct on his part, but rather shows the manners in which the applicant frustrates his contact with the minor child. According to the respondent It shows attempts by "*a desperate father to have contact with his child whilst being frustrated to do so*".

10. The respondent did not abuse the applicant verbally and did not threaten or harass her. The respondent did not subject the applicant to constant emotional onslaught or abuse. The fact that the applicant made several phone calls to the applicant shows that the applicant did not answer his calls during the times when he was allowed to have contact with the minor child. According to the respondent, the WhatsApp messages, when read in context, show a continuing frustration of the respondent`s contact rights in respect of the minor child.

11. The respondent is currently in the UK and are being assisted by "Justice for Fathers" who will enlist a mediator in an attempt to reach an agreement with the applicant regarding the respondent`s contact rights. In one message which the respondent sent to the applicant, he made it clear that his intentions of travelling to the UK were to visit the minor child and to get the authorities and UK Court involved in the dispute between the applicant and the respondent. The respondent never had any intention of removing the minor child from the applicant`s care. The only reason why he required a copy of the minor child`s passport was due to the fact that a valid passport is required in terms of the Divorce Order and that British Immigration requires proof of the minor`s passport for the respondent`s supportive parent Visa. According to the respondent the applicant knows full well that he would not be able to remove the child from the UK with only a copy of the minor child`s passport.

12. According to the respondent he is not an aggressive and short-tempered man. The allegation that he will assault the minor child

is baseless and shocking. According to him he "*has never and will never assault my child*". The applicant is *mala fide* in making such allegations.

13. The applicant has obtained a Court Order in the UK, which is confirmed by an email form the applicant`s solicitor attached to the answering affidavit. It was obtained in the absence of both the respondent and his attorneys. According to the respondent the fact that the applicant obtained such an order is indicative thereof that the present application was unnecessary and amounts to an abuse of process. The applicant does not want the respondent to have any contact with the minor child and therefore launched the present application in an attempt to prevent the respondent from having contact with the minor child. The interim Court Order which the applicant obtained does in any event not assist her in the UK as it is an order of a foreign Court which has no final effect.

14. The respondent has not subjected the applicant to any emotional or psychological abuse. He is also not intimidating, insulting, abusing or harassing her.

15. The respondent no longer intends to bring any Contempt of Court application against the applicant. The applicant`s unfounded fear of being arrested and detained does not warrant an interdict being granted against the respondent, as the South African authorities will in any event not arrest or detain the applicant without just cause.

The replying affidavit:

[15] In the replying affidavit the applicant, *inter alia*, makes the following averments in response to the answering affidavit:

1. In general, the applicant persists with her version as contained in the founding affidavit insofar as the respondent`s version differs from hers. I am not going to repeat such averments and will concentrate on responses specific to the answering affidavit.

2. The respondent is misleading the Court and distorting the truth to the extent that a punitive costs order should be granted against the respondent.

3. In the past the respondent abused the applicant and he assaulted her and the minor child. The applicant referred to paragraph 6.4 of her Particulars of Claim filed in the divorce action where she stated that the respondent has assaulted the applicant.

4. The respondent`s admission that he slapped the respondent, which he attempts to justify and down play, is in contrast to his plea filed in the divorce action where he denied that he assaulted the applicant and what he told the Social Worker during an evaluation conducted by the offices of the Family Advocate when he also denied that he assaulted the applicant. The applicant denies that she slapped the respondent as averred in his answering affidavit and also denies that they resolved the issue after the respondent slapped her.

5. In addition to the applicant having been assaulted, the respondent also hit the minor child.

6. The respondent verbally abused the applicant.

7. The applicant admits that the respondent arrived in the UK on 24 August 2023 and that she issued the application in the UK Ccourt on 19 September 2023 which now governs the respondent`s interim contact rights in the UK. According to the applicant, after the respondent`s arrival and until the issuing of the aforesaid application in the UK, the respondent never requested to see the minor child. Even after the Interim Order was granted in the UK, the respondent again exercised none of his allocated contact rights.

8. The applicant denies that the respondent never assaulted the minor child and referred to incidents which the respondent admitted to the Family Counsellor and which was recorded in her report.

9. The applicant has been advised by her Solicitor that in the absence of a Disclosure order, the parties are not at liberty to attach the Interim Order or the e-mail already attached to the answering affidavit. They are also not allowed to provide details regarding the Court proceedings in the UK. The applicant`s solicitor approached the UK Court to obtain the necessary permission to disclose the Interim Order, but the request has not been finalised.

10. The proceedings in the UK are so-called Children Court proceedings and as such that Court will not grant an Order interdicting the respondent from assaulting, insulting etc the applicant. The applicant therefore still requires an Order from this Court in the present application. The respondent is using the Divorce Order as a tool to harass and threaten the applicant.

11. The applicants conclude her replying affidavit with the following paragraph 48.4:

> "Lastly now that the UK Court has granted an Interim Court order, there is basically two Court Orders governing our parental rights and responsibilities. As matters stand, I have no guarantee that the Respondent will comply with the Interim Court Order, even upon his return to South Africa, and I have a legitimate fear, considering our history of conflict, that the Respondent may even argue in months to come, should he not be satisfied with the Orders granted by the UK Court, that the same is not enforceable in South Africa. There cannot be two different Court Orders and this is why I require a declaratory Order suspending the Respondent's contact rights as is sought in prayer 2.4 of the Notice of Motion to prevent that uncertainty and any potential conflict between us as for long as the necessary investigations are conducted by the UN Court."

<u>The respondent's further affidavit:</u>

[16] During an earlier occasion when this matter served before a different Judge, that Judge granted leave to the respondent to file a further affidavit in response to the applicant's allegations regarding the respondent's alleged assaults of the minor child.

[17] The respondent denies that he physically assaulted the minor child as alleged and described by the applicant and gives his

version of the relevant incidents. According to the respondent the applicant`s allegation that he assaulted the minor child is untrue and simply made in an attempt to obtain an interdict which she is not entitled to.

Urgency:

[18] In both his written heads of argument and during his oral arguments, Mr Els, on behalf of the respondent, contended that the application was not urgent and should not have been heard and granted as such.

[19] I, however have to agree with the submissions of Mr Coetzer, on behalf of the applicant, that the issue of urgency has already been decided upon by the Judge who issued the rule *nisi* hearing. That decision cannot be revisited, although I will return to this aspect when I deal with costs.

Contempt of court and the right to be heard:

[20] It is the respondent`s contention that the Applicant is in Contempt of Court for failing to comply with the provisions of the Divorce Order and as such she should not be heard until she complies with the said provisions.

[21] It is indeed so that a Court may refuse to hear a person who is in Contempt of Court until such contempt has been purged. This is, however, not an absolute rule. To preclude a person from a hearing may cause great injustice and as such a Court must exercise its discretion based upon the circumstances of the

case. See **<u>Di Bona v Di Bona</u>** 1993 (2) SA 682 (C) at 688 B – 690 B.

[22] In the present matter there is a dispute of fact as to whether the applicant is in wilful and *mala fide* contempt of the Divorce Order. I am not called upon to adjudicate this dispute. In the circumstances of the present matter and in view of my conclusions and findings later in the judgment, I consider it just and in the interest of both the respondent and the minor child to allow the applicant to be heard in this matter.

<u>Jurisdiction in respect of contact with the minor child:</u>

[23] The following statutory provisions are applicable in this instance regarding the variation of a Court Order dealing with contact and care of a minor child:

1. Section 8(1) of the Divorce Act, 70 of 1979, determines that an Order in respect of custody or guardianship or access to a child made in terms of the said Act, may be rescinded or varied if a Court finds that there is sufficient reason for it.

2. Section 8(2) of the Divorce Act states further that a Court, other than the Court which made the Order, may rescind, vary or suspend such Order if the parties are domiciled in the area of jurisdiction of such Court, or if the applicant is domiciled in the area of jurisdiction of such Court and the respondent consents to the jurisdiction of the Court.

3. Section 28(1)(a) of the Children`s Act, 38 of 2005, states that a party may apply to a High Court, a Divorce Court or a Children`s Court for an Order extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

4. Section 29(1) of the Children`s Act states further that the aforementioned application may be brought in the High Court, a Divorce Court or a Children's Court within whose area of jurisdiction the child concerned is ordinarily resident.

5. Section 21 of the Superior Courts Act, 10 of 2013, states that a Division of the High Court of South Africa has jurisdiction over all persons residing or being in and in relation to all causes arising within its area of jurisdiction.

[24 In the matter of **Di Bona v Di Bona,** *supra,* the following is stated at 695 E to 696 D:

"In our law, and English law would appear to be the same, the only Court that has jurisdiction to order the handing over of children and to authorise, if need be, the Sheriff to take the children from one parent and to hand them over to another, is the Court of the place where the children are to be found and where they are living and under whose judicial guardianship the children are at the time of the making of the order. In South Africa the Supreme Court is not bound by a foreign order of Court relating to the custody of or access to children who are in South Africa and who are not, and were not, in a foreign country, the Court of which has purported to make such order. The function and duty of the South African Court, where a dispute arises as to the custody of or access to the children, is to establish what is in the best interests of the children, whatever another Court may have found in this regard and to make its own order accordingly. It has to form an independent judgment on the evidence before it and in the course of doing so it may give such weight to a foreign custody or access order or an order relating to the well-being of the children as the circumstances may justify, but it is certainly not bound by such foreign order nor will it grant process in aid of the enforcement of such an order without the enquiry which I have mentioned. (See *Märtens v Märtens* 1991 (4) SA 287 (T) at 292; *Matthews v Matthews* 1983 (4) SA 136 (E); *Desai v Desai* 1987 (4) 178 (T); *Abrahams v Abrahams* 1981 (3) SA 593 (B); *Zorbas v Zorbas* 1987 (3) SA 436 (W); and *Riddle v Riddle* 1956 (2) SA 739 (C) at 744-5, which decision was cited with approval and applied in *Katz v Katz (supra* at 379D-G).)

The refusal of Courts of a country where the children are to enforce custody and access orders made by a foreign Court is based not only upon the propositions aforementioned but also upon other legal grounds. Both in South Africa and in England, a foreign order of Court may be enforced only if it is a final and conclusive judgment or order, that is to say, if the judgment is regarded by the Court which made it as *res iudicata*. A judgment which is variable by the Court which pronounced it is not a final order and will never be enforced by the Courts of any other country. (See *Dicey and Morris (op cit* at 428).) **An order for the custody of, or access to, children is *par excellence* a variable and not a final order, and will not be enforced *per se* in England if granted in this country. This Court accordingly has no jurisdiction to make an effective order in respect of children who are in England and no longer within South Africa.** In any event, this Court clearly has no jurisdiction to order the handing over of a child which is in another jurisdiction where the writ of Court does not run. (See *Ceronio v Snyman* 1961 (4) SA 294 (W) at 297H-298B, applying *Coomb v Coomb* 1908 TH 241; *Anderson v Van Vuuren* 1930 TPD 118, *Martine v Large* 1952 (4) SA 31 (W).)

This Court accordingly has no jurisdiction to entertain the proposed action insofar as it relates to an order for the return of the children from England to South Africa and for the handing over of the children to applicant pursuant to whatever rights of access to the children he may have. He must have recourse to the appropriate English Court, which is the upper guardian of these two children, to seek his remedies in this regard." (My emphasis)

[25] In the judgment of **<u>N.A.N v C.N</u>** (2425/2016) [2017] ZAECPEHC 61 (14 December 2017) at paragraph [22] the following is stated:

"[22] The terms of section 29 are clear and unambiguous and, in my view, serve as an overriding determinant of jurisdiction in circumstances where a court is called upon to terminate, suspend or circumscribe the parental rights and responsibilities of a parent. <u>The requirement is that the minor child must be ordinarily resident within the area of jurisdiction of the court</u>. This is a territorial limitation of jurisdiction." (My emphasis)

[26] In the matter of **<u>J.S v W.F</u>** JDR 1572 at para [46] the court stated as follows:

"In light of the above, I am of the view that if <u>the relief sought in prayer 4.5 of the amended notice of motion entails limitation or extension of parental responsibilities, the matter falls outside the scope of the Court's jurisdiction. If, however, the relief sought is a declaratory order in which the applicant's rights as co-holder of parental responsibilities and rights and co-guardian of the minor children is to be defined, the position changes. A declaratory order will not change the *status* quo but merely delineate the parties' rights and responsibilities as it is informed by the settlement agreement and the relevant sections of the Children's Act. ..."</u> (My emphasis)

[27] From the aforesaid legislation and case law, it is evident that the only Court which has jurisdiction over the care and contact rights in respect of the minor child, is the Court in whose jurisdiction the minor child is residing; hence; the relevant Court in the UK.

[28] With regard to a declaratory order, the following is stated in the judgment of **<u>Sex Worker Education and Advocacy Task</u>**

Force v Minister of Safety and Security and Others 2009 (6) SA 513 (WCC) at paras [35] to [37]:

"[35] I now deal with the relief sought by applicant, namely declaratory and interdictory relief.

[36] It is trite that a court has a discretion to grant declaratory relief in terms of s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959. In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) ([2006] 1 All SA 103) at 213E - G, it was held that the said section requires a two-stage approach. Firstly, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. Secondly, if the court is satisfied that such an interest exists, it must be considered whether or not the order should be granted. This latter stage involves the exercise of a discretion with due regard to the circumstances of the case.

[37] As explained by Erasmus *Superior Court Practice* at A1-34/34A, a court may, in the exercise of its discretion whether to grant or refuse a declaratory order, decline to deal with the matter where there is no actual dispute. It may also, in the exercise of its discretion, decline to grant a declaratory order if it regards the question raised before it as hypothetical, abstract or academic. Nor will a court grant a declaratory order where the issue has already been decided by a court of competent jurisdiction, or where the legal position has been clearly defined by statute. See *Garment Workers' Union, Western Province, and Another v Industrial Registrar and Another* 1967 (4) SA 316 (T)." (My emphasis)

[29] The relief the applicant is seeking in the present matter in relation to the suspension/limitation of the contact rights of the respondent to the minor child, is a far cry from a declaratory order. The present order is clear and unambiguous. The attempt to couch the requested relief in the form of a declaratory order,

is completely without basis or substance. I will return to this aspect when I deal with costs.

[30] This Court, consequently, clearly had and has no jurisdiction to have granted paragraphs 2.4, 2.5 and 2.6 of the rule *nisi* and same should be discharged.

[31] In the circumstances it serves no purpose to deal with the merits or demerits of the said relief claimed.

Final interdict:

[32] It is trite that the three requirements for a final interdict are the following:

1. A clear right on the part of the applicant.

2. An injury actually committed or reasonably apprehended. This means that there must be proof of some act interfering with the applicant`s right or a well-grounded apprehension that such an act will occur.

3. The absence of any other satisfactory remedy available to the applicant.

[33] With regard to a clear right, it is being described as follows in **Erasmus, Superior Court Practice**, at RS 22, 2023, D6-14 & D6-15:

"...but a more correct rendering would be a 'definite right'. It is submitted that what is meant by the phrase is 'a right clearly established'. Whether the applicant has a right is a matter of substantive law; whether that right is clearly established is a matter of evidence. In order to establish a clear right the applicant has to prove on a balance of probability the right which he seeks to protect."

[34] An injury actually committed must be a continuing one as the Court will not grant an interdict restraining an act already committed.

[35] The test for the reasonable apprehension of an injury is an objective one. An applicant must therefore show objectively that his/her apprehension is well grounded. Mere assertions of his/her fear is insufficient. The facts grounding the apprehension must be set out in the application to enable the Court to judge for itself whether the fear is indeed well grounded. See **Erasmus, Superior Court Practice**, *supra,* at RS 22, 2023, D6-16 & D6-16A:

[36] Factual disputes must be resolved, if the parties do not request such issues to be referred for trial or evidence in terms of rule 6(5)*(g)*, by applying the test enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, namely that the interdict sought can be granted only if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting thereof. In **Nampesca (SA) Products (Pty) Ltd and Another v Zaderer and Others** 1999 (1) SA 886 (C) at 892 C it is stated as follows:

"As the applicants are seeking relief which is final of nature and the parties have not requested that any factual issues be referred for trial or evidence in terms of Rule 6(5)*(g)*, such disputes must be resolved by applying the test enunciated in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)

Ltd 1984 (3) SA623 (A) at 634E-G, namely that the interdict sought can be granted only if the facts as stated by the respondents, together with the admitted facts in the applicants' affidavits, justify the granting thereof. Where there are disputes of fact a Court can decide the issues only if it is satisfied that there are no real and genuine disputes of fact; that the respondent's allegations are so far-fetched or untenable that their rejection merely on the papers is warranted; or that viva voce evidence will not disturb the probabilities appearing from the affidavits. (See Administrator, Transvaal, and Others v Theletsane and Others 1991 (2) SA 192 (A) at 197B.)"

[37] In **Soffiantini v Mould** 1956 (4) SA 150 (E) at 154 G – H the Court held as follows:

"It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

Clear right:

[38] The applicant has a clear right not to be assaulted, insulted, threatened harassed, abused and/or intimidated and the same applies to the minor child. I consequently agree with Mr Coetzer`s submission that the first requirement for a final interdict has consequently been established.

[39] I will now turn to deal with the second requirement of an injury or injuries actually committed or reasonably apprehended.

Injury actually committed or reasonably apprehended:

A: Assaults or threats of assault on the applicant:

[40] The one slap in the face with an open hand by the respondent occurred during 2016 already. The parties differ as to what led up to it and the long term impact, if any it had on their relationship. I do not suggest that the said slap was acceptable, not at all. The fact is that it was and is not a continuing injury. Nowhere is there any suggestion that the respondent again assaulted the applicant or even threatened to assault her after that one incident.

[41] The applicant in her replying affidavit points out that already in the Particulars of Claim which the applicant filed in the divorce action, she averred that the respondent has assaulted her. However, it is necessary to also look at the counterclaim which the respondent filed in the divorce action wherein he specifically also pleaded that the applicant assaulted the respondent *"by slapping him in his face".*

[42] If the assault-incident had such a profound negative impact upon their marriage relationship as averred by the applicant, I find it strange and unexpected that the minor child was still conceived after that incident and that the applicant remained in the marriage relationship until February 2020 when the divorce action was instituted. I would also have expected the applicant to have made more of an issue about it during the investigation by the Family Counsellor and the family advocate, which she did not.

[43] The allegation by the applicant that she was afraid that "*history*" would repeat itself and that the respondent will "*continue assaulting*" her, causes her to presently have a reasonable apprehension that the respondent will assault her, is completely baseless and unfounded.

B: Assaults or threats of assault on the minor child:

[44] Paragraphs 2.1 and 2.2 of the rule *nisi* provide, *inter alia,* for an interdict against assaulting the minor child. The one averment in the founding affidavit in support hereof is a side-remark in respect of the minor child at paragraph 21 of the founding affidavit:

> "I was afraid that history repeat itself and that the respondent will, considering his short temper, continue assaulting me, **or the minor child for that matter**, in future". (My emphasis)

The second remark is contained at paragraph 43.2 of the founding affidavit where the applicant states that she believes that with one or two contact sessions the respondent will behave, but the moment he is allowed to take the minor child with him for an extended period of time, the risk of him assaulting the minor child will increase significantly.

[45] In my view no factual basis or foundation whatsoever was made out in the founding affidavit for the aforesaid relief.

[46 It was only once the respondent denied in the answering affidavit that he ever and will never assault the minor child, that the applicant saw it fit to mention the incidents which she labels as "assaults". The question once again arises, as with the allegations regarding the slap in her face, why the applicant did not consider those incidents important enough to have mentioned the details thereof in the founding affidavit. The applicant seemingly did not consider those incidents to have been assaults in the true sense of the word, otherwise one would have expected that she would have mentioned the details. I`m not implicating that same did not happen, since the respondent himself admits the occurrence of the three incidents as he did in the report of the Family Counsellor. My concern lies with the applicant`s version, or the lack thereof in the founding affidavit, that it constituted assault, as oppose to the respondent`s version in the report of the Family Counsellor and in his supplementary affidavit.

[47] In the report of the Family Counsellor, the counsellor, with reference to the three incidents, stated that the applicant alleges that the respondent "*applies harsh punishment*". No mention of "assault" was made by the applicant.

[48] The Family Counsellor, after having dealt with the incidents, concluded as follows at paragraph 11.14 of her report:

> "j) From the investigation and collateral contacted, none of the persons has ever witnessed or suspect the father of the abuse of [the minor child] and they have never seen the father inflicting physical harm or punishment upon [the minor child].
>
> k) The undersigned is of the opinion that the father`s punishment upon [the minor child] was harsh at the time and was inflicted when the

father was aggravated by the [minor child`s] negative behaviour and disobedience as well as the physical harm that [the minor child] inflicted on the father.

l) The father is not an abusive type of father at all and it would be in the best interest of the father, if the father could deal with his frustrations better and seek assistance from the Psychologist he is involved with." (My emphasis)

[49] All of the aforesaid begs the question why the applicant agreed to the terms of the Deed of Settlement in respect of the respondent`s contact rights if the applicant feared that the respondent may harm or assault the minor child. No explanation in this regard has been forthcoming from the applicant.

[50] In the circumstances I have to accept the respondent`s version and no proper case has been out regarding alleged assaults or threats of assault on the minor child.

C: Insulting, threatening, harassing, verbally abuse or intimidating the applicant/and or the minor child:

[51] Mr Coetzer submitted in his written heads of argument at paragraphs 20.1 and 20.3 thereof as follows:

"20.1 One must merely peruse the various WhatsApp-messages to arrive at the conclusion that the Respondent is guilty of harassing the Applicant by sending excessive WhatsApp- messages to the Applicant, by making excessive phone calls and by constantly threatening the Applicant of Contempt of Court Proceedings, constantly accusing her falsely of parental alienation and that he is coming.

...

20.3 In addition to this the Applicant mentioned that the Respondent blames her and he is short tempered. Couples with the fact that he terminated the mandate of his attorney, boarded a plane, never approached the Court one can understand the Applicant's fears and the same cannot be dismissed as baseless."

[52] Although it is true that the respondent informed the applicant on 18 August 2023 that he no longer has a South African attorney of record and that he will depart to the UK on 23 August 2023, he advised the applicant on 21 July 2023 already in a Whatsapp that "*seeing that you are living under British jurisdiction I intent on taking our matter to a British Court*". The applicant could not have had a *bona fide* fear that the respondent will merely pitch up at her home, take Dylan and return to South Africa. The applicant must surely have been aware that the respondent would not be able to remove the minor child from the UN with only a copy of the minor child's passport.

[53] As correctly pointed out by the respondent in his answering affidavit, the abovementioned message made it clear that the respondent`s intentions of travelling to the UN were to visit the minor child and to get the authorities involved between the applicant and him. This was a clear indication that he did not have any intention of removing the minor child from the applicant`s care. He also duly explained why he needed a copy of the minor child`s passport.

[54] The applicant bemoans the fact that the respondent "threatens" her with Contempt of Court proceedings, that she will be arrested when she arrives in South Africa etc. and states that she feels

intimidated and harassed thereby. However, the so called "threats" are all lawful remedies which the applicant has at his disposal to compel the applicant to comply with the Divorce Order. There is absolutely nothing wrong with telling the applicant that he will use his remedies should she not comply with the Divorce Order. To the contrary, it is clearly indicative thereof that the respondent is of no intention to take the law into his own hands.

[55] Already in the report of the Family Counsellor the Counsellor pointed out and made mention of the frustration which the respondent is experiencing. The following was, *inter alia,* stated at paragraph 11.11 and 11.20 of the report:

"The father mostly has frustrations related to contact with [the minor child] that he wants to discuss with the mother, but are unable to do so. ... The father indicated that he has to phone a few times before the mother answers in order for him to have a video call contact with [the minor child]. He could see the mother was on the phone, but she ignored his calls. The father fear that the mother will frustrate contact the moment the investigation of the Family Advocate is complete. ... **From the investigation it was evident that there is chronic interference with visitation and communication.**" (My emphasis)

[56] I have carefully perused the contents of the Whatsapp messages and the number of missed calls between the parties attached to the founding affidavit. I agree with the contention by Mr Els that the said WhatsApp messages do not constitute harassment, illegitimate threats, abuse or intimidation. The clear picture which I get from the said messages and calls is that of a caring and desperate father who desires to have proper contact with his minor child, but whose contact and contact rights to the minor

child is being severely and *mala fide* frustrated by the applicant. The applicant is making it as difficult for the respondent as she can.

[57] I consequently find that the applicant's application does not make out a proper case in respect of the second requirement for obtaining a final interdict.

[58] I therefor deem it unnecessary to deal with the third requirement of no other satisfactory remedy available to the applicant.

[59] In the circumstances paragraphs 2.1 to 2.3 of the rule *nisi* also stands to be discharged.

Costs:

[60] In the **Law of Costs**, AC Cilliers, March 2024 SI 49, at paragraph 12.11A the following applicable principles are stated:

"**Costs orders in custody and access and similar cases**

The court is nowadays inclined to regard matters involving children as different from ordinary civil matters. Accordingly, it appears that in applications for variation of custody orders (and similar cases), the usual rule (or, at any rate, the tendency) is to make no order as to costs. ...

On the other hand, it has been held that in custody and access cases there is no general "rule" that no order as to costs should be made. This is well illustrated by a custody matter in which the English courts had also been involved. (*KLVC v SDI and Another* [2015] 1 All SA 532 (SCA), [2015] JOL 32761 (SCA)) The first respondent, an unmarried father, had brought a successful application to the High Court, which held, amongst other things, that before removing their child from the Republic, the appellant ought to have obtained the first respondent's permission, or, otherwise, an appropriate court order. In an appeal to the Supreme Court of Appeal, that court said the following in paragraph 39 of its judgment:

> 'It is so that generally in cases involving children, for example those concerning rights of access, courts frequently make an order that parties must pay their own costs because they are considered to be acting in the best interests of the children as envisaged by section 28 of the Constitution. I have however taken into consideration the fact that in the present proceedings the application in the court *a quo* was brought at the behest of the English court and that the first respondent was put to the expense of bringing the proceedings in order to assist the English court in resolving a difficult issue relating to custody rights pertaining to the child. Essentially this case revolved around the best interests of S to have access to her biological father. The appellant adopted a deliberately difficult and obstructive approach throughout this litigation. In addition, she introduced scurrilous and vitriolic matters about the first respondent which were completely irrelevant to the issue for determination. Undeterred by the finding of the court *a quo*, she has persisted in the present appeal with her frivolous claims with the sole purpose of denying the appellant his parental rights to S. Undoubtedly her conduct deserves serious censure from this Court as it borders on abuse of the court process. In the circumstances, it is appropriate that the appellant should pay the costs of appeal.'""

[61] In the present matter both parties are seeking costs against each other on a punitive scale of attorney and client.

[62] In *casu* the application entails a combination of relief, being a prohibitory interdict in respect of both the applicant and the minor child and the variation/suspension of the respondent`s contact rights.

[63] It is trite that the issue of costs falls within the discretion of the Court.

[64] In exercising my discretion my starting point is that since this application mainly deals with the contact rights of the respondent in respect of the minor child, it should, in general be approached on the basis that each party is to pay his/her own costs. However, there are circumstances in the present matter which necessitates that I have to reconsider the aforesaid general rule. I do not intend to deal with all those circumstances, but need to mention some of them.

1. Although I am not called upon to re-determine urgency, I have the advantage of having "the full picture" of the relevant facts and circumstances before me, which the Judge who issued the rule *nisi* did not have. It is now evident that not only was there no basis to have issued this application on an urgent *ex parte basis,* the applicant did so realizing full well that this Court does not have the jurisdiction to have granted paragraphs 2.4 to 2.6 of the rule *nisi.* The applicant even acknowledged same in her own papers and the arguments presented on her behalf, but despite that the applicant persisted claiming the said relief.

2. During argument stage the applicant all of a sudden sought relief in terms of the Interim Order that had been granted in the UK in the stead of paragraphs 2.4 to 2.6 of the rule *nisi,* and again, despite the Court`s lack of jurisdiction. It constituted completely new relief.

3. The manner in which the relief sought was couched ass though it was a declaratory order, constituted a willful abuse of process.

4. The fact that the applicant persisted with the confirmation of paragraphs 2.4 to 2.6 of the rule *nisi* even after she obtained the Interim Order in the UK, hence at a stage when such confirmation was no longer necessary. It also constituted an abuse of process.

5. The totality of the application was unfounded and without any merit to the extent that it is to be considered to be frivolous and vexatious.

6. The fact that it is evident that the applicant is frustrating the respondent`s rights of contact with the minor child in an intentional, abusive and *mala fide* manner.

[65] I am consequently of the view that the applicant is to be ordered to pay the costs of the application.

[66] I have considered the respondent's request that such costs should be on a punitive scale. However, the fact that I intend ordering the applicant to pay the costs of the application, is already to be considered punitive in nature, considering the general rule in these type of matters. I`m therefore satisfied that an order on party and party scale would be appropriate.

[67] With regard to the wasted costs occasioned by the postponement of the application on 2 November 2023, I deem those costs to be costs in the application.

Order:

[68] I consequently make the following order:

1. The rule *nisi* issued on 23 August 2023 is discharged with costs, which costs include the wasted costs occasioned by the postponement of 2 November 2023.

[redacted]

C. VAN ZYL, J

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