

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **13612/2024**

In the matter between:

C H

Applicant

and

A C (FORMERLY E)

First Respondent

THE OFFICES OF THE FAMILY ADVOCATE

Second Respondent

R C

Third Respondent

JUDGMENT DELIVERED ON 4 SEPTEMBER 2024

Hearing dates: 2, 3 and 4 September 2024

GORDON-TURNER, AJ:

Introduction

1. This is an application in which the applicant, who acts in person, seeks to rescind selected provisions in a settlement agreement which was made an Order of Court in the divorce action between him and his former wife, the first respondent on 18 July 2023. In summary, the provisions he seeks to remove provided that the first

respondent would have sole and exclusive parental responsibilities and rights in respect of the two minor children born of the marriage, who are presently 10 and 12 years old respectively, and that he consented to the adoption of the children by the third respondent, who is now married to the first respondent.

2. Although not stated in his Notice of Motion, the applicant explains in his founding affidavit that he wishes the selected six paragraphs of the consent paper to be replaced with an Order that he be granted reasonable contact with the children provided that, if they are not yet ready to engage in contact with him alone, that such contact be supervised by an independent social worker appointed by the Family Advocate until such time as the children are comfortable to have unsupervised contact with him.

3. The first and third respondents (hereafter collectively referred to as (“**the respondents**”)) oppose the application. They are represented by the same attorney and counsel. The Family Advocate has not participated in the proceedings. However, the children have their own legal representation since March 2022, when the first respondent appointed an attorney, Mrs Elana Hannington to act for them.

4. This matter first served before Wille J on 14 June 2024 and was postponed until 2 September 2024 with a timetable providing for the filing of papers and heads of argument. On the initiative of Wille J, the third respondent was joined as the third respondent. The joinder order was correctly made in view of the third respondent’s interest in the relief sought – if granted, he will be unable to adopt the children as provided in the Divorce Order. The Order of 14 June 2024 further provided:

“It is recorded that Ms E Hannington represents the interests of the minor children. Suppose an argument needs to be presented on behalf of the minor children at the hearing of the matter. In that event, the Court hereby appoints Advocate Adri Thiaert to assist in presenting such argument on behalf of the minor children to assist the Court.”

5. Shortly before the scheduled hearing, and on 28 August 2024, Mrs Hannington delivered a detailed affidavit updating the Court on the welfare of the children and

the outcome of her most recent consultation with them on 27 August 2024, to which I make further reference below.

6. In response to Mrs Hannington's affidavit, the applicant addressed a letter to me via my registrar on 29 August 2024 in which he stated:

"At 18h36 yesterday evening I noticed that Elana Hannington had served me another and late affidavit on this matter.

As a result of the most recent affidavit there are clearly disputes of fact that cannot be decided by the affidavits and for this reason, I am requesting that your Grace refer this matter to trial so that witnesses can be called and am approaching your Grace and requesting an expedited date for trial.

If there are factual disputes, then I cannot go by the way of my application. I understand that the respondents are clearly relying on experts who claim I am unstable. And my version is that I was not in a fit state of mind when I signed. In which case both versions aligned at the time that I brought my application. Now there are disputes of fact, and I don't actually know what the respondents are contending.

Please refer to trial so witnesses can be called."

7. At the hearing on 2 September 2024, applicant motivated his request to go to trial (modified to a referral to oral evidence) on two bases. First, he contended that Mrs Hannington's affidavit referred to proceedings that had taken place in the Magistrates Court during March 2024 which gave rise to Protection Orders in terms of the Domestic Violence Act, 116 of 1998, and to affidavits referred to in those proceedings which had been delivered by the first respondent (as applicant / complainant on behalf of the children) and by him as the respondent. He contended that the full text of those affidavits should be before the Court. He further contended that he needed to obtain a transcript of the hearing that had taken place before Justice Wille on 14 June 2024. Justice Wille had reportedly alluded then to the "ventilation of the issues" which the applicant understood, so he said, to mean that

the learned Judge expected oral evidence to be adduced. The applicant further stated that he had witnesses who could contradict the contents of Mrs Hannington's affidavit as far as it made reference to an incident that had taken place at Clifton 4th Beach in Cape Town in late February 2024 which gave rise to the Protection Orders. The potential witnesses included his wife, AP, his two brothers and a social worker, Mineke Toerien, who had previously supervised his contact with the children.

8. As is often the case when a party in a matter has no representation, the Court was constrained to guide the applicant through the proceedings, and, in particular, to frequently remind him that he was entitled to make submissions, but in doing so he could not stray from the evidence on the papers and proffer new information from the Bar, to which counsel for the respondents justifiably objected. The applicant was also labouring under the misapprehension that the proceedings could or would readily convert to a trial, and that it would be postponed, or at least stood down for a day to afford him an opportunity to call witnesses. Treading the fine line between advising and guiding, the Court explained the manner in which a referral to oral evidence or trial ordinarily takes place, that the respondents had been brought to Court in motion proceedings, that the Court had regulated the conduct of the proceedings accordingly by way of the Order granted by Justice Wille on 14 June 2024, that the primary issue to be decided by the Court was whether it could rescind the provisions of the settlement agreement as prayed for by the applicant, and that the oral evidence he apparently intended to adduce was not pertinent to the issue of rescission. The applicant's informal application from the Bar for a referral to oral evidence could, at that point, have been dismissed, as the respondents' counsel urged me to do. The Appellate Division¹ considered the analysis of an alleged dispute of facts and request for referral to oral evidence in circumstances similar to the present matter where it was common cause that the relevant agreement had been signed by the party requesting the referral, that it had been made an Order of Court and that its terms were binding on her. Milne JA agreed at 261B-C with the finding of Lazarus J that the disputed issue was irrelevant, and held that the hearing of oral evidence would not and could not have affected the outcome of the claim for substantive relief and would have caused unnecessary costs to have been incurred

¹ *Wallach v Lew Geffen Estates* CC 1993 (3) SA 258 (A).

and have involved unnecessary delay. Although I harboured similar reservations at the time about this matter, I took account of the fact that the applicant was unrepresented and did not have a full appreciation and understanding of the rules and procedures of the Court.

9. I explained to the applicant that the subject matter that the applicant wished to introduce by way of oral evidence relating to the events in February 2024 on Clifton 4th Beach and the ensuing domestic violence proceedings during March 2024 might become relevant if he was afforded a rescission as prayed. The reason for the potential relevance of those events is that the Court would then need to consider what form of access, if any, it could order between the applicant and the children. However, that enquiry, and any oral evidence thereon, would be redundant if the relief sought in prayer 2 of his Notice of Motion was refused.

10. Counsel for the respondents, Ms Buikman, advised that her attorney was able to provide to the applicant, the children's legal representatives and the Court copies of the transcripts of the proceedings in the Domestic Violence Court of Wynberg, as well as the affidavits filed by the parties. She further advised that the respondents would consider the attachments to the email correspondence which had been addressed to my registrar, as to whether those documents should also become part of the record.

11. In those circumstances, I formed the view that if the subject matter which the applicant wished to present was contained in the transcripts, affidavits in the Magistrates Court, and the aforesaid email attachments, then it may equally be possible to dispense with oral evidence and simply permit the parties to address argument on their contents.

12. Accordingly, I directed that the applicant's application from the Bar for a referral to oral evidence would be deferred for later determination during the course of the three days set aside for the hearing, and that the parties should first address argument in relation to the rescission issue and costs, whereafter this judgment was to be delivered.

The relief sought by the applicant

13. The applicant prayed for Orders as follows:

- “1. That the application be treated as urgent and that the non-compliance with the rule relating to service and filing be condoned.*
- 2. Further and/or alternative relief.*
- 3. The primary relief sought is an order setting aside paragraphs 2.2, 2.3, 2.4, 2.6, 2.7 and 2.8 of the settlement agreement signed on 13 July 2023 to rescind the court order in making these paragraphs orders of this Honourable Court.*
- 4. The basis is urgent as I have been repeatedly threatened with contempt of court and might be forced to leave the country.*
- 5. I have not seen my daughters for three years.”*

14. The applicant provided his email address as the address at which he would accept notice and service of process in the proceedings.

15. In the applicant's founding affidavit deposed on 11 June 2024, he states therein that he is unemployed and provided a residential address in Bantry Bay, Cape Town. In his replying affidavit, deposed on 19 August 2024 for a notary in Amsterdam, The Netherlands, the applicant stated that he is a *“recently employed financial business development professional, residing in Tamarin, Mauritius”*.

16. The provisions of the consent paper that the applicant seeks to set aside are paragraphs 2.2 to 2.4 and 2.6 to 2.8 under the heading *“Parental Responsibilities and Rights”* in the consent paper and read as follows:

- “2.1 It is recorded that there are two minor children born of the marriage between the parties, namely H A H (born xx xxx 2012) and B A H (born xx*

xxx 2014) (“the minor children”).

2.2 Plaintiff shall have sole and exclusive parental responsibilities and rights in respect of the minor children and act as the minor children’s sole guardian as provided for in sections 18(2)(c), 18(3), 18(4) and 18(5) of the Children’s Act, 38 of 2005, as amended (“Children’s Act”).

2.3 Defendant hereby consents to the termination of his parental rights and responsibilities in respect of the minor children on date of signature of this agreement, in accordance with the provisions of section 28 of the Children’s Act, as amended.

2.4 In order to give effect to the provisions of paragraphs 2.2 and 2.3 above, Defendant hereby agrees and consents to the adoption of the minor children by Mr RC (with identity number: xxxxxx xxxx xx x) and who is in a permanent long-term relationship with the Plaintiff (hereinafter referred to as ‘C’).

2.5 ...

2.6 Defendant further undertakes to give his full cooperation and comply with all necessary legal formalities apropos the adoption of the minor children referred to above and to attend to signature of all and any necessary documentation, as the case may be, to give effect to the aforesaid within 7 days within date of written request to do so.

2.7 Should Defendant fail to comply with his obligations as set out above, then and in that event, the Office of the Family Advocate, alternatively the Registrar of the High Court, further alternatively, the Clerk of the Children’s Court, is hereby irrevocably and unconditionally authorised to attend to signature of all such documentation on his behalf.

2.8 Defendant confirms that he understands the relevant provisions of the Children’s Act, which provisions have been explained to him and hereby

waives his right to rely on the provisions of the said Act, more in particular, the procedures provided for therein, including those contained in section 233(8) thereof.”

17. The applicant's Notice of Motion read with his founding papers and replying affidavit make it plain that he expected the remaining provisions of the consent paper and Court Order to remain intact. These include provisions where the parties waived and abandoned all claims to personal maintenance against each other, and retained all movable, immovable, corporeal and/or incorporeal assets currently in their respective possession or under their control as their sole and exclusive property, as a full and final settlement of all proprietary claims arising from their marriage. It is common cause that the further provisions in clause 5.1 to 5.4 of the consent paper operated exclusively to the advantage of the applicant. They read:

“5.1 Plaintiff hereby waives all claims against Defendant in respect of arrear maintenance for the minor children.

5.2 Plaintiff and Defendant agree to waive all and any costs orders procured against each other in the above matter, including but not limited to all and any interlocutory applications.

5.3 The parties hereby acknowledge that the foregoing constitutes a full and final settlement of all outstanding differences between them save and except as herein provided, neither party shall enjoy any claim of whatsoever nature against the other.

5.4 This agreement shall be of full force and effect as from the date of signature of the last signing party notwithstanding the date of the final decree of divorce.”

18. After describing the litigation, his grievances concerning Mr Smuts and Ms Pettigrew, the terms of his employment and the impending birth of his son of his relationship with his then fiancé, AP (now his wife), the applicant summarised the basis for his case in his founding affidavit as follows:

“... the confluence of all of these events seemed to conspire all at once against me. I became sickly and lacked any energy. This is very unlike me. I have never been ill or lacking energy. I sank into a deep depression because I had no money. I was deeply in debt, I was being repeatedly threatened that I was facing jail for contempt of court if I did not make payment of an amount that I simply was unable to pay. I was also facing the loss of my job and an inability to take care of my new family. I was also unrepresented at a critical time when the settlement was concluded. I was emotionally and mentally overwhelmed, I felt paralyzed and could not apply my mind to this matter with any degree of rationality at all.

I acknowledge that I signed the settlement agreement but I know now for a fact that I was not a fit or rational state of mind when I did so. I probably would have signed my own death warrant had it been put in front of me at that moment. Signing the settlement agreement was totally inconsistent with my conduct or my intentions up until that time. I had fought relentlessly for my right to contact with my children to the point of literally bankrupting myself in the process. I did not sign the settlement agreement believing that I thought this was in the best interests of my children. I certainly did not agree to sign it because I wanted to permanently distance myself from my children. It simply made no rational sense to sign. The fact is, I was in an emotional blackhole with no money, no job, no legal support, the looming prospect of jail for contempt just as baby L had been born and with the belief that there was no way out.

Had I not been facing such darkness, such unrelenting litigation, threats of jail for contempt and relentless provocation day and night from Mr Smuts, compounded by my fears of being separated from my newborn son L, I would not have ever signed the settlement agreement. I love B and H beyond all measure and until that moment there was not a second that passed where I did not want to see them, love them and be the father that I am entitled and desperate to be to them.”

19. Before addressing the parties' respective arguments, it is necessary to set out some background and the litigation history.

Background

20. The applicant and the first respondent were married on 22 October 2011, at which time the first respondent was pregnant with their first child, H. The parties separated during 2017, at which time they were living in Mauritius.

21. The first respondent returned to South Africa with the children, and commenced divorce proceedings in December 2018.

22. At the time of the separation, the children were aged five years and three years respectively. Contact between the applicant and the children was characterised by lengthy periods of separation which would have been particularly marked for children of such young age. The guidance of experts was obtained. Two social workers became involved. Dr Elsabe Durr-Fitchen delivered a report concerning contact on 20 June 2019, and Esna Bruwer delivered a more detailed report on 12 August 2019. Ms Bruwer observed that the children needed an opportunity to have an ongoing post-divorce relationship with the applicant. Throughout her observations, they projected a need to spend time with him and enjoyed time in his care. She pointed out that a child is not able to distinguish their own real feelings from the feelings of the parent if they do not have emotional security in their primary parent relationships. She remarked that although the applicant has portrayed parenting traits that will foster healthy relationships with his children, significant efforts would have to be made to implement structure and predictability when the children are with him. She further remarked that the parents had different childhood experiences and they would have to do significant work to align their parenting and approaches to child rearing. She found that in respect of communication with the children, the applicant may at times be inappropriate and ill-attuned. She reported that the children have been exposed to adult conflict over a period of time, that no child can be left unaffected by this, and that it should be acknowledged that particular attention should be given by both parents to implement positive discipline structures. She noted that within the first five years of both children's lives, significant trauma was

already experienced. She recorded that almost every person that had known the applicant and the first respondent as a couple confirmed their volatile and toxic marital relationship, but none had witnessed the children being harmed by anyone of the parents. However, some collateral sources had witnessed the applicant having road rage with the children in his car as well as turning from charming to very angry in a short space of time. There were some reports made to her of recreational use of marijuana. She assessed that the applicant tends to minimise difficult and important relational issues and acts impulsively without considering consequences and advised that when you are caring for two children in a divorce situation, it becomes imperative to err on the side of caution and apply your mind as a single parent. She further observed that it was expected that both children would experience anticipation anxiety before visits from the applicant as contact was not in a regular and predictable pattern for them. She noted that research findings strongly suggest that the single most important predictor of children's adjustment post separation or divorce is the quality of the relationship between the parents. The antagonism, mistrust and suspicion between the parties represents the single most important risk factor for the children's post-divorce adjustment. She recommended the applicant undergo drug testing on his return to South Africa and that both parents receive guidance in dealing with the movement of the children between homes. She further recommended that the children needed to consult with a mutually agreed child therapist in order to assist them with their own feelings in respect of the divorce and, in particular, the movement between parents.

23. Later the same year, the first respondent brought an application in terms of Rule 43 of the Uniform Rules of Court for maintenance *pendente lite* for herself and the minor children and a contribution to her costs in the divorce action. She also sought an Order to appoint clinical psychologist, Mrs Leigh Pettigrew, to conduct a care and contact assessment. The Rule 43 application served before Gamble J. Maintenance *pendente lite* and a contribution to costs was ordered and the applicant was ordered to pay the costs of the Rule 43 application. However, the appointment of Ms Pettigrew was postponed *sine die*. Ms A Heese, a practising advocate and member of the Cape Bar, was appointed as mediator to assist the parties to formulate and implement the terms of any parenting plan or order in regard to the parties' parental rights and responsibilities to the children. The first respondent was ordered to set

down the application to appoint Ms Pettigrew on ten days' written notice to the present applicant, only after the mediator certified in writing that the issue of the applicant's care and contact with the children remained unresolved. The applicant had opposed that application, but it is unclear on the current papers which particular aspects of the relief he was resisting.

24. Conflict between the applicant and respondent concerning contact continued. Further approaches were made to this Court. On 25 March 2020, during the Covid pandemic, at the instance of the applicant, Sievers AJ granted an Order defining weekly overnight contact periods between the applicant and the children as well as telephonic and video contact. That Order also provided that in the event of the applicant's failure to return the children, the respondent would be entitled to enlist the services of the Sheriff of the High Court, alternatively, the SAPS to assist with their return. The Order further provided that following the period of the national lockdown, the applicant would be entitled to have sleepover contact with the children for four consecutive days after which the contact arrangements would be revisited.

25. Barely a month later, the application was revisited by Hack AJ, after taking account of the exception contained in Direction 1(c)(i) of the Directions issued by the Minister of Social Development dated 7 April 2020 being part of the Regulations made under Section 27 of the Disaster Management Act, 57 of 2002. This afforded the applicant extended in-person contact with the children, which would take place mid-week and on three consecutive weekends. The Order further provided that if the lockdown were extended, the schedule would apply save that the weekend contact would take place only on alternate weekends commencing 15 May 2020. Costs were reserved for the divorce action.

26. Mediation regarding contact failed. The first respondent appointed Mrs Leigh Pettigrew, an educational psychologist, who is very experienced in child care matters. The first respondent approached the Court again on notice to the respondent, who appeared in person. An Order was granted by Henney J directing the applicant and the respondent to cooperate with Ms Pettigrew who had been appointed by the applicant to conduct an investigation into the best interests of the children and who was to make recommendations regarding the parties' parental

responsibilities and rights in respect of the children. The first respondent was to bear Ms Pettigrew's costs. Pending finalisation of Ms Pettigrew's investigation, the Order by Hack AJ granted on 15 April 2020 would remain in force. The applicant herein was directed to pay the costs of that opposed application.

27. Ms Pettigrew commenced her investigation, which she was required to do urgently. In the meantime, the subject matter of the Rule 43 Order was revisited by the Court. A further opposed application was brought in which the applicant herein again appeared in person. That resulted in an Order granted by Goliath DJP on 4 June 2020 directing the applicant to make payment of certain outstanding amounts, and modifying the Rule 43 Order granted by Gamble J by reducing the extent of the applicant's obligations. Each party was to pay their own costs in the application.

28. On 18 September 2020, Ms Pettigrew delivered her interim report, followed by an addendum on 21 September 2020, both of which were furnished to the parties. Ms Pettigrew comprehensively documented the history of the disputes between the parties and the challenges encountered by the children. She recommended that the applicant undergo a full forensic assessment with a psychiatrist in order to determine his capacity to co-parent, make joint decisions, make sound and rational decisions when the children were in his care and to identify possible recommendations that may assist the applicant in the children's best interests. Initially, the applicant refused to undergo the forensic psychiatric assessment. The first respondent reacted by instituting an urgent application in which she sought an Order that the applicant be permitted to exercise only supervised contact with the children, as well as telephonic contact. The applicant was given notice of this application which served before Samela J on 3 December 2020. The applicant arrived at Court on the hearing date but was not present when the Order was granted by Samela J. In the addendum to her interim report, Ms Pettigrew had expressed her *"deep concern that the children may be at risk in [the applicant's] care until such time as the matter has been fully assessed by the forensic psychiatrist ..."*. The addendum recorded that within hours of releasing her interim report, she had received 30 WhatsApp messages from the applicant, and within a space of 48 hours that had amounted to 122 WhatsApp messages, four voice recordings and eight emails sent by the applicant to her. She acknowledged that her interim report was very painful for the applicant to read and

that her recommendations were not what he had expected. She brought attention to her concerns about his impulsivity, and the possible effect of reactivity on his children, then only eight and six years respectively. She recorded *“instead of processing the report over a period of time, reflecting on comments made and taking out of the report those comments and opinions that are helpful for his development, and considering over time his best possible approach to the assessment, within half an hour of receiving the report, [the applicant] was already on the offensive”*. From this, he appears unable to control his impulses. She further expressed the concern that this difficulty and the risk that when exercising his forthcoming contact he may on the spur of the moment discuss the contents of the report in an impulsive moment. Ms Pettigrew turned out to be perspicacious in this observation. The applicant indeed confronted H about her contributions to the report. This is contrary to the children’s interests - to involve them in the fray between their parents - and it is concerning that he ignored Ms Pettigrew’s concern.

29. The applicant contends that the first respondent contrived to take an Order in his absence and, so he implied, thereby obtain the perceived advantage of supervised contact. It is not necessary for purposes of this application to resolve the factual dispute regarding the circumstances under which an Order was granted in the applicant’s absence. Counsel for the respondents advised me from the Bar that the applicant had immediately applied for a reconsideration of Justice Samela’s Order and that application which served before Papier J was unsuccessful. The applicant did not dispute this information. It bears mention that the Order of Samela J records that there was no appearance by the applicant, postponed the application *sine die* to enable Ms Pettigrew to finalise her report and directed that the in-person contact between the applicant and the children would be supervised pending the finalisation of Ms Pettigrew’s report.

30. Subsequent thereto over the period from February 2021 to June 2021, the applicant exercised regular contact with the children which was supervised by a social worker, Mineke Toerien. He has attached her reports on such supervised contact to his founding affidavits, which reflect that the contact proceeded smoothly and without incident. However, Ms Pettigrew’s final report records information given to her by the children concerning abusive conduct that took place when Ms Toerien

could not witness it, for example when she was in the bathroom. The applicant denies any such abuse, and similarly denies complaints of abuse directed, particularly at H, during the parties' marriage when they still cohabited with each other. This too was not a dispute that was necessary to resolve in order to determine the relief sought by the applicant in this application. Notwithstanding, the applicant was eager to ventilate each and every one of the disputes which arose from the various expert reports and affidavits that had been filed in the various proceedings. Much of the Court time in the hearing of this application was devoted to explaining that these collateral disputes were not necessary to determine and did not assist his case, nor did they assist the Court to determine the relief sought.

31. Ultimately, by March 2021, the applicant submitted himself to assessment by a forensic psychiatrist, Dr Konrad Czech. The applicant is critical of the circumstances under which the investigation by Dr Czech took place during the pandemic, at which time wearing of masks and social distancing was still peremptory. Dr Czech's report, finalised on 25 August 2021, makes it clear that, in addition to his consultations with the applicant, he also conferred with Ms Pettigrew and Ms Raphael. Dr Czech's findings were that the applicant has maladaptive personality traits, that he lacked insight and judgement and that he was unable to recognise his role in the difficulties that had occurred in his relationship with the children. He recorded that the applicant rejected the idea of entering into psychotherapeutic treatment which would be the appropriate manner to assist him to modify his behaviour in relation, amongst other things, to the children. His view was that the primary consideration did not lie with the applicant's psychiatric status, but rather with his expressions of rage or anger to the children and his hostile behaviour towards them (which had been documented in Ms Pettigrew's interim report). For this reason, Dr Czech found that the children's fear of him and their refusal to have contact with the applicant justified the need for supervised access irrespective of any diagnostic issues.

32. On 14 September 2021, with the benefit of Dr Czech's report, Ms Pettigrew filed her final report as contemplated in the Order of Samela J. She recommended that given the serious concerns about the applicant's behaviour towards the children, that the first respondent should be granted sole parental responsibilities and rights and that the applicant's contact with the children should continue to be supervised. The

applicant had not had contact with the children since June 2021. He claimed that he could not afford the costs of supervision. As it turns out, he had also stopped paying maintenance for the children in terms of the Rule 43 Order granted by Gamble J, as varied by the Order of Goliath DJP.

33. In the period between the delivery of Ms Pettigrew's interim report and her final report, the first respondent's relationship with the third respondent, which had commenced in 2017, had developed to the extent that she and the children moved into the third respondent's home during December 2020.

34. What followed is the development of a family unit comprised of the respondents and the children. The third respondent, who is apparently a man of some means, arranged for them to travel to the Seychelles on holiday in the period between 23 September 2021 and 10 October 2021. The applicant, as co-guardian of the children, was allegedly uncooperative about affording his consent. The first respondent accordingly approached the Court and secured an Order on 21 September 2021 granted by Erasmus J authorising her to travel with the children to the Seychelles for the holiday period and to sign all such documents as may be necessary to facilitate the children's travel, and dispensing with the applicant's consent and signature for that purpose. Each party was to pay his/her own costs of that application.

35. Following upon Ms Pettigrew's final report, the first respondent again approached the Court. The applicant was served with the papers but did not appear at the hearing before Mangcu-Lockwood J on 15 November 2021. An Order was granted providing that the respondent and applicant would be entitled to act as co-guardians in respect of the children and authorising the first respondent to travel with the minor children outside of the borders of South Africa for the purposes of holidays provided that she provided him with 14 days' notice of her intention to do so and the details of the proposed holiday. The first respondent was authorised to unilaterally sign any documentation and take any action necessary to obtain, procure and/or renew the children's travel documentation. The Order further provided that the children shall primarily reside with the first respondent, subject to the applicant's rights of supervised contact. The first respondent was granted sole and full parental rights in

respect of the children, enabling her to make all decisions regarding the children's best interests. The Order further provided that the applicant shall exercise supervised contact with the children as determined by Ms Pettigrew, if and when he indicates his intention to exercise such contact, and that he was to pay all costs relative to the services of a social worker to be appointed by Ms Pettigrew in order to facilitate supervised contact. The applicant was also ordered to pay the costs of that application on the scale as between attorney and client. This Order ("**the Mangcu-Lockwood Order**") is significant for purposes of the present application because, in final terms, it deprived the applicant of his parental rights in relation to the children, save for a residue of his co-guardianship rights, which themselves had been diluted by the Orders permitting the first respondent to travel abroad with the minor children (on the defined conditions) without the necessity of obtaining the applicant's consent thereto.

36. The applicant had, by this time, returned to Mauritius.

37. On 17 December 2021, Mr Stephen Thomson of Thomson Wilks Inc. placed himself on record as the applicant's attorney.

38. The applicant appointed his own expert, Ms Toni Raphael, to conduct an assessment. Her report was filed on 24 October 2022. She recorded that the children had not had contact with the applicant since 24 June 2021 and that H was refusing all contact. The applicant cited the cost of supervision as his reason not to continue with supervised contact. Ms Raphael observed that when contact had been exercised, there had been prolonged periods without any, or with sporadic contact with the applicant, during which time there was an 'emotional vacuum' for the children. In his absence, the children had to re-group, adjust, and get on with their lives with their mother. She reported that the onus was on the applicant to establish and maintain the children's trust, whether by continuing the supervision process with Ms Toerien, maintaining regular contact or engaging in a personal therapeutic process himself. She stated that the applicant's resistance to taking responsibility for the breakdown of his relationship with the children, and his apparent failure to comply with the recommendations aimed to assist him is a major setback to the remediation of the current situation. In order to move forward, the applicant would

first have to take responsibility and focus on his part in what has happened. She concluded that the voice of the children cannot be dismissed or ignored, and that her recommendations were not materially different to those of Ms Pettigrew.

39. As mentioned above, the applicant had defaulted on his maintenance obligations. On 28 February 2022 the first respondent launched a second application to hold the applicant in contempt of Court as a result of his failure to pay maintenance. The applicant opposed the application alleging that he could not afford the maintenance and that he was not deliberately in default of the Rule 43 Order.

40. By agreement between the parties, the contempt application was postponed for hearing on 8 March 2023. The parties undertook to engage in mediation with Ms Heese during February 2023.

41. By agreement between the applicant and counsel for the respondents, the record in this matter was supplemented during the hearing with seven exhibits numbered A to G, one of which was a pack of documents which had served before Magistrate Plaskett in the Wynberg Magistrates Court during the domestic violence proceedings in March 2024. That pack included a draft consent paper from the first respondent which was provided to Ms Heese on 1 March 2023 under cover of an email from the first respondent's attorneys, drawing attention to the provision in the consent paper for adoption of the minor children by the first respondent. The draft consent paper, as counsel for the respondents submitted, is virtually identical to the consent paper which was ultimately executed by the parties on 13 July 2023. The only discernible difference is that the executed consent paper includes an additional sub-clause 2.5 recording that "*plaintiff and the minor children are and have been cohabiting with C [the third respondent] for many years*". The applicant does not require the Court to "*rescind*" that provision.

42. On 2 March 2023, Ms Heese addressed an email to the attorneys for the applicant and the attorneys for the first respondent stating that "*pursuant to the mediation sessions held, it is my understanding that the parties are considering a settlement on the terms as set out in the draft consent paper annexed hereto ... Please advise me as soon as possible whether a settlement on this basis could be*

achieved, alternatively, provide any comments you may have". The attached consent paper differed in some respects from that provided by the first respondent on the previous day, but significantly, it did include the same clauses 2.1 to 2.4 and 2.6 to 2.8 which feature in both the first respondent's draft consent paper and the duly executed consent paper of 18 July 2023.

43. On 2 March 2023, the applicant's then attorney, Mr Thomson, addressed an email to Ms Heese stating:

"Are you serious? I cannot in good conscience recommend this capitulation to C [the applicant] which is something I believe he will live to regret.

How has this matter got to the point where you are recommending that he forfeit his parental rights and even beyond that, recommend that he consent to the adoption by RC [the third respondent] of his two daughters.

I think I need to sit with you to understand how after a single session with each parent this is the outcome you recommend."

44. Ms Heese immediately responded by email, stating:

"As mediator it is not my function to make any recommendation to either party and I certainly did not do so.

I conveyed an offer that was made, and as I was obliged to do, I explained the repercussions to all involved and advised them to take advice from their legal representatives before making any final calls, and explained that a draft consent paper would be sent to all the attorneys to afford them an opportunity to advise prior to any agreement being reached.

You are most welcome to call me to discuss."

45. It is evident from this exchange of emails between the applicant's attorney and the mediator, which was copied to the applicant's senior and junior counsel, as well

as the Cape Town attorney acting for the applicant, that the applicant's legal advisors were alive to the salient provisions of the consent paper which are now the subject of this application. It is also evident that the applicant received the benefit of explanations from the mediator on their terms, and that he had, at the very least, the opportunity to take advice from his legal representatives. Mr Thomson deposed to an affidavit on 19 March 2024, apparently for the purposes of the domestic violence proceedings, in which he explained the circumstances under which he withdrew as the applicant's attorney on 30 June 2023. He described his experience of the applicant in the preceding period. Mr Thomson did not say in his affidavit that he failed or neglected to afford advice to the applicant in the period from 2 March 2023 to 30 June 2023. Plainly, the affording of such advice would have fallen within his mandate as the applicant's representative in the divorce and ancillary proceedings, and he was applying his mind to the proposals mooted in the course of mediation by Ms Heese.

46. While a Court is slow to draw inferences in motion proceedings, it tests the bounds of credulity to expect the Court to accept that a senior attorney of Mr Thomson's standing would have failed and neglected to explain the meaning and import of the clauses in question to the applicant. That is the position contended by the applicant.

47. The contempt of Court application was heard on 8 March 2023 pursuant to which Sher J found the applicant to be in contempt of Court and ordered him to pay the sum of R616 985.39 together with interest thereon on or before 8 July 2023, failing which the first respondent was given leave to set the matter down on the same papers, duly supplemented for the Court to determine what sanction should be imposed upon the applicant. Sher J ordered that the applicant pay costs, including reserved costs, on an attorney and client scale.

48. The applicant did not make payment as ordered, nor any part of the sum ordered by Sher J.

49. Instead, via Ms Heese, he provided a consent paper that he had signed which Ms Heese transmitted to the first respondent on 23 June 2023. The first respondent rejected that offer and so advised Heese on 29 June 2023.

50. The following day, 30 June 2023, the applicant's attorneys of record withdrew.

51. On 3 July 2023, the first respondent's attorney wrote to Ms Heese, reiterating her previous settlement proposal and proffering the reasons why she believed the settlement to be in the best interests of the minor children. The first respondent had not then re-enrolled the contempt of Court application for the hearing regarding sentence.

52. On 5 July 2023, Ms Heese sent an email to the first respondent enclosing an email from the applicant wherein he stated the following:

"I agree to proceed as Smuts had presented. Can you ask him to put together the final and share signed copy (this one still has some red drafts and I assume we do not have to refer to specific investments as the agreement seems all encompassing)

I am not in SA and won't be for the foreseeable future. So can we use DocuSign for my signature – or should I post wet ink but with non-SA notaries?"

53. It was thus known at that time that the applicant was not within South Africa, although his whereabouts were not disclosed.

54. The deadline by which the applicant was required to make payment as provided in the Order of Sher J arrived on 8 July 2023, without payment being made.

55. On 10 July 2023, the first respondent addressed a letter to Ms Heese enclosing the consent paper as she had proposed, and to which the applicant was apparently amenable as intimated in the above-quoted email to Ms Heese.

56. On 13 July 2023, Ms Heese returned the duly signed consent paper that she had received from the applicant. This was in fact a copy of the consent paper as the original was expected to be sent back to South Africa via courier. It transpires that

the original consent paper has gone missing. However, nothing turns on this as the Court was prepared to grant the decree of divorce incorporating the consent paper, having regard to a copy thereof duly stamped by the Family Advocate. It bears mention that the applicant signed the consent paper on 13 July 2023, omitting the place of signature where provided for on the final page thereof. His signature was witnessed by AP, who is now his wife, and MP who is his brother-in-law.

57. The applicant also complied with a request to provide a signed notice of withdrawal of defence and counter-claim in the divorce action which he duly did on 13 July 2023.

58. The divorce action was then heard on an undefended basis before Slingers J on 18 July 2023. The consent paper was made an Order of Court. At that date, the applicant had not seen the children for a period of almost two years.

59. On 28 February 2024, an incident occurred at Clifton 4th Beach that became the subject of the domestic violence proceedings instituted by the first respondent on behalf of the children. An interim Order was granted on 28 February 2024 and served upon the applicant. He anticipated the return day to 12 March 2024 and represented himself. He had prepared an affidavit but it had not been deposed before a Commissioner of Oaths. The presiding Magistrate, Ms Plaskett, accordingly took his oath in order to admit that affidavit into the record of those proceedings.

60. By agreement, the affidavits filed by both parties in those proceedings as well as the transcripts of the hearings on the 12th and 20th of March respectively were introduced as exhibits and included in the record in this matter. I have noted that the contents of the applicant's opposing affidavit in the Magistrates Court proceedings found their way into and seem to be the foundation for his founding affidavit in the present application. Mrs Hannington also filed an affidavit, and its contents were replicated in her affidavit in this matter deposed on 20 August 2024.

61. After hearing full argument, the Magistrate postponed the application for judgment and extended the interim Order to 20 March 2024. The transcript reveals that the applicant stated to the Magistrate that his "*whole intention was to stop the*

adoption". The Magistrate correctly pointed out that he was taking issue with the High Court Divorce Order and consent paper and the only Court that could give him relief was the High Court. He responded that he would proceed in the High Court. When delivering her judgment, the Magistrate stated that she had discerned from more than one person that the children had a negative reaction upon seeing the applicant on the day in question, that it affected them profoundly afterwards, and that the applicant knew or ought to have known to keep his distance, despite the fact that he had not planned to be in the same place as the children and the respondents on the day in question. The Court granted a final Protection Orders in respect of H in one Order and in respect of B in the other Order, interdicting him from entering their schools and attending any of their school functions or extra-mural activities. These orders amended the interim Protection Orders which had incorporated wider restrictions. Nevertheless, the applicant has taken no steps to set aside the final Protection Orders on review or appeal.

62. On 11 April 2024, the respondents' attorney, Mr Smuts, addressed an email to the applicant drawing his attention to paragraph 2 of the consent paper made part of the Divorce Order. He stated that his clients, the respondents, are in the process of attending to the necessary formalities in the adoption of the children by the third respondent.

63. The appropriate Form 61 (consent by parent to the adoption of a child) in respect of each of the children was enclosed for the applicant's signature within seven days, failing which Mr Smuts held instructions to invoke the provisions of the Order.

64. It is apparent from the pack of correspondence between the applicant and Mr Smuts both prior and subsequent to the 11 April 2024 letter that the applicant had formed the view that he was entitled to refuse his co-operation in the adoption formalities. He contends that Mr Smuts threatened him with incarceration for contempt of the Divorce Order, which required such co-operation. I perused that correspondence and find nothing untoward in Mr Smuts' letters and emails. He did little other than record the facts and assert his clients' rights. He exercised commendable restraint by ignoring the insults in the applicant's emails about his professionalism and the accusation that he was bullying the applicant. I did,

however, discern a defiant tone in the applicant's emails to Mr Smuts.

65. I was informed from the Bar by counsel for the respondents that the present application was served upon first respondent only on 11 June 2024, by which time it had been set down on the opposed motion roll on 14 June 2024. The applicant did not dispute this account. He offered no explanation as to how his Notice of Motion, which intimated a set down date of 14 May 2024, had resulted in a set down a month later, on such short notice to the first respondent.

The applicant's case

66. The applicant had intimated during the domestic violence proceedings that his case in this matter would be founded on the basis that he was under duress at the time of executing the consent paper on 13 July 2023.

67. The party seeking to set aside an agreement on the basis of duress must allege and prove that there was a threat of considerable evil to the person concerned or to their family, that the threat was of an imminent evil and induced fear, that the threat was unlawful or contrary to good morals, that his fear was reasonable and that the contract was concluded as a result of the duress.²

68. No allegations were made on the papers that would support any finding of duress. Instead, the applicant's affidavits and his submissions in argument were directed at a case that he was not of sound mind at the time that he signed the consent paper. The application was accordingly determined on the basis that his cause of action was the absence of his mental capacity at the time of executing the contract. The reasons the applicant advanced were that he was not legally represented at the time that he signed as he was unable to afford representation, and he was outside of the country. The applicant stated during argument that he was in Germany at the time. He accepted that this was not evident to the first respondent who had presumed that he was in Mauritius. However, nothing turns on precisely where he was located at the time of execution of the agreement.

² *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (CC) at 306A-B.

69. The applicant's affidavits state that he signed the consent paper as he was under threat of incarceration given this Court had found him to be in contempt of Court for failure to pay maintenance in respect of the children. An Order had been granted on 8 March 2023. He alleged that his financial circumstances were dire at that time due to the impact of the Covid pandemic, that he had been informed in May 2023 that he was to be made redundant, and he was thereafter retrenched. His affidavits, however, provide no detail whatsoever of his assets, liabilities, income and expenditure during the six and a half months in 2023 preceding the execution of the consent paper (or earlier), other than to state that he had incurred debt to his legal representatives in the order of R600 000.00 and he had been ordered by Sher J to pay the arrear maintenance and costs due to the first respondent. From the Bar, he advised that he had received a retrenchment package from his former employer in Mauritius. However, no details of this had been provided in the papers.

70. With regard to his state of mind at the time of executing the consent paper, he alleged that he was suffering from deep depression and that he was not in a fit or rational state of mind. He contended that Ms Pettigrew's reports supporting the award of sole parental responsibilities and rights to the first respondent, were biased and dishonest, because, so he alleged, she was a paid expert hired by the first respondent, and as such was a party to an agenda between the respondents' attorney, Mr Smuts, and the respondents directed at depriving him of those responsibilities and rights.

71. He also made extensive reference to alleged provocation and threats at the time by Mr Smuts which he contends placed great pressure upon him.

72. He relied also upon the affidavit of Mr Thomson, his former attorney. The respondents' counsel submitted that that affidavit had been deposed for purposes of the domestic violence proceedings and had not again been verified on oath for the purposes of these proceedings, that it does not constitute evidence before the Court and fell to be struck from the record. However, this submission was overtaken by the agreement between the parties that the affidavits in the domestic violence proceedings could be admitted into the record.

73. Mr Thomson did not hold himself out to be an expert in mental health. Mr Thomson had become frustrated with the applicant's instability and his total inability to pay attention or heed his advice. He had explained that the applicant became increasingly frustrated as the litigation progressed, and his mood was one of desperation. His account accords, in some measure, with the applicant's account of his state of mind. However, his opinion about the applicant's state of mind up to 30 June 2023, when he withdrew as his attorney, is inadmissible. He is not qualified to proffer evidence on mental health. In any event, Mr Thomson has not testified about the applicant's mental health at the time the consent paper was executed. That is the relevant time to evaluate his mental health: Innes CJ held in *Pheasant v Warne* 1922 AD 1 481 at 488 to 489:

"... a court of law called upon to decide a question of contractual liability depending upon mental capacity must determine whether the person concerned was or was not at the time capable of managing the particular affair in question – that is to say whether his mind was such that he could understand and appreciate the transaction in which he purported to enter ... and the onus of establishing defective mentality must lie upon the side which relies upon it."

74. Mr Thomson's affidavit simply does not assist the applicant's cause in this matter. Similar considerations apply to the letter from the applicant's current therapist, a Mr Nikolaou. His credentials are not made clear, nor for how long he has treated the applicant. He has not deposed to an affidavit. His assertion that the applicant was under significant psychological distress at the time of signing the consent paper seems to derive only from information provided by the applicant. He did not observe him at the relevant time. The applicant clarified from the Bar that he has not met Mr Nikolaou, who is based in the United Kingdom, and his counselling sessions take place virtually.

75. Mr Thomson goes on to state that he had been willing to depose to an affidavit to assist the applicant in the domestic violence proceedings because a "*well-orchestrated and well-funded legal campaign*" had been waged by the respondents

on the applicant to exert pressure upon him to sign the consent paper by persuading him to agree to the third respondent's adoption of the children in exchange for relinquishing the first respondent's financial claims against the applicant.

76. Respondents' counsel correctly submitted that if Mr Thomson had harboured concerns about the applicant's mental state and his ability to give him instructions, he could have applied for the appointment of a curator *ad litem* to the applicant, yet no such application was ever brought. Furthermore, Thomson did not communicate any such concerns to the first respondent's attorney or to the mediator, Ms Heese, at the time that the consent paper was being considered in late June 2023.

77. I have quoted above from his email to Ms Heese of 2 March 2023 in which no reference is made to the applicant's mental state.

78. Of more cardinal importance is the fact that Mr Thomson did not and could not provide any evidence regarding the applicant's state of mind at the critical date of 13 July 2023 when the consent paper was signed. His affidavit accordingly does not assist in establishing the applicant's state of mind on 13 July 2023 when the consent paper was signed, in particular, to support any finding that the applicant was incapable of appreciating what he was consenting to when he was so signing.

79. The history which I set out above supports a contrary finding that the applicant well knew and understood what he was doing, and understood that the terms of the consent paper operated to his advantage.

80. The applicant has failed to discharge his onus, and accordingly the application must be dismissed.

Costs

81. In her written submissions dated 27 August 2024, counsel for the respondents asked for an Order that the application be dismissed with costs. In her oral submissions, she moved for the costs to be ordered on a punitive scale as between attorney and client. She also requested an Order that the applicant be prohibited

from bringing further proceedings in relation to the children and/or against the respondents until the costs orders in this application have been satisfied.

82. In motivating the punitive scale, she referred to the manner in which the application had been conducted, with the respondents having been brought to Court on extremely short notice in June 2024 and thereafter faced shortly before the hearing with the prospect of the referral of the matter to oral evidence and the protraction of the proceedings. She referred to the fact that in all the ancillary applications to the divorce proceedings to which I have referred above, no orders as to costs were made in favour of the applicant. Costs orders were either that each party would bear their own, or that the applicant was directed to pay costs. The Mangcu-Lockwood Order had all but deprived the applicant of his parental responsibilities and rights and had ordered costs in favour of the first respondent on the scale as between attorney and client. The first respondent had, as part of the composite package in the consent paper, waived her right to recover those costs from the applicant, as set out in the quoted clauses above from the consent paper. She traded off her personal financial interests in order to secure the children's position and to protect their best interests, yet she had been obliged to obtain Protection Orders on behalf of the children from the Magistrates' Court, where no costs orders were made, and to incur costs in the present application.

83. It is an established principle that by reason of special considerations arising either from the circumstances which gave rise to the proceedings or from the conduct of the losing party, the Court in a particular case may consider it just, by means of such Order to ensure more effectually than it can do by means of a judgment for party and party costs that a successful party will not be out of pocket in respect of the expense caused by the litigation.³ An award of attorney and client costs will not be granted lightly. The Court's discretion to order the payment of attorney and client costs includes all cases in which special circumstances or considerations justify the granting of such an order. No exhaustive list exists.⁴

³ *Nel v Waterberg Landbouwers Ko-Operatiewe Vereniging* 1946 AD 597 at 607.

⁴ *Rautenbach v Symington* 1995 (4) SA 583 (O) at 588A-B.

84. In exercising my discretion, I have taken into account the following factors:

84.1 The application was ill-considered and stillborn from the outset, given that the applicant failed to simultaneously apply (to the extent it was possible to do so on any basis) to set aside the Mangcu-Lockwood Order. Even if successful in the primary relief that he sought herein, pursuant to that Order, the first respondent would remain the sole holder of parental responsibilities and rights.

84.2 The applicant sought to retain for himself the advantages conferred by the consent paper, namely the extinction of all his debts owed to the first respondent, yet there was no tender in his papers to settle those debts. When it was pointed out during argument that he could not rescind only part of an agreement, but would have to accept the rescission of the agreement in its entirety, and thereby lose the financial advantages afforded to him, he did not take the opportunity to make a concrete, detailed offer to restore that which would otherwise have been due to the first respondent, but for provisions of the consent paper.

84.3 The applicant evinced his intention to bring these proceedings as early as 28 February 2024 yet delayed serving papers upon the first respondent until 11 June 2024, on three days' notice of the hearing set down on 14 June 2024. The urgency with which he approached the Court was entirely self-created.

84.4 Notwithstanding, he was accommodated by the Court with a date on the opposed motion roll only three months later.

84.5 Having been afforded this indulgence, he sought by way of an email addressed unilaterally to my registrar on 29 August 2024, to obtain a postponement of the proceedings on the strength only of his email request that he could refer the matter to trial / oral evidence. The applicant has persisted until time of writing this judgment in his attempts to communicate with me *ex parte* despite my admonitions to desist. This is ironic and peculiar

given his accusation that there was no transparency in the communications between Mr Smuts and Ms Pettigrew.

84.6 In order to meet his concern that the affidavit of Mrs Hannington filed on 28 August 2024 gave rise to alleged disputes of fact, and to mitigate prejudice to the opposing party occasioned by any action of the proceedings and/or postponement thereof, I received by agreement between the parties seven exhibits referred to above which added a further 264 pages to a record already in excess of 1 000 pages in length. This additional material had to be assimilated at speed during the adjournments and overnight between the first and second day of the hearing. While the respondents do not complain of prejudice occasioned to them, it was undoubtedly inconvenient, as it was to the Court.

84.7 The applicant's papers did not deal in any respect with the impact upon the children of the relief that he sought. He explained in argument, as also on affidavit, that he did not wish to change the existing "*arrangements*", namely that respondents continue to bear all the parental responsibilities and rights for the children, but he simply wanted to be able to have a relationship with them and facilitate the children having a relationship with his infant son L and the applicant's extended family. However, he provided no detail of any of the work that he had done to develop his own insight and judgement, and his parenting skills, as had been recommended by virtually every mental health professional being engaged in the matter including his own appointed expert, Ms Raphael. He alternately said that he would do so, and that he had done so. He simply did not engage with the evidence of Mrs Hannington that the children have repeatedly, consistently and as recently as 27 August 2024 articulated to her their fear of the applicant, that they were resolute in their resistance to any contact with him and that they were very happy about their pending adoption by the third respondent. When I suggested to him that he could, in the face of this undisputed evidence, convey a message to his children that he loved them, cared for them and takes account of their wishes, by signing the adoption papers. He responded that he read the situation entirely differently, and he

required the children to tell him their wishes directly. This response exhibited a startling lack of empathy from the applicant. It resonates with the findings of the mental health professionals engaged in the course of the divorce proceedings.

84.8 The applicant focused in the proceedings on his own desires and needs rather than the best interests of the children, which should have been of paramount concern to him.

84.9 The applicant maintained his position as a purported victim, and did not appear to genuinely take responsibility for his own actions and inaction.

84.10 The applicant cast unwarranted aspersions on the professionalism, integrity and independence of Ms Pettigrew, Mr Smuts, Ms Heese (*“she gave mixed messages”*) and the children’s legal representatives, whom he accused of being aligned with respondents.

85. In short, I consider that the institution and conduct of these proceedings was vexatious. In the circumstances, I am satisfied that an award of attorney and client costs in favour of the respondents is justified.

86. On behalf of the children, Mr Pincus submitted that the first respondent’s decision to appoint legal representation was a wise one, given the reports that had been made by the children to Ms Pettigrew regarding abuse at the hands of the first respondent. I must emphasise that in considering this submission, I make no finding the veracity of the children’s allegations, as it was not necessary to do so for purposes of these proceedings. I agree with Mr Pincus’ submission.

87. From about the time when his contact with the children became supervised, the applicant advanced a narrative in his correspondence, repeated in his affidavit, that the respondents, aided and abetted by Mr Smuts, were conspiring to deprive him of all contact, and that the children were being schooled or coached to make reports to Ms Pettigrew, to this end. It was a salutary measure to avoid questions of such

influence by appointing an independent person to represent the children. To my mind, this also afforded the applicant a measure of protection from any improper influence by the respondents (of which I could find no convincing evidence on the papers).

88. Mr Pincus sought an order that the applicant be directed to pay the children's legal costs, including the costs of two counsel. This was sought on a party and party scale. In regard to employment of two counsel, he submitted that it was justified due to the difficulty of the matter, the serious allegations that had been made, and the complicated and unusual history of the matter. He pointed out that Ms Thiart was obliged to attend the hearing by virtue of the Order made by Justice Wille. Mrs Hannington explained in her affidavit of 28 August 2024 that she had taken the decision to brief Mr Pincus to lead Ms Thiart. I cannot fault her judgment in doing so. The litigation has a lengthy history, the record was voluminous, and it is a matter of substantial importance to the children so as to merit their representation by a senior and very seasoned practitioner in family law such as Mr Pincus.

89. I am satisfied that the applicant should bear the children's costs on a scale as between party and party. My Order differentiates between the applicable scale in relation to senior and junior counsel's fees.

I order as follows:

1. The application is dismissed.
2. The applicant shall pay the costs of the first and third respondents on the scale as between attorney and client, such costs to include the reserved costs of the hearing on 14 June 2024 and the case management conference before Justice Wille on 16 June 2024.
3. The applicant shall pay the children's costs in this application, including the costs of the case management conference, and including the costs of two counsel, provided that the fees of senior counsel shall be recoverable on Scale C and that of junior counsel on Scale A.

F J GORDON-TURNER
MS ACTING JUSTICE OF THE HIGH COURT

Appearances

For the Applicant

Mr H[...] (In Person)

Counsel for First to Third Respondent

Adv Louise Buikman SC

Instructing Attorney

Mr Juan Smuts
Abrahams & Gross Attorneys

Counsel for the Children

Adv B Pincus & Adv A Thiart

Instructing Attorney

Mrs Elana Hannington
Norman Wink Stephens Attorneys