



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

Case No:3358/24

In the matter between:

DR

Applicant

and

N M

First Respondent

R L

Second Respondent

Heard: 09 December 2024

Delivered: Electronically on 23 January 2025

JUDGMENT

LEKHULENI J

Introduction

[1] The endless dispute between the applicant and the respondents has led to three urgent applications that served before this Court on 09 December 2024. In the first application, the applicant seeks an order that Dr Konrad Czeck, a forensic psychiatrist, be appointed by the court to conduct a psychiatric and drug abuse assessment and evaluation in respect of the first respondent and to compile a report setting out his findings and recommendations regarding the first respondent's alleged abuse of benzodiazepine drug.

[2] The applicant also seeks an order that in compiling the said report, amongst others, Dr Czeck be authorised to have such powers as directed by this court to obtain all relevant information from the first respondent's treating psychiatrists and psychologists, both current and historical, including a record of all medication prescribed to the first respondent for the period January 2023 to date.

[3] In addition, the applicant seeks an order that Dr Czeck be authorised to conduct interviews with the applicant and the respondents and to administer random drug testing on the first respondent without notice to the respondent, and to consult with both childcare experts appointed by the court - Ms Leigh Pettigrew and Terence Dowdall, to compile his report. The applicant seeks this order to assist the court in determining whether the first respondent is better suited to be the primary carer of two minor children, WML and LW, which will be determined in Part B of this application.

[4] In the second application, the applicant seeks an order that the terms of the joint minute prepared and signed by two childcare experts, Leigh Pettigrew and Terence Dowdall, dated 01 August 2024, be implemented forthwith to replace the terms of the court order granted by this Court on 13 June 2024. Additionally, the applicant seeks an order that the said joint minute regulate the contact arrangements pertaining to the two minor children, WML and LM, forthwith pending the final determination of Part B of the application.

[5] The third application involved a counterapplication instituted by the first and second respondents (*"the respondents"*) in which they seek an order directing that the applicant's application to have the recommendations contained in the joint minute

of Leigh Pettigrew and Terence Dowdall, in respect of the minor child WML be postponed to such a date as this Court may determine, with the applicant paying the costs of the postponement on an attorney and client scale.

[6] Furthermore, pending the postponed date, the respondents seek an order that the applicant's contact arrangement with WML in terms of the order granted on 13 June 2024, be substituted by an order to the effect that from the commencement of the 2025 school year, the applicant shall see WML on each alternate Wednesday from after school until 18h30 when first respondent or second respondent shall fetch WML from the applicant's home. That the applicant shall see WML one weekend a month from after school on Friday until Sunday at 18h30 and on one weekend a month from 10h00 on Saturday until Sunday at 18h30.

[7] In addition, the respondents are requesting an order directing the applicant to cooperate with Terence Dowdall, the expert appointed by the first respondent. This cooperation aims to assess and understand the underlying causes of WML's behaviour, as indicated by her schoolteacher. According to the respondents, this will enable the expert to make recommendations regarding how best to address such conduct, including but not limited to the nature of the extent of the applicant's contact arrangement that will serve WM's best interest. The respondents also seek an order that should the applicant decide to appoint an expert, the expert and Mr Terence Dowdall shall convene and prepare a joint minute within 10 days following the finalisation of the reports.

The Application for the Appointment of Dr Czeck

[8] For the purposes of this judgment, I will consider each of these applications individually and in sequence. I will first consider the applicant's application for the appointment of Dr Czeck, and thereafter, I will consider the implementation of the joint minute application. However, in considering the two applications, I deem it necessary to briefly set out the factual background giving rise to these applications. The facts hereof have been dealt with extensively in the judgment of this Court dated 05 March 2024. To ensure thoroughness, I shall provide a summary of these facts, incorporating the necessary changes pertinent to this judgment.

[9] The applicant and the first respondent are same-sex couples. They were married on 29 April 2023 in terms of the Civil Union Act 17 of 2006. However, they are currently separated. No children were born during their marriage. The applicant has two biological children who were born through a surrogate motherhood agreement as envisaged in section 292 of the Children's Act 38 of 2005 before his civil union with the first respondent. The said children are MT, a boy born in 2012 who is 12 years old and MC, a boy born in 2016 who is now 8 years old. The two minor children are currently in the care of the applicant.

[10] Prior to the marriage between the applicant and the first respondent, the first respondent was previously married to the second respondent in terms of the Civil Union Act. The first respondent and the second respondent were both same-sex couples, and their marriage was formally dissolved by a court order on 13 November 2020. During the marriage between the first and second respondent, a minor child, specifically a girl named WML, was born on 09 October 2018 through a surrogate motherhood agreement. The first respondent is the biological father of WML.

[11] In accordance with the parenting plan concluded between the parties, the first respondent is designated as the primary carer for WML, while the second respondent exercises visitation rights with the minor child as stipulated in the plan.

[12] Following the divorce between the first and second respondent, the applicant married the first respondent. Before their marriage, the first respondent had a second child, LM, who was born on 12 April 2022 through a surrogacy agreement. LM was born after the first and the second respondent divorced and before the first respondent could marry the applicant. When LM was born, the first respondent and the applicant were in a romantic relationship for approximately six months before concluding their marriage agreement. The applicant was not involved in the legal process for LM's surrogacy agreement. Thus, the applicant does not appear on LM's birth certificate. Notwithstanding, the applicant has been actively involved in LM's life since birth and has cared for and provided for him financially as he provided for his two biological children.

[13] The applicant and the first respondent were married to each other on 25 April 2023, and their marriage is still in subsistence. The parties are currently separated, and divorce proceedings are pending. No children were born in their marriage. As stated earlier, the applicant has two biological children who were born through a surrogate agreement before his relationship with the first respondent. The family of the applicant and the first respondent comprised the applicant, the first respondent and their four minor children, who lived together as a family unit until the applicant and the first respondent separated.

[14] During the marriage, the applicant developed a strong relationship with the first respondent's children, WML and LW. Additionally, WML and LW formed a close bond with the applicant's children, MT and MC. The applicant and the first respondent lived together as a family unit, along with their respective children, from August 2020 until 09 February 2024. During this period, they created a shared home environment, fostering bonds among both sets of children. However, on 09 August 2024, the first respondent left the family home, taking his two minor children, LM and WLM, with him.

[15] After the applicant and the first respondent separated, a dispute arose regarding the applicant's contact with WML and LM (the first respondent's children), with whom he had developed a close bond. As a result, the applicant urgently approached this Court seeking an order for interim care and contact with WML and LM. Additionally, the applicant requested the appointment of Leigh Pettigrew, an educational psychologist, to conduct a care and contact assessment and to provide the court with recommendations for future contact arrangements that would be in the best interest of WML and LM. At the hearing of that application, the applicant abandoned the relief for interim care of WML and LM and persisted only in seeking interim contact and the appointment of Leigh Pettigrew to conduct an assessment.

[16] After listening to arguments and considering the matter, the court ordered that pending the final determination regarding the relief sought in Part B, the applicant was granted permission to have contact with LM every Tuesday, starting after school and continuing until 08h00 on Wednesday. Additionally, the applicant was allowed contact with LM every alternate weekend, beginning after school on Friday and

ending at 08h00 on Monday. For WLM, the court ordered that the terms of contact would be determined through mutual agreement between the first and second respondents.

[17] Leigh Pettigrew, an educational psychologist, was appointed as an expert for the applicant, and Terry Dowdall, a clinical psychologist, was appointed as the first respondent's expert. Both experts were directed to urgently conduct an assessment and compile reports setting out their findings and recommendations regarding future contact arrangements between the parties and the minor children that would be in the children's best interest.

[18] In light of the serious allegations presented in the applicant's founding affidavit concerning the parenting capacity of the first respondent, the court, *mero motu* directed the office of the family advocate to conduct a comprehensive care and contact assessment regarding the minor children. This assessment is intended to ascertain the best interests of the children involved.

[19] The respondents objected to the court's order instructing the office of family advocate to conduct a care assessment concerning the minor children. Consequently, the respondents sought leave to appeal this order, asserting that the court erred in directing a care assessment by the family advocate, as the applicant had not requested such an assessment, and the court had not determined that a care assessment was warranted. The applicant opposed this application.

[20] Following a thorough examination of the matter, the application for leave to appeal was dismissed. The court determined that ordering the family advocate to conduct an investigation was in the best interests of the minor children. On 08 July 2024, the respondents sought permission from the Supreme Court of Appeal to challenge the court's order directing the family advocate to investigate the matter. The Supreme Court of Appeal found no prospects of success on appeal and dismissed the application.

[21] In the interim, the educational Psychologist Leigh Pettigrew filed her report. In accordance with this Court's order, Ms Pettigrew recommended that the family

advocate conduct a comprehensive care assessment to serve the children's best interests. Leigh Pettigrew expressed concern about the first respondent's possible abuse of benzodiazepine and recommended that a suitably qualified psychiatrist or clinical psychologist be appointed to investigate the first respondent's abuse of benzodiazepine and to report to this Court on whether the result obtained will or will not have an effect on the two young children. Leigh Pettigrew recommended that the two minor children, WML and LM, maintain contact with the applicant. Leigh Pettigrew also recommended regular sleepover contact between the applicant and WML, which should be implemented immediately.

[22] Due to some disagreements in the implementation of Leigh Pettigrew's recommendation on contact, on 04 June 2024, the applicant brought an urgent application seeking the immediate implementation of Ms Pettigrew's recommendation in respect of the applicant's contact with LM and WML pending the outcome of Part B of the main application. Both respondents opposed the application. However, an agreement regarding the applicant's contact with LM and WML was reached and recorded in an order granted by Wille J on 13 June 2024.

[23] The order made provisions for the applicant's contact with WML during the school term, including sleepover contact on certain school nights and weekend contact. It also made provisions for holiday contact. Simply, the applicant's contact with LM remained the same, but his contact with WML was increased to include, among others, weekday sleepover contacts and two weekends a month. The contact was set to begin during the upcoming school holidays and would continue until a final decision was reached regarding the relief requested in Part B of the application or until any other interim application brought by the parties was finalised.

[24] Subsequently, Terence Dowdall, the clinical psychologist, completed his report in late July 2024. In his report, he recommended that the two minor children, WML and LM, maintain contact with the applicant. Terence Dowdall particularly recommended that the applicant should get a two-night weekend with WML from Saturday afternoon to Monday morning school drop (considering the Jewish Sabbath on a Friday night), and this must overlap with a weekend that he has LM and every Wednesday after school to Thursday morning drop off. In his report, Terence

Dowdall noted that he does not suspect that the first respondent has a benzodiazepine addiction. However, he recommended that an independent psychiatrist and drug evaluation by a psychiatrist with a good understanding of pharmacological issues, such as Dr Konrad Czeck, be appointed to conduct such an assessment.

[25] Later, Terence Dowdall and Pettigrew met in July 2024 and agreed to the terms of a joint minute in which recommendations were made regarding the applicant's contact with WML and LW. The two experts prepared and signed a joint minute and made available to the parties in early August 2024. I will revisit this joint minute later in this judgment when I deal with the application for implementing this joint expert minute.

[26] Following Mr Dowdall's recommendation, the first respondent's attorneys arranged for the first respondent to consult Dr Czeck. Thereafter, the first respondent consulted with Dr Czeck the clinical psychologist.

[27] The applicant took umbrage that the first respondent's attorneys arranged that the first respondent consults with Dr Czeck without notifying him or his legal team for such consultation and without Terence Dowdall and Leigh Pettigrew having any insight or input regarding the scope of Dr Czeck's assessment. To this end, the applicant's legal team requested a copy of Dr Czeck's mandate or the relevant instructions from Dr Czeck regarding the scope of the assessment.

[28] In response, the first respondent's legal team asserted that Dr Czeck was not the applicant or a joint expert, as the applicant did not engage him. The first respondent's attorneys further stated that they engaged Dr Czeck on their initiative as their client's expert, considering the recommendations made by Mr Terence Dowdall in his report. In addition, the first respondent's attorneys stated that Dr Czeck has not completed his investigation but has prepared an interim report, and that same could be furnished to the applicant provided the applicant provided an irrevocable written undertaking that he would not distribute or publish the report or any of its contents in any manner whatsoever.

[29] Dr Czeck's interim report was subsequently provided to the applicant. Dr Czeck's report indicates that the primary finding is that the first respondent is dependent on Benzodiazepines. Dr Czeck also noted that the first respondent conceded that he suffers from an unhealthy dependence on Ativan. In the report, Dr Czeck noted very concerning issues relating to the use of certain medications for which the first respondent did not have the necessary prescription. This is the aspect that Dr Czeck indicated that it needed further investigation.

[30] Dr Czeck recommended that the first respondent either participate in an outpatient treatment program, which usually takes approximately 8 weeks or alternatively a three-week in-patient programme followed by outpatient treatment and supervision, which could be accomplished at the Crescent Clinic or Rustenburg Clinic.

[31] Pursuant to Dr Czeck's interim report, despite his initial impression that an outpatient program would suffice, the first respondent followed Dr Czeck's professional advice and committed himself to an in-patient program that was intended to last for 28 days at Rustenburg Clinic, a facility proposed by Dr Czeck to the first respondent. The first respondent indeed attended the Rustenburg Clinic and returned home on Monday, 14 October 2024.

[32] In this application, the applicant insisted that the appointment of Dr Czeck should not be a sole mandate, considering that both childcare experts recommended that the first respondent undergo such an assessment. To this end, on 18 September 2024, the applicant's attorneys addressed a letter to the first respondent's legal team requesting confirmation from them that from thence, henceforth, Dr Czeck's mandate would be considered a joint mandate. This proposal was rejected. In their correspondence dated 25 September 2024, the first respondent's attorneys insisted that Dr Czeck was neither the applicant's expert nor a joint expert as the applicant did not engage him.

[33] The first respondent's attorneys insisted that the first respondent engaged Dr Czeck on his own initiative after considering the recommendations made by Mr Dowdall in his report, and he is not a joint expert. The applicant challenged this

stance and contended that the first respondent and his legal representatives were hiding information from the applicant on the psychiatric and drug abuse assessment of the first respondent.

[34] Pursuant to the stance adopted by the respondent, the applicant asserted that he eventually instituted this application seeking an order that Dr Czeck be appointed by this Court to conduct a psychiatric and drug abuse assessment in respect of the first respondent. In his application, the applicant also sought an order that Dr Czeck, as a court-appointed expert, compile a report setting out his findings and recommendations, with such powers as this Court may direct, to ensure that the scope of Dr Czeck's assessment is not limited to what the first respondent does or does not wish the child care expects, the family advocate and this Court to know.

[35] After the applicant launched the application, the first respondent filed a notice to abide. The first respondent's legal representative, Mr Goodkin, filed an explanatory affidavit in which he refuted the allegations that he assisted the first respondent in hiding information or keeping the applicant in the dark about the condition of the first respondent. In his explanatory affidavit, Mr Goodkin asserted that although Dr Czech was engaged as the first respondent's expert, in a letter dated 18 October 2024 to the applicant's attorneys, he confirmed that to avoid further costly litigation and conflict, the first respondent had decided to consent to Dr Czeck's appointment by the Court in terms of prayer 2 and 5 of the applicant's notice of Motion.

[36] Mr Goodkin further stated that to provide clarity, the first respondent suggested further additions to the applicant's notice of motion, which were incorporated into a proposed draft order. These proposals were consistent with what the applicant sought in the notice of motion and contained in previous correspondences of applicant's attorneys. Primarily, the amendments to the applicant's notice of motion were that pending the completion of Dr Czeck's report, the legal representatives of the applicant and the respondents may only communicate in writing with Dr Czeck, and any such written communications had to be copied to all the other legal representatives.

Discussion

[37] Children are the soul of society. If we fail them, then we have failed as a society.¹ This matter is not about the applicants, or the respondents. It is about the two minor children, WML and LM in the care of the first respondent. As envisaged in section 28(2) of the Constitution, the centrality of these children's best interests must be the overarching principle guiding this court's decision. This principle should take precedence over the constant and endless conflicts between the applicant and the respondents. This Court sits as the upper guardian for minor children, with a primary obligation to prioritise their protection and welfare.

[38] As the upper guardian of WML and LW, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child.² This court is not bound by procedural strictures or by the limitations of the evidence presented or by contentions advanced or not advanced by the respective parties.³ In *Terblanche v Terblanche*,⁴ the court stated that when a court sits as upper guardian in a custody matter:

“It has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information of whatever nature which may be able to assist it in resolving custody and related disputes.”

[39] In the present matter, it is common cause that the two experts, Leigh Pettigrew and Terence Dowdall considered the allegations pertaining to the first respondent's alleged abuse of prescription medication and recommended that the first respondent undergo an independent psychiatric and drug assessment regarding

¹ *SS v Presiding Officer of Children's Court: District of Krugersdorp and Others* Case 2012 (6) SA 45 (GSJ) at para 1.

² *J v J* 2008 (6) SA 30 (C) at para 20.

³ *Kotze v Kotze* 2003 (3) SA 628 (T) at 630F- I.

⁴ 1992 (1) SA 501 (W) at 504C.

his alleged benzodiazepine addiction. Terence Dowdall, the first respondent's expert, recommended an independent psychiatric drug evaluation by a psychiatrist with a good understanding of pharmacological issues, such as Dr Czeck. Following the recommendations of Mr Dowdall, the first respondent's attorneys appointed Dr Czeck to conduct the assessment. Indeed, the interim report of Dr Czeck confirmed that the first respondent was addicted to benzodiazepine.

[40] The applicant impugns the unilateral appointment of Dr Czeck by the first respondent and his legal representatives. According to the applicant, after the reports of the two experts confirming that the first respondent was abusing drugs, the next step ought to have been for the experts to meet and discuss the appointment of Dr Czeck.

[41] In my opinion, although it would have been ideal for the parties to jointly delineate and circumscribe the scope of assessment, the first respondent cannot be faulted for unilaterally appointing Dr Czeck to conduct an assessment. It must be borne in mind that the first respondent's expert made recommendations that the first respondent be evaluated by psychiatrist with a good understanding in pharmacological issues such as Dr Czeck. As a result, of the report and recommendations by the first respondent's expert, Dr Czeck was appointed as the first respondent's expert on 26 July 2024 to conduct a full psychiatric evaluation for medicolegal purposes on the first respondent.

[42] I agree with the views expressed by Mr Van Embden SC that the first respondent was fully entitled to follow the express recommendations of his expert Terry Dowdall and to appoint Dr Czeck as his expert to conduct the appropriate evaluation. In my view, there is nothing irregular about such an appointment. While the applicant's expert also recommended that such an assessment be conducted, that did not compel the first respondent to seek the applicant's approval as to the appointment of his own expert or for the expert to be jointly appointed.

[43] Notwithstanding, the fact that the applicant also has a keen interest in the evaluation of the first respondent cannot be ignored or discounted. Importantly, it has also already been confirmed that the first respondent has an addiction problem to

benzodiazepine. Dr Czeck has also confirmed this in his preliminary report. In my view, it will not be in the interest of both parties, particularly the minor children, that the applicant appoints his own expert to conduct a similar evaluation on the first respondent, as this may delay the finalisation of the matter.

[44] Dr Czeck has already commenced with his evaluation. He has prepared two preliminary reports. He was appointed in July 2024 and delivered his interim report on 29 August 2024. After the discharge of the first respondent from Rustenburg Clinic, Dr Czeck delivered another preliminary report dated 4 November 2024 in which he comments on the first respondent's current mental state, his process at Rustenburg Clinic and the gains made, and suggested a structured plan for the future.

[45] In the said report, Dr Czeck notes further that the first respondent's abuse of benzodiazepine dependence is in early remission. Dr Czeck further records that since discharge, the first respondent has been managed at aftercare at Rustenburg Clinic by Dr Torline. Furthermore, Dr Czeck states that it is additionally necessary to establish a reasonable regime that could be followed to assist the first respondent in his sobriety and to ensure safety at home.

[46] Based on the progress that has been made thus far, an appointment of another expert to do the same evaluation would delay the finalisation of the matter. Such an approach in my view would offend section 6(4)(b) of the Children's Act 38 of 2005 which provides that in any matter concerning a child a delay in any action or decision to be taken must be avoided as far as possible.

[47] In my opinion, it is in the best interest of the children for Dr Czeck who has already begun and made significant progress in his assessment of the first respondent to be appointed by this court to complete the evaluation. Dr Czeck should report his findings to the court, the family advocate, and the childcare expert. This will enable the childcare experts and the family advocate to make informed recommendations regarding the care and contact arrangements for the minor children, based on the assessment's outcomes that may influence their evaluations.

[48] Accordingly, the appointment of Dr Czeck by the court would ensure openness and transparency. I am mindful that an expert does not advocate for the party by whom they are appointed. An expert is expected to be objective, dispassionate and unbiased. However, the appointment of Dr Czeck by the court would safeguard his independence as he will no longer be considered the expert of any of the parties but rather as a court-appointed expert.

[49] At the hearing of this matter, the court was informed that the applicant was willing to share the costs of Dr Czeck with the first respondent attendant to the assessment of the first respondent. In my view, the independence of Dr Czeck will be safeguarded by directing that the first respondent and the applicant be equally responsible for bearing the costs associated with this appointment.

[50] From the report of Terence Dowdall, it is noticeable that Dr Czeck is an experienced psychiatrist with a good understanding of pharmacological issues and an appropriate person to be appointed in this matter. He has already been instructed to conduct a full psychiatric evaluation investigation for medical purposes on the first respondent. I have complete confidence in this expert's ability to conduct an independent report that prioritises the best interests of minor children, free from any influence by the involved parties. The fact that he immediately confirmed in his interim report that the first respondent is addicted to benzodiazepine clearly attests to his independence and unbiased mind.

[51] Importantly, at the heart of Dr Czeck's investigation is the ability of the first respondent to care for the minor children. An investigation of care and contact is inquisitorial in nature. The court may have recourse to any source of information, of whatever nature, which may assist it in resolving the custody and related disputes. As an expert appointed by the court, either party may call Dr Czeck as a witness and pose questions to him. When called as a witness, Dr Czeck may be questioned by the court and subjected to cross-examination by the opposing party.

[52] As discussed above, the court is not constrained by procedural formalism when it comes to the best interests of minor children. The suggestion that the applicant should engage his own expert, in my view, is untenable and cannot be

supported. It must be stressed that despite the first respondent's insistence that the applicant appoint his own expert, the first respondent did not provide the applicant with an undertaking that he would cooperate and provide the said expert with unfettered access to relevant information. In the absence of such an undertaking, it can be reasonably inferred that the first respondent will not cooperate with the applicant's appointed psychiatrist.

[53] Finally, on this issue, I have noted concernedly that both parties have adopted a confrontational approach in dealing with this matter, which is highly regretted. That also played itself at the hearing of this matter. I deem it proper to sound a note of caution that the interests of minor children should not be sacrificed or compromised by the rigid and inflexible stance adopted by the parties and their legal teams. After hearing the arguments from both parties, I am of the strong view that the appointment of Dr Czeck by the court could have been granted by agreement between the parties without the intense argument of two counsels for hours in court.

[54] It is perhaps apposite to remind ourselves of the guiding principles set forth in section 6(4)(a) of the Children's Act that in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.

[55] Consequently, I believe it will be in the minor children's best interest that the court appoints Dr Czeck to finalise the investigation that he has already commenced and provide this court and the relevant parties with the necessary report and recommendations.

[56] This leads me to the second application, the application for the implementation of the joint minute. The applicant's application for implementing the joint minute of the childcare experts is intertwined with the respondents' counterapplication. For convenience, I will first summarise the applicant's application for the implementation of the joint minute and thereafter consider the two applications jointly.

The Applicant's Second Application: Should the joint Minute prepared by the court appointed childcare experts be implemented forthwith?

[57] In this application, the applicant sought an order that the terms of the joint minute provided in accordance with the terms of a court order dated 13 June 2024 and signed by the court-appointed childcare experts, Leigh Pettigrew and Terence Dowdall, dated 01 August 2024, be implemented forthwith. In addition, the applicant sought an order that this joint minute replace the terms of a court order granted by this court on 13 June 2024 and forthwith regulate the contact arrangement pertaining to the minor children, WML and LM pending the final determination of Part B of this application.

[58] On 13 June 2024, an order by agreement was granted in terms of which the applicant was allowed to have contact with LM in terms of the court order granted by this court on 05 March 2024. The first and the second respondent were ordered to facilitate contact between the applicant and WML, which contact was to be on each alternate Wednesday from after school until the following morning when she is taken to school, to coincide with Wednesday mid-week overnight when LM is with the applicant

[59] In terms of the June 2024 order, WML spent a total of 6 nights per month with the applicant, 3 nights of which were school weeknights. The June 2024 order specifically provided that once the report of the court-appointed childcare experts was completed, Mr Dowdall and Ms Pettigrew shall meet and produce a joint minute if so instructed by the parties' attorneys, and which meeting had to take place within 10 days of such delivery and instruction.

[60] In accordance with the terms of the June 2024 order, Ms Pettigrew and Mr Dowdall met on 25 July 2024 and provided a joint minute signed by both experts on 01 August 2024. The two experts agreed on the contact arrangement for the applicant regarding LM and WML. The joint minute recommendations proposed that WML spend a total of 7 nights per month with the applicant, 5 of which were school nights. Concerning LM, the experts agreed in their joint minute that LM's holidays with the applicant would be shared on a 50:50 basis.

[61] The experts agreed in the joint minute that WML would be collected by the applicant every Wednesday after school and dropped off at school every Thursday Morning. The experts also agreed in their joint minute that the applicant will spend one full weekend a month with WML from after school on a Friday until Monday morning when the applicant drops WML off at school. The two childcare experts also agreed that WML should commence this schedule immediately and that WML should spend a third of each school holiday with the applicant.

[62] The applicant sought the immediate implementation of the joint minute. According to the applicant, it was his understanding that if the experts could conclude a joint minute stipulating agreed contact arrangements, such arrangements would be implemented forthwith without the need for the parties to approach this court. Pursuant thereto, the applicant brought this application because he claims that the second respondent has been resistant to implementing the joint minute.

[63] According to the applicant, this resistance primarily stems from the second respondent's disagreement with the recommendation for the applicant to have sleepover contact with WML every Wednesday. The applicant believes that the second respondent is unhappy about this arrangement because he himself does not have sleepover contact with WML during the week.

[64] According to the applicant, the purpose of this application is to seek the immediate implementation of the terms of the joint minute, which has been determined to be in the children's best interest by both childcare experts. The applicant states that the second respondent has alleged in recent times that WML's teacher has raised concern regarding WML's behaviour at school, which the second respondent alleges is connected to WML's sleepover contact with the applicant and the applicant's sons every second Wednesday as provided for in the June 2024 order. The applicant further asserts that the fact that the second respondent would not allow the applicant to engage with WML's school to inquire about the details of the concerns and be part of the solution is making matters worse.

[65] The applicant believes that the alleged behavioural issues of WML, if they indeed exist and to the extent claimed by the second respondent, are more likely a result of the disruptions to WML's life caused by the first respondent's admission to an inpatient rehabilitation facility and an ongoing conflict and disruptions caused by the second respondent's persistent attempt to limit contact between applicant and WML.

[66] The applicant believes that the onus is on the second respondent to show why the joint minute should not be implemented and not only him to show why it should be implemented. According to the applicant, the second respondent took the law into his own hands by refusing to implement the joint minute. The applicant states that the second respondent cannot merely "wish away" the terms of the joint minute or the June 2024 order in terms of which the joint minute was produced. The applicant prayed the court to grant an order in terms of the notice of motion.

[67] As stated above, I will evaluate this application jointly with the respondents' counterapplication discussed hereunder as the two applications are intertwined.

The Respondents' counterapplication

[68] In response to the applicant's application for the immediate implementation of the childcare experts' joint minute, the respondents instituted a counterapplication in which they seek an order directing that the applicant's application to have the recommendations contained in the July 2024 joint minute of Leigh Pettigrew, and Terence Dowdall, in respect of the minor child WML be postponed to such a date as this Court may determine, with the applicant paying the costs of the postponement on an attorney and client scale.

[69] Additionally, pending that postponed date, the respondents seek an order that the applicant's contact arrangement with WML in terms of the order granted on 13 June 2024 be substituted by an order to the effect that from the commencement of the 2025 school year, the applicant shall see WML on each alternate Wednesday from after school until 18h30 when first respondent or second respondent shall fetch WML from the applicant's home. The applicant shall see WML on one weekend a

month from after school on Friday until Sunday at 18h30 and on one weekend a month from 10h00 on Saturday until Sunday at 18h30.

[70] Furthermore, the respondents request an order that the applicant be directed to cooperate with Terence Dowdall, the expert appointed by the first respondent for the purpose of the expert assessing and considering the underlying cause of WML's bad behaviour at school as indicated by her educator and to enable him to make recommendations in respect of how best to address such conduct including but not limited to the nature of an extent of the applicant's contact arrangement that will serve WM's best interest. If the applicant elects to appoint an expert, then such expert and Mr Dowdall shall meet and produce a joint minute within 10 days of the reports being finalised.

[71] The respondents assert that during October 2024, the first respondent attended in-patient treatment at Rustenburg Clinic on the advice of Dr Czeck. During the four weeks of his treatment, WML was in the care of the second respondent. The applicant continued to have contact with WML in terms of the June 2024 order. However, WML's concerning conduct at school and after school night sleepovers at the applicant's home continued during this time. Upon the first respondent's discharge, the provisions of the June 2024 order, in all respects, were again implemented. Notwithstanding, the respondents assert that WML's troubling behaviour at school after spending a school night sleepover at applicant's home persisted.

[72] The respondents indicated that WML's behaviour at school, after an overnight stay at the applicant's residence, requires evaluation by an expert. This assessment is intended to identify the underlying causes of this behaviour and to ascertain whether alterations to the contact arrangements specified in the June 2024 order, as well as the recommendations outlined in the joint minute by Leigh Pettigrew and Terence Dowdall completed in July 2024, are warranted. To this end, the respondents are of the view that the applicant's sleep over contact on school nights should be suspended for such purpose or pending the investigation.

[73] In addition, the respondent asserted that despite purporting to be concerned with WML, the applicant insists that the recommendations contained in the joint minute be implemented and is not willing to suspend sleep over contact on school nights during the period of the assessment. The respondents stated that the applicant also appears to disregard the fact that WML will commence grade 1 in 2025, and this is a foundational year in which she should experience as little disruption as possible.

[74] The respondents referred the court to an email of 28 August 2024 attached to their founding answering affidavit, in which WML's teacher stated that WML seemed unsettled this term and not her usual self. The teacher also stated that WML was experiencing separation anxiety in the morning when her father dropped her off at school. The teacher noted that there have been mornings when the WML has been in tears and asked to go home to the first respondent. The teacher also asserted that WML did not have contact with the applicant from 5 to 08 August 2024, which had been a noticeably good week for her.

[75] In the said email, the teacher further asserted that on 21 and 22 August 2022, WML's behaviour had been out of control, and she had been screaming and shouting at friends, which was out of character and was saying things such as, I am done with you.

[76] On 29 August 2024, WML's teacher further conveyed in an email that WML had been particularly unsettled and could not focus on tasks. The teacher stated that in her free play, WML was very aggressive with killing and dying games and that in the game, her sister kept being killed and had to die. It was conveyed that this obviously upsets her friends. The teacher noted that WML engages in such play after a sleepover contact in the applicant's home. According to the teacher, in her professional opinion, midweek sleepovers with a non-parent are not beneficial to WML, and this was causing anxiety and disruptions to her school life.

[77] On 15 September 2024, the teacher also expressed concern that on Thursday, when coming from the applicant's house, WML was more distracted than usual, singing killing songs and rhymes and games, as well as hitting another child

out of frustration, which is not her usual character. This was after a sleepover at the applicant's place. On 08 September 2024, after WML had slept over at the applicant's home, WML's teacher conveyed an email to the respondents in which she stated that WML was fighting and arguing with girls in the class from the minute she walked in, shouting at them with a lot of anger. According to the teacher, WML's play was rough and physical in the playgrounds. Not only was her behaviour disruptive to herself and her day, but it also affected others in the class.

[78] Pursuant to WML's behaviour at school, the respondents could not agree to the implementation of the recommendations contained in the joint minute of the two experts as the applicant wished to implement. Given the concerns the educator raised regarding WML's conduct, the respondent proposed that an expert consider the impact of midweek sleepover contact with the applicant. The respondents referred to various correspondences exchanged between the parties with a view to reaching an amicable settlement on the issue to no avail. The respondents sought an order that the implementation of the joint expert minute be postponed pending an investigation by an expert.

Applicable Legal Principles and Discussion

[79] As mentioned previously, the two applications, namely the counterapplication and the application for the immediate implementation of the joint minute of the childcare experts, centre around the best interests of the child. Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. The child's interests take precedence over the interests of the parents. Section 9 of the Children's Act echoes section 28(2) of the Constitution and provides that in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance must be applied.

[80] As correctly pointed out by Ms McCurdie SC, the issue to be determined in this application is very narrow. The court is only enjoined to determine whether the immediate implementation of the joint minute recommendations is in WML's best interest or whether it is in her best interest that such implementation be postponed

pending the assessment by the childcare experts in respect of the concerns raised by WML's teacher which assessment may impact on the contact arrangement currently contained in the joint minute recommendations. This question, in my view, can be determined on the papers before this Court.

[81] In considering this question, I must stress that the teacher of WML has raised serious concerns about the sleepover of WML at the applicant's place on weekdays. According to the teacher, the child becomes aggressive and unsettled at school on days succeeding the sleepover at the applicant's premises. In her affidavit, WML's educator states that as an experienced educator, she can express a view regarding the negative impact of school night sleepovers on many children of WML's age and has needed to take this up with parents of learners before in the interests of their children.

[82] Notably, the teacher notes that one expects a child to be a little unsettled when moving between homes in divorced or blended families. However, when there is a marked and on-going impact on a child, this is a concern for an educator. The educator's view in this regard is not a comment on the applicant or his household. According to the teacher, it is a comment about WML having a stable and consistent routine and sleeping in one home on school nights.

[83] Ostensibly, it has not yet been established what caused the alleged misbehaviour. The two child experts expressed divergent views on this aspect. Ms Pettigrew contends that the cause of WML acting out is likely multifaceted and cannot be attributed to a single cause. On the other hand, Mr Dowdall persists that sleepover contact should be suspended so that it can be determined whether this is the source or a contributing factor to WML's behaviour.

[84] In my opinion, the allegations presented by the teacher warrant serious consideration and should not be overlooked or undervalued. It is imperative that an investigation is conducted to ascertain the underlying causes of such behaviour. I appreciate the fact that the two experts have prepared and signed a joint minute. I am also mindful that litigants should not be encouraged to repudiate agreements for

tactical reasons.⁵ However, I am of the view that the joint minute signed by the experts cannot be allowed to trump or supersede the best interests of the child.

[85] Simply put, a joint minute formulated by a panel of experts cannot take precedence over the best interests of the child. This consideration becomes particularly pertinent when new evidence emerges after the finalisation of the joint minute, which suggests that the implementation of the joint minute may compromise the child's welfare. More so, consistent with section 9 of the Children's Act, the standard prioritising the best interests of the child must be applied in all matters related to their care, protection, and well-being.

[86] In any event, the recommendations of a joint minute are no more than the experts' common opinion on a matter within their joint expertise and is merely part of the total body of evidence. The court must still determine whether to accept the joint opinion.⁶ The existence of that agreement between the experts will not ordinarily preclude evidence that qualifies or contradict their opinion, unless the case has been conducted based on the agreement and the admission of that evidence will prejudice the other party in a manner that cannot be cured.⁷

[87] The behaviour of WML at school after the sleepover at the applicant's home has not been disputed, reasonably so because the cause remains undetermined. It was not envisaged when the joint minute was completed and signed. WML's teacher has explained in detail WML's conduct after sleeping at the applicant's premises. The applicant impeaches the teacher's reports and alleges elements of bias against him. In my considered opinion, in the absence of concrete evidence that contradicts the claims made by WML's teacher, I am inclined to accept that the information provided by WML's teacher is more than adequate to support a conclusion that she has expressed her concerns in good faith and with WML's best interests as a priority.

[88] As correctly submitted by Mr Van Embden, the teacher has not sought to apportion blame to any party. Furthermore, the concerns she raised have been

⁵ *BEE v RAF* 2018 (4) SA 366 (SCA) at para 67.

⁶ *HAL O.b.O MML v MEC For Health, Free State* 2022 (3) SA 571 (SCA) at para 229.

⁷ *HAL O.b.O MML v MEC For Health, Free State* (*supra*) at para 229.

correctly determined by Mr Dowdall to require investigation. In my view, these allegations are serious and must be investigated. Even if it means that the experts or either party attend school after such a sleepover to confirm or refute the teachers' observations.

[89] I have noted the applicant's contention raised in the replying affidavit, however, I am of the view that in the absence of any evidence to the contrary, it would be irresponsible for this court to direct the implementation of the terms of the joint minute, as regards WLM's school night sleepover at the applicant's home, without first examining the issues that her teacher has raised regarding her conduct, which she records appears to manifest at school following the sleepover at the applicant's home.

[90] I must stress that the allegations raised by the teacher about WML's behaviour after sleeping over at the applicant's place are very concerning. In my judgment, given the evidence presented, it would be a serious failure of duty for this court to order the immediate implementation of the joint minute, considering the serious allegations raised by the teacher who spent significant time with the child at school. The request to postpone the implementation of the joint minute, as articulated in the counterapplication, should be granted until a thorough expert investigation is conducted to ascertain the underlying cause of the alleged behaviour. This prudent approach, in my view, will ensure that all relevant factors are thoroughly evaluated and that the interests of WML are more effectively safeguarded.

[91] Mr Pincus SC argued on behalf of the applicant in his written submissions that the suspension of the applicant's weeknight sleepover contact with WML may prejudice the applicant in the assessment by the family advocate, which is due to commence in March 2024 and that his contact with WML may still be suspended at that point in time and present a skewed picture to the family advocate as to the amount of contact the applicant enjoyed with WML. Respectfully, I do not agree with this proposition. The focus of the investigation must be on WML as opposed to the parties themselves.

[92] Furthermore, the applicant would still exercise contact with WML pending the investigation during weeks days. To the extent that the applicant is prejudiced with the postponement of implementing the joint minute, such prejudice is far outweighed by the potential prejudice to WML if the alleged behaviour is not investigated before implementing the weekly overnight contact on school nights in terms of the joint minute.

[93] Additionally, I do not expect that the investigation of WML's conduct would take a long time. At the hearing of this matter, the court was informed that Mr Dowdall had already commenced the investigation. In the interest of transparency and openness, I am of the view that it will be in the interest of both parties, particularly in the best interest of the minor child, that both Ms Pettigrew and Mr Dowdall should be appointed to conduct the proposed additional assessment and should agree on the scope and breadth of such assessment. Accordingly, after completing their assessments, both experts would be better placed to articulate their positions on whether WML's mid-week overnight contact with the applicant contributes to the alleged behavioural issue.

[94] The applicant must still maintain day contact with WML during school terms, pending the outcome of the investigation. I appreciate that the applicant has formed a strong bond as a loving father to WML. However, in a case like this, I am of the view that the court must err on the side of caution and direct that pending the implementation of the joint minute, an investigation be conducted to ensure that the best interest of WML is upheld. Significantly, the court must consider all relevant circumstances and ensure that the child's best interest is paramount. In *P and Another v P and Another*⁸, the court stated that the court does not look at sets of circumstances in isolation. The court stated:

“I am bound, in considering what is in the best interests of G, to take everything into account which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into

⁸ 2002 (6) SA 105 (N) at 110C-D.

account the possibility of what might happen in the future if I make any specific order.”

[95] While in *AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)*,⁹ the Constitutional Court endorsed the view that the interest of minor children should not be held at ransom for the sake of legal niceties.

[96] Consequently, I am of the view that the implementation of the joint minute should be postponed pending the investigation of the alleged behaviour of WML's conduct after sleeping over at the applicant's place.

Order

[97] Given all these considerations, the following order is granted:

Order regarding the Appointment of Dr Czeck

[98] Dr Konrad Czech, a forensic psychiatrist (“*Dr Czech*”), is appointed by the Court to finalise his psychiatric and drug abuse assessment and evaluation in respect of the First Respondent, and in terms of which he has produced two interim reports, dated 29 August 2024 and 4 November 2024. Dr Czeck is directed to provide his further report after the six-month urine testing period, referred to in paragraph 101 below.

[99] The Applicant's expert, Leigh Pettigrew (“*Pettigrew*”) and the First Respondent's expert, Terence Dowdall (“*Dowdall*”), may engage with Dr Czech in respect of his full psychiatric assessment of the First Respondent and the First Respondent's abuse of benzodiazepine and any other drug addiction provided that any such written communications (including all text and WhatsApp messages) with Dr Czech by either expert are immediately copied to the other expert.

⁹ 2008 (3) SA 183 (CC) at para 3.

[100] For the purpose of his assessment, Dr Czech is authorised to have the following powers and, in particular, may take the following steps to conclude his assessment and compile his further report;

100.1 ensure that his further report addresses any of the outstanding issues which might be raised by Pettigrew or Dowdall.

100.2 Conduct interviews with the Applicant, the First Respondent and the Second Respondent on reasonable notice and for reasonable periods.

100.3 Consult with both Pettigrew and Dowdall.

100.4 Consider the assessment reports of both Pettigrew and Dowdall.

100.5 Conduct interviews with any other relevant collateral sources on reasonable notice and for reasonable periods.

100.6 Subject to paragraph 101 below, administer random drug testing to the First respondent, without notice to the First Respondent.

100.7 To consider all other aspects relating to the First Respondent's drug abuse and full psychiatric assessment, as identified and or raised by Dowdall and or Pettigrew and addressed to Dr Czech in writing by Dowdall and or Pettigrew, withing 10 days of this order being granted.

[101] Pending the finalisation of Dr Czech's further report, the First Respondent shall undergo drug testing including benzodiazepine urine tests at an accredited pathology facility, twice weekly for three months and random testing thereafter for another three months, under the supervision of Dr Czech. The results shall be furnished to Dr Torline and Dr Czech immediately upon receipt of same by the First Respondent, and which results shall, if positive, be immediately shared with the parties' legal representatives and experts.

[102] Pending the completion of Dr Czech's further report, the legal representatives of the Applicant, the First Respondent and the Second Respondent may only communicate in writing with Dr Czech and any such written communications (including text and WhatsApp messages) shall be copied to all other legal representatives.

[103] Dr Czech's appointment by the Court shall not preclude any of the parties from calling him as an expert in the pending legal proceedings or preclude any of the parties' legal teams from consulting with Dr Czech once he has furnished his final report. However, the trial Court will make whatever rulings it deems necessary in relation to the receiving of Dr Czech's expert evidence.

[104] Subject to paragraph 105 below, Dr Czech's further report and its contents shall not be distributed, disseminated or published in any manner whatsoever (including on any social media platform) except for the purposes of the pending court proceedings.

[105] Dr Czech's further report shall be provided to this Honourable Court, Pettigrew, Dowdall, the Family Advocate and the respective attorneys of the parties.

[106] The Applicant shall pay to the First Respondent 50% of the costs incurred by the First Respondent to date, occasioned by the appointment of Dr Czech and the furnishing of his two interim reports. From date of this order all costs in respect of Dr Czech shall be payable by the Applicant and the First Respondent in equal shares.

[107] All questions of costs in respect of the appointment of Dr Czech shall stand over for determination in the main proceedings.

Order regarding the implementation of the Joint Minute

[108] The applicant's application to have the recommendations contained in the July 2024 Joint Minute of Leigh Pettigrew (*'Pettigrew'*), the educational psychologist and Terence Dowdall (*'Dowdall'*), the clinical psychologist in respect of the minor child WML is postponed to 13 March 2025 at 10h00;

[109] Pending the postponed date, the Applicant's contact in paragraphs 1.4. to 1.4.4 of the order of this court, granted on 13 June 2024 (*the June Order*) shall be substituted by the following:

[110] From the commencement of the 2025 school year:

110.1 On each alternate Wednesday from after school until 18h30 when first respondent or second respondent shall fetch WML from applicant's home;

110.2 On one weekend a month from after school on the Friday until the Sunday at 18h30;

110.3 On one weekend a month from 09h00 on the Saturday until the Sunday at 18h30.

110.4 Directing that the balance of the provisions of the June Order, relating to WLM, including provisions relating to applicant's holiday contact with WLM, shall remain in full force and effect.

[111] The Applicant and the respondents shall cooperate with Dowdall and Pettigrew, or the relevant child care expert that the Applicant may want to appoint, for the purpose of the experts assessing and considering the underlying cause of WML's conduct (as indicated by her school teacher) and to enable them to make recommendations in respect of how best to address such conduct including, but not limited to the nature of and extent of Applicant's contact arrangements that will serve WML's best interests.

[112] The Applicant and the Respondents shall cooperate in the assessment and facilitate the observation of WML in their respective homes. This observation will include WML's interactions with the Applicant, the Respondents, the carers, and/or the Applicant's children for the purposes of the assessment by the two experts.

[113] The two experts shall provide their reports alternatively, interim reports on or before 28 February 2025.

[114] The two experts shall meet and produce a joint minute within 10 days of the reports being finalised, in which Minute they will record the issues on which they agree and the issues on which they do not agree and shall record such recommendations in respect of Applicant's conduct on which they agree. For judicial oversight purposes, the duly signed joint minute shall be submitted to the court for consideration on the postponed date.

[115] The parties' legal representatives shall meet at the earliest possible opportunity thereafter for the purposes of attempting to resolve the matter based on the recommendations contained in the joint minute, alternatively to agree on the filing of any further papers in the matter for the purposes of hearing on 13 March 2025.

[116] The costs of the application for the implementation of the joint minute and the counterapplication shall stand over for later determination.

LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Mr Pincus SC

Instructed by: Bertus Preller (Maurice Phillips Wisenberg Attorneys)

For the first Respondent: Mr Van Embden SC

Instructed by: Rael Goodkin (Werksmans Attorneys)

For the Second Respondent: Ms McCurdie SC

Instructed by: Elana Hannington (Norman Wink Stephens Attorneys)

