



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 15202/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES.

DATE: 16 January 2024



In the matter between: -

KKA

Applicant

and

KNT

Respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 16 January 2023.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] This application in terms of rule 43(6) came before me as a special allocation. It concerns an applicant father's contact with his minor daughter, who is presently 7 years old.

[2] On the 10th of September 2020 Crutchfield J granted the following rule 43 order *pendente lite*: -

"1. That the applicant and the respondent remain coholders of all parental responsibilities and rights in respect of the minor child, P.

2. That primary residence of the minor child shall remain with the respondent subject to the applicant's rights of contact with the minor child as follows:

2.1 Telephonic contact or contact by other audio means, between the hours of 18:00 and 18:30 which contact shall be facilitated and monitored by the respondent;

2.2 The telephonic contact shall take place on every alternate weekday, which will commence on 11 September 2020;

2.3 Contact every weekend on either a Saturday or a Sunday, alternating between the hours of 10:00 and 12:30 commencing on the 19th of September 2020;

2.4 Contact on one weekday each alternate week, between the hours of 16:00 to 18:00, such day to be arranged between the parties and the social worker. This weekly contact will commence from 11 October 2020."

[3] The order further provided for:

- 3.1 the appointment of a social worker who would supervise the applicant's contact and interdicted the applicant from *inter alia* discussing anything regarding an alleged incident that occurred on the 7th of March 2020 involving the minor child.
- 3.2 the automatic termination of the contact if the applicant was arrested or charged by the South African Police Services arising from the alleged incident of 7 March 2020.
- 3.3 either of the parties who may approach the court to vary the terms of the order by supplementing the affidavits filed of record, which the applicant has now done by way of this application ("**the application**") before me.

[4] The applicant seeks, *inter alia*:

- 4.1 unsupervised midweek, weekend and holiday contact, which include sleepovers;
- 4.2 an order entitling him to attend all school functions, school events, parent/teachers meetings, church activities and extracurricular activities in which the minor child participates;
- 4.3 an order directing the respondent to cooperate with the inquiry of the Family Advocate and to ensure that the minor child attends such inquiry;

4.4 the appointment of Dr Robyn Fasser ("**Dr Fasser**") to conduct an investigation into the best interests of the minor child and to provide the parties and the court with her written report setting out her opinions, findings and recommendations regarding the exercise by the parties of their parental responsibilities and rights, including those of care and contact in respect of the minor child.

- [5] As an alternative, the applicant seeks an order that the supervised contact, should it continue, be either at a child-friendly venue or at the applicant's place of residence.
- [6] The respondent seeks a dismissal of the application with costs on a punitive scale. The respondent asserts that should the court find it necessary for an expert to be appointed, then it should be Prof Gertie Pretorius mandated to assess the minor child to ascertain what really happened to the minor child in relation to the events of the 7th of March 2020.
- [7] When the applicant enrolled the application on the ordinary Rule 43 roll on 12 June 2023, the respondent brought an application to postpone the rule 43(6) application. In addition, she applied for condonation for the late filing of her sworn opposing affidavit. Both the postponement and condonation application was opposed and answering papers were filed. However, the parties agreed to postpone the application to another date and to the late filing of the respondent's opposing papers. Costs occasioned by both applications were reserved for later determination.

ISSUED TO BE DETERMINED

[8] This court has thus been called upon to determine the following issues: -

[8.1] Whether a material change in circumstances exists that justifies a variation of the Rule 43 order.

[8.2] Whether the order granted by Crutchfield J should be varied in the manner claimed by the applicant;

[8.3] Whether Dr Fasser should be appointed to investigate the best interests of the minor child;

[8.4] Whether the respondent should be directed to operate with the Family Advocate and to make the minor child available for attendance at the office of the Family Advocate;

[8.5] Whether Prof Pretorius should be appointed to assess the minor child with a view to ascertaining what really happened to the minor child in relation to the events of the 7th of March 2020;

[8.6] Who should bear the costs of the application in terms of rule 43(6), and of the postponement and condonation applications.

THE FACTS

[9] The parties were married to each other on the 1st of October 2015 out of community of property with the application of the accrual system.

- [10] One minor child, a girl was born of the marriage on the 13th of December 2016.
- [11] The applicant instituted a divorce action against the respondent during July 2020. It is opposed and still pending. A trial date has as yet not been allocated.
- [12] On the 7th of March 2020 the applicant and the minor child visited the applicant's brother, family members and others.
- [13] On the 8th of March 2020 the respondent informed the applicant that the minor child had made a report of abuse of a sexual nature as a result of which she was taken to a general practitioner and by her treating paediatrician.
- [14] The applicant continued to exercise contact with the minor child from 9 March 2020 to approximately 18 March 2020 by collecting her from school and spending time with her. From 18 March 2020 until the order was granted by Crutchfield J, the applicant exercised no physical contact with the minor child.
- [15] The police investigation was completed and the docket was sent to the office of the Director of Public Prosecution ("**DPP**"). The DPP declined to prosecute on the basis that there was no reasonable prospect of a successful prosecution.
- [16] The respondent did not accept the decision of the DPP and instituted review proceedings.

- [17] On 1 June 2023 the National Prosecuting Authority ("**NPA**") advised that it had called for the docket and the reasons for the DPP declining prosecution. The NPA received the DPP's report as well as copies of the case docket on 30 August 2023.
- [18] On the 5th of October 2023, after the hearing of this application the NPA advised that it decided, after careful consideration of the evidence, not to proceed with charges against the applicant.

THE APPLICANT'S CASE

- [19] It was the applicant who applied to court for supervised contact "*out of caution and to prevent any allegations of improper conduct on [his] behalf*".
- [20] The respondent alleged that the applicant was a suspect because the minor child "*indicated that the applicant was fully aware of what occurred on the 7th of March 2020 at D's home*".
- [21] The applicant was not present when the minor child was examined by the general practitioner, but he met with the doctor together with the respondent after the examination. The doctor told them that there was no physical evidence of sexual abuse, but that as a matter of caution the minor child would be prescribed antiretroviral medication.
- [22] On the evening of 8 March 2020 the parents agreed to take the minor child to her treating paediatrician for a second opinion as they were both concerned about the effect of antiretroviral medication on the minor child.

- [23] Pursuant to the events of 7 March 2020, the applicant continued to collect the minor child from school on Monday, 9 March 2020 and until 17 March 2020. This position changed when on 18 March 2020 the respondent failed to answer telephone calls from the applicant and thereafter refused to allow any contact to the minor child.
- [24] Prior to 18 March 2020, the applicant cared for the minor child each afternoon during that period. After 8 March 2020 and until the applicant's physical contact was terminated about a week later, the minor child showed no signs of trauma, made no disclosures to the applicant that she had been hurt by any third party and made no reference to any incident that had occurred on 7 March 2020.
- [25] On 8 March 2020 the respondent opened a criminal complaint at the local police station. The applicant was informed that the complaint related to the minor child's alleged sexual abuse on 7 March 2020 whilst in his care and visiting the home of the applicant's brother.
- [26] The applicant gave a witness statement to the South African Police Service ("**SAPS**") and witness statements of the applicant's brother, sister-in-law, the domestic helper and their three children were taken. The names and contact details of the applicant's brother's two friends were also provided to the SAPS. Both of the friends were interviewed as witnesses and witness statements were taken during about June 2022. The applicant agreed to and underwent a polygraph test on 1 June 2022.
- [27] The applicant asserts that the minor child has never alleged that the

applicant sexually abused her or physically harmed her. The respondent has refused to provide any details of the police investigation to the applicant or to discuss any aspect of the minor child's care with him.

[28] The applicant requested the Family Advocate to convene an inquiry. On 23 June 2022 the respondent advised through her attorneys that she was not willing to submit to any investigation by the Family Advocate and that the minor child could not be exposed to any investigation by any person or official who was not a SAPS expert before the criminal investigations and proceedings have been finalised.

[29] On 1 July 2022 the Family Advocate advised that they had no jurisdiction to proceed with the inquiry and closed its file. On 11 July 2022 the applicant's attorney requested written reasons for this finding. The respondent's attorney stated her position in writing.

[30] On 2 August 2022 the investigating officer advised that the applicant was no longer seen as a person of interest. The respondent objected to the position taken by the investigating officer.

[31] On 19 August 2022 the Family Advocate addressed a letter to both parties' representatives and advised that an inquiry had been rescheduled for 12 October 2022. Notwithstanding the respondent's objection, the Family Advocate advised that it had the requisite jurisdiction and that an appointment would be rescheduled. The rescheduled date provided to the parties was 20 February 2023. The applicant attended the inquiry. Neither the respondent, nor the minor child were in attendance.

- [32] During September 2022, after a further seven months had elapsed with no conclusion being reached and with no evidence that the minor child was assaulted or sexually abused, the investigating officer advised that he would seek direction from the senior public prosecutor. After this was done, the investigating officer advised that another social worker would be appointed to interview the minor child.
- [33] During October 2022 the respondent opened a criminal case of contempt against the applicant and the supervising social worker. The basis of her complaint as appeared from her affidavit was that the appointed social worker for supervised contact had left the applicant outside their practice alone with the minor child, which the respondent had seen when she arrived to collect the minor child on 3 October 2020. The investigating officer took a full statement from the applicant and the social workers. Nothing came of the complaint.
- [34] On 4 October 2022 the respondent alleged that the social workers and the applicant had breached the order in that they removed the minor child from the premises of the social workers and took the child to the applicant's home.
- [35] On 6 October 2022 the social worker responded to the allegations and confirmed that at no point in time did they leave their premises with the child.
- [36] The applicant concludes that his rights and responsibilities towards the minor child are ignored by the respondent.

[37] During October 2022 the parties' legal representatives discussed the appointment of a forensic psychologist to conduct an assessment regarding the best interests of the minor child insofar as parental responsibilities and rights are concerned, but, although an assessment was agreed to in principle, the respondent expressed reservations as she was concerned that an assessment or investigation might interfere with or compromise the SAPS investigation.

[38] On 8 November 2022 Prof Kruger, the attorney for the applicant, wrote to Dr Fasser, copying the respondent's attorney, in which Dr Fasser was requested to indicate whether in her professional expert opinion a forensic assessment would in any manner compromise the investigation by the SAPS.

[39] Dr Fasser replied that there would be no compromise of the police investigation if she were to conduct a forensic investigation or *vice versa*. She stated: -

"In my opinion I do not think that an investigation into care and contact running parallel to a police investigation compromises the police investigation or vice versa.

I have done this before and the type of assessment I would conduct would not replicate what I assume would be the kind of assessment that the police or a social worker would administer in a sexual abuse investigation." (emphasis added)

[40] Despite Dr Fasser's advices, the respondent on 9 November 2022 instructed her attorney to advise that she did not agree that Dr Fasser

should conduct a forensic assessment, because the respondent persisted that Dr Fasser's assessment would compromise the police investigation.

[41] The applicant complains that the current supervised contact regime is artificial, restrictive and frustrating to the minor child and deprives her of her right to enjoy contact in more natural circumstances and in a more natural environment. The applicant told the court that the minor child is upset when told that the contact is to end and has to be prepared in advance for contact to end. On several occasions the minor child has had a temper tantrum when told that contact must end and on one occasion she even threw her shoes over the Durawall to the next-door neighbour's house in protest. The minor child has constantly asked to visit the applicant at his home and to sleep over, which causes the applicant to come up with excuses why it is not possible.

[42] The minor child has also repeatedly asked the applicant to come watch her swim at her school and to participate in a play and athletics. She also has repeatedly asked why the applicant no longer collected her from school as he used to and take her home as he used to.

[43] The applicant complains that during video calls the minor child is monitored and there is always someone in the room who distracts her. The device is placed on a stand in front of a pink curtain in the corner of a room. The minor child is distracted by the presence of a third party in the room. The child looks for approval from this third party every time she responds to the applicant. The applicant stated that the minor child is sometimes enticed to end the call prematurely by being told that she is going to be left behind

when the others go to the shops or elsewhere.

- [44] The respondent refuses to engage with the applicant concerning the minor child's schooling. This was confirmed in a letter dated 7 December 2022 written by the respondent's attorney: -

"... Your client appears to believe that because a letter was written (inappropriately as it happens) in which he is alleged not to be a person of interest in respect of the abuse of his child that he is freed of responsibility in the matter and that he is entitled without more to the rights and responsibilities of the child's parents in accordance with our law. This is wrong."

- [45] The Family Advocate completed a report dated 6 April 2023 in respect of the meeting with the applicant in which he concluded in paragraph 36 thereof that: -

"In the current matter, the undersigned is unable to make a recommendation as only the plaintiff could be interviewed as a result of the defendant's non-participation in the process."

THE RESPONDENT'S CASE

- [46] The respondent averred that there has been no material change in circumstances as required by Rule 43(6).

- [47] The respondent stated that although the police investigation has been completed, she does not accept the outcome, hence the review. The respondent argues that the fact that the police investigation has apparently been completed does not change the circumstances at all as there has been

no definitive determination of what the involvement of the applicant was, if any, on 7 March 2020.

[48] The respondent asserted that once the DPP has issued a certificate of *nolle prosequi*, she intends to take the matter further as she has been advised that it is possible for the perpetrators of the acts against the minor child on 7 March 2020 to be pursued through a private prosecution in the courts in circumstances where the State has declined to do so.

[49] The respondent stated that she was advised that an investigation by a psychologist or the Family Advocate prior to a criminal trial will compromise the determination of the true facts and be confusing for and detrimental to the minor child. It is for this reason that she denies that any grounds exist for the appointment of a psychologist to investigate the best interests of the minor child.

[50] Furthermore, the respondent expressed the belief that any investigation that occurs in relation to the minor child and the applicant would constitute an interference in a criminal trial relating to the minor child's allegations of sexual abuse.

[51] In the final instance the respondent proposed that Prof Gertie Pretorius be appointed to carry out an assessment of the minor child with a view to ascertaining what really happened to her in relation to the events of 7 March 2020 and the involvement, if any, of the applicant therein and for her to make recommendations to the court about the presentation of the minor child's evidence in a manner appropriate to limit the trauma to the

minor child of having to recount the events of 7 March 2020.

- [52] The respondent disputes the applicant's description of the events surrounding the medical examinations of the minor child. The respondent denies having laid a criminal complaint against the applicant and states that it must have been the medical practitioner who first examined her who is statutorily required to do so.
- [53] The respondent denies all allegations that the minor child's contact with the applicant is frustrated in any way.
- [54] The respondent brought an application in terms of rule 43(5) for leave to file a further affidavit. In her application the respondent told this court that the forensic social worker in the employ of the South African Police Service conducted an assessment of the minor child during the course of the investigation into the events that occurred on 7 March 2020.
- [55] During the course of a telephonic conversation between the SAPS social worker and the respondent on 12 June 2023, the respondent recorded the conversation. She attached a translated transcription. Neither the translation nor the transcription was attended to by a sworn translator or reputable and independent transcriber.
- [56] The respondent stated that from the content of the conversation it is apparent that the minor child disclosed incriminating evidence to the SAPS social worker regarding the sexual assault and that the applicant was complicit in facilitating the assault, if not an active participant. Apparently the SAPS social worker told the respondent that there had been a statement

in the police docket, drafted by the SAPS social worker in the minor child's own words to the effect that the applicant told her to go to the bedroom with the perpetrator.

[57] It was alleged that the statement had been removed from the docket which is the main reason why the decision was taken not to prosecute the applicant. This is according to the respondent.

OBJECTION TO AFFIDAVIT IN TERMS OF RULE 43(5)

[58] The applicant opposed the respondent's application for leave to adduce a further affidavit. He opposed the application on the following grounds: -

59.1 The allegations relating to the SAPS social worker are hearsay, have no probative value and no weight can be attached to such allegations. It is not in the interest of justice that the court admits such hearsay evidence;

59.2 The alleged transcript of a partial conversation alleged to be between the SAPS social worker and the respondent is not a comprehensive and full transcript of the conversation, there is no proof that it is accurately transcribed by an independent third party, there is no proof from an independent third party that the translation is accurate and no weight can be attached to the transcription;

59.3 The hearsay evidence alleged to emanate from the SAPS social worker was known to the respondent prior to the delivery of her

replying affidavit;

59.4 The allegations made by the respondent as to the reason why the DPP declined to prosecute are speculate and in fact contradictory to the allegations made by the respondent in her replying affidavit.

[59] The applicant alleges that the respondent is not *bona fide* in that she seeks to introduce without any context as to time or place an additional allegation which is at variance with the allegations set out in the rule 43 application and in the replying affidavit.

[60] As far as the alleged missing statement from the docket is concerned, the applicant denied that the minor child could have written the words as alleged by the speaker in the transcription because she cannot write in the manner alleged if she was only 6½ years of age. The applicant denied that he told the minor child to go to the bedroom with the perpetrator.

EVENTS SUBSEQUENT TO THE HEARING OF THIS APPLICATION

[61] It is common cause that during the hearing of this application there was still no outcome regarding the review process. The parties were requested to keep the court apprised of any developments in this regard.

[62] For the sake of transparency, all subsequent correspondence exchanged with my then registrar regarding the NPA review is set out in this judgment.

[63] On 13 October 2023 Prof Kruger, copying Mr Holtmann (the respondent's attorney), addressed correspondence to my registrar and attached a copy

of a letter received from the NPA. The letter from the NPA is dated 5 October 2023 and emanates from the offices of Adv De Kock. The letter reads as follows: -

"Your representations on the aforementioned subject refers.

Kindly be informed that the National Director of Public Prosecutions (NDPP) has delegated the authority to decide on matters such as this to the head of the National Prosecution Service (NPS) of the National Prosecuting Authority, thus this response from my office.

This office has received reports from both the Director of Public Prosecutions, Gauteng North Local Division (DPP), and the Special Director of Public Prosecutions of the Sexual Offences and Community Affairs Unit (SOCA). A copy of the police docket was made available to this Office, and the aforementioned considered holistically, taking cognisance of the content of the issues raised in the representations submitted.

I have decided, after a careful evaluation of the evidence, not to proceed with the charges against your client."

[64] Pursuant to the email from Prof Kruger and the letter from Adv De Kock (from the NPA), a Mr Sydney Tyobeka saw it appropriate to address correspondence to my registrar which reads as follows: -

"Good day

Kindly note that the letter that was forwarded to you on the 13 October 2023 as having been authored by Adv R J de Kock is possibly forged. I have received a similar letter (attached as annexure "LTR"), which I am in the process of having investigated. I also attach another letter from my previous communication with Adv De Kock, which has the authentic signature (annexure "C")."

[65] Upon receipt of the aforesaid email I requested my registrar to address the following email to the parties: -

"Pursuant to the letter from the NPA dated 5 October 2023, the below-mentioned email was received from a non-party. The email correspondence is forwarded to the parties for the sake of transparency. Kindly note that the judge will not engage with or entertain any correspondence that have been addressed a by non-party or the parties' legal representatives."

[66] On 26 October 2023 the respondent personally addressed an email to my registrar, which reads as follows: -

"Good day

I wish to confirm that I fully understand and respect the esteem judge's concerns regarding the appropriate handling of correspondence related to the NPA matters. In compliance with your guidance, I will personally ensure that any further information required from my father, Mr Sydney Tyobeka, concerning these matters, will be directed to me initially. I will then review and forward all relevant information to your office.

I apologise sincerely for any inconvenience or misunderstanding the previous method of correspondence might have caused. I shall also forward all previous correspondence to you under separate email."

[67] The applicant's attorneys were not copied in on this correspondence.

[68] The further correspondence that were forwarded by the applicant were as follows: -

[68.1]The email from the Ethics and Fraud Hotline dated 25 October 2023,

acknowledging receipt of the disclosure and that it has been reported to the NPA. A reference number was provided;

[68.2] An email dated 25 October 2023 from Mr Sydney Tyobeka, again addressed to my registrar, where he provided proof of the steps that have been taken regarding the letters that were flagged.

[69] On 27 October 2023 Prof Kruger addressed a letter to Adv De Kock. The respondent's attorney was copied in. In essence, the letter brought to Adv De Kock's attention the allegation of forgery.

[70] On 6 November 2023 the respondent addressed further correspondence to my registrar stating as follows: -

"Good day

See below, email correspondence from NPA representations.

- 1. This is the response from representations after they were alerted of the ethics and fraud investigation by attorney P Kruger. I believe it should not be taken at face value.*
- 2. The ethics and fraud division has not confirmed the contents conveyed by this letter, dated 2 November 2023, neither has the process that has been initiated by the ethics and fraud division been completed."*

[71] Attached to the email was a letter addressed by Adv De Kock to Mr Sydney Tyobeka on 2 November 2023 wherein he stated the following: -

"I hereby acknowledge receipt of the abovementioned communication, the content of which is noted.

Your complaint in respect of alleged forgeries of the letters emanating from this office has been investigated.

In response to your allegations, please be advised as follows:

- 1. Annexures "CFNPA1", "CFNPA2", "CFNPA3" which were addressed to you was, not signed personally by me, but by a member of my staff who was authorised to sign on my behalf;*
- 2. Annexures "LTR" and "LTA" addressed to you and Prof Kruger, was signed personally by me. These two letters convey by decision in respect of the review of the DPP's decision to decline to prosecute.*

As conveyed to you in my letter dated 5 October 2023, I have confirmed the decision of the Director of Public Prosecutions, Gauteng Division, to decline to prosecute.

The matter is regarded as finalised and this office proceeds to close its file."(emphasis added)

APPLICATION OF RELEVANT LEGAL PRINCIPLES TO THE FACTS

The best interests standard

[72] The principle that in all matters concerning a child the best interests of such child are paramount is entrenched by the Constitution and repeated in section 7 of the Children's Act, 38 of 2005 ("**the Children's Act**").

[73] The factors set out in section 7 of the Children's Act do not exist in a vacuum as each case is different and the court is enjoined to take into account the context and facts of each particular matter in order to determine the best

interests of the child.¹

[74] The discretion of the court when considering its decision as to the best interests of a child is unique, not circumscribed in the narrow or strict sense of the word and requires no onus in the conventional sense.²

[75] As was stated in *Cunningham*³: -

*"What is required is that the court acquires on an overall impression and brings a fair mind to the facts set out by the parties. **The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed facts and opinion, in the final analysis structured value judgment about what is considered will be in the best interests of the minor child.**"*⁴(emphasis added)

The further affidavit

[76] Therefore litigation concerning the best interests of a minor child amounts to a judicial investigation in which strict adherence to technical procedural requirements and technical procedural objections may undermine efforts to determine the best interests of the child.⁵

[77] As a court sitting as upper guardian, it is trite that I have very wide powers in establishing what is in the best interests of a minor child which includes

¹ *Cunningham v Pretorius* [2008] ZAGPH 258 (21 August 2008).

² *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at paragraph [17].

³ See footnote 1 *supra* for the citation.

⁴ Paragraph [9].

⁵ *Jackson v Jackson* 2002 (2) SA 303 (SCA) at paragraph [5].

recourse to any source of information, of whatever nature, which may be able to assist this court in resolving care, contact and related disputes.⁶

[78] Accordingly, in the best interests of the minor child concerned, the respondent's application for leave to file a further affidavit is granted and the further affidavit is permitted into evidence. The weight that is to be attached to the evidence is of course a different matter altogether.

[79] The transcription provided by the respondent was not attended to by a sworn transcriber or translator. The call was at some stage interrupted. This the respondent conceded. There is no evidence before me that the participants to the call were in fact who the respondent says they were. One would at the very least have expected to see a confirmatory affidavit by the other participant to the call. This was not done.

[80] The admissibility of all hearsay rests on the twin pillars of trustworthiness and necessity.⁷ As was stated by Zeffert *et al*:⁸

"The higher the probative value of the evidence, and the more difficult and costly it would be to procure the actor or declarant as a witness, the greater the need to receive the evidence."

[81] Upon considering the various authorities of what the courts consider an acceptable explanation to be, it becomes clear that such evidence is only

⁶ *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504C.

⁷ Wigmore on Evidence at para 1420; *Hewan v Kourie NO and Another* 1993 (3) SA 233 (T) at p. 237-238.

⁸ Zeffert & Paizes; *The South African Law of Evidence* (Second Edition) at p. 408.

allowed in extraordinary circumstances such as death⁹, physical or mental incapacity¹⁰, or a fear of violent reprisals¹¹.

[82] In the matter of *Padongelukkefonds v Van den Berg en 'n Ander*¹² the applicant's founding affidavit contained hearsay evidence furnished by someone with whom the applicant's legal representative had consulted, but no reasons were given as to why no statement from that person had been included in the papers. The evidence was not permitted.

[83] Even if the best reasons are furnished a court must still be satisfied that the requirements of section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988, have been met.

[84] In this matter there is no explanation why the SAPS social worker did not depose to an affidavit confirming the existence of the statement and that it had been removed from the docket. No foundation was laid in the further affidavit why this evidence should be allowed and even if it had, very little weight can be attached to it as the court cannot ignore the fact that the NPA had carefully considered everything that it had received from the DPP and that if there was proof of the removal of any evidence, the NPA would have had this issue investigated.

⁹ S v Mbanjwa and Another 2000 (SACR) 100 (D) at 113e.

¹⁰ The Civil Proceedings Evidence Act 25 of 1965; section 34(1)(b).

¹¹ S v Hlongwane 1989 (3) SA 318 (D) at 325I-J.

¹² 1999 (2) SA 876 (O).

MATERIAL CHANGE IN CIRCUMSTANCES

[85] What constitutes a material change in circumstances is not defined by the rules nor by the various reported and unreported authorities that I have considered. And for good reason. It allows a court faced with such an application to apply the rule expansively and being mindful of the Constitutional dispensation of our country as a court is entitled to do and as was stated by the Constitutional Court in *S v S*¹³:

"In addition, there is no reason why rule 43 should not be expansively interpreted as some courts have already done."

[86] It is not surprising that the Constitutional Court expressed the *obiter* view that Rule 43 may be wanting in certain respects and that there may well be grounds for a review of rule 43(6) in the future to include not only changed circumstances but also "exceptional circumstances".¹⁴

[87] In *Dodo v Dodo*¹⁵ the court held that there was no reason why special circumstances should not justify a deviation from the norm where the complexities are unusual. I align myself with this decision as it certainly cannot be argued with any conviction that the facts and issues before me are not extraordinary.

¹³ *S v S and Another* 2019 (6) SA 1 (CC) at par. [56].

¹⁴ Par. [53].

¹⁵ 1990 (2) SA 77 (W) at 79B – D.

[88] It is has been more than three years since the police investigations commenced and despite a review process initiated by the respondent, the DPP has decided not to prosecute and has closed its file. Moreover, there is not one iota of evidence identifying the applicant as the perpetrator or linking him to the commission of a crime against the minor child. This, in my view, constitutes a material change in circumstances as contemplated by the provisions of Rule 43(6).

[89] More than 27 months have passed after the respondent first laid a complaint, no suspect had been identified.

[90] The minor child allegedly had been subjected to three interventions by social workers over a period of three years, including empowerment sessions without any outcome.

[91] It is enough now. This child needs both her parents in her life despite their differences.

CONTACT

[92] Having carefully considered the evidence, I find that there exists no factual basis upon which a court can continue to impose severely limited contact between the applicant and the minor child. However, the court is cognisant of the fact that the minor child has not enjoyed any sleepover contact or spent any longer than two hours every week (with two more hours every alternating week) for the past three years. Bearing this in mind, it would be in the best interests of the minor child that any unsupervised contact that may be reintroduced, should be phased in over a reasonable period of time

to ensure that the minor child adjusts without any difficulties. The order that I intend to make, will provide for a transition period.

- [93] In addition to the phased-in contact, it would serve the minor child's interests to commence therapy with a reputable child psychologist, not only to assist her with the contact adjustment but to provide her with useful tools to cope with the divorce of her parents and the effects that has on how she perceives her world. Hence, the order will provide for the appointment of a therapist for the minor child.

THE APPOINTMENT OF AN EXPERT

- [94] The expression "*expert witness*" is ordinarily used to refer to a witness whose opinions and the reasons on which they are based are admissible in evidence as his/her knowledge and experience on some or other subject matter enables such a witness to draw inferences and form views and circumstances where a court is unable to do so reliably, unless it receives assistance or guidance from someone with expertise on the relevant subject matter or in that particular field.¹⁶

- [95] Various facets of what an expert is have been reiterated in judicial pronouncements over the years. The prime function of an expert witness is "*... to guide the court to a correct decision on questions falling within his specialised field. His own decisions should not, however, displace that of*

¹⁶ George Coleman QC *Cross-Examination: A Practical Handbook*, Juta & Co Ltd, 1st edition at 197.

the tribunal which has to determine the issues to be tried...".¹⁷

[96] In *Stock*¹⁸ Diemont JA at 129G said as follows: -

"An expert in the field of psychology or psychiatry who is asked to testify in a case of this nature, a case in which difficult emotional, intellectual and psychological problems arise within the family, must be made to understand that he is there to assist the court. If he is to be helpful he must be neutral."

[97] Dr Fasser's role as an expert psychologist is to give her opinions, findings and recommendations regarding the exercise by the parties of parental responsibilities and rights. She is not the trier of fact.

[98] Notwithstanding all the respondent's protestations that the minor child should not be subjected to an assessment by either the Family Advocate or an expert, the respondent proposes that Prof Pretorius be appointed to assess the minor child in order to ascertain what really happened to her in relation to the events of 7 March 2020 and to make recommendations to the court about the presentation of the minor child's evidence. The assessment that the respondent has in mind, is exactly the kind she alleges would interfere with police investigations or private prosecutions. I therefore find the respondent's objection to Dr Fasser's appointment and investigation without justification.

[99] The facts remains that the NPA has declined to prosecute and there are no

¹⁷ *S v Gouws* 1967 (4) SA 527 (E) at 528D-F.

¹⁸ *Stock v Stock* 1981 (3) SA 120 (A) at 129E-F.

criminal proceedings pending as envisaged in section 76(1) of the Criminal Procedure Act, 51 of 1977 that may have perhaps precluded unsupervised contact or an investigation by Dr Fasser.

[100] The same goes for an investigation by the office of the Family Advocate. I reiterate that the purpose of and role performed by the office of the Family Advocate in disputes involving minor children cannot be overstated.¹⁹ In 2003, this Court in *Soller*²⁰ aptly described the position of the Family Advocate as follows: -

*"..the Family Advocate, as required by legislation, reports to the court on the facts which are found to exist and makes recommendations based on professional experience. In so doing the Family Advocate acts as an advisor to the court and perhaps as a mediator between the family who has been investigated and the court."*²¹

[101] In *Terblanche*²² the court described Family Advocates as:

"..particularly well equipped to perform such functions and duties, having at his or her disposal a whole battery of auxiliary services from all walks of life, including family counsellors appointed in terms of the Act and who are usually qualified social workers, clinical psychologists, psychiatrists, educational authorities, ministers of religion and any number of other persons who may be cognisant of the physical and spiritual needs or problems of the children and their parents or guardians, and who may be able to render assistance to the Family Advocate in weighing up and evaluating all relevant facts

¹⁹ ST v BN and Another 2022 JDR 0272 (GJ) par [108].

²⁰ *Soller N.O. v G and Another* 2003 (5) SA 430 (W).

²¹ At p 437.

²² *Terblanche v Terblanche* 1992 (1) SA 501 (W).

and circumstances pertaining to the welfare and interests of the children concerned."²³

[102] The facts remains that the parties cannot agree on residency and contact.

An objective investigation and recommendation is therefore imperative in order to assist the court ultimately in finding what arrangements would serve this child's best interests. I am accordingly inclined to grant the applicant the relief that he seeks for the appointment of Dr Fasser and a referral to the Family Advocate.

COSTS

[103] The granting of costs orders in Rule 43 applications are rare, but not entirely unheard of. However, courts are usually, and correctly so in my view, mindful not to mulct parties in costs, especially when both parties were *bona fide* in their approach to court. It is also important not to punish a party in Rule 43 proceedings, which are by their very nature interim in nature, as in doing so a Court may unintentionally create a false impression in the minds of the parties that the winner and loser in the divorce action has been determined and may discourage those parties who desperately need interim relief, to approach the court.

[104] In my view, neither party acted unreasonably. I therefore do not intend to grant a costs order against any party in the Rule 43(6) application.

[105] As far as the costs occasioned by the condonation and postponement

²³ At 503E - I.

application are concerned, I find that applicant was entitled to enrol the application, but should have allowed the respondent to file her papers, whereas the respondent was entitled to be heard, but ought to have complied with the time periods for filing so as not to delay the hearing. In a way they have only themselves to blame for the incurrence of unnecessary costs. Awarding a costs order against a party will only add to the acrimony and will not serve the minor child's best interests. It is hence my order that each party will pay their own costs in respect of these applications.

[106] **ORDER**

I accordingly grant an order in the following terms: -

1. Paragraphs 2, 3, 4 and 5 of the order granted by Crutchfield, AJ on 10 September 2020 are substituted in their entirety with this order.
2. *Pendente lite* the applicant shall be entitled to reasonable rights of contact to the minor child, as follows: -

2.1 For the remainder of January 2024 until 29 February 2024, the applicant shall exercise supervised contact with the minor child by the already appointed social worker at either a child-friendly venue or at the applicant's place of residence, such contact to be exercised as follows:

2.1.1 Every weekend on either a Saturday or a Sunday, alternating between the hours of 10:00 and 12:30 commencing on the 20 January 2024;

2.1.2 Contact on one weekday each alternate week, between the hours of 16:00 to 18:00, such day to be arranged between the parties and the social worker. This weekly contact will commence from the date of this order.

2.2 The social worker shall in her sole discretion determine the manner of collection and return of the minor child.

2.3 The costs occasioned by the supervision shall be shared equally by the parties.

2.4 From the 1st March 2024 onwards, the applicant shall exercise unsupervised contact with the minor child as follows:

2.4.1 In the first week of every two-week cycle during school term time from Friday after school when the applicant shall collect the minor child from school until Sunday, 17h00 when the applicant shall return the minor child to the respondent's home;

2.4.2 In the second week of every two week cycle during term time on a Wednesday from after school when the applicant shall collect the minor child from school until Thursday morning when the applicant shall return the minor to school;

2.4.3 Daily unsupervised telephonic contact and contact by other audio-visual means between the hours of 18h00 and 18h30 on the days that the applicant does not have physical contact with the minor child;

2.4.4 On every school day the applicant shall collect the minor child from her home and take her to school. Should the applicant, for any reason be unable to do so, he shall give the respondent reasonable and timeous notice of his inability to do so.

2.4.5 Holiday contact of two separate periods of 5 (five) consecutive days and 5 (five) consecutive nights during the winter school holidays in June/July 2024 and annually thereafter and two periods of 7 (seven) consecutive days and 7 (seven) consecutive nights during the December/January school holidays in 2024/2025 and annually thereafter. The first period in December 2024 shall commence on the first Saturday after school closes and the second period shall commence on 23 December 2024 at 09h00 and shall terminate on 30 December 2024 at 09h00;

3. In addition to the contact provided for above, the applicant shall be entitled to attend all school functions, school events, parent/teachers meetings, church activities and extracurricular activities in which Penyai participates in irrespective of whether same fall during his usual contact period;
4. The applicant shall be entitled to receive from the school attended by the minor child all reports relating to her and all information pertaining to her extramural activities, school functions and the like and the respondent shall notify the school accordingly;
5. In the event that either party intends to remove the minor child from her

usual place of residence for a holiday, such parent shall on request provide the other parent with full particulars of the place at which the minor child will be staying, her date of departure, date of return and shall provide contact details to enable the remaining parent to have telephonic or contact by other virtual means to the minor child during this period;

6. The Family Advocate is requested to convene an enquiry and to provide a report to the parties and the Court as a matter of urgency. The respondent is directed to cooperate with the enquiry of the Family Advocate; to attend such enquiry convened by the Family Advocate and to ensure that the minor child attends such enquiry;
7. Dr Robyn Fasser ("**Dr Fasser**") is appointed to conduct an investigation into the best interests of the minor child and to provide the parties and the Court with her written report setting out her opinions, findings and recommendations regarding the exercise by the parties of their parental responsibilities and rights including those of care and contact of the minor child;
8. The applicant and the respondent shall pay in equal shares the costs of Dr Fasser directly to Dr Fasser on demand including any deposit required by Dr Fasser;
9. Both parties shall cooperate with the process of Dr Fasser to the full extent required by her including inter alia attending all such interviews, evaluations and assessments required by Dr Fasser, completing all questionnaires and/or other forms and providing Dr Fasser with all information and/or

documentation required by her and by making the minor child available for all such interviews, evaluations and assessments required by Dr Fasser in the timeframes required by her to enable her to conduct and complete her investigation;

10. Both parties shall sign Dr Fasser's mandate upon receipt thereof from Dr Fasser;
11. On completion of her investigation Dr Fasser shall provide her written report setting out her findings, opinions and recommendations regarding the best interests of the minor child to the parties and to the Court;
12. A therapist shall be jointly appointed by the parties for the minor child to guide the minor child during the transition phase of her contact with the respondent, if necessary, and to equip the minor child with necessary tools to assist her in coping with the effects of her parents' divorce. Such appointment shall be done immediately.
13. The costs of the therapist shall be paid by the parties in equal shares.
14. Should the parties be unable to agree on a therapist, either or the legal representatives jointly, may approach the Chairperson of the Gauteng Family Law Forum to nominate a suitable therapist.
15. The costs of this application shall be costs in the divorce action.
16. Each party shall pay his/her own costs occasioned by the condonation and postponement application.

A handwritten signature in black ink, which has been partially redacted with a black rectangular box. The signature appears to be 'F. Bezuidenhout'.

F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 7 September 2023

DATE OF JUDGMENT: 16 January 2024

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