

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2024 - 021334

1. REPORTABLE: **NO**
2. OF INTEREST TO OTHER JUDGES: **NO**
3. REVISED: **YES**

DATE: 13 June 2025

SIGNATURE OF JUDGE: [REDACTED]

In the matter between:

K.Y.O

APPLICANT IN LEAVE TO APPEAL/IN COURT A QUO

and

M.S

RESPONDENT IN LEAVE TO APPEAL/ IN COURT A QUO

This Judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines system and by release to SAFLII. The date for hand down is deemed to be 13 June 2025.

JUDGMENT: LEAVE TO APPEAL

HAUPT, AJ

- [1] The applicant applies for leave to appeal against the order and judgment granted by this court sitting as the Family Court and hearing opposed

motions.¹ The matter concerns the interest of OR, an 8-year girl child born from the relationship between the applicant, her father, and the respondent, her mother. The applicant's application to vary the primary residence of OR from being with the respondent to that of shared residency was dismissed with costs on an attorney and client scale.²

- [2] The parties were before this court during 2019 under a different case number for relief regarding *inter alia* confirming the applicant as a co-holder of parental rights and responsibilities in accordance with section 21 of the **Children's Act**,³ residency and the extension of the applicant's contact.⁴ The order granted by agreement before Tuchten J during September 2019 also provided that if the parties are unable to agree regarding the further extension of the applicant's contact to OR, that the parties reserved the right to approach the court on the same papers as supplemented and after the Office of the Family Advocate has provided their final report.
- [3] When the applicant again approached this court under case number 021334/2024 during February 2024 the dispute revolved around the extension of the applicant's contact as recommended by a mutually appointed expert, the social worker Mrs Irma Schutte. Mrs Schutte recommended shared residency to be phased in such a manner that from January 2025 OR resides on a weekly basis equally with both her parents.
- [4] It is common cause that OR has been primarily resident with the respondent since the parties' separation during 2018 and that there is high levels of conflict between the parties and differing parenting styles. The respondent did not agree with Mrs Schutte's findings and recommendation and informed the applicant of her reasons prior to the launching of the application.

¹ The order was granted on 13 January 2025 prior to the commencement of the 2025 school year and the judgment and the reasons for the order was delivered on 24 February 2025

² To be taxed on scale B

³ 38 of 2005. Section 21 deals with the parental responsibilities and rights of unmarried fathers

⁴ 46957/2019

- [5] The applicant approached this court on motion proceedings seeking that Mrs Schutte's recommendation be made an order of court and that the respondent pay the costs in the event of opposition. Despite referring in detail to the 2019 proceedings in his founding affidavit, the applicant failed to explain why the present application was launched under a different case number or why he did not comply with the September 2019 order by approaching the Office of the Family Advocate for a final report.
- [6] On 12 September 2024 the matter was postponed to 7 November 2024. This court requested the Family Advocate to investigate and report on the best interest of OR and to consider any new circumstances of each party including the report of Mrs Schutte in respect of shared residency. The parties were further provided with the opportunity to file supplementary affidavits and supplement their Heads of Argument before the hearing of the matter.
- [7] The Family Advocate's November 2024 report took issue with Mrs Schutte's findings and recommendations. The Family Advocate referred the court to relevant literature and research on the role of experts, concerns regarding shared residency in high conflict relationships and that quality parenting and close meaningful relationships are unrelated to the amount of time the non-residential parent and the child spend together.
- [8] The Family Advocate's report was filed shortly before the hearing of the matter. After hearing the parties and the Family Advocate, judgment was reserved. The parties were afforded the opportunity to file supplementary heads of argument to further address the Family Advocate's report and recommendation.
- [9] The application for leave to appeal dated 17 March 2025 sets out three main grounds upon which leave is sought. Firstly, that the court *a quo* descended into the arena and disregard of the *audi alterem* principle. Secondly that the court *a quo* placed undue reliance on the Family Advocate's report and recommendations and thirdly that in exercising its judicial discretion properly, the court would not have granted a punitive costs order.

THE COURT DESCENDING INTO THE ARENA

- [10] Although the applicant acknowledges the wide powers and the duty of the court sitting as upper guardian as enunciated in numerous judgments,⁵ it is argued that this court did not apply the principle of *audi alterem partem* causing the process followed to be unfair.
- [11] The applicant argues that the court *a quo* descended into the arena by “*contacting*” the Family Advocate to comment on Mrs Schutte’s report, and to investigate and provide a recommendation. A further ground for leave to appeal is that a presiding judge in an adversarial system is required to be impartial and that in arriving at its decision must be called upon by counsel, rather than the court’s own volition, what evidence ought to be considered.
- [12] The applicant further argues that the court called upon the Family Advocate to investigate and report on the recommendations of Mrs Schutte and “*called upon the family advocate and lead oral evidence without affording any of the parties an opportunity to put questions to the family advocate*”.⁶ Mrs Schutte should have been called by the court to give oral evidence as the respondent, the Family Advocate and the court criticised Mrs Schutte’s report.
- [13] The SCA in **B v S** remarked that litigation involving the interest of minor children is not of the ordinary civil kind.⁷ The authorities are clear that in matters concerning minor children the court’s approach is not adversarial but inquisitorial.⁸ This kind of litigation involves a judicial investigation in which the court can call evidence *mero motu* and the court’s primary focus is on the minor child and not on the parties.⁹ As upper guardian the court is actively involved and may have recourse to any source of information of whatever

⁵ **J v J** 2008 (6) SA 30 (C), 2002 (6) SA 105 (N) at 110C- D; **AD and DD v W and Others (Centre for Child Law as amicus curiae; Department of Social Development as intervening party)** 2008 (3) SA 183 (CC) paragraph [30] at 370A; **AD & DD v DDW and Others** 2008 (3) SA 183 (CC) at paragraph [30] at 370A; **ZDE v DE** [2024] JDR 4976 (SCA); **Shawzin v Laufer 1968** (4) SA 657 (A) at 662E – 663B

⁶ Applicant’s heads of argument, para 18 filed at 27-31

⁷ 1995 (3) SA 571 (A) at 585 E

⁸ **B v S** supra; **T v M** 19 97 (1) SA 54 (A) at 57 H-58 A

⁹ **Terblanche v Terblanche** 1992 (1) SA 501 (W) at 504 C-D; **B v S** supra; **T v M** supra

nature to properly determine the best interest of the minor child and is not bound by the evidence presented or contentions advanced by the parties.¹⁰

[14] In **T v M** the SCA remarked that the sole criterion is always the best interest of the child concerned, that there is no onus as such on either party and concluded that “*..a Court should be slow to determine facts by way of the usual approach adopted in opposed motions and explained in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 584H-585E.*”¹¹

[15] According to the applicant to ensure a fair hearing, especially in circumstances where conflicting expert reports have been provided, the court *a quo* ought to have either referred the matter to oral evidence or at the very least called Mrs Schutte to give evidence and afforded both parties an opportunity to question these two experts.

[16] In support of the argument that it is not uncommon for a court sitting as upper guardian to refer a matter brought on motion proceedings to oral evidence the applicant relies on **ZDE**.¹² However the **ZDE** matter is procedurally and factually distinguishable from the present matter. **ZDE** was a divorce action and not motion proceedings. The matter came before the court *a quo* as an unopposed divorce and the provisions of section 6(1) and (3) of the **Divorce Act** was applicable.¹³ The defendant appeared at the hearing and alleged that

¹⁰ **Terblanche** supra

¹¹ 1997 (1) SA 54 (A) at 57H- 58A

¹² **ZDE v CE** [2024] JDR 4976 (SCA)

¹³ 70 of 1979 Sections 6(1)(a) and (3) provides as follows:

“6(1) A decree of divorce shall not be granted until the court—

(a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances;
and.....

(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent. “

she signed the settlement agreement under duress as the plaintiff informed her that she will then be able to have contact with the minor child born from the marriage.

- [17] In the present matter the applicant elected to proceed with motion proceedings with the knowledge that the respondent does not agree with Mrs Schutte's findings, report, and recommendations. The applicant even went so far as to request Mrs Schutte to respond to the respondent's criticism against her report as contained in the answering affidavit, and Mrs Schutte's response was attached to the replying affidavit.
- [18] None of the parties exercised his/her right to request for a referral to oral evidence. This issue was not raised in the further supplementary affidavit that was filed nor in the further heads of argument filed after the argument on 7 November 2024.
- [19] The respondent simply did not agree with the findings, report and recommendations of Mrs Schutte and the court itself raised certain issues with regards to whether Mrs Schutte's report meets the requirements of what is expected of an expert's report. This in my view did not warrant a *mero motu* referral to oral evidence.
- [20] When an expert makes recommendations without providing the proper factual and scientific basis for such investigation and the recommendations flowing from such recommendations, the expert fails in his/her duty towards the court.¹⁴ It is the expert's obligation to ensure that the findings and recommendations are based on sound, logical and scientifically based reasoning.¹⁵
- [21] The court owes no duty to an expert or any of the parties in motion proceedings to allow for further reports and/or evidence for purposes of rectifying of or addressing deficiencies in an expert report filed. The focus of

¹⁴ **Schneider N.O and Others v AA and Another** 2010 (5) SA 203 (WCC) at 211J – 212B

¹⁵ **Southwood's Essential Judicial Reasoning in Practice and Procedure and the Assessment of Evidence** (Lexis Nexis) at 7 - 8

the court is on the interests of the minor child and not the interests of the expert to further justify his/her findings.

- [22] The applicant relied almost solely on the report and recommendation of Mrs Schutte and knew that his case would stand and fall by the content of such report. An applicant in motion proceedings cannot bargain on a matter being referred to oral evidence. The same principle applies to the expert providing a report, which should contain sufficient information to substantiate the expert's findings and/or recommendations.
- [23] If in applications involving minor children where there is disagreement amongst the experts and/or the Family Advocate about what is in the best interests of such child(ren) a court is expected to *mero motu* call for oral evidence, such proceedings would almost without exception result in "mini trials". In my view this is a dangerous expectation to create with litigants and experts alike and has the potential to open the doors to abuse of proceedings.
- [24] Such an approach is further not conducive to the judicial investigation into the best interest of minor children and contrary to the provisions of sections 6(4) and 7(1)(n) of the **Children's Act**. These sections of the Act provide that in matters concerning the interests of minor children a delay in any action or a decision to be taken must be avoided as far as possible.
- [25] Accordingly, in my view there were not sufficient grounds for referral to oral evidence.
- [26] Consequently, the grounds for leave to appeal advanced by the applicant under this heading are not supported by the applicable authorities, legislation, the orders granted on 12 September and 7 November 2024, the arguments raised before the court *a quo*, and the heads of argument filed.

THE AUDI PRINCIPLE

- [27] As referred to above, after the first hearing before me on 12 September 2024 the matter was postponed specifically to provide the parties an opportunity to supplement their papers as well as their Heads of Argument and for the Family Advocate to investigate and report to the court. Following the hearing on 7 November 2024 the parties were given a further opportunity to file supplementary Heads of Argument specifically to address the Family Advocate's report and recommendation.
- [28] The parties were therefore given more opportunity than parties in motion proceedings are normally given to ensure that their respective versions and arguments are properly before court. I therefore do not agree with the applicant's contention that that the court *a quo* disregarded the *audi* principle.

UNDUE RELIANCE PLACED ON THE REPORT AND RECOMMENDATION FROM THE OFFICE OF THE FAMILY ADVOCATE

- [29] The applicant argues that the court *a quo* ought to have called Mrs Schutte to give evidence and to explain those aspects the court grappled with such as her methodology and her ultimate findings instead of rejecting them out of hand and by accepting the recommendation of the Office of the Family Advocate. I have already dealt with these arguments hereinabove.
- [30] The role and obligations of an expert and that of the Office of the Family Advocate are distinguishable. The Family Advocate fulfills its responsibilities towards litigants, minor children and the court in terms of the **Mediation in Certain Divorce Matters Act**.¹⁶ Section 4 of the Act deals with the powers and duties of the Family Advocate and provides in subsection (3) as follows:

“(3) *Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in*

¹⁶ 24 of 1987

*subsections (1)(b) and (2)(b) and may adduce any available evidence relevant to the action of application and cross-examine witnesses giving evidence thereat.*¹⁷

- [31] The important role of the Family Advocate has been dealt with in numerous judgments including that the Family Advocate is required to be of assistance to the court.¹⁸ As remarked in **Terblanche v Terblanche**, the Family Advocate plays an important role in assisting the court and a failure to refer a matter concerning the interests of a minor child for an investigation by the Family Advocate may in certain circumstances be unwise and may lead to a result which is neither just nor expeditious.¹⁹
- [32] It is in the court's discretion whether as upper guardian it relies on the recommendations of the Family Advocate.²⁰ The court *a quo* dealt extensively with the report of Mrs Schutte and the weight to be attached to it,²¹ and the input received from the office of the Family Advocate.²²
- [33] When considering the best interest of OR the court *a quo* had regard to all the information before it - the long history of high conflict between the parties, the inability to effectively communicate as parents, and OR's emotional deregulated behaviour as reported by both parties to the Family Advocate and Councilor and as observed by Mrs Schutte.²³
- [34] The facts before the court *a quo* was not considered in isolation. Regard was given to what happened in the past, after the close of pleadings, and even right up to the day when the court considered the evidence. This included the possibility of what might happen in the future if the court made a specific order.²⁴

¹⁷ My emphasis. In **Centre for Child Law v TS and Other** 2023 (6) SA 1 (CC) section 4 was declared invalid as it excluded unmarried parents from the simplified process for initiating an enquiry by the Family Advocate into the welfare of children born from such relationships

¹⁸ **Soller N.O. v G and Another** 2003 (5) SA 530W at paragraph 23 - 24

¹⁹ **Terblanche** *supra* at 403C - H

²⁰ **ZDE** *supra* at paragraph 20

²¹ Paragraph 45 to 64 of the judgment

²² Paragraph 65 to 71 of the judgment

²³ Judgment paragraph 77

²⁴ Judgment paragraph 81

- [35] Consequently, I am of the view that another court will not reasonably come to a different conclusion in respect of the involvement of and reliance placed on the report and recommendation of the Family Advocate by the court *a quo*.

COSTS ORDER

- [36] The applicant argues that the court *a quo* failed to exercise its discretion judicially in that it failed to consider that the respondent has not complied with the previous court order to change OR's surname and that the applicant was substantially successful with his application on the issue of the surname. In addition, it is argued that since an independent expert was agreed upon to conduct an assessment it was not necessary for the Family Advocate to investigate and that the applicant had no other option but to approach the court where the respondent rejected the expert's recommendation, and the applicant accepted same.
- [37] It is a trite that court orders stand until they are amended or set aside. The September 2019 order, which was made by agreement between the parties, specifically provided for the Family Advocate to file a final report in the event of the parties not agreeing to the further extension of the applicant's contact. I was not referred to any case law in support of an argument that where the parties agree to an independent expert that it is not necessary for the Family Advocate to investigate where an order directs otherwise.
- [38] It is a well-established principle that the award of costs unless expressly otherwise enacted, is in the discretion of the presiding judicial officer.²⁵
- [39] Before a court of appeal will interfere with an order as to the costs, it must be satisfied that there has not been a judicial exercise of the court's discretion. In other words, to justify interference on appeal, there must have been an improper exercise of judicial discretion.²⁶

²⁵ **Ferreira v Levin, Vryenhoek v Powell N.O. and Others** 1996 (2) SA 621 (CC) at 624 para 3

²⁶ **Beinash v Wixley** 1997 (3) SA 721 (SCA) at 739G-H; **Logistic Technologies (Pty) Ltd v Coetzee and Others** 1998 (3) SA 1070J (WLD) at 1075I to 1076D

- [40] The judgment deals with the reasons for the costs order in paragraphs 92 to 94 thereof. Consequently, there is no special circumstances in the application for leave to appeal to warrant an interference by a court of appeal in the exercise of this court's discretion regarding the costs order granted.

REQUIREMENT FOR THE GRANTING OF LEAVE TO APPEAL

- [41] The applicant seeks leave to appeal in terms of the provisions of section 17(1)(a)(i) and (ii) of the **Superior Courts Act**.²⁷
- [42] The applicant argues that the appeal would have a reasonable prospect of success and that there are compelling reasons why the appeal should be heard. According to the applicant an appeal court's guidance is required on the nature and extent of the court's powers as upper guardian when faced with conflicting expert opinions and when the Family Advocate is called upon to give evidence, so as not to curtail the powers of the upper guardian but also that the rules of justice and fairness and laws of evidence are still adhered to.
- [43] The test for granting leave to appeal has become more stringent and the threshold for granting of leave to appeal more onerous.²⁸
- [44] In determining whether there is a reasonable prospect of success and compelling reasons I considered the judgment, and the application, the heads of argument filed at the hearing by the court *a quo*, including the subsequent heads of argument, the orders granted in September and November 2024 and the notices and argument of both parties in the application for leave to appeal.
- [45] I am not persuaded that another court would come to a different conclusion, that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the leave to appeal should be granted. None of the grounds are novel. There are no conflicting judgments regarding

²⁷ 10 of 2013

²⁸ Section 17(1)(a)(ii)

the powers and duties of the court sitting as upper guardian and the duties of an expert and the role of the Family Advocate in matters involving the interests of minor children.

[46] A court in considering an application for leave to appeal must be persuaded with a measure of certainty that another court will differ. Given the above, I am not persuaded that the appeal would have a reasonable prospect of success. There is no misdirection on the law or on the facts dealt with by the court *a quo*. In addition, the authorities on the court's role as upper guardian and the wide powers of the court when the interests of minor children are involved are clear and provide sufficient guidance to be applied on a case-by-case basis.

[47] In the result the following order is made:

[47.1] The application for leave to appeal is refused with costs on Scale B.


HAUPT AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearing for the applicant:
Instructed by:

Adv. F Bezuidenhout
DI SIENA ATTORNEYS

Appearing for the respondent:
Instructed by:

Adv D Theodorellis
Wilsenanch Van Wyk Goosen & Bekker Inc

Matter heard virtually on:

16 April 2025