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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Reportable

CASE NO: D6383/2024

In the matter between:

C[...] N[...]

APPLICANT

and

I[...] G[...] R[...]

RESPONDENT

This judgment was handed down electronically by circulation of the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be on 28 October 2025 at 13:15pm

ORDER

The following order shall issue:

1. The interlocutory application for the referral of the main application to trial is dismissed;
2. The main application is dismissed.
3. The applicant is directed to pay the costs of both the main and the interlocutory applications on an ordinary party and party scale, including the costs of counsel, according to scale A.

4. With effect from the first Friday immediately succeeding the date of this order the respondent shall be entitled to have contact with the child, ZGR, a boy, born on 12 February 2019, during school term times as follows:
 - 4.1 For a period of two months:
 - 4.1.1 every alternate weekend from after school or aftercare on Friday when the respondent shall collect the child from school until Saturday at 17h00 when the respondent shall return the child to the applicant at the Fields Hill Shell petrol station and from 09h00 to 17h00 on Sunday with the respondent to collect the child from and return him to the applicant at the Fields Hill Shell petrol station;
 - 4.1.2 every Thursday from after school or aftercare when the respondent shall collect the child from school until Friday morning when the respondent shall drop the child at school.
 - 4.2 After the lapse of the aforesaid two-month period and for a further period of two months, the respondent shall have contact with the child as follows:
 - 4.2.1 every Thursday from after school or aftercare when the respondent shall collect the child from school until Friday morning when the respondent shall drop the child at school;
 - 4.2.2 every alternate weekend from Friday after school or aftercare when the respondent shall collect the child from school until Sunday at 17h00 when the respondent shall return the child to the applicant at the Fields Hill Shell petrol station;
 - 4.2.3 should the Friday preceding or the Monday succeeding the weekend be a public holiday, the public holiday shall form part of the weekend and in the event of the Monday being a public holiday, the child shall spend Monday night with the respondent who shall drop the child at school the following Tuesday morning.
 - 4.3 After the lapse of the second two-month period referred to in paragraph 5.4 above, the respondent shall have contact with the child as follows:
 - 4.3.1 every Thursday from after school or aftercare when the respondent shall collect the child from school until Friday

morning when he shall drop the child at school;

4.3.2 every alternate weekend from Friday after school or aftercare when the respondent shall collect the child from school until Monday morning when the respondent shall drop the child at school;

4.3.3 should the Friday preceding or the Monday succeeding the weekend be a public holiday, the public holiday shall form part of the weekend and in the event of the Monday being a public holiday, the child shall spend Monday night with the respondent and he shall drop the child at school the following Tuesday morning.

4.4 During the December 2025/January 2026 school holidays:

4.4.1 the child shall spend alternating periods of seven consecutive nights with the respondent and seven consecutive nights with the applicant;

4.4.2 the seven-night periods shall commence at 09h00 on the first day of each period with effect from 09h00 on the day after school closes for the holidays;

4.4.3 all handovers shall take place at the Fields Hill Shell petrol station.

4.5 With effect from the March/April 2026 school holiday, all school holidays shall be divided into two equal halves and the child shall spend one half of each school holiday with the applicant and the other half with the respondent with the halves to alternate each year. Handovers shall take place at the Fields Hill Shell petrol station.

4.6 The respondent shall have contact with the child on Fathers' Day from 09h00 to 17h00 should that day fall during a weekend when the respondent is not having contact with the child and the applicant shall be entitled to have contact with the child on Mothers' Day from 09h00 to 17h00 should that day fall during a weekend when the child is having contact with the respondent. Handovers shall take place at the Fields Hill Shell petrol station.

4.7 On the respondent's birthday, should the birthday fall on a day when the child is attending school, the respondent shall have contact with

him from after school until school commences the following day. Should the birthday fall on a weekend when the respondent is not having contact with the child, he shall be entitled to have contact with the child from 09h00 to 17h00. The applicant shall be entitled to have the same contact with the child on her birthday should it fall on a day when the respondent is having contact with the child. Handovers shall take place at the Fields Hill Shell petrol station.

4.8 On the child's birthday:

4.8.1 should the birthday fall during a weekend, the party with whom the child is not spending the weekend shall be entitled to have contact with him from 08h00 to 13h00 or from 13h00 to 18h00, with handovers to take place at the Fields Hill Shell petrol station;

4.8.2 should the birthday fall on a day when the child is attending school, the party with whom the child is not staying shall be entitled to have contact from after school, when he or she shall collect the child from school, until 17h00 when he or she shall return the child to the other party at the Fields Hill Shell petrol station.

4.9 In respect of Christmas, the party with whom the child is not staying at the time shall be entitled to have contact with the child from 12h00 on 24 December until 12h00 on 25 December. Handovers shall take place at the Fields Hill Shell petrol station.

4.10 On Good Friday the party with whom the child is not staying at the time shall be entitled to have contact with the child from 08h00 to 13h00 or from 13h00 to 18h00. Handovers shall take place at the Fields Hill Shell petrol station.

4.11 All public holidays, other than those dealt with above in paragraphs 4.2, 4.3, 4.9 and 4.10, shall alternate between the parties.

4.12 In the event of the child being ill, the respondent shall nevertheless be entitled to exercise the contact provided for in paragraphs 4.5 to 4.11 above unless otherwise agreed to by the parties in writing. If the child is not attending school due to illness on a day when the respondent is due to collect the child from school, handovers shall take place at the

Fields Hill Shell petrol station.

- 4.13 The respondent shall be entitled to have telephonic and video contact with the child at 17h00 on the days when he does not have physical contact with the child.
- 4.14 The respondent, after informing the applicant, is hereby authorized and directed to arrange for the child to attend therapy with either Lauren Snailham or Melinda Howlett ('the psychologist') and to provide a mandate to the psychologist to render therapy for the child without the need for the applicant's consent thereto, provided that the applicant had been informed and has unreasonably withheld her consent.
- 4.15 Each party is directed:
- 4.15.1 to ensure that the child attends all therapy sessions which are scheduled for the child by the psychologist at times when the child is in his or her care;
 - 4.15.2 to attend any therapy session if required to do so by the psychologist;
 - 4.15.3 to pay 50 per cent of the costs of the child's therapy sessions with the psychologist in the event they are not covered by the respondent's medical aid scheme and to pay in full for the costs of any individual therapy session which he or she may have with the psychologist.
 - 4.15.4 the obligation to pay 50 per cent of the fees for a psychologist only applies when the psychologist had been agreed and consented to by both the applicant and the respondent.
- 4.16 Paragraphs 4.1 to 4.15 above supersede and replace paragraph 4 of the order on 4 August 2022 under case number D5777/2022, paragraph 1 of the order granted on 2 July 2024 under case number D5383/2024 and paragraph 6 of the order granted on 19 August 2024 under case number D6383/2024.

JUDGMENT

Notyesi AJ

Introduction

[1] The applicant instituted these proceedings before this court seeking for an order that the respondent's contact with the parties' minor child, whom I shall refer to as "ZGR", to be suspended. The applicant and the respondent are divorced. Their marriage had produced one minor child, 'ZGR'. In terms of the divorce order, primary care and residence were awarded to the applicant, subject to the rights of access and phased contact of the respondent.

[2] The application is predicated on the serious allegations of abuse, which includes abuse of a sexual nature, said to have been committed by the respondent upon ZGR. According to the applicant, the source of the allegations of abuse is ZGR. Based on the alleged abuse of ZGR as a minor child by the respondent, the applicant is contending that it is no longer in the best interests of ZGR for the respondent to retain rights of contact. The relief sought is opposed by the respondent.

[3] The respondent is disputing the allegations that he had abused and violated ZGR. He had contended that the applicant is the source of the allegations against him and not ZGR. The respondent is seeking for the retention of the existing custodial and rights of contact arrangements with ZGR which are in terms of the divorce order.

[4] A few weeks preceding the date of hearing, the applicant brought an interlocutory application on 1 August 2025, seeking for the referral of the matter for trial. In this application, the applicant had contended that a substantial dispute of material facts has arisen in the main application.

[5] That interlocutory application, too, is opposed by the respondent. The respondent is contending that the alleged disputes of fact are not material and that

they are not genuine or *bona fide* to warrant a referral for trial. The respondent had contended that the interlocutory application is a stratagem of the applicant to delay finality.

History of litigation before this Court

[6] The application was instituted on 5 June 2024 and it was placed on the urgent roll of 2 July 2024. Following such hearing, the court only allowed the respondent restricted and supervised contacts with ZGR. In addition, to the restricted contacts, the court directed for the Family Advocate to provide a report on or before 18 August 2024. The relevant parts of the order provide as follows:

- ‘2. The parties are directed to attend the scheduled Family Advocate enquiry on 17 July 2024 at 09h00.
3. The Family Advocate is requested to provide its report (and interim, if necessary, report is only interim in nature) on or before the 18th of August 2024.
4. In the interim report, the Family Advocate shall make suitable suggestions, if any, on the section of telephonic contact between the fortnightly access periods.’

[7] On the return date of 19 August 2024, the Family Advocate’s report was delivered, and whereafter the court directed for the appointment of a forensic psychologist to assess and investigate the dispute. The relevant part of the order is set out below:

- ‘1. The application is adjourned sine die.
2. A forensic psychologist shall be appointed to assess the issues in dispute in this matter.’

[8] No material developments of the case had taken place since 19 August 2024 until June 2025. The respondent set down the matter for final hearing on 20 August 2025. Following the set down of the application, the applicant instituted the interlocutory application. Due to the issues being interwoven, this Court had directed for the instantaneous hearing of the applications.

Material facts

[9] The parties are the biological parents of ZGR. They share the rights and legal duties in respect of him. The dispute arises from issues related to contacts with ZGR

by the respondent.

[10] It is common cause that the dispute about such contact rights of the respondent had, at some stage, led to the institution of contempt of court against the applicant. That was on the applicant refusing access of the respondent to ZGR. On 29 June 2023, following the hearing of such contempt, the court issued an order against the applicant to comply with the order of divorce regarding access rights and contacts of ZGR by the respondent. The relevant parts of the order read as follows:

‘3. Pending the return date, the Respondent is directed to forthwith comply with the Order of this Honourable Court dated 4 August 2022, under case number D5777/2022.’

[11] On 8 September 2023, the contempt proceedings were postponed *sine die*, with the rule nisi extended accordingly.

[12] In instituting these proceedings, the applicant is alleging that on or about July 2023, she had a suspicion that ZGR had been exposed to sexual abuse. Her suspicion was grounded by certain unfamiliar conduct of ZGR, as a minor child. According to the applicant, she caught ZGR masturbating by stroking his penis. ZGR was only about four years old. She questioned ZGR. The response of ZGR was he had been taught that by a certain man with a red hat. Below is the alleged response by ZGR:

‘the man in the red hat told me to touch my booya (referring to penis) and told me it is good for me.’

The full identity of the man was not revealed to the applicant by ZGR at that time.

[13] According to the applicant, prior to the incident of July 2023, ZGR had, at times, exhibited some signs of having been exposed to acts of abuse. The applicant alleged that ZGR would refuse overnight contact with the respondent. The applicant further alleged that ZGR had also shown behavioral changes, such as anxiety, fear, and clinginess and of performing sexual acts on other children at school.

[14] According to the applicant, she had communicated her observations of ZGR

to the respondent.

[15] The identity of 'the man in the red hat' was only disclosed to the applicant on 10 January 2024. On this day, ZGR, had allegedly revealed that the respondent was the man with the red hat. Resulting from such revelation of the identity of the respondent, the applicant took ZGR to Dr Ananth, for observation. She also opened a criminal case against the respondent and that case was registered under case no: 292/1/2024. The applicant was advised to submit a J88 form to the district surgeon at Tutuzela Clinic, R K Khan Hospital. The applicant and ZGR started to attend consultations with a clinical psychologist, Ms Nicole Smith ('Ms Smith'). The respondent was later charged for the sexual abuse.

[16] The respondent was thereafter released on bail with bail conditions which restrained him from having contact with ZGR.

[17] The applicant had also alleged that, after the respondent was charged, she notified the school about the allegations and charges against the respondent. Despite such notification to the school, and to her surprise, the respondent was allegedly allowed contact with ZGR by the school.

[18] The applicant had expressed her concern that, should these allegations prove to be true, ZGR stands to suffer irreparable harm, physically and psychologically. Therefore, the applicant asked for the suspension of the order issued on 4 August 2022 relating to the contacts of ZGR by the respondent.

[19] The respondent has disputed the allegations of sexual abuse of ZGR. According to him, the allegations of sexual abuse are a mere retaliation of the applicant following the contempt proceedings. The respondent stated that from the date of the divorce, the applicant has frustrated his rights of access and contact with ZGR. He also disputed that he contacted ZGR whilst at school as alleged by the applicant. The teachers had also disputed the alleged contact of ZGR by the respondent. An affidavit from the school teacher and a letter of the school principal has been filed in support of the respondent's version. Regarding the matter of taking

ZGR for therapy at the request of the applicant, the respondent confirmed that he had agreed for that arrangement. According to the respondent, a session was scheduled for 5 January 2023. The respondent alleged that the applicant failed to ensure ZGR's attendance on the scheduled date. The respondent further stated that he had been personally unable to attend the therapy due to the restrictions of the order against him.

[20] The respondent also averred that the criminal case that was instituted by the applicant was withdrawn for lack of evidence. The respondent pointed out that the J88, social worker report and the forensic psychologist report do not collaborate the allegations against him. The respondent confirmed that he had a close relationship with ZGR. He denied that he had committed any harmful acts or undermined the best interests of ZGR.

The expert reports

[21] Ms Smith, a psychologist, provided two reports. These reports are dated 8 March and 20 May 2024. In these reports, Ms Smith recorded that she only interviewed the applicant and ZGR. She stated that she was informed by the applicant that ZGR had engaged in inappropriate sexual behavior at home and at school. According to Ms Smith, ZGR appeared to have conflictual feelings towards his father which included feelings of fear, but also reference to good experiences. She had also recorded the allegations of ZGR regarding the abusive behavior of the respondent and his alleged friends.

[22] The Family Advocate's report had been filed. According to the report, an enquiry was conducted on 17 July 2024 by Menzi Mdunge ('Mdunge'), a registered social worker and family counsellor. The purpose of the enquiry was to determine the exercise of parental responsibilities and rights in respect of ZGR. Mdunge had also submitted her own report which forms part of the Family Advocate report. In preparation of such reports, the applicant and the respondent were interviewed. ZGR was also assessed. Additionally, all previous reports and police investigations were considered by the family counsellor. The relatives were also interviewed.

[23] The observations of the family counsellor were that the applicant and respondent shared an acrimonious relationship following their divorce. In the view of the family counsellor, the applicant and respondent had not healed from the aftereffects of the divorce and recommended that both parties seek counselling to address the ongoing conflict between them.

[24] The Family Advocate had recorded these instructive remarks:

'I am advised by the Family Counsellor that he has investigated the allegations raised unfortunately it could not be established the veracity of the allegations. The matter has been withdrawn, (*sic*) however the psychologist report is still outstanding. Accordingly, we need to err on the side of caution and attach a precautionary clause, that the Respondents contact with the child is to be supervised.'

[25] The Family Advocate had recommended for supervised and shared parental responsibilities, access, and rights in respect of ZGR, by the respondent, pending filing of a forensic psychologist report. The parts of the Family Advocate report, in this regard, record as follows:

'7.3 The Respondent shall exercise supervised rights of contact to ZGR as follows:

- Every alternate weekend Saturday and Sunday from 10h00 to 16h00.
- Daily telephonic contact inclusive of video calls.
- Sharing of ZGR's birthday.
- Mother's Day and Father's Day with the respective parent times as above.
- The above contact is subject to it being supervised by the paternal grandmother.'

[26] A report by Captain Gcabashe ('Gcabashe') of the South African Police Service ('SAPS') has been filed and that report was part of the criminal investigation. Gcabashe has 23 years of work experience as a social worker. In those 23 years, 14 years of her experience was working with children. In her report, Gcabashe alleged that she had conducted interviews with ZGR. The purpose of her report relates to

ZGR's developmental stage, his ability to communicate, recollection of information and the ability to distinguish between the truth and a lie. Gcabashe alleged that she had followed established procedures in conducting child investigation. On her evaluation, Gcabashe recorded as follows:

'ZGR is 5 years old and he is functioning at the pre-Operational stage according to Piaget's theory. He disclosed information about the alleged incident of sexual abuse and he also indicated that his mother told him the story for the talk. During further questioning the child concerned was unable relate to incident of sexual abuse. This revealed that there is high possibility that the child concerned was coached about the alleged incident of sexual abuse since the parents are also divorced.'

[27] Additionally, Gcabashe, in her conclusions, recorded the following:

'Although the child concerned was able to identify between right and wrong, he disclosed information about the alleged incident of sexual abuse, but he indicated that his mother told him the story for the talk.'

[28] Further documents that had been filed included a letter recording the withdrawal of the charges. The letter reads as follows:

'This letter confirms that the above-named accused was charged on Pinetown CAS 292/01/2024 and the case was withdrawn by Senior Public Prosecutor at Pinetown court on 2024-10-25 for insufficient evidence.'

[29] A clinical psychologist, Mr Willows had also filed a report. He had been appointed by the KwaZulu-Natal Family Law Forum, following a court order of 19 August 2024. In the report, Mr Willows confirmed that he conducted a full psychometric assessment on the respondent and interviewed ZGR. The applicant did not avail herself for the interview. Mr Willows confirmed to have requested the applicant to present herself for an interview, and that he had sent emails directly to the applicant without success.

[30] In his report, Mr Willows had described the co-parenting relationship of ZGR by the parties as hostile and uncooperative, post their divorce. In this regard, Mr Willows recorded that he had been informed by the respondent that there was no

communication between the parties concerning the welfare of ZGR relating to health and education progress.

[31] Mr Willows had concluded, after his investigations, that there were no reasons to recommend any restriction on the contact between ZGR and the respondent. He could not find any reliable evidence to support the allegations of sexual abuse or that the respondent was an abusive or neglectful parent.

[32] This Court was also furnished with the report of the Chief Clinical Psychologist for the Etheke District prepared by Mr Suntosh R Pillay. The report had followed a referral of ZGR by the Director of Public Prosecution. The report recorded a favourable history on the education of ZGR. These are some of the conclusions from the report:

- 'a. ZGR is functioning within the expected intellectual range for a 5-year-old.
- b. ZGR is not a mentally disabled witness.
- c. ZGR can testify about the alleged crime, provided the questions are phrased simply, clearly, and age-appropriately; and sufficient time is provided for him to articulate a response.
- d. Testifying in an open court will cause Zander undue anxiety, stress and harm, and an intermediary is essential.'

[33] A report by the clinical social worker, Hannah (Annie) Varaden ('Varaden'), was also filed by the applicant. In her report, it was proposed that care and contact arrangements of ZGR needs to be changed. The child's contact with the biological father needs to be supervised by a neutral professional person for a period. In preparation of that report, the respondent was not invited nor interviewed by Varaden.

Issues for determination

[34] This Court must determine the following issues:

- (a) Whether there is a dispute of fact;

- (b) Whether the matter should be referred for oral evidence, if not;
- (c) The main application regarding suspension of the contact with ZGR, if not granted;
- (d) What would be in the best interests of ZGR; and
- (e) The appropriate order of costs.

(a) The applicant's contentions

[35] It was submitted on behalf of the applicant that there are material disputes of fact which could not be resolved on papers. Counsel for the applicant stressed that there is a need to test the opinions of expert psychologists under cross-examination. Based on those submissions, counsel had urged the court to refer the matter for trial. Counsel had relied on the authority of *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*.¹ In *Room Hire*,² the court outlined the principal ways or circumstances in which a dispute of fact may arise in motion proceedings, which include:

- '(i) When the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voca* if subpoenaed.
- (ii) When the respondent admits the applicant's affidavit evidence but alleges other facts which the applicant disputes.
- (iii) When the respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them, putting the applicant to the proof and himself gives or proposes to give evidence to show that the applicants and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which the applicant relies to prove the main facts are untrue. The absence of any positive evidence possessed by a respondent directly contradicting the applicant's main allegations does not render the matter free of a real dispute of fact.'

¹ *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) ('Room Hire').

² *Ibid.*

[36] Applicant's counsel also indicated that the applicant intends to call her own forensic psychologist and that the applicant was ready and willing to co-operate with the investigation conducted by Mr Willows.

[37] It was further contended on behalf of the applicant that, when deciding on the best interests of the minor child, this Court exercises its discretion grounded in a judicial investigation into all relevant factors of what is in the best interests; and in doing so, must consider the physical, psychological, and emotional wellbeing of the child. Counsel pointed out that other experts have raised concerns about ZGR's wellbeing and the impact that the serious allegations of abuse had on him. Whilst on the other hand, the clinical psychologist had recommended that the respondent be allowed full contact without restrictions. The submissions, on behalf of the applicant, are that these conflicting opinions need to be tested and evaluated in oral hearing.

[38] Counsel for the applicant had also called into aid the authority of *National Director of Public Prosecutions v Zuma*,³ where it was stated:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.'

[39] The applicant had relied on the provisions of Rule 6(5)(g)⁴ as the foundation of the application and urged the court to refer the matter for trial. This aspect is dealt with in due course.

³ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

⁴ Rule 6(5)(g): 'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and to be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[40] Regarding the merits, counsel for the applicant had contended that it was not in the best interests of ZGR for continued contact with the respondent as well as the sharing of the residence. Counsel had stressed the seriousness of the allegations made against the respondent. Regarding onus, it was contended on behalf of the applicant that there is no real onus of proof as this matter involved the best interests of the minor child. The applicant's counsel stressed that the court, as an upper guardian, is required to consider the evidence and based on the evidence available, determine the matter with due regard to the best interests of the minor.

[41] The applicant's counsel had buttressed the point that there are conflicting recommendations from the office of the Family Advocate and clinical psychologist, Mr Willows. Counsel had criticised Mr Willow's report on the ground that he did not interview the applicant.

The respondent's contentions

[42] The respondent's counsel had sought for the dismissal of both the interlocutory and the main applications. She had contended that there is no genuine or material disputes of fact and that the matter is capable of being resolved on the papers. The respondent's counsel submitted that it is well established under the *Plascon-Evans*⁵ rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. It may be different if the respondent's versions consist of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched, or so clearly untenable that the court is justified in rejecting them merely on the papers.

[43] It was submitted on behalf of the respondent that it has been shown that the allegations of the applicant are not credible and consists of falsified facts. Counsel for the respondent had emphasised that the matter is disposable based on the reports of the experts. In her submission, counsel had conceded that because the

⁵ *Plascon-Evans*. See also *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC) paras 8-10.

case involved the best interests of a minor, the court should be slow in its application of the *Plascon-Evans*⁶ rule and thus it ought to act with caution. I agree with this submission. In *P v P*,⁷ it was stated:

‘The court conducts an investigation into the matter, a process in which it may act more inquisitorially than would be acceptable in adversarial proceedings. Nevertheless, there is authority that where a parent seeks a relocation order which amounts to a variation of a divorce order, it is for such parent to establish on a balance of probability that a variation should be granted (*Jackson supra* 307G-H and cases there cited – although Cloete AJA’s was a minority judgment, the majority did not express disagreement with the legal principle).’

[44] The respondent’s counsel had urged the court to consider the application based on common cause facts and the inherent probabilities that could not be realistically disputed or challenged. It was contended, on behalf of the respondent, that the applicant had approached the court based on the allegation of sexual abuse of ZGR.

[45] The respondent had also submitted that the conduct of the applicant should be considered. In this regard, this court was pointed to the history of the applicant refusing contact with ZGR by the respondent. Counsel stressed the issue of the contempt of proceedings previously launched and the resultant court order. For his proposition, counsel relied on the authority of *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd*,⁸ where it was held as follows:

‘I conceive that the test to be applied as to whether a genuine factual dispute has been raised on the papers is similar in nature to that in a trial at the point where the plaintiff’s case has been closed and absolution is sought before the defence is embarked upon. Here, the test is whether there is evidence upon which a reasonable presiding officer might or could find for the plaintiff. If there is, absolution should be refused. The court does not enter into an evaluation of the credibility of witnesses unless they have ‘palpably broken down, and where it is clear that they have stated what is not true’. Similarly, in motion proceedings, a robust approach can only be taken, and the matter decided on the probabilities, if that clear falsity emerges from the papers.

⁶ *Plascon-Evans*.

⁷ *P v P* [2019] ZAWCHC 174 para 69.

⁸ *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZP) para 15.

[46] Counsel had contended that in view of the report of Gcabashe, who had assessed ZGR, there should be no doubt that the child was coached by the applicant. In this regard, counsel heavily relied on the SAPS social worker report which concluded that there was a high probability that the child had been coached to make the allegations. In addition to this contention, counsel had then put into question the refusal of the applicant to cooperate with Mr Willows during the investigations.

[47] On behalf of the respondent, it was further contended that the application for referral of the matter to trial is a mere attempt by the applicant to delay the respondent's unrestricted access to ZGR. Counsel had urged this court to closely examine the alleged dispute of fact and decide whether a genuine dispute of fact exists that cannot be resolved on the papers alone, thus resulting in the requirement for oral evidence.

[48] Regarding the main application, the counsel had submitted that there are no valid reasons for the suspension of the rights of access and contact of the respondent with ZGR. It was further submitted that the primary purpose of the main application was to permanently suspend the respondent's contact with ZGR. The contention was that, the applicant was therefore obliged to make a case for the permanent suspension of that access, which, according to the respondent, the applicant failed.

[49] I consider all these contentions.

Whether there is a dispute of fact

[50] Under rule 6(5)(g), this Court, in addition to its broader discretionary powers, has three alternatives; first, it may dismiss the application; second, it may direct that oral evidence be heard on specified issues and third, it may refer the matter to trial. I also agree with the applicant that this Court has a discretion to order that the matter be referred for trial. However, that is not the only option. It will be materiality of disputes or the weight of reasons that would lead for the referral of the matter to oral

evidence.

[51] The Supreme Court of Appeal has cautioned that a court should be astute to prevent an abuse of its process in such a situation by an unscrupulous litigant intent on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one.⁹ This means that the court must scrutinise the application and determine whether the circumstances set out in *Room Hire*,¹⁰ have been established or any of them have given rise on the facts. This is a true discretion.

[52] In the exercise of this Court's discretion on whether to refer the matter to trial or not, these considerations are relevant:

- (a) the case is about the best interests of the child;
- (b) the parenting rights of both parties;
- (c) the serious allegations against the respondent;
- (d) the possible impact on the rights of access by the respondent to ZGR;
- (e) the outcome of the investigations onto the allegations;
- (f) all the expert reports filed before this Court;
- (g) the effect of the withdrawal of the criminal case by the State;
- (h) the report of SAPS social worker;
- (i) the Family Advocate report filed on 19 August 2024;
- (j) the forensic investigation report of the court appointed psychologist;
- (k) the reasons of the requested referral to trial and, (the prolonged delay before reaching finality).

[53] I also hold a view that this Court is entitled, in its process of evaluating the reports and the entirety of evidence, to consider the conduct of the parties during investigations. I must remark that the litigation history in this matter is unsatisfactory. It is undesirable to prolong any litigation involving minor children. As a matter of principle, the best interests involving minor children must be expeditiously

⁹ *Minister of Land Affairs and Agriculture and Others v D&F Wevell Trust and Others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) ('*D&F Wevell Trust*') at 205.

¹⁰ *Room-Hire*.

determined. Where there are allegations of abuse of a minor, there is more urgency for finalisation of the matter. The protracted litigation and exchange of documents with repeated court appearances, must on their own, traumatise both the parents and the minor child.

[54] Once the interim relief was granted on 19 August 2024, the applicant showed loss of appetite for the finality of the case. The case had been moribund until the resuscitation by the respondent. Whilst the court had ordered the parties to appoint a forensic psychologist, they could not do so. That must have caused further delays on the finality. I propose to consider the reports at this stage.

[55] It would be on the consideration of these reports and the totality of the evidence which would determine the application for trial. Whether the disputed issues have any bearing on the question relating to the suspension of the rights of contact by the respondent can only be resolved by a close examination of the alleged disputes. It is well to remember that this Court is not determining the allegations themselves. What should be looked at is the source of these allegations and whether they can be established in order to deprive the respondent of his parental rights in due course. If the allegations emanate from a totally unreliable source, there would be no basis to refer the matter for oral evidence.

[56] In my view, the application for referral of the matter is premised on flimsy reasons. The summary of those reasons is:

- (a) the applicant seeks for a second chance to be interviewed by Mr Willows;
- (b) the applicant seeks for an opportunity to appoint her own clinical psychologist;
- (c) she also seeks for an opportunity to cross-examine the various experts.

[57] All these reasons stand to be rejected. First, the applicant, on her own accord, declined an available opportunity offered by Mr Willows for an interview; second, she was never refused any right to appoint her own psychologists; and third, the applicant had not set out the nature and extent of the evidence to be led by the

intended expert or additional witnesses; there is no explanation for her failure to timely call for such evidence; the applicant has not offered any contrary expert opinion to dispute the reports already filed; and, most significantly, the criminal case had already been withdrawn due to lack of evidence.

[58] In my view, all these considerations should weigh heavily against the referral of the matter. That must not be the end. This Court must examine the applicant's explanations for her inaction.

[59] The applicant merely attributes her behaviour on ignorance as she alleges herself to be a lay person and that she feared the respondent. These reasons are not convincing and should outrightly be rejected. The applicant had previously denied the respondent access rights to ZGR. That was a contravention of the court order. Even in the subsequent contempt proceedings, the applicant had sought to blame her ignorance and relied on being a layperson. In this interlocutory application, she has averred:

'My attorney advised me at the time that the order of 19 August 2024 provided that the respondent and I must agree upon the identity of a forensic psychologist within one week of the date of the order, with the purpose of this forensic psychologist conducting a forensic investigation into this matter.

I was also informed by my attorney that if the respondent and I were unable to agree upon the psychologist, the chairperson of the KwaZulu-Natal Family Law Forum would nominate the forensic psychologist and we would be obliged to co-operate with that person so nominated.'

[60] In her own version, the applicant did not agree with the respondent regarding the appointment and identity of the forensic psychologist, as ordered by the court. It is obvious that, in accordance with the court order, the KwaZulu-Natal Family Law Forum was obliged to appoint the forensic psychologist. There could never have been any basis to doubt the involvement of Mr Willows in the dispute.

[61] I have no doubt that the applicant was always aware about the need to be interviewed by a forensic psychologist. A reasonable litigant in the position of the

applicant would have taken reasonable steps after the lapse of the period referred to in the court order. I therefore reject the submission that the applicant is a layperson. Mr Willows had sent correspondence to the applicant. The applicant is not an unsophisticated litigant. She is recorded to hold a B.Com Management. In my view, the true intention of the application for referral to trial is to supplement the applicant's case.

[62] It has been repeatedly stated that a litigant's case stands or falls on his own averments. A party may not seek to lead oral evidence to make out a case for the first time, by way of such oral evidence, where his case is not already made out by his own on the papers.¹¹ The Supreme Court of Appeal in *D&F Wevell Trust*,¹² and with reference to the matter of *Carr v Uzent*,¹³ accepted that the referral to oral evidence must fall within the factors enunciated in *Room Hire*¹⁴ and the *Plascon-Evans*¹⁵ decisions. In *Carr*,¹⁶ it was said that:

'In my opinion, in his affidavits, read as a whole, to make out this case, and Rule 9 was never designed to enable an applicant to amplify affidavits by additional evidence where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case ambiguous, uncertain, or fail to make out a cause of action at all.'

[63] Having regard to all the circumstances of this case, the general conduct of the parties and the available objective evidence, I am of the view that the disputes arising are of a peripheral nature to the main issue.

[64] I am mindful that the methods outlined in the *Plascon-Evans*¹⁷ on resolution of disputes in cases of this nature, should not be readily invoked. In *B v S*,¹⁸ it was held:

'In addition it seems to me to be necessary to lay down that where a parental couple's access (or custody) entitlement is being judicially determined for the first time – in other words where there is no existing Court order in place – there is no onus in the sense of an

¹¹ *D&F Wevell Trust*.

¹² *Ibid* para 58.

¹³ *Carr v Uzent* 1948 (4) SA 383 (W) ('*Carr*').

¹⁴ *Room Hire*.

¹⁵ *Plascon-Evans*.

¹⁶ *Carr* at 390.

¹⁷ *Plascon-Evans*.

¹⁸ *B v S* 1995 (3) SA 571 (A) ('*B v S*') at 584-585.

evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial. Even where variation of an existing custody or access order is sought, and where it may well be appropriate to cast an onus on an applicant, the litigation really involves a judicial investigation, and the Court can call evidence *mero motu*...

[65] In my view, the *B v S*¹⁹ and other similar judgments do not preclude determination of the matter based on the *Plascon-Evans*²⁰ rule in every given dispute involving custody of a minor child. I agree with the respondent's counsel in her submission that the *Plascon-Evans*²¹ rule is applicable subject to the court being cautious of the matter in dispute.

[66] In *B v S*,²² reference is made to a situation where there is no existing court order in place. In cases such as this, where there is an existing order and the applicant seeks to suspend such an order based on allegations of a serious nature such as the present, there would be no reason not to require of the applicant to produce sufficient evidence. I agree that the court should be very slow to determine facts by way of the usual opposed motion court approach, even where there is an existing order, however, that must remain fact specific. The applicant has made serious allegations and she must bear the evidential duty.

[67] Accordingly, the application for the referral of the matter to oral evidence must fail.

The main application

[68] Stripped into its essential parts, the main basis of this application are the allegations of sexual abuse of ZGR. The essence of the contentions being that, if the allegations are established, that would render it no longer in the best interests of ZGR to have contact with the respondent in terms of the divorce order. In other words, for this application to succeed, this Court must be satisfied about the

¹⁹ Ibid.

²⁰ *Plascon-Evans*.

²¹ Ibid.

²² *B v S*.

truthfulness, even a *prima facie* view would suffice about these allegations.

[69] It must be accepted that the application is premised on the provisions of s 28(1)(a) of the Children's Act 38 of 2005. This section empowers this Court to suspend any or all the respondent's parental responsibilities and rights for a period or to terminate completely any or all such parental rights or to limit the parental responsibilities and rights of the respondent. The section must be read, together with other subsections, and more particularly, subsection (b). I agree with the submissions on behalf of the applicant that the allegations of sexual abuse are of a serious nature and if established, they would negatively impact ZGR and would undoubtedly adversely affect his best interests. It is therefore crucial that this Court should closely examine the allegations and the reports filed.

[70] In doing so, this Court is obliged to consider all relevant factors, and most importantly;

- (a) ZGR's best interests;
- (b) the relationship between ZGR and the respondent whose parental responsibilities and rights are being challenged;
- (c) the degree of commitment that the respondent has shown towards ZGR; and
- (d) any other fact that should, in this Court's opinion, be considered, more particularly that there are these allegations which are *prima facie* serious.

[71] The power that the court exercises concerning children's best interests, is not a discretion in the narrow sense. It is a discretion in the broad sense, a value judgment in which a court must have regard to several disparate and incommensurable features so that it could arrive at a just decision.²³

[72] Counsel for the applicant had correctly submitted that the applicant had no real onus in the conventional sense. This position finds support in *M v M*,²⁴ where it was held:

²³ *Knox DÁrcy and Others v Jamieson and Others* 1996 (4) SA 348 (A)

²⁴ *M v M* [2018] ZAGPJHC 4 para 24.

'This court sits as the upper guardian of all minors within its jurisdiction. The discretion that is to be exercised when decisions pertaining to the best interests of children are to be made is unique, and not to be circumscribed in the narrow or strict sense of the word as it is explained in *Bezuidenhout v Bezuidenhout* 2005 (2) 187 (SCA) para 17. Satchwell J stated in *LW v DB* 2015 JDR 2617 (GJ) para 5 that the discretion to decide whether a child can accompany a parent who leaves the jurisdiction of the court, requires no onus in the conventional sense. This approach is in line with the principle set out by the Supreme Court of Appeal in *Jackson v Jackson* 2002 (2) SA 303 (SCA) para 5 that where the interests of minor children are involved, the litigation amounts to a judicial investigation of what is in their best interests. The Court is not bound by the contentions of the parties. That slavish adherence to technical procedural requirements might result in a court not being able to decide an issue in the best interests of a child, has been recognized in the unreported judgment of Matojane J in *DJB v MDP* case number 303774/2008 decided in 2010 in the North Gauteng High Court, Pretoria, para 12. Here, the court held that the most important consideration in the case is the physical, psychological, and emotional well-being of the minor child under the circumstances, and that technical procedural objections might shift the focus and undermine efforts to determine the best interests of the child.' (Footnote omitted)

[73] As established above, this Court is required to adopt a holistic approach to the matter. The court must have an overall impression in order to bring a fair mind to the facts set out by the parties. The opinions of experts and the prevailing circumstances of the case must be assessed in a balanced fashion for this Court to render a finding mixed of fact and opinion in a final analysis of what, in a value judgment, would be in the best interests of ZGR. The court investigates the matter, a process in which it must act more inquisitorial.²⁵

[74] According to the applicant, she had caught ZGR masturbating by stroking his penis. That incident occurred in July 2023. Although the applicant was concerned that ZGR must have been sexually exposed and abused, she took no steps to do investigations. ZGR had disclosed what the man in the red hat had allegedly done to him. All that was left was to uncover the identity of the man in the red hat. The applicant's inaction in this regard must be put into question. It is doubtful that she had a suspicion of sexual abuse at that stage.

²⁵ *P v P* supra at para 69

[75] More importantly, ZGR had continued with his contacts and visits to the respondent. I find merit to the respondent's submission that in circumstances such as those, a reasonable and concerned parent would have taken necessary steps to obtain a professional assessment and sent the child for therapy and an investigation to be undertaken if there were suspicions of sexual abuse. I may add that it was instructive to send ZGR for observation in view of the alleged state of sadness, anxiety, and depression.

[76] I do add, as a further concern of this Court, that the allegations regarding the applicant's suspicion of ZGR's sexual abuse were not raised by the applicant during the contempt of court proceedings. There is no explanation why the suspicion of such serious allegations of sexual abuse could not be raised in that application. That was an available earliest opportunity. Only a few weeks later, following the contempt order, around July 2023, the applicant started to entertain these suspicions and considered them in a more serious manner. I have serious doubts that a single act of a child masturbating would lead to the only conclusion which is that a child might have been sexually abused. In my view more evidence was required in this regard and it had not been furnished. The single act of a child caught masturbating cannot be enough to sustain a conclusion that he had been abused or sexually exposed in an abusive manner. The behaviour could have been influenced by several factors such as peer pressure or some television or social media exposure.

[77] The circumstances that had led to the disclosure of the respondent as the man with the red hat are also not convincing. ZGR had just returned from his mid-week visit with the respondent. He started drawing pictures of which the applicant questioned him. The concern of this Court is that there is no explanation of what exactly attracted the applicant to these drawings. The applicant merely states in her papers that her suspicion had arisen when ZGR became uneasy and afraid. There is paucity of information in this regard. ZGR, according to the applicant, had drawn a picture of two persons, the one bigger figure with lots of colouring in red in the head region with only the eyes showing on the face, and another smaller figure crouching almost below the large figure. In this Court's mind, it remains doubtful that such a

drawing could ground suspicion of sexual abuse.

[78] I turn to the criminal investigation. The criminal case had been withdrawn due to insufficient or lack of evidence. The decision had followed the investigations by the SAPS. Gcabashe had found no basis of the allegations of sexual abuse. This Court could not find any fault about the report of Gcabashe, and none was advanced on behalf of the applicant. Gcabashe had concluded that there is *prima facie* evidence of suggestibility of the allegations by the applicant to ZGR.

[79] This Court had no contrary report from that of Gcabashe regarding the investigations of the allegations. In such circumstances, the uncontested report of Gcabashe, who is independent in the matter, should be given serious consideration by this Court.

[80] In *Schneider NO and Others v AA and Another*,²⁶ Davis J discusses the duties of an expert with reference to some authorities, whereafter he makes the following statement, with which I agree:

'In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.'

[81] Accordingly, I accept the uncontested report of Gcabashe and her findings.

[82] In advancing her application, the applicant had relied on the expert opinion of

²⁶*Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC) at 211-212; [2010] 3 All SA 332 (WCC).

Ms Smith. The reports are unhelpful. Ms Smith did not list her qualifications or expertise in the report. She also failed to give details of the methodology of her own assessment and investigation. It is not apparent from her report whether ZGR was interviewed separately from the applicant. Significantly, Ms Smith largely repeats the allegations of the applicant. She did not interview the respondent. These shortcomings, in my view, creates an imbalance in her assessment and renders the credibility of her findings questionable in the court's mind.

[83] For these reasons, whilst I do not reject the report of Ms Smith, I do not place much reliance thereupon. I agree with what was said in *K.O v M.S.*²⁷ where the court stated:

'In my view the requirements for expert reports should be strictly complied with to ensure that vulnerable children are protected and not exposed to a situation where they are expected to satisfy the expectations of a parent(s) and adapt their lives to accommodate a parent's needs or the recommendation of an expert.'

[84] Similarly, this Court is not persuaded by the report of Varaden. The report is lacking in details. The respondent was neither interviewed by Varaden nor afforded any opportunity for the interview. Clearly, the report is based on the views of the applicant. The circumstances under which ZGR was interviewed are not set out. This Court has not been taken into confidence on whether the minor child was interviewed in a proper manner and in a conducive environment. It would be too risky to readily accept this report.

[85] In respect of both reports of Ms Smith and Varaden, my conclusions are informed by: (i) the qualifications and the experience of these expert witnesses are not disclosed; (ii) the lack of support in their conclusions; (iii) the measure of equivocality with which they express their opinions; (iv) the poor quality of their investigations; (v) and the presence of impartiality which could result in a lack of objectivity. On consideration of these aspects, I cannot fully rely thereupon.

²⁷ *K.O v M.S* [2025] ZAGPPHC 192 para 47.

[86] I turn to the Family Advocate and the court appointed forensic psychologist, Mr Willows.

[87] The Family Advocate held an enquiry. It was conducted by a registered social worker who is also a family counsellor. All the parties and their relatives were participating in the enquiry. I find no shortcoming in the Family Advocate report.

[88] This Court therefore accepts the Family Advocate and the family counsellor reports. In these reports, the allegations of sexual abuse could not be confirmed or verified. The reports are logical and based on objective analysis of the facts and information that was available.

[89] Mr Willows' report is also logical and convincing. It is well to remember that he had been appointed by the KwaZulu-Natal Family Law Forum. The applicant avoided participation in such investigations. The conclusion of Mr Willows is that there is no reliable evidence of the respondent being an abusive or neglectful parent.

[90] The report of Mr Willows is detailed, well-reasoned and is based on objective facts. He had conducted psychometric assessment of the respondent. According to him, a psychometric assessment is a structured test used to measure a person's mental capabilities, personality traits and behavioural style. It is an independent process. He had visited the home and observed ZGR with the respondent and the grandmother. He had examined the police investigation records and other reports. He had interviewed ZGR as well. The conclusion he arrived at is based on the analysis of those interviews, contacts and observations.

[91] In *K.O v M.S.*²⁸ it was held:

'The primary purpose of an expert report is to assist and provide a court with an objective opinion. The expert's task is to assist the court with information based on scientific facts and research that would have been unavailable, without the expert's contribution. The expert brings an understanding of the emotional dynamics and interpersonal interactions. The

²⁸ Ibid.

expert may provide an understanding of the needs of the child and the influence of traumatic events on the child's behaviour. However, the opinion of the expert cannot replace the court's decision. The role of an expert has been described as "to assist the Court with the utmost social responsibility and justice, while maintaining standards and ethics". If an expert is to be helpful, the expert must be neutral.' (Footnote omitted)

[92] Having regard to all the reports, more particularly, the Family Advocate, clinical psychologist, Mr Willows, and the nature of the evidence presented by the applicant, together with the police investigation reports and all relevant information that had been filed, I conclude that the allegation of sexual abuse of ZGR has not been established. The criminal charges had also been withdrawn due to lack of evidence. I find no evidence to support the allegations. Does this conclusion end the enquiry; no.

[93] It was correctly submitted, on behalf of the applicant, that this Court is required to determine the best interests of ZGR. What is in the best interests of a child is a question of fact. In *P v P*,²⁹ it stated that:

'In accordance with s 28(2) of the Constitution, s 9 of the Children's Act 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. Section 7(1) details the factors that must, where relevant, be taken into consideration in applying the standard of the best interests of the child. This does not mean that the child's best interest is the only consideration or even that it necessarily trumps all others (cf *S v M (Centre for Child Law As Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC) para 26). Parenthood is a fundamental and life-affirming human experience. It can be cruel and hurtful, and an insult to a parent's dignity, to deprive him or her of a meaningful role in nurturing and developing and maintaining a bond with the child. The Act speaks not only of the responsibilities but also the rights of a parent in relation to the child. In a case where the best interests of the child are clear and are adverse to a parent's interest in performing a parenting role, the former would, I think, always have to prevail. In other cases, however, it may be far more difficult to discern what course of action will best advance the child's interests, and in such cases the parents' respective interests may come to the fore.'

²⁹ *P v P* [2019] ZAWCHC 174 para 59.

[94] I also agree with the statement of Mossop J in *R.M.D v K.D.*³⁰ where it was stated:

'In an ideal world, it would be in the best interests of the minor child if she continued to form part of an intact, united, loving family where her needs were catered for and where she felt secure. In such circumstances she would be given the best opportunity to develop into a well-balanced and responsible member of society who will be able, one day, to contribute to her society.'

[95] In her report, Varaden had emphasised that this Court should consider, as a priority, the safety of ZGR. I agree. She recommended supervised and monitoring of contacts between ZGR and the respondent. I disagree. There is no evidence before this Court that ZGR would be harmed by the respondent. The recommendations of Varaden were all conclusions based on unproven allegations of serious abuse. This Court has already found that there is no evidence in that regard.

[96] The Family Advocate had recommended for the respondent to exercise supervised rights of contact to ZGR. That recommendation was subject to the report of the clinical psychologist. The clinical psychologist had delivered her report. In the report, the clinical psychologist had concluded as follows:

'The current evaluation revealed no reason to recommend any restriction placed on the contact between ZGR and his father. This recommendation is dependent on an assumption that there is no reliable evidence of Mr R[...] being an abusive or neglectful parent.'

[97] The police investigations have not established the allegation. I therefore agree with the recommendation of the clinical psychologist that there is no basis to restrict or impose supervision on the contacts of the respondent with ZGR. Relying on the Family Advocate report and the clinical psychologist, this Court must decline the applicant's request for suspension of contacts of the respondent. There would be no basis for such a drastic order in the parenting of ZGR.

[98] The court must not only consider the best interests of the child in isolation of other relevant factors. Of course, the best interests of the child are paramount. In *S v*

³⁰ *R.M.D v K.D* [2023] ZAKZNPHC 2 para 29.

*M (Centre for Child Law As Amicus Curiae)*³¹ it was stated:

‘The fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.’

[99] The reports indicate that the respondent is a loving and caring parent. He had close relations with ZGR. The relations had been strained by the limited contacts imposed by the court order. There are no special circumstances which would warrant for the limiting of contacts between ZGR and the respondent. I agree with what was said in *P v P*³² that parenthood is a fundamental and life-affirming human experience. It can be hurtful and an insult to a parent’s dignity to deprive him or her of a meaningful role in nurturing and developing and maintaining a bond with the child.

[100] In the view of this Court, there are considerable benefits for ZGR in having a shared parenting arrangement. He will maintain a sound relationship with both parents. That relationship had existed between the parties after the divorce until the unsubstantiated allegations of abuse were raised against the respondent. All the reports are not indicative of a child that has been abused.

Conclusions

[101] Having regard to all the circumstances discussed above and the various reports filed, this Court holds the view that the applicant has failed to make out a case for the suspension of the rights of contact and access of ZGR by the respondent. The applicant has also failed to establish the allegations of sexual abuse of ZGR by the respondent.

[102] The results are that the application should be dismissed.

[103] This Court has canvassed with the parties an appropriate order that would accommodate the best interests of ZGR. I am indebted to counsel for their

³¹ *S v M (Centre for Child Law As Amicus Curiae)* 2008 (3) SA 232 (CC) para 26

³² *P v P* supra at para 59

submissions in this regard. I intend to grant an order which would be in accordance with the best interests of ZGR.

Costs

[104] The general rule is that costs must follow the results. The respondent has urged this Court to award costs on scale C of the tariff. On the contrary, the applicant had asked for each party to pay its own costs. Applicant's counsel had submitted that the award of costs would only prolong the acrimonious relationship that already exists between the parties. Whilst this submission is attractive, I am constrained to disagree on the facts of this case.

[105] The conduct of the applicant has been unsatisfactory. This Court takes a dim view on the applicant's refusal to cooperate with the clinical psychologist. The allegations against the respondent were disparaging and humiliating to him as a parent. All this could have been avoided by an act of forensic investigation, which the applicant had avoided.

[106] I am also not persuaded that this Court should grant costs on a punitive scale. The costs shall be on the ordinary party and party scale, including costs of counsel on scale A.

Order

[105] In the result, the following order is issued:

1. The interlocutory application for the referral of the main application to trial is dismissed;
2. The main application is dismissed.
3. The applicant is directed to pay the costs of both the main and the interlocutory applications on an ordinary party and party scale, including the costs of counsel, according to scale A.
4. With effect from the first Friday immediately succeeding the date of this order the respondent shall be entitled to have contact with the child, ZGR, a boy, born on 12 February 2019, during school term times as follows:

- 4.1 For a period of two months:
 - 4.1.1 every alternate weekend from after school or aftercare on Friday when the respondent shall collect the child from school until Saturday at 17h00 when the respondent shall return the child to the applicant at the Fields Hill Shell petrol station and from 09h00 to 17h00 on Sunday with the respondent to collect the child from and return him to the applicant at the Fields Hill Shell petrol station;
 - 4.1.2 every Thursday from after school or aftercare when the respondent shall collect the child from school until Friday morning when the respondent shall drop the child at school.
- 4.2 After the lapse of the aforesaid two-month period and for a further period of two months, the respondent shall have contact with the child as follows:
 - 4.2.1 every Thursday from after school or aftercare when the respondent shall collect the child from school until Friday morning when the respondent shall drop the child at school;
 - 4.2.2 every alternate weekend from Friday after school or aftercare when the respondent shall collect the child from school until Sunday at 17h00 when the respondent shall return the child to the applicant at the Fields Hill Shell petrol station;
 - 4.2.3 should the Friday preceding or the Monday succeeding the weekend be a public holiday, the public holiday shall form part of the weekend and in the event of the Monday being a public holiday, the child shall spend Monday night with the respondent who shall drop the child at school the following Tuesday morning.
- 4.3 After the lapse of the second two-month period referred to in paragraph 5.4 above, the respondent shall have contact with the child as follows:
 - 4.3.1 every Thursday from after school or aftercare when the respondent shall collect the child from school until Friday morning when he shall drop the child at school;
 - 4.3.2 every alternate weekend from Friday after school or aftercare when the respondent shall collect the child from school until

Monday morning when the respondent shall drop the child at school;

4.3.3 should the Friday preceding or the Monday succeeding the weekend be a public holiday, the public holiday shall form part of the weekend and in the event of the Monday being a public holiday, the child shall spend Monday night with the respondent and he shall drop the child at school the following Tuesday morning.

4.4 During the December 2025/January 2026 school holidays:

4.4.1 the child shall spend alternating periods of seven consecutive nights with the respondent and seven consecutive nights with the applicant;

4.4.2 the seven-night periods shall commence at 09h00 on the first day of each period with effect from 09h00 on the day after school closes for the holidays;

4.4.3 all handovers shall take place at the Fields Hill Shell petrol station.

4.5 With effect from the March/April 2026 school holiday, all school holidays shall be divided into two equal halves and the child shall spend one half of each school holiday with the applicant and the other half with the respondent with the halves to alternate each year. Handovers shall take place at the Fields Hill Shell petrol station.

4.6 The respondent shall have contact with the child on Fathers' Day from 09h00 to 17h00 should that day fall during a weekend when the respondent is not having contact with the child and the applicant shall be entitled to have contact with the child on Mothers' Day from 09h00 to 17h00 should that day fall during a weekend when the child is having contact with the respondent. Handovers shall take place at the Fields Hill Shell petrol station.

4.7 On the respondent's birthday, should the birthday fall on a day when the child is attending school, the respondent shall have contact with him from after school until school commences the following day. Should the birthday fall on a weekend when the respondent is not having contact with the child, he shall be entitled to have contact with the child

from 09h00 to 17h00. The applicant shall be entitled to have the same contact with the child on her birthday should it fall on a day when the respondent is having contact with the child. Handovers shall take place at the Fields Hill Shell petrol station.

4.8 On the child's birthday:

4.8.1 should the birthday fall during a weekend, the party with whom the child is not spending the weekend shall be entitled to have contact with him from 08h00 to 13h00 or from 13h00 to 18h00, with handovers to take place at the Fields Hill Shell petrol station;

4.8.2 should the birthday fall on a day when the child is attending school, the party with whom the child is not staying shall be entitled to have contact from after school, when he or she shall collect the child from school, until 17h00 when he or she shall return the child to the other party at the Fields Hill Shell petrol station.

4.9 In respect of Christmas, the party with whom the child is not staying at the time shall be entitled to have contact with the child from 12h00 on 24 December until 12h00 on 25 December. Handovers shall take place at the Fields Hill Shell petrol station.

4.10 On Good Friday the party with whom the child is not staying at the time shall be entitled to have contact with the child from 08h00 to 13h00 or from 13h00 to 18h00. Handovers shall take place at the Fields Hill Shell petrol station.

4.11 All public holidays, other than those dealt with above in paragraphs 4.2, 4.3, 4.9 and 4.10, shall alternate between the parties.

4.12 In the event of the child being ill, the respondent shall nevertheless be entitled to exercise the contact provided for in paragraphs 4.5 to 4.11 above unless otherwise agreed to by the parties in writing. If the child is not attending school due to illness on a day when the respondent is due to collect the child from school, handovers shall take place at the Fields Hill Shell petrol station.

4.13 The respondent shall be entitled to have telephonic and video contact with the child at 17h00 on the days when he does not have physical

contact with the child.

- 4.14 The respondent, after informing the applicant, is hereby authorised and directed to arrange for the child to attend therapy with either Lauren Snailham or Melinda Howlett ('the psychologist') and to provide a mandate to the psychologist to render therapy for the child without the need for the applicant's consent thereto, provided that the applicant had been informed and has unreasonably withheld her consent.
- 4.15 Each party is directed:
- 4.15.1 to ensure that the child attends all therapy sessions which are scheduled for the child by the psychologist at times when the child is in his or her care;
 - 4.15.2 to attend any therapy session if required to do so by the psychologist;
 - 4.15.3 to pay 50 per cent of the costs of the child's therapy sessions with the psychologist in the event they are not covered by the respondent's medical aid scheme and to pay in full for the costs of any individual therapy session which he or she may have with the psychologist.
 - 4.15.4 the obligation to pay 50 per cent of the fees for a psychologist only applies when the psychologist had been agreed and consented to by both the applicant and the respondent.
- 4.16 Paragraphs 4.1 to 4.15 above supersede and replace paragraph 4 of the order on 4 August 2022 under case number D5777/2022, paragraph 1 of the order granted on 2 July 2024 under case number D5383/2024 and paragraph 6 of the order granted on 19 August 2024 under case number D6383/2024.

NOTYESI AJ

APPEARANCES:

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Attorneys for the applicant	:	Shamla Pather Attorneys Inc Suite 202, 2 Richefond Circle Ridgeside Office Part Umhlanga Rocks
Counsel for the respondent	:	Adv E S Law
Attorneys for the respondent	:	Law Offices of Karen Olivier 58 St Andrews Drive Durban North 4501
Date Heard	:	20 August 2025
Date Delivered	:	28 October 2025