REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 8563/18

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	NO
2.OF INTEREST TO OTHER JUDGES:	NO
3.REVISED	NO

24/01/2022 **Judge**
Dippenaar

In the matter between:

DG Applicant

and

SANET VAN ASWEGEN N.O
as curatrix ad litem to **TRD** First Respondent

VDM MW Second Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 24th of January 2022.

DIPPENAAR J:

[1] This is the latest application in a longstanding battle between the applicant and the second respondent at the midst of which is their seven year old daughter, T. At the heart of their dispute is T's disclosures of possible sexual abuse perpetrated against her by the Applicant made to various third parties during 2018 and the applicant's averments of parental alienation of T perpetrated by the second respondent. These issues are the central disputes between the parties in the pending legal proceedings ("the main proceedings").

[2] The applicant by way of interlocutory application presently seeks the implementation of certain recommendations made by Prof G Pretorius, aimed at reintegration therapy and the restoration of his contact to T. The second respondent by way of counter application seeks an order directing T to receive play therapy, together with ancillary relief. Both the respondents oppose the relief sought by the applicant. The application papers are voluminous and run into an excess of 1100 pages.

[3] The applicant's supervised contact to T was suspended pending the final determination of the main proceedings and the Teddy Bear Clinic's investigations into the alleged sexual abuse by way of court order on 1 November 2019. That order was granted pursuant to an urgent application launched by the first respondent, T's *curatrix ad litem* and voice of the child ("the *curatrix"*) during October 2019. The basis of that application was that the applicant had, whilst exercising supervised contact to

T,attempted to influence her to recant her version, whilst an investigation by the Teddy Bear Clinic into possible sexual abuse of T by the applicant was pending.

[4] The Teddy Bear Clinic's final report was rendered on 19 December 2019. One of its recommendations was that *"This child must continue with play therapy to deal with the psychological trauma as well as receive preventative and protective therapy in terms of body safety. Once in therapy, the child can resume contact with her father under supervision by a registered mental health professional. However caution needs to be taken by the supervising professional relating to T's needs- the child experienced the father as intimidating and coercing her at school to recant her disclosure, which was overheard and noted by the supervising teacher. The child cannot be placed under distressing circumstances in order to meet the needs of the father above her own, until this court is able to reach conclusion in this matter"*.

[5] During the course of 2020, T received some play therapy which from the report of Ms Bouwer seems to have terminated during November 2020. No reason was provided in the papers as to why the play therapy did not continue.

[6] Professor Pretorius was appointed by agreement between the parties to provide a report regarding access and contact to T, which report was provided during November 2020 ("the Pretorius report"). In that report, recommendations were made that reintegration therapy between T and the applicant commence with limited individual sessions after which the process of reintegrated contact would commence. Professor Pretorius effectively concluded that T's relay of events pertaining to the alleged sexual abuse was tainted, that the evidence of sexual abuse was scant and that there has been parental alienation of the applicant. It is beyond dispute that the contents of Professor Pretorius's report deals with the central issues between the parties in the main proceedings and that she will be a central witness in those proceedings.

[7] The present application was launched during July 2021. In his founding papers, the applicant raises a number of objections to the Teddy Bear Clinic's report and the

findings and recommendations raised therein. In turn, the second respondent in her answering papers raises various objections to the findings and recommendations contained in the Pretorius report.

[8] In his founding papers the applicant sought to implement the Pretorius report, despite it being clear that substantial factual disputes exist which can only be determined by way of oral evidence. The applicant argued that the recommendations in the two reports are similar and thus that there were no disputes precluding the granting of the relief sought. I do not agree. Once the two reports are considered in context the applicant's contentions do not pass muster and it is clear that the fundamental findings pertaining to the alleged sexual abuse in the reports of Professor Pretorius and the Teddy Bear Clinic are substantially in conflict and that numerous factual disputes exist on this issue which cannot be resolved on the papers. There are also numerous factual disputes on the issue of parental alienation. Moreover, importantly those issues should in my view be dealt with in the main proceedings rather than in the present application. There is in my view merit in the second respondent's contention that the present application has sought to circumvent the main proceedings, illustrated by the voluminous and expansive nature of the applicant's founding affidavit which traverses the entire history of the matter.

[9] Shortly before the hearing, the *curatrix* reported that the National Director of Public Prosecutions ("the NDPP") was considering whether to prefer criminal charges against the applicant pertaining to the alleged sexual abuse. The correspondence from the NDPP confirmed that T had been consulted and that she was assessed as a competent witness. The *curatrix* reported that she had conversed with the NDPP's Adv Drotsky who requested her to bring to this court's attention that until a decision was made whether or not to prosecute the applicant, he should not have access to T. If such a decision was made, the applicant should have no contact to T pending the criminal trial as she would be the primary witness against the applicant.

[10] The applicant had contended in his papers that he had been exonerated from all criminal charges. Factually this is not the case. The applicant was afforded an opportunity to consider his position regarding the pursuit of the present application at this time, given the substantial new circumstances which arose after all the application papers had been filed. Both the *curatix* and the second respondent argued that the recent developments constituted a material change in circumstance and that the application should not proceed. The applicant was notified by the respondents that a punitive costs order would be sought if he persisted in arguing the application at this stage.

[11] The applicant elected to persist with the present application and the relief sought therein, albeit that he argued that the reintegration therapy and commencement of his contact with T could be staggered. The applicant did not request a postponement, nor the opportunity to deal with the recent developments pertaining to the NDPP.

[12] At the hearing the applicant baldly, and without any factual foundation suggested that there was a conspiracy involving the second respondent and the NDPP aimed at thwarting his contact with T. He further accused the *curatrix* of colluding with the second respondent and of not being objective, without any factual basis for such contention stated in his papers. The applicant's affidavits are replete with similar accusations and intemperate contentions which in my view have a bearing on costs, an issue to which I later return.

[13] It is apposite to first deal with the four points *in limine* raised by the second respondent. I do not intend disposing of the application on the basis of those issues, although some of them have merit, but rather to consider them in the context of an appropriate costs order.

[14] Regarding the non-joinder of Ms Van Hoffen, the maternal grandmother of T, I agree with the second respondent that she does have a direct and material interest in

these proceedings[1], given that she is a party to the main proceedings in respect of which relief pertaining to T's care and contact in terms of the order of Wepener J granted on 20 August 2019 is still pending. It would however serve no purpose in postponing this application so that she can be joined.

[15] There is also merit in the second respondent's *lis pendens* point, given the pending main proceedings pertaining to the determination of the parental rights and responsibilities pertaining to T, including care and contact. I have already dealt with the factual disputes pertaining to the allegations of sexual abuse, exacerbated by the recent developments pertaining to possible criminal charges begins preferred against the applicant in relation thereto. In order to determine whether the recommendations made by Prof Pretorius are indeed in T's best interests or not, clarity is required on that issue. I have already found that evidence is required and that the issue is central to a determination of the main proceedings.

[16] I do not however agree that the second respondent has made out a proper case for the striking out of the averments objected to in her answering papers. The second respondent did not serve a notice in terms of r 6(15) although the objectionable paragraphs were referred to in the answering affidavit. Although I agree with the second respondent that the applicant's papers are replete with scurrilous, vexatious and irrelevant allegations made against not only the second respondent but also against the *curatrix*, the objectionable averments have not been properly identified. Insofar as the second respondent has objected to the hearsay allegations and unsubstantiated expert opinions expressed by the applicant in his affidavits, those allegations carry no weight.

[17] Condonation was sought for the late delivery of second respondent's replying affidavit in her counterapplication. That application was not opposed and I am satisfied that good cause[2] has been shown for the granting of condonation.

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[1] Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA) at 176H-I
[2] Pangbourne Properties Ltd v Pulse Moving CC and Another 2013 (3) SA 140 (GSJ) para [17]

[18] Turning to the merits of the application, it in essence one under s 7 of the Children's Act[3] for a variation of the present contact order, which requires the best interests of child standard to be applied and various factors to be taken into account as set out in that section[4]. In determining such an application, a court must make a value judgment based on its findings of fact in the exercise of its inherent jurisdiction as the upper guardian of minor children[5]. It entails a judicial investigation of what is in a child's best interests. A court is not bound by the contentions of the parties and slavish adherence to technical procedural requirements may result in a court not being able to decide an issue in the best interests of a child[6].

[19] T is still of a tender age and is only seven years old. It is necessary to have as a paramount concern her physical, emotional and psychological wellbeing. Even in the Pretorius report, relied on by the applicant, T's state is described as being fearful of the applicant and she associates feelings of fear, sadness and anxiety in respect of her relationship with him. T also has other challenges and has had to deal with schooling challenges in the midst of the Covid 19 pandemic and the death of the second respondent's partner with whom she shared a close relationship. If it is decided that the applicant is to be criminally prosecuted, it will undoubtedly present further challenges to T.

[20] Considering T's present state and emotional vulnerability, it is undoubtedly in T's best interests that she receives play therapy on an ongoing basis until it is no longer required. It is not possible at this stage to determine when that will be, but I am persuaded that the proposed play therapy should at this stage be on an ongoing basis. The position can be reassessed during the main proceedings.

[21] The question is whether play therapy should be combined with reintegration therapy and the reintroduction of contact as sought by the applicant. It was central to his

[3] 38 of 2005
[4] In the present context the factors in s7(1) (a), (b) (c), (d), (e), (f), (g), (h), (l) and (n) require special consideration.
[5] PvP 2007 (5) SA 94 (SCA) at para [14]
[6] Jackson v Jackson 2002 (2) SA 303 (SCA) at par [5]

case that a roadmap should be set with imposed timelines to avoid any further deterioration in his relationship with T. There are a number of factors which in my view do not favour the granting of the relief sought if T's best interests are considered.

[22] First, the fate of the possible criminal proceedings is at this juncture unknown. Were the NDPP to decide to formally prosecute the applicant, that process must proceed unhampered by the effects of any order granted in the present proceedings. It has already been indicated by the NDPP that if there is to be a prosecution of the appellant, their stance is that T, as primary witness, should have no contact with the applicant until the proceedings are finalised. In this context, it is relevant to bear in mind that the basis on which the applicant's contact with T was suspended was the applicant's attempt to manipulate and influence T during the Teddy Bear Clinic investigations.

[23] Second, even if the NDPP elects not to prosecute the applicant and the above considerations do not apply, I am not persuaded that the applicant has made out a cogent case that the recommendations in the Pretorius report must be implemented. In addition to the factual disputes and the second respondent's challenges to the Pretorius report, the report is entirely silent on the implications of simultaneously pursuing play therapy and reintegration therapy and what the likely implications thereof on T would be. The applicant has further provided no cogent factual basis as to why a short and limited reintegration process and the resumption of his contact to T would be in T's best interests. The applicant's case further ignores the report of the Teddy Bear Clinic. For reasons already stated the Pretorius report cannot simply be accepted in the present proceedings.

[24] Third, in his papers, the applicant's focus is not on T's best interests but rather focusses on his own rights and interests. There are many factual disputes on the papers surrounding the applicant's bald averments of parental alienation, an issue which is central to the parties' disputes and will require oral evidence to resolve in the main proceedings.

[25] Whilst it is in a child's best interests to maintain a good relationship with both her parents, it is well established that any right vested in a parent must yield to the dictates of the welfare of the child[7]. As stated by Howie JA in *B v S*[8]*:*

> *"Parenthood in most civilized societies is generally conceived as conferring on parents the exclusive privilege or ordering, within the family, the upbringing of children of tender age, with all that entails. That is a privilege, which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed by the general law, and, where the circumstances demand, by the court or the authorities on whom the legislature has imposed the duty of supervising the welfare of children and young persons. When the jurisdiction of the court is invoked for the protection of the child, the parental privileges do not terminate. They do, however, become immediately subservient to the paramount consideration which the court has always in mind, that is to say the welfare of the child."*

[26] Whilst I accept that a suspension of access cannot endure indefinitely, the orders which are presently in place are only set to endure until the determination of the main proceedings. In the present circumstances it is not possible, nor in my view in T's best interests, to set any chronological timelines as much depends on the outcomes of uncertain variables, the most important of which is meeting T's emotional and psychological needs. The applicant seems not to appreciate that T's emotional and psychological state and her response to play therapy will have to dictate the pace of progress. Although the applicant's frustration at the uncertainty this creates is understandable, such frustration must always be subservient to T's best interests.

[27] In my view on a conspectus of all the facts, the applicant has not established that it is in T's best interests to grant the relief sought. To the contrary, it is in T's best interests not to.

[28] The applicant's main objection against the relief sought in the counter application pertaining to play therapy is that it provides no clear roadmap indicating the time frame within which he is to obtain contact to T. Considering the present circumstances and the prevailing uncertainty regarding the future of the criminal proceedings it is in my view not possible to set any time lines and it would not be in T's best interests to do so.

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[7] B v S 1995 (3) SA 571 (A)
[8] 1995 (3) SA 571 (A) at 581A

[29] For reasons already stated, I conclude that the second respondent's counter application should be granted. However, in my view it would not be appropriate to afford the proposed therapist with an unfettered discretion as sought by the second respondent but rather that the process should be subject to judicial oversight. It would be appropriate for the curatrix to obtain regular reports pertaining to T's play therapy which would in due course assist a court dealing with the main proceedings to make an appropriate order.

[30] The parties were requested to provide the names of suitable play therapists who were willing and able to assist T. The parties could not agree on a particular therapist and I was provided with the names of various individuals. As certain of these individuals were not available to assist, the *curatrix* was requested to provide other suitable and available therapists.

[31] I turn to the issue of costs. The respondents sought a punitive costs order against the applicant on the basis that the application was ill-conceived. Both respondents emphasised that the applicant was at risk in electing to pursue the application in light of the recent developments regarding the criminal prosecution. The stance adopted by the applicant was confusing resulting in the matter standing down for counsel to obtain instructions. The approach adopted was that the applicant persisted in seeking the relief sought although the reintegration therapy could be pursued in a staged fashion. The applicant must face the consequences of his election to persist with the application in light of the present uncertainty regarding his criminal prosecution as it is an important factor to take into consideration. The conduct of the applicant in relation to this application, including the inordinate length of his papers, his attempt to circumvent the main proceedings and his unsubstantiated vexatious and intemperate allegations in my view justify the granting of a punitive costs order. There was in my view, also no sound basis on which the second respondent's counter application was opposed.

[32] In relation to the costs of the play therapist, it would be appropriate for any costs in excess of the amount covered by the applicant's medical aid to be borne by the applicant and the second respondent in equal shares. The parties each provided a proposed draft order which draft orders have been considered.

[33] I grant the following order:

[1] Condonation is granted for the late delivery of the second respondent's replying affidavit in the counter application.

[2] The applicant's application is dismissed;

[3] The second respondent is directed to submit TRD, a girl born on the 21st of January 2014 and currently 7 years old, ("*T*") to play therapy, with immediate effect, to be undertaken by Dr Lynette M Roux, ("the play therapist") on a weekly basis or such other basis as recommended by Dr Roux, pending the determination of the main proceedings;

[4] The first respondent is directed to obtain bi-monthly reports from the play therapist pertaining to T's play therapy and her progress and state of emotional and psychological wellbeing;

[5] The costs of the play therapist and any costs ancillary thereto referred to in 3 above shall be paid by the applicant's medical aid and any shortfall shall be borne by the applicant and the second respondent in equal shares;

[6] In the event that there are any shortfalls that are not covered by medical aid, the applicant is directed to forthwith provide proof to the second respondent that the invoice and/or statement was submitted to his medical aid and that the medical aid

has not covered such cost and does not intend to reimburse the applicant for such cost, in which case the amount will be borne by both parties in equal shares;

[7] Should either party make payment in excess of his or her half share of the play therapy costs, then the other party shall be liable to reimburse said party within 7 days of being furnished with proof of payment of the relevant amount.

[8] The applicant is directed to pay the costs of the application and the second respondent's counter application on the scale as between attorney and client.

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EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 06 December 2021
DATE OF JUDGMENT	: 24 January 2022
APPLICANT'S COUNSEL	: Adv. M van Nieuwenhuizen
APPLICANT'S ATTORNEYS	: Steve Merchak Attorneys
Curatrix Ad Litem	: Adv. S. Van Aswegen
2nd RESPONDENT'S COUNSEL	: Adv R Adams
2nd RESPONDENT'S ATTORNEYS	: Pottas Attorneys