

SOUTH AFRICA / JUDGMENT

Ncube v Duba, Ncube v Duba (23010/2004, 51561/2010) [2011] ZAGPPHC 61 (20 April 2011)

[2011] ZAGPPHC 61

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Byl

CASE / FILE NUMBER

23010/2004, 51561/2010

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE No. 23010/2004

DATE:20/04/2011

In the matter between:-

MOLOKE BENNET NCUBE.....Applicant

and

GIVEN PITSI DUBA.....Respondent

CASE No. 51561/2010

JUDGMENT

Van der Byl, AJ:-

Introduction

- [1] This is a joint judgment in the above two matters, Case No. 23010/2004 and Case No. 51561/2010, both of which served before me on 24 February 2011, 25 February 2011 and 28 March 2011.
- [2] It is common cause that the parties were married to each other during 1994 and that a child, N D ("the child"), was born out of their marriage on 21 June 1997.
- [3] The parties were, after the Respondent together with the child left the common home on 18 May 2004, divorced on 6 March 2008 on the occasion of which a deed of settlement concluded between the parties was made an order of Court in terms of which, inter alia, primary residence of the child was vested in the Respondent and certain rights of contact with the child were granted to the Applicant as the father of the child.
- [4] The two matters before me are a sequel to a protracted, unfortunate and bitter, if not tragic, history during which six court orders were during the period 7 March 2006 to 25 February 2011 granted against the Respondent in terms of which she was in effect ordered to allow the Applicant contact with the child.
- [5] The six order concerned orders were granted on 7 March 2006 by Patel J, on 9 May 2006 by Murphy J, on 6 March 2008 by Shongwe J, on 12 August 2010 by Mavundla J, on 7 October 2010 by Webster J and on 25 February 2011 by myself.
- [6] As will be pointed out below, the Applicant was, despite these orders, during a period of almost seven years, apart from sporadic telephonic contact, allowed some contact with the child on only three occasions, namely, unsupervised on 21 June 2009 and, on the insistence of the Respondent, in her presence on 20 August 2010 and 21 August 2010.
- [7] In Case No. 23010/2004 the Applicant seeks, against the background of, according to him, numerous futile attempts to obtain reasonable access to the child, an order, in addition to the usual order of costs, in terms of which the aforesaid deed of settlement is varied so as to vest primary residence of the child in him.
- [8] In Case No. 51561/2010 the Applicant seeks, based on the Respondent's failure or refusal to comply, particularly, with the court order granted by Mavundla J on 12 August 2009, an order, in addition to the usual order of costs, in terms of which the Respondent is found to be in contempt of Court for non-compliance with that order.
- [9] The allegations on which such relief are claimed in these matters are in many respects disputed by the Respondent which call for a full and extensive exposition of the facts and allegations relied upon by the parties in support of, and in opposition to, the relief so claimed.

[10] As will be pointed out below, the evidence in Case No. 51561/2010 ("the contempt application") is a continuation and part of the events referred to in Case No. 23010/2004 ("the variation application").

[11] I will accordingly jointly deal with all the evidence as it emerged from both matters.

[12] I will deal seriatim with the circumstances under which each of the six orders in question was granted.

Circumstances under which the various orders were granted

[13] Firstly, there is the interim order granted by Patel J in terms of Rule 43 on 7 March 2006.

[14] According to the Applicant -

(a) he, after the Respondent left the common home, issued a summons against her for divorce under Case No. 23010/2004 in which he claimed, in addition to a decree of divorce, an order that custody and control over the child be granted to the Respondent subject to his right of reasonable access to the child, and the Respondent in turn claimed, as was evident from her plea filed in the divorce

proceedings, an order that such access should be supervised "as she may allow (para 5 and 6 of Applicant's founding affidavit in the variation application, record pp. 8 and 9);

(b) the Respondent since she left the common home refused to give him her home address and furthermore refused him any contact with the child and even took a cell phone away which he had given to the child so as to maintain telephonic contact with the child (para 7 and 12 of that affidavit, record pp. 9 and 12);

(c) he then, on advice of his attorney, awaited a report from the Family Advocate who interviewed him and the Respondent on one occasion whereafter the Respondent, despite various requests by the Family Advocate, failed to attend any further interviews and to make the child available for such interviews so that the Family Advocate had eventually to interview the child at his school (para 8 of that affidavit, record p. 10 and Annexure A, record p. 34);

(d) the Respondent, on receipt of the Family Advocate's report on 30 November 2005 in which, in order to guard against parental

alienation, the Family Advocate recommended reasonable access, including removal rights every alternate weekend and school holidays

and telephonic contact, still refused him contact with the child (para 9 to 11 of that affidavit, record pp. 10 to 11);

(e) he then brought an application in terms of Rule 43 in which he claimed an order granting him reasonable access to the child,

including removal rights every alternate weekend and school holidays, as well as the right to contact the child telephonically (para 15 of that affidavit, record p. 13).

[15] The Respondent failed to file an opposing affidavit, but on 7 March 2006, being the date on which the matter was enrolled, counsel who appeared on her behalf requested, saying that the Respondent was unable to attend, a postponement, whereupon, the matter was then postponed sine die, but, as is apparent from para 16 of that affidavit, record p. 14 and Annexure B, record p. 45, Patel J granted the Applicant, in the interim -

- (a) the right to remove the child alternate weekends (commencing from the first weekend after the date of that order, ie., 11 March 2006);
- (b) the right to remove the child alternate school holidays (commencing from the first holiday after the date of the order), Christmas to rotate between the parties; and
- (c) the right to telephonic contact with a cell phone to be provided, as undertaken, by the Applicant.

[16] Despite this order the Respondent still refused the Applicant any access to the child. She also failed to file an opposing affidavit, whereupon, the matter was enrolled for 9 May 2006 (para 17 of that affidavit, record p. 14).

[17] In response to these allegations, the Respondent -

- (a) admitted that the Applicant issued summons for a divorce, but contended that she and the child were "expelled" by the Applicant from their home (para 9 of Respondent's opposing affidavit in the variation application, record p. 70);
- (b) denied by way of a bare denial that she, after she left the common home, refused the Applicant any contact with the child and that she had taken the cell phone away from the child (para 11 of that affidavit, record p. 71);
- (c) denied also by way of a bare denial that she "simply did not go for the interview with the Family Advocate and contended, without stating why, that what was stated in the report of the Family Advocate was not the correct state of affairs and more particularly

at the time she deposed to her affidavit on 11 August 2010 (para 13 and 15 of that affidavit, record p. 72);

- (d) denied by way of a bare denial that she, after the report of the Family Advocate became available, refused the Applicant any contact with the child (para 16 of that affidavit, record p. 73);
- (e) denied by way of a bare denial that she, after the order of Patel J was granted on 7 March 2006, refused the Applicant any contact with the child (para 23 of that affidavit, record p. 76).

[18] Secondly, there is the final order granted by Murphy J in terms of Rule 43 on 9 May 2006

[19] On 9 May 2006, in the absence of any opposing affidavit and on the Respondent's apparent failure to appear, Murphy J granted, as is apparent from para 17 of the founding affidavit in the variation application, record p. 14 and Annexure

C, record p. 46, a final order in terms of which the Applicant was granted the following rights of access to the child, namely -

- (a) to remove the child every alternate weekend (commencing the first weekend after the date of that order, being 13 May 2006);
- (b) to remove the child every alternate school holiday (commencing the first holiday after the date of that order, Christmas to rotate between the parties;
- (c) to have telephonic contact with the child by means of a cell phone to be provided, as undertaken, by the Applicant; and
- (d) reasonable visitation to the child.

[20] As the Respondent was still refusing to disclose her residential address it was arranged, on her insistence, that the Applicant would collect the child at McDonald's, Randburg, for the first weekend envisaged in Murphy J's order (paras 18.1 and 18.2 of that affidavit, record pp. 14 and 15)

[21] According to the Applicant, the Respondent, however, on her arrival refused to hand over the child and drove away, but, as was later determined, instead went to the police station where she laid a charge against the Applicant accusing him of having threatened her with a gun. The Applicant described this allegation as a blatant lie and raised the question why he would have taken a gun to collect his child and why would he have attempted to take the law into his own hands after having followed a lengthy and costly legal process to obtain access to his child, particularly, where he had a court order in his favour (paras 18.3 to 18.6 of that affidavit, record pp. 15 and 16).

[22] He was, according to him, later informed by the child that the Respondent told him to lie about the incident at McDonald's (para 18.7 of that affidavit, record p. 16).

[23] The Respondent in turn merely reiterated the allegations that she was threatened with a firearm and that she drove away because she was scared for her life and that of her child (para 25 of her opposing affidavit, record p. 76).

[24] Thirdly, there is the order by Shongwe J (as he then was) on 6 March 2008.

[25] According to the Applicant he was after the incident at McDonald's not granted any rights of access to the child, but at the pre-trial proceedings held with a view to the divorce, the Respondent conceded to supervised access to the child being the basis on which the deed of settlement was eventually concluded (paras 19.4 and 20.1 to 20.4 of the founding affidavit in the variation application, record pp. 17 and 28).

- [26] In terms of the deed of settlement, Annexure D to that affidavit, record p. 47 -
- (a) custody of the child was awarded to both parties, but primary residence of the child was vested in the Respondent;
 - (b) the Applicant was entitled to contact the Respondent telephonically to arrange a time, date and place at which to visit the child;
 - (c) the Respondent was at all material times to be present during the exercise by the Applicant of his visitation rights.
- [27] According to the Applicant, the Respondent after the date of their divorce, despite numerous telephone calls to arrange contact with the child and numerous letters by his attorney of record threatening to bring an application for contempt of Court, constantly refused him access to the child until 21 June 2009, being the date of the child's birthday, and persistently refused to disclose the child's whereabouts (paras 22 and 23 of that affidavit, record pp. 20 and 21).
- [28] On that date he phoned the Respondent and asked to speak to the child to congratulate him on his birthday. A few hours later the child returned his call in the course of which they had a pleasant conversation (paras 24 and 25 of that affidavit, record pp. 21 and 22).
- [29] The following day at his request the Respondent, albeit to his surprise, agreed that he may remove the child from school, being the first occasion he was allowed access to the child since they separated five years earlier on 18 May 2004 (paras 24 and 25 of that affidavit, record pp. 21 and 22)
- [30] The Applicant on this occasion bought, with the Respondent's permission, the child a cell phone and saved the number of his cell phone on it so that he and the child would be able to have telephonic contact with each other which contact lasted until sometime during July 2009 (paras 25 and 26 of that affidavit, record p. 22).
- [31] Since July 2009 he, however, found that every time he phoned the child the cell phone was switched off and when he thereupon on numerous occasions phoned the Respondent to find out what was going on she on each occasion had an excuse and eventually snapped at him saying that he gave his current wife cars to drive around, but he left her without a car or shelter and that he would not see the child for as long as she lives because he left her without a car and shelter (para 28 of that affidavit, record p. 23).
- [32] The Applicant after a few days again phoned the Respondent and asked to speak to the child, but she informed him that she was in Polokwane and the child was in Johannesburg, but that he could see the child, whereupon, they arranged to meet the following day so that they can talk about it. However, the following day she said that she was going to see her lawyer. On a question what was wrong with the child's phone, she told him that he changed the number, but she will "sms" him the number which she never did (para 29 of that affidavit, record

p. 24).

- [33] The Applicant on 27 August 2009 went to the child's school where the child asked him why the Respondent does not want him to see him (para 30 of that affidavit, record p. 25).
- [34] The Applicant on 27 September 2009 obtained the child's new number from him at school and phoned him the next day during which the child indicated to him that he would like to visit him for the December school holidays, but that he was scared since the Respondent said that his wife would kill him (para 31 of that affidavit, record p. 25).
- [35] The Respondent on 5 September 2009 phoned him and said to him that he is a "thunderhea" and that she does not want him in their lives and that she would kill him and ensure that he becomes "bewitched", but later phoned and attempted to apologise. He in any event thereafter, often without the Respondent's knowledge, spoke to the child telephonically and discovered that he is often left at home alone when the Respondent and her husband visits Polokwane and that the child often "skips school (para 32.1 to 32.4 of that affidavit, record p. 26)
- [36] At some stage he contacted the child's school teacher who told him that she was concerned about the child as he was at times absent from school for two weeks before the school closes and two weeks after the school reopens, that she contacted the Respondent about the situation, but she never came back to her. According to him the teacher was not prepared to give him a letter to that effect because the principal would not give her permission to do so (para 32.5 and 32 .6 of that affidavit, record p. 27).
- [37] As is apparent from the Applicant's supplementary affidavit filed in the contempt application, (para 11 of that affidavit, record p. 205) he on 4 October 2010 had a conversation with the child's headmaster during which he informed him that the child was often absent from school on an on-and-off basis for approximately six weeks, that the child was not doing well in school and that he would in all likelihood fail that year (the headmaster was according to the Applicant also not prepared to depose to an affidavit as he did not want to get involved in court applications between the parties).
- [38] On 7 October 2009 the child phoned him and told him that his mother had taken his phone away "to register it with 'Rica'", but never again returned it to him, whereupon, the child asked him to provide him with a new phone which he did (para 33.3 of the founding affidavit filed in the variation application, record p. 28).
- [39] It is against this background that the Applicant contended that it is not in the child's best interests that his primary place of reference should vest in the Respondent as she has been alienating the child from him for five years at the time by telling him, for instance, that he killed their first born child (who in fact died because of being prematurely born), that he used to beat her up at all time during their marriage, that he does not make any financial contribution to the child's maintenance (whilst he has been paying R4 000 per month at all times) and that her husband was going to beat him up should he persist with his intent to

see the child (para 35 to 39 of that affidavit, record pp. 28 to 32)

As far as the Applicant's current wife is concerned, the Applicant indicated that he, after the Respondent left him, became romantically

involved with his current wife, Thabelang Melydan Ncube ("Thabelang"), who is an admitted advocate and the senior manager for the compliance division of the Limpopo Gambling Board in Polokwane. Soon after he so became involved the Respondent wanted to

reconcile. He, however, told her that he was not interested. The Respondent then started spreading lies about Thabelang by accusing

her of witchcraft and issued summons against her for having allegedly having broken up her marriage. A counterclaim was then instituted

against the Respondent for defamation, but the matter was eventually settled on the basis that the claims were withdrawn and each party to pay her own costs (paras 13 and 14 of that affidavit, record pp. 12 and 13).

[40] In response to these allegations, the Respondent -

- (a) denied, although she conceded that she received letters from the Applicant's attorney threatening to bring an application for her to be held in contempt, by way of a bare denial the allegation that she refused the Applicant any contact with the child after 6 March 2008 (paras 40.1 and 41 of the Respondent's opposing affidavit, record pp. 84 and 85);
- (b) conceded that she was not prepared to disclose the child's whereabouts "for safety and security reasons, and also in terms of the protection order" (para 40.2 of that affidavit, record p. 84);
- (c) denied by way of a bare denial the allegation that she always had an excuse as to why the child's cell phone was always switched off and that she snapped at him saying that his wife was a witch and that for as long as she lives he would not see the child because he left her without a car and shelter (para 46 of that affidavit, record p. 87);
- (d) denied again by way of a bare denial the allegation that she instead of discussing as arranged the previous day, how it can be arranged that he could see the child and that she failed to comply with a promise to "sms" the child's new cell phone number to him (paras 47 and 48 of that affidavit, record pp. 87 and 88);
- (e) denied also by way of a bare denial the allegation that the child on 27 August 2009 asked him why the Respondent does not want him to see him (para 50 of that affidavit, record p. 87);

- (f) contended in response to the allegation that the child was often absent from school, that, referring to a letter annexed to her affidavit as Annexure T3 (record p. 111), the Applicant's unannounced visitations to the child at school are not in the best interest of the child and that the Applicant "feeds the minor child with wrong and false information" against her (para 51 of that affidavit, record pp. 89 and 90);
 - (g) denied also by way of a bare denial the allegation that she phoned him on 5 September 2009 and called him a "thunderhead" and said that she would kill and bewitch him (para 52 of that affidavit, record p. 90);
 - (h) denied the allegation that the child is often absent from school (para 54 of that affidavit, record p. 90);
 - (i) contended, referring to a letter Annexure T4 to her affidavit, in response to the allegation that the Respondent took his cell phone to register it in terms of "RICA", but never returned it, that it is detrimental to the child in so far as he was scared as to how he was going to explain such an expensive cell phone to his teacher and fellow friends (paras 55 to 59 of that affidavit, record pp. 90 to 94);
 - (j) denied, referring to the letters Annexures T3 and T4, that she is not a fit and proper person in which primary residence of the child should be vested and challenged the Applicant to submit a report from the Family Advocate in that regard (paras 60 to 68 of that affidavit, record pp. 95 to 103).
- [41] The Applicant lodged, based on the foregoing allegations set out in his founding affidavit, the variation application on 14 October 2009.
- [42] The Respondent filed a Notice of Intention to Oppose on 22 October 2009, and, since no opposing affidavit was thereafter filed, the matter was enrolled by notice dated 11 January 2010 on the opposed roll for 10 August 2010.
- [43] Fourthly, there is the order of Mavundla J dated 12 August 2010
- [44] When the matter was called before Mavundla J on 12 August 2010, ie., 10 months after she filed her notice of opposition, the Respondent filed her opposing affidavit.
- [45] On this occasion the Family Advocate handed in a report (Annexure A, record pp. 33 to 50) prepared during August 2010 in which it was recommended that the Applicant be granted permanent residence of the child.
- [46] As is apparent from this report the Family Advocate and the Family Counsellor whose report was annexed to the Family Advocate's report, interviewed only the Applicant as the Respondent was unable to avail herself for an interview prior to the hearing of the matter. They, however, succeeded in interviewing the child at his school.

As indicated in the report (record p. 121) it is recorded -

- (a) that the child indicated to them that he is very keen to have contact with his father;
- (b) that the child was very aware of the conflict between his parents pertaining to him and indicated that he wishes it to come to an end;
- (c) that he wished to have free contact with either of his parents without feeling guilty about his affection to both of them;
- (d) that as a result of the estrangement the child did not have a relationship with the Applicant's current spouse, but was willing to gradually foster a relationship between them and that he was keen to meet his little half brother and have a relationship with him;
- (e) that the child indicated that he was currently not ready to be permanently separated from the Respondent, as he was, so it was

perceived, currently experiencing security and stability with the Respondent which seems to be due to the lack of contact with the Applicant for a long period of time and the uncertainty of the Applicant's environment.

In paragraph 6.3 of her report (record p. 120) the Family Advocate reported as follows:

"The best interest of a child are best served by both parents having an equal say in the raising of the child and the child maintaining equal contact with both parents on a regular basis. The Respondent in the current matter has left the Applicant out of major decision-making processes that involve the child and has failed to keep him informed of the child's well-being and development and this has resulted in the Applicant missing out on several years of the child's growth, development and milestone achievements."

Taking into consideration the information at her disposal at the time, the Family Advocate recommended that, although the Respondent was not interviewed, the Applicant be granted permanent residence, but recommended that, should the Court insist on the Respondent being interviewed, interim rights of removal of the child be granted to the Applicant without any supervision.

I accept that it was on this basis that Mavundla J based the order granted on 12 August 2010.

[47] In terms of the order granted by Mavundla J on that date the matter was postponed sine die and the Respondent was ordered to file an application for condonation for the late filing of her opposing affidavit within 15 days as from that date (para 2 of replying affidavit, record p. 202).

The Respondent never complied with this order.

[48] As is apparent from the order (record pp. 64(a) and 64(b)), Mavundla J, by agreement between the parties, furthermore, ordered -

- (a) that due to the urgency of the matter the Deputy Judge President was requested to allocate a hearing date before the end of the year;
- (b) that pending the outcome of this application the Applicant will as agreed between the parties, have the following rights of contact with the child -
 - (I) to remove the child on Saturday, 14 August 2010 from 9h00 to 16h00;
 - (ii) to remove the child on Saturday, 21 August 2010 from 9h00 to 16h00;
 - (iii) to remove the child for every alternative weekend from Friday 17h00 till Sunday 17h00 starting on Friday 3 September 2010;
 - (iv) to remove the child for every short school holiday starting on 23 September 2010 to 3 October 2010;
 - (v) to remove the child for half of the December 2010 school holidays (the last part of the holiday), and that the child will spend

Christmas with the Applicant;

- (c) that the Respondent will take the child to the Sandton Police Station on the respective dates and times as set out above in order for the Applicant to exercise his rights of contact at which address the Respondent will again collect the child at the respective dates and times;
- (d) that the South African Police be requested to assist the Applicant in removing the child in terms of the aforesaid orders;
- (e) that the Respondent to allow telephonic contact between the Applicant and the child at all times and to furnish the child with a cell phone for that purpose and to inform the Applicant's attorney within five days of that order of the number of that cell phone and to ensure that remains in working order;
- (e) that the Respondent should bear the costs incurred by the Applicant on 11 August 2010 and that the costs incurred by the Applicant on 12 August 2010 be reserved .of her recommendations and the reasons therefor.

Thirdly, an affidavit (record p. 134) by the same social worker in which it is stated that she again interviewed the child on 10 September 2010 in the presence of Lieutenant Colonel Mahladimela during which the child indicated that he wished his father to stop pushing and scaring him that his mother would go to jail if he does not spend time with him and that he wished him to stop referring to the court order. Furthermore, he said that he does not want to meet his father until he understands his schedule and does not push him.

It does not appear from this affidavit or from the opposing affidavit why it was deemed necessary to interview the child on 10 September

2010 and why this affidavit was obtained from the social worker and not from the child himself. The allegations contained therein in any event appear to be in contradiction with the contents of the social worker's earlier report in which it is indicated that the child indicated that he merely wished his mother to be around the place where his father is taking him and that he wanted to know him better.

The allegations contained in this affidavit also conflict with the undisputed facts that the reason why the child was not handed to the Applicant on September 2010 was because the child wished to rather attend a party and not that he did not wish to have unsupervised

contact or any contact at all with the Applicant.

As is apparent from the Family Advocate's final report dated 17 September 2010

(record

p. 135) it is apparent that the child never at any time during interviews with him by the Family Advocate insisted on supervised

visits. When this was pointed out to the Respondent by the Family Advocate she accused the Family Advocate of being biased in favour of the Applicant.

Furthermore, as is apparent from the letter (Annexure T6, record p. 114) annexed to the Respondent's opposing affidavit in the variation application, the child indicated on 10 August 2010 that he wanted to remain with his mother and to start a form of relationship with his father, with the possibility of weekend visits.

Fourthly, a report prepared by a clinical psychologist (record p. 269) on two interviews conducted with the child on 15 September 2010 and 19 September 2010. According to the report the child was referred to him by the social worker who interviewed him at the Police Station. Based on what the child told him the psychologist recommended -

- (a) that the child should continue to live with his mother and step father;
- (b) that his biological father needs a "psychological evaluation/interview" before he can be granted permission to spend time with the child;
- (c) that initial visits with the child must be supervised and monitored until it is ascertained that it is "reasonably safe" for the child to be with him;
- (d) that the child needs to be emotionally prepared by a therapist before a court appearance;
- (e) that the child needs to be in therapy to help him deal with difficult emotions caused by the "recent change in his life";
- (f) that the Respondent and step father may also benefit from parental guidance with a psychologist.

Having read the report, it would appear, on the assumption that it is in the absence of an affidavit admissible evidence, that, apart from the fact that the recommendations are based merely on what the child told him most of the time in the presence of the Respondent and the child's stepfather, the psychologist was unaware of the long background history of the matter, the various reports of the Family Advocate and that at that stage four court orders had already been granted in terms of which the Applicant was granted access to the child. It is also apparent from this report that what he observed during his interviews with the child was in conflict with what the child, according to the social worker's affidavit, told her on 10 September 2010.

In these circumstances I am unpersuaded that he was in a position to express and did express an objective and reliable opinion.

[65] I need also to refer to the Applicant's replying affidavit (record p. 188 onwards) and certain supplementary affidavits filed by him on new developments after he filed his replying affidavit in so far as they relate to the allegations made by the Respondent in her opposing affidavit.

[66] In this regard I can refer to the following -

(a) in relation to the Respondent's criticism (para 28, 29 and 30 of the opposing affidavit, record pp. 73 to 76) on the Family Advocate's report prepared during August 2010, the Applicant pointed out (para 23 to 29 of the replying affidavit, record pp. 198 to 201) -

(I) that the Family Advocate even in her final report after having interviewed the Respondent still adhered to her original recommendations;

(ii) that the Respondent also failed to avail herself for an interview with the Family Advocate for purposes of the Family Advocate's report made available on 30 November 2005;

(iii) that the principal's letter conflicts with the Family Advocate's report;

(b) in relation to her response on what occurred on 14 August 2010 (paras 33 to 34 of her opposing affidavit, record pp. 79 to 89) the Applicant stated (paras 31 to 49, record pp. 202 to 209) -

(I) that the Respondent acted in bad faith by having consulted the social worker at the Sandton Police Station without disclosing that to the legal representatives during negotiations on 11 and 12 August 2010 for the Applicant's interim rights only to use it two days later as a way to frustrate the execution of Mavundla J's order;

(ii) that unfortunately the Police only assisted the Respondent and, despite a request, failed to help the Applicant in the execution of the order;

(iii) that, should the Family Advocate have indicated that she would not have made her earlier recommendation if she knew what the child's views were, it is highly unlikely that she would have adhered to her recommendations in her final report (which was in any event later denied by the Family Advocate);

- (iv) that it is not true that the Family Advocate appeared not to have been sober;
- (v) that the Applicant's attorney was very rude to the Family Advocate and that the Police's conduct to respond to the request of the Applicant's attorney to remove the Family Advocate, being an officer of this Court and having been there on the authority of the Court, from the Police Station was very upsetting which shows the influence the Respondent and her attorney had at the Police Station;
- (vi) that he called his own attorney to the Police Station because he felt that he was being bullied by the Respondent's attorney;
- (vii) that the child never told the Applicant's attorney that he was not willing to leave with the Applicant without supervision (see: letters, Annexures BB1 and BB2 addressed by the Applicant's attorney to the Respondent's attorney on 17 and 20 August 2010 and the letterAnnexure BB3 dated 23 August 2010 by the Respondent's attorney addressed to the Applicant's attorney and a letter BB4 dated 25 August 2010 by Applicant's attorney in response to that letter, record pp. 253 to 262);
- (viii) that the child was in fact very keen to go to Sandton City Mall and got with the Applicant into his car out of his own free will;
- (c) in relation to the allegation (para 36.4 of Respondent's opposing affidavit, record p. 96) that "the child is still not to be removed by the Applicant without any supervision" (para 53.4 of the replying affidavit, record pp. 212 and 213) -
- (i) the Applicant pointed out, correctly in my view that the Family Advocate never indicated that the child told her that he did not want to be removed without supervision;
- (ii) the Applicant contended, in relation to the report of the unidentified social worker -
- (aa) that, apart from expressing some doubt as to whether she was the author of that report, it does not appear from the report that the child indicated to her that it was never her instructions that the child refused to be removed without supervision; and
- (bb) that it is in any event unusual that a social worker should make a recommendation after only one interview;
- (d) in relation to the allegation that the child indicated that he would prefer to rather have attended a birthday party of a family member on 3 September 2010 {paras. 38 and 39 of that affidavit, record pp. 92 to 96), the Applicant indicated that, apart from the fact that the child never mentioned that to him in the course of the week and that the excuse of unsupervised contact was no longer raised, he would have, should it be true that the child would have liked to attend such a party, ensured that the child could have attended the party as it could not have lasted a whole weekend {para 63 of the replying affidavit, record p. 217).
- [67] Because of the serious allegations made by the Respondent against the Family Advocate, I need to refer to the Family Advocate's responses contained in a Supplementary Report of the Family Advocate (record pp. 274 to 283).

[68] In this regard I can refer to the following -

- (a) in relation to the allegations made on the Family Advocate's recommendations that the child be "removed" (paras 29.7, 29.8 and 30.3 of the opposing affidavit, record pp. 75 and 76), the Family Advocate pointed out (para 3 of the supplementary report, record pp. 275 and 276) -
 - (i) that the Respondent was misconstruing the provisions of sections 10 and 31(1) of the Children's Act, 2005, requiring "due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development' and not that such views and wishes should be the deciding factor when determining the issue of best interests;
 - (ii) that, as is apparent from the report, the child's opinion was sought and considered;
- (b) in relation to the allegation that the Family Advocate expressed an opinion without the Respondent's input (para 30.2 and 30.4 of the opposing affidavit, record p. 76), the Family Advocate pointed out (para 4 of the supplementary report, record p. 276) that at the time the report was filed the Respondent had not yet availed herself, but that provision had been made for that in the recommendation;
- (c) in relation to the Respondent's actions to interview and involve the social worker at the Police Station (para 33.4, 34.1.5 and 34.1.7 of the opposing affidavit, record p. 78), the Family Advocate pointed out (para 5 of the supplementary report, record p. 276) that the Respondent made unilateral arrangements which were imposed upon all present, that she was not pleased with the arrangements and made it clear to the Respondent, but in any event awaited the outcome of that social workers interview with the child;
- (d) in relation to the Respondent's allegation that she was not sober (para 34.1.9 of the opposing affidavit, record p. 78), the Family Advocate pointed out (para 6 of the supplementary report, record p. 276) that she denies with contempt the "contempts" raised against her and indicated that it is merely "indicative of the levels that the Respondent is willing to go in order to discredit (her) personally as well as the findings of (their) investigation"]
- (e) in relation to the Respondent's allegation that the Family Advocate then suggested that she should take a walk with the child, but that she refused because the Family Advocate had said that she would not have made the recommendations she made had she been aware of the child's wishes 34.1.13 and 34.1.14 of the opposing affidavit, record

- p. 82), the Family Advocate denied the allegation and indicated that she was exasperated as a result of what she viewed to be obstructive behaviour on the part of the Respondent (para 7 of the supplementary report, record p. 277);
- (f) in relation to the Respondent's allegation relating to the occurrences that had given rise to the Family Advocate being requested to leave the Police Station (para 34.1.23 of the opposing affidavit, record p. 84), the Family Advocate admitted that she refused to leave as she was not impressed with the Respondent's attorney's unprofessional conduct who on his arrival refused to speak to her or to even acknowledge her presence and even manhandled her after having requested the police to remove her as she could not be privy to their talks which were according to him subject to attorney client privilege (para 8 of the supplementary report, record p. 277);
- (g) in relation to the Respondent's allegation that the Family Advocate failed to file, despite letters addressed to her by her attorney, a supplementary report relating to her interview with the Respondent on 11 August 2010 (paras 38.5 to 38.9 of the opposing affidavit, record p. 93), the Family Advocate pointed out that in response to a letter received from the Respondent's attorney she addressed a letter to him in which it was stated that the report will only be provided after she satisfied herself that the contact set out in Mavundla J's order has been exercised (para 10 of the supplementary report, record p. 278);
- (h) in relation to the Respondent's request that a fresh investigation be conducted (para 45.6 of the opposing affidavit, record p. 103), the Family Advocate pointed out that such an investigation will serve no purpose as it has by then become apparent that the Respondent will not accept any recommendations that do not suit her (para 11 of the supplementary report, record p. 279);

(I) in relation to the Respondent's allegation that the child had expressed his views I am accordingly satisfied that the Respondent's

denials are "so far-fetched" and "clearly untenable" that I have no hesitation in rejecting those denials on the papers (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 635B).

[95] In the second place the Respondent manipulated various situations to sidestep or prevent compliance with the various court orders granted against her or to delay the finalization of the various applications lodged by the Applicant.

[96] In this regard I can refer to the following:-

[97] Firstly, she refused from the moment she left the common house to disclose her address or the whereabouts of the child.

By refusing to provide her residential address or even the address of her place of employment, she at all times made it impossible, not only for papers to be duly served on her, but also for the Applicant to exercise the rights granted to him by the various court

orders

and, inter alia, created the difficulties that occurred at McDonalds and at the Sandton Police Station.

The Respondent's excuse for not providing her address, namely, that it is because of the interim protection order she obtained on 2 June 2006 is unimpressive since she refused to disclose her address or the whereabouts of the child from the very moment she left the common home on 18 May 2004, being more than two years before the protection order was granted.

In my opinion her refusal to provide her address was merely a bad excuse at first to prevent the Applicant from contacting the child and later to escape due compliance with the orders granted against her and, in so doing, to deprive or frustrate the Applicant, from exercising his rights of contact with the child.

[98] Secondly, there is the evidence that she constantly took the cell phones away the Applicant had given the child in an attempt to at least by that means maintain, as he was in terms of the various court orders granted in his favour entitled to do, regular contact with the child, and probably on at least one occasion changed the number of his cell phone.

[99] Thirdly, she on at least two occasions did not avail herself and the child for interviews with the Family Advocate who was charged with the function of providing the Court with a report on the best interests of the child so that the Family Advocate was bound to interview the child at his school and to submit at first two reports without the full benefit of the Respondent's inputs.

[100] Fourthly, the Respondent failed to file an opposing affidavit in the Applicant's Rule 43 application in which he sought an order granting him rights of access to the child. Instead counsel appeared on her behalf and sought a postponement to afford her an opportunity to file such an affidavit because she was, apparently without any indication

why, "unable to attend".

Patel J postponed the matter sine die, but granted an interim order in terms of which the Applicant was granted unsupervised contact with the child. She failed to comply with this order and in any event failed to file an opposing affidavit or to appear on the date the matter was enrolled for final determination.

Her conduct in this regard strongly suggested that she on the first occasion the matter was enrolled merely attempted to delay the

matter.

[101] Fifthly, there is the McDonald's incident which seems to have occurred on 14 May 2006 on the occasion on which she was bound in terms of the order of Murphy J to hand the child over to the Applicant for the weekend.

The Respondent's conduct in relation to this incident was in my view highly suspect.

It is, as indicated by the Applicant, in my view really ridiculous to believe that he, after not having seen his child for almost two years, would have pointed a gun at the Respondent if it was his only aim to collect his child for the weekend in terms of the order granted to him. It is of some significance that Respondent failed to give any detailed particulars of how it occurred. If it is true that he did point a firearm at her, the question arises what he could have had in mind. If regard is had to her affidavit made in support of the protection order on 2 June 2006 (p. 120), of which, incidentally, not all the pages have been annexed to the papers, it is stated that the child had already made arrangements to visit a friend, that the child phoned the Applicant and told him and that her Attorney said that they shouldn't go. It must follow that she had no intention of handing the child over to the Applicant for the child for the weekend. All indications are that the Applicant was never charged for having pointed a firearm at the Respondent. Furthermore, no affidavit of her aunt who allegedly accompanied her on this day was annexed to the papers.

According to the Applicant the child at some stage informed him that his mother told him to lie about this incident. I am well aware of the hearsay nature of this evidence, but, bearing in mind that the Applicant had no access to the child to obtain an affidavit from him and the fact that the Respondent who did have access to the child did not deem it necessary to file an contradictory affidavit of the child or other available confirmatory affidavits, this is a situation where the Applicant's evidence in this regard can be admitted in terms of section 3(1)(vii) of the Law of Evidence Amendment Act, 1988 {Act 45 of 1988}.

In my opinion this version was merely a ploy to escape compliance with Murphy J's order and can on the probabilities be rejected on the papers as untenable and untrue.

[102] Sixthly, there is the Respondent's insistence from the date of their divorce that any access to the child should be supervised.

Except for the McDonald's incident (which I have already rejected), the Respondent advanced no reasons for her attitude in this regard and I fail to see why supervised contact was necessary at any time and, particularly, at this stage where the child had already attained the age of 14 years.

She in any event agreed to unsupervised contact on 21 June 2009, but before that date and, particularly, after that date again insisted

for no apparent reason on supervised contact. According to the Family Advocate's report (para 4.2) made available on 17 September 2010 (contempt application, record p. 136) she conceded during an interview conducted on 11 August 2010 that the Applicant was never abusive towards the child, but she still preferred that contact with the child should be exercised under supervision "for her own peace of mind".

However, three days later on 14 August 2010 and after having agreed to an order on 12 August 2010 providing for unsupervised contact, she refused to allow unsupervised contact on the grounds thereof that the child refused to accompany the Applicant alone.

Her conduct in this regard is highly suspicious.

As is apparent from the three reports submitted by the Family Advocate, the child on no occasion insisted on supervised contact which accord with communications the child, according to the Applicant, made to him.

On 14 August 2010, however, the child all of a sudden seems to have undergone an incomprehensible change of heart in circumstances where the Respondent had, earlier in the week, surreptitiously briefed an unidentified social worker, to be present and to interview the child at the Sandton Police Station, incidentally, at the same time she was. required in terms of a court order, to hand the child over to the Applicant.

Notwithstanding the child's purported refusal to be alone with the Applicant he in the end out of his own free got into the Applicant's car in order to drive, as agreed, to the Sandton Shopping Mall.

I have no doubt that the Respondent was responsible for the child's insistence on this day and thereafter to supervised contact and later, as indicated in the affidavit filed by the social worker (record p. 134), "that he does not want to meet his father until he understands his schedule and does not push him".

[103] Seventhly, there is the evidence by the Applicant that the child told him on the few occasions they were in contact with each other -

- (a) that he would have liked it to visit him during the December 2009 school holidays, but that he is scared as the Respondent told him that the Applicant's wife would kill him;
- (b) that the Applicant killed their first born;
- (c) that the Applicant had beaten her up during their marriage;
- (d) that the Applicant is not contributing financially to his maintenance,

being all communications that are on the objective available evidence untrue and which are communications which appear to be aimed at discouraging the child from having any contact with the Applicant

The Respondent denied all these allegations, but It is evident from the communications that the child could not have had any knowledge of the facts referred to in the communications unless it had been communicated to him by the Respondent.

This is also evidence which can in my view be admitted under section 3 of the Law of Evidence Act, 1988.

In any event the Respondent indeed made allegations to the Family Advocate that she was emotionally and physically abused by the

Applicant during their marriage. It appears to be a doubtful allegation if on bears in mind that she admittedly issued summons

against the Applicant's current wife for being the cause of the break up of their marriage.

[104] Eighthly, there is the fact that the Respondent failed to take the child on 3 and 17 September 2010 to the Sandton Police Station in order to enable the Applicant in accordance with the order of Mavundla J to remove the child for the respective weekends.

On 3 September 2010 the Respondent arrived at the Police Station and informed the Applicant that the child was at home crying since he did want to go with the Applicant as he preferred to attend a party of a family member. Significantly no mention was made that he was not prepared to be in unsupervised contact with the Applicant. The excuse appears, if not untrue, to be a lame one. According to the Applicant he had various conversations with the child in the week in which he appeared to have been excited on the prospects on spending the weekend with his father (which is confirmed by his half brother who spoke to him in the course of that week, record

p. 171) and that he would, should it be true, in any event have ensured that the child could attend the party.

On 17 September 2010, being the next date on which he was entitled to remove the child for the weekend and being a date after the contempt application was lodged, the Respondent did not even bother to go to the Police Station.

[105] Ninthly, the Respondent blatantly ignored without offering any excuse the orders granted by Webster J on 7 October 2010 and by myself on 25 February 2011.

[106] Furthermore, I need to comment on the manner in which members of the Sandton Police Station have dealt with this matter.

It is in my view apparent that the relevant members made no attempt to assist the Applicant, as ordered by Mavundla J, in removing the child in terms of the aforesaid orders. Instead they, on the unprecedented and improper instructions of the Respondent's attorney, assisted in effecting the removal of the Family Advocate from the Police Station. In doing that they actually assisted the Respondent in failing to comply with a court order and in the process assisted in removing an officer of the Court who was there on the authority of the Court to assist in the execution of a court order. Their conduct clearly lacked objectivity.

Furthermore, there is the conduct of Superintendent Mahladimela of the Sandton Police Station who seems to have involved himself personally and improperly in the dispute.

In the circumstances the objectivity of members of the Sandton Police Station in dealing with this matter is in my view suspect and it is advisable that the Sandton Police Station should be restrained from any further involvement in the disputes between the parties in these matters.

[107] I need also to refer to the documents annexed to the Respondent's papers as Annexures T2, T4 and T5, record pp. 111 to 114, purportedly documents prepared by teachers at the child's school.

Apart from questions raised on behalf of the Applicant on the admissibility of these documents, I find it strange that these teachers deemed it necessary or expedient to prepare and forward these documents to the Applicant and for what reason they had done that, particularly, if regard is had to the fact that the principal and the child's teacher refused, at the request of the Applicant to depose to affidavits on issues they raised with him in relation to, inter alia, to the child's school attendance.

Annexure T2 is a document addressed "To whom it may concern" has obviously been prepared to criticise the Applicant, not having been allowed to visit the child otherwise, for having visited the child at school on two occasions. If he was to be criticized, the question arises why it was not taken up with the Applicant himself. It creates the impression that it was subjectively motivated.

Annexure T4 is a letter addressed by the child's teacher to the Respondent in which it is stated that the child complained to her that the Applicant had given him an expensive cell phone together with a "sim" card and that he was concerned that his father came to visit him at school without prior permission of his mom.

Why it was deemed necessary necessary for the teacher to have written this letter to the Respondent is not clear to me as she could merely have phoned the Respondent if was a matter of some concern or she could have taken it up with the principal.

Annexure T5 is a letter written by the principal addressed to the Respondent to inform her that the Family Advocate had interviewed the child at school on 5 August 2010 and notified her of what was discussed with the child.

Why he elected to involve him in the issues between the parties in this regard is unclear as he on a later date indicated to the Applicant when he requested him to depose to an affidavit on certain issues relating to the child's school attendance that he did not want to get involved in the issues between the parties.

I am in the circumstances not prepared to take particular notice of the contents of these documents.

[108] Furthermore, there are indications that the child has been allowed to skip school for extensive periods which already had a negative impact on his school education.

Conclusions

[109] In view of the foregoing, I came to the conclusion that the Respondent, save for a few insignificant instances, deliberately over a period of almost seven years alienated the child from the Applicant and left him out of any decision making, Set alone' major decision making, in the child's upbringing.

[110] This she had done notwithstanding six court orders in terms of which she was ordered to allow the Applicant reasonable access to the child.

[111] In a process of thwarting compliance with the various court orders she devised various dubious, if not surreptitious, methods not to comply with some of the orders and just blatantly ignored the other orders and has gone out of her way to negatively influence the child against having contact with the Applicant.

[112] This brings me to consider, with due regard to the above conclusions, the relief claimed in both the variation application and the contempt application.

[113] As far as the variation application is concerned, the reversal of custody of a child, because of the recalcitrance of a custodial

parent, is, as is apparent from a few judgments delivered in our Courts not an unusual occurrence.

[114] In this regard I can refer, particularly, to the following reported judgments.

[115] In *Kok v Clifton* 1955 (2) SA 326 (W) the learned Judge expressed himself in this regard at 330C as follows:

"It is a common-place that it is in the interests of the child of divorced parents that it should not be estranged from either parent; the child should not be placed in such a position as to lose affection for either of its parents, nor that either of the parents should lose affection for and interest in the child. It is of importance to this child, in my view, that the father should retain his affection for the child and his interest in him".

[116] In *Germani v Herf* 1975 (4) SA 887 (A), the Court was, as in this case, concerned with a factual situation where a father was, despite an order of Court that the father was entitled to certain rights of access to his child, refused access to a child by the mother over a protracted period of time. The question in issue in that matter was whether the father proved that the mother's refusal to comply with the Court's order was wilful, regard being had to the 12 year old child's steadfast refusal to have anything to do with the father. Having held (at p. 900A) that "the child's recalcitrance has undoubtedly been encouraged by the negative attitude (the mother) has

constantly adopted towards (the father's right to access)", the Court raised the question whether in such circumstances the Court a quo could have considered awarding custody of the child to the father. In this regard the Court remarked at 905A as follows:

"A note of warning should, I think, be added here. If appellant's access continues to be frustrated or prevented by first respondent or the child, the Court a quo may well have to consider seriously in the light of all the circumstances, apart from any question of enforcing the committal order against first respondent, whether the only solution is to award the custody of the child to appellant, at any rate for such time as it deems fit That would afford an effective opportunity for father and son to become reconciled."

[117] In *Richies v Richies* 1981(1) PH B4 (0) Van den Heever J said the following which is also apposite here:

"A parent who unnecessarily deprives a child of the opportunities to experience the affection of its other parent and breaks down the image of that other parent in the eyes of the child, is a selfish parent, robbing the child of what should be its heritage in order to salve his own wounds. And regrettably often parents wounded by their marital conflict lose their objectivity and use, as very effective clubs with which they beat the foe, the objects both profess to love more than life itself, their children, who suffer further trauma in the process"..

[118] This is an approach also followed in similar circumstances in other countries, such as, for example, in a judgment delivered in the Australian High Court of Justice, Family Division reported as *Vv V*[2004] EWHC 1215 (Fam) In this matter the Court was also faced with a situation where the mother unilaterally and unreasonably denied a father access to his children. After constant litigation between the parties over a period of four years involving 17 court orders and directions of some 16 judges the Court eventually, indicating that it was time that the litigation should be brought to an end for the sake of the children, transferred residence of the children to the father.

Of importance and relevant to the circumstances of this matter, is the following passage from paragraph 2 of the judgment:

" Unfortunately the courts at all levels are well accustomed to intractable contact disputes which drag on for years with little or anything to show for the outcome except numerous court hearings, misery for the parents, who become more entrenched in their

positions, wasted court resources, and above all serious emotional damage to the children. These disputes

are expensive, They take up a disproportionate amount of time in court, thereby depriving other cases of timely hearing. Constant litigation in respect of residence and/or contact is not only destabilising for parents and children who become a battleground to be fought over at any cost, but it is a process which progressively results in entrenched attitudes as if engaged in a war of attrition. Frequently, as in the current case, it is the mother caring for the children who is against making contact work. I find she has undermined contact to father over a period of years in circumstances in which the children love their father, want to spend time with him, know him and a good relationship with him. They also love their mother who, in many respects, is a good parent. Had it not been for the breakdown of the parents' relationship, the alienation of their

respective extended families and the corrupting, corroding effect of litigation battles, I consider that not one word of criticism would have arisen concerning the quality of care given to these children. What has happened is a tragedy because each parent has much to offer."

The following remarks made by the Court in that matter in paragraph 4 of that judgment are also of some significance in this matter:

There is also a perception that courts allow parents with care to flout court orders for contact and permit the parent with residence to exclude the parent from the lives of the children so that the other parent is worn down by years of futile litigation which achieves nothing and only ends when the parent gives up the struggle, or the children are old enough to make their own decisions, assuming they have not been brainwashed in the meantime."

[119] In having considered the sentiments expressed in the above matters with which I am in respectful agreement, I am mindful of the constitutional provision that a child's best interests are of paramount importance in every matter concerning the child.

[120] In relation to the wishes, according to the evidence adduced by the Respondent, purportedly expressed by the child, particularly, during the period 14 August 2010 to 10 September 2010,¹ need to refer to the sentiments expressed in the following judgments.

In the German! case, *supra*, at 899D the learned Judge indicated as follows:

"No doubt the attitude of a child ought to be taken into account in appropriate circumstances, especially where he is nearly adult. But here the child, is still young, immature in mind, impressionable and, notwithstanding his stubbornness, unable to decide for himself what is in his best interests. ... Moreover, to attach such decisive importance to the child's own professed intractable attitude as the learned Judge has done means that the child is thereby being allowed to frustrate access orders recently

agreed upon by his parents and solemnly granted by the Court as being in his best interests. That surely cannot be right. Generally, the correct judicial approach should be that the refusal or reluctance of a young child to submit to access is not by itself a reason for disobeying an order of Court conferring such access..... It can be accepted that the child does not want to submit to appellant's access. That not infrequently happens where the parents are divorced and especially where they continue to bicker about access to the child."

[121] In *McCall v McCall* 1994 (3) SA 201 (C) the learned Judge remarked as follows at 207G

"On the other hand it is clear..... that, if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his expressed preference."

[122] In *Vv V*, *supra*, para 44 the learned Judge said the following in this regard:

' The wishes and feelings of the children are significant in respect of their age and maturity. These children wish to stay with their mother with whom they have always lived. Their wishes must be taken into account, but cannot be determinative of outcome, partly because of their young age, and also because they have become enmeshed in the parents problems and have learnt to say what they think is expected of them. In order to survive emotionally I find these children, and particularly N, have become skilled in reiterating the views of the views of their principal carer to date, namely the mother, and in consequence that their views are tainted by the influence of the mother."

[123] In view of the foregoing, there is in my view in the circumstances no other option or solution, but to grant the relief claimed in the variation application.

[124] I need, however, to say that I would not have considered this as an option or solution had the Respondent adhered to any of the orders granted against her or at the very least the last order granted by me so as to allow the child to experience the company of his father and to view and judge for himself the circumstances under which' his father is living.

[125] I am concerned about the influence under which the child was subjected over a period of seven years and the effect it may have on the child and the relationship between him and his father. I would have preferred a situation where the implementation of a variation order to be gradually phased in until a situation is reached in which all the parties will be comfortable. The difficulty, however, is that, bearing in mind the Song history of this matter, the Respondent may again find a way to frustrate compliance with the order.

[126] I can only express the hope that, particularly, the Respondent will now come to her senses and that she and the Applicant can come to some arrangement which will ensure a healthy relationship between the child, on the one hand, and his parents, on the other and which may not necessarily call for the implementation of the order I intend to make.

[127] As far as the contempt application is concerned, I am satisfied that it has on the probabilities been shown that the Respondent was indeed in wilful contempt of not only the order of Mavundla J, but also all the other five orders in question.

[128] In so far as I have come to the conclusion that custody of the child should be reversed, ii will at this stage serve no purpose to make any of the other orders claimed in the contempt application.

[129] This brings me to the question of costs.

Costs

[130] There is in my view no reason why in the variation application the question of costs should not follow the result.

[131] As far as the contempt application is concerned, the Respondent was, as I already indicated, in contempt of, particularly, the order of Mavundla J, and the Applicant was, therefore, justified in having lodged that application and to have prosecuted the matter to the end. The Respondent ought therefore to also pay the costs incurred by the Applicant in that application.

Order

[132] For the reasons set out in this judgment I make the following orders -(a) in Case No. 23010/2004-

1. THAT the Deed of Settlement concluded between the parties on 4 March 2008 and made an order of Court on 6 March 2008 be hereby amended -

(a) by the substitution for paragraph 2.3 of the following paragraph:

"2.3 The parental rights and responsibilities pertaining to the minor child, N D, be granted to the parties jointly, subject thereto that the child's care be awarded to the plaintiff, and that his primary residence be vested with the plaintiff";

(b) by the substitution for paragraph 3 of the following paragraph:

3.

REASONABLE ACCESS

The defendant be granted rights of reasonable contact with the minor child, which will include the right to remove the minor child every alternative weekend from Friday 17h00 to Sunday 17h00, as well as every alternative short school holiday and half of every long school holiday, on the basis that Christmas would rotate between the parties.";

(c) by the substitution for paragraph 4 of the following paragraph:

4.

MAINTENANCE FOR CHILD

The defendant will pay maintenance in respect of the minor child to the plaintiff in the amount of R1 000 per month from the first day of the month in which this order becomes operative and thereafter monthly in advance on or before the 1th day of each succeeding month.".

2. THAT the order contained in paragraph 1 shall come into operation on the first day of the first school holiday commencing after the date of this order.

3. THAT the members of South African Police Service stationed at the Sandton Police Station are prohibited from interfering with, or taking part in any manner whatsoever in, the execution of this order.

4. THAT the Sheriff be authorised and directed -

- (a) to take the child from the Respondent and hand the child over to the Applicant.
- (b) if necessary, to obtain the services of members of the South African Police Service other than any member of the South African Police Service stationed at the Sandton Police Service, to assist the Sheriff in handing over the child to the Applicant.
- 5. THAT the principal of Grayston Preparatory at cnr Gillard & North Streets, Sandown be hereby ordered to furnish the residential address of the Respondent to the Sheriff in order to enable the Sheriff to execute this order.
- 6. THAT the Respondent be ordered to pay the costs incurred by the Applicant, including the costs reserved on 24 February 2011 and 25 February 2011; and
- (b) in Case No. 5156172010 -
- 1. THAT the Respondent be held to have been in wilful contempt of the order granted by Mavundla J on 12 August 2010, but no further

orders

are made in respect thereof.

- 2. THAT the Respondent be ordered to pay the Applicant's costs, including the costs reserved on 12 August 2010;
- (c) in respect of both applications:-

THAT the orders referred to in paragraphs (a) and (b) above -

- (a) be served on the Respondent at care of M B Mokoena Attorneys, 1002 10 th Floor, 130 Beatrix Street, Arcadia Centre, Cnr Beatrix & Vermeulen Street, Pretoria, and at care of the Principal, Grayston Preparatory at cnr Gillard & North Streets, Sandown;
- (b) be conveyed, if possible or necessary, telephonically to the Respondent by the Sheriff;
- (c) be served by the Sheriff on the Station Commissioner of the South African Police Service of the Sandton Police Station;
- (d) be served by the Sheriff on the principal of Grayston Preparatory at cnr- Gillard & North Streets, Sandown.

P C VAN DER BYL

ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT.:ADV ILSE VERMAAK-HAY

On the instructions of: ANGENHOVEN PISTORIUS & PARTNERS INC

c/o BERNHARD VAN DER HOVEN ATTORNEYS

Pare Nouveau 225 Veale Street

Brooklyn

PRETORIA

Ref: ABT van der Hoven/ER

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ON BEHALF OF THE RESPONDENT IN PERSON

c/o M B MOKOENA ATTORNEYS

1002-10 th Floor 130 Beatrix Street Arcadia Centre Cnr Beatrix & Vermeulen Street

Ref.: Divos/06MB-DUBA

Tel No. 012 326 6714

or

c/o The Principal Grayston Preparatory cnr Gillard & North Streets

SANDOWN

Tel No. 011 884 1234

DATE OF HEARING 28 March 2011

JUDGMENT

DELIVERED ON 20 April 2011

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