

SOUTH AFRICA / JUDGMENT

W.L v S.H and Another (2205/2016) [2016] ZAKZDHC 52; [2017] 1 All SA 652 (KZD) (3 November 2016) [2016] ZAKZDHC 52

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Sishi

CASE / FILE NUMBER

2205/2016

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

KWAZULU-NATAL LOCAL

DIVISION, DURBAN

CASE

NO.: 2205/2016

In

the matter between:

W

L APPLICANT

And

S

H FIRST

RESPONDENT

SHEPSTONE

& WYLIE ATTORNEYS SECOND

RESPONDENT

JUDGMENT

Date delivered: 3 November 2016

SISHI J

Introduction

[1] In this application the Applicant seek an order in the following terms.

“1. That the First Respondent is directed to attend and participate in an enquiry to be conducted by the office of the Family Advocate, Durban, on a date and time to be determined by it, on not less than five days written notice thereof;

2. That it is directed that no person, including any representative of the Second Respondent, or any person instructed by the Second Respondent, may be present during the enquiry to be conducted by the office of Family Advocate, Durban, as provided for in paragraph 1 hereof;
3. That the Second Respondent is interdicted and restrained from allowing any of its employees, or instructing any of its employees, including but not limited to Estelle De Wet, to be present during the enquiry, as provided for in paragraph 1 hereof;
4. That, alternatively to paragraphs 2 and 3 hereof, and in the event of the office of Family Advocate deeming it necessary to allow the First Respondent to have legal representation on her behalf at the enquiry, as provided for in paragraph 1 hereof:

4.1 the Applicant shall be entitled to be interviewed separately and without the presence of the First Respondent and any employee of the Second Respondent, or any person representing the Second Respondent present at the Applicant’s interview with the office of the Family Advocate, Durban.

4.2 the First Respondent’s legal representative from the Second Respondent, including but not limited to Estelle De Wet, or any person instructed by the Second Respondent to represent the First Respondent at the enquiry on the basis of a watching brief and shall not participate in the said enquiry;

5. That the First and Second Respondents are directed to pay the costs of this application jointly and severally.”

[2] The relief sought by the Applicant can conveniently be summarized as follows: He seeks mandatory relief against the First Respondent in paragraph 1 of the Notice of Motion. The Applicant seeks declaratory relief in paragraph 2 of the Notice of Motion. The Applicant seeks prohibitory relief against the Second Respondent in paragraph 3 of the Notice of Motion. As an alternative, the Applicant seeks further declaratory relief in paragraph 4 of the Notice of Motion. Finally, the Applicant seeks an order directing the First and Second Respondents to pay the costs of this application. The First and Second Respondents seek an

order dismissing this application with costs.

Background

[3] The Applicant and the First Respondent are the unmarried father and mother respectively of a minor child A., a boy born on [...]

2013. It is evident that A. has been the subject of dispute between the parties in all the litigation referred to in in this application which has gone through our Courts.

[4] The Applicant herein instituted the main application in these proceedings in March 2016. In paragraph 1.4 of the Notice of Motion he sought relief in the following terms:

“1. That the office of the Family Advocate, Durban, is requested to conduct an enquiry and submit a report to this Court setting out therein its recommendations regarding the relief sought by me in this application subject to the following stipulations:

1.1 Any communications between the parties or their representatives and the office of the Family Advocate Durban shall be addressed to the attorney of the other party so as to provide for transparency in these communication exchanges;

1.2 I together with the First Respondent (and A.) shall attend an enquiry of an office of the Family Advocate and the legal representatives of me and First Respondent are not permitted to attend the office of the Family Advocate for the enquiry.”

[5] In the founding affidavit, the Applicant explained the reason why he sought relief on such terms as follows. In the previous proceedings he had instituted proceedings against the First Respondent in this Court under case number 10832/2014. The First Respondent’s attorneys had only communicated in writing with the office of the Family Advocate in Durban privately and without including his attorneys in such communications, but the First Respondent’s attorneys also attempted to obstruct the process of the enquiry by insisting that they attended the enquiry together with the First Respondent as her legal representative. There is however no agreement between the parties in this regard.

Common cause facts

[6] The following facts are either common cause or not disputed between the parties.

[7] Moodley AJ having heard arguments in the main application made an order requesting the office of the Family Advocate to conduct an enquiry and submit a report for consideration by this Court (as claimed by the Applicant in subparagraph 1.4 of the Notice of Motion).

[8] The Family Advocate enquiry was set down on 14 April 2016.

[9] Only the Applicant was interviewed in this enquiry, and because the First Respondent was not interviewed, the Family Advocate could not make recommendations regarding the relief sought by the Applicant in the main application.

[10] The First Respondent insisted on her attorney being present in the enquiry to observe the interview of both the Applicant and the First Respondent.

[10.1] The Applicant objects to the First Respondent having her attorneys present during the enquiry by the office of the Family Advocate;

[10.2] Despite the Applicant's objection to the presence of the First Respondent's attorneys in the enquiry, he would not object to the presence of the First Respondent's attorney, so long as he is interviewed separately from the First Respondent and the First Respondent's attorney only be present while the First Respondent is being interviewed.

[10.3] The Applicant and the First Respondent have reached a dead-lock in this regard.

[11] Hence the Applicant has instituted this application against the First Respondent for:

1. An order directing the First Respondent to attend the enquiry alone and preventing her from having her attorney present at the enquiry;
2. Alternatively, and if the Family Advocate would allow the First Respondent to have her attorney present at the enquiry, then he seeks an order entitling him to be interviewed separately, without the First Respondent's attorney being present, and the First Respondent's attorney shall only be allowed to observe the First respondent's interview on a watching brief.

Applicant's

submissions

[12] The Applicant submitted that the office of the Family Advocate is established in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 ("The Mediation Act").

[13] The Act provides that the Minister of Justice and Constitutional Development:

"...may appoint one or more officers in the public service at each division of the Supreme Court of South Africa (the High Court), to be styled the Family Advocate, to exercise the powers and perform the duties granted or assigned to the Family Advocate by or under this Act or any other law[1]"

[14] The Minister of Justice and Constitutional Development has under section 5 of the Mediation Act made the regulations under the Act[2].

[15] Both the Mediation Act and the regulations thereto show that the procedures followed by the Family Advocate are fairly unregulated. There are very few prescriptive rules about how it should exercise its powers and perform its functions.

[16] With regards to the procedure to be followed by the Family Advocate in the enquiry to be instituted for the purpose of the report and recommendation to Court on the welfare of minor children, the regulations provide that the Family Advocate shall institute an enquiry in such a manner as may be deemed "expedient or desirable[3]".

- [17] The Applicant submitted that this Court has the power to grant the order sought by the Applicant in paragraphs 1 and 2 of the Notice of Motion. He concedes that the order sought in paragraphs 2 in effect dictates to the Family Advocate how it is to conduct an enquiry in this matter. This submission is based upon the following:
1. The Constitution provides that the High Court has the inherent power to protect and regulate its own processes and to develop common law, taking into account the interests of justice[4].
 2. The Family Advocate itself recognizes that its office "...is an extension of the Court in that it assist the Court when it comes to minor children involved in a legal dispute."
 3. The Children's Act provides that all proceedings in a matter concerning a child must respect, protect, promote, fulfil the child's rights and best interests[5].
 4. The Children's Act also provides that an approach which is conducive to conciliation and problem solving should be followed, and a confrontational approach avoided[6].
 5. The Family Advocate's role in enquiries is always at the outset, after advising both parties of the law, to attempt to mediate settlement between the parties. Only if the disputes are not settled by mediation, does the Family Advocate make recommendations to Court.
 6. One of the important and necessary principles of mediation is that it is conducted on a "without prejudice" basis.
 7. The presence of an attorney in the mediation proceedings violates the underlying principles of this process.
 8. The Family Advocate concedes that no policy has ever been established by the Chief Family Advocate regarding the presence of attorneys during the enquiries.
 9. The order sought by the Applicant in this application would therefore not violate any policy decision made by the Chief Family Advocate (or any regulations made by the Minister of Justice and Constitutional Development) regarding this issue of the attendance of the legal representatives at the enquiry.
 10. The Mediation Act itself provides that the Family Advocate shall exercise its powers and perform its duties in terms of the Act or any other law which will include common law.
 11. In this regard it is also relevant to highlight the fact that the Mediation Act expressly provides that the High Court can condone any non-compliance with the provisions of the regulations to the Act, which in fact means that the High Court is empowered to regulate procedures to be followed by the Family Advocate[7].

- [18] The Applicant contends that not only does this Court have the power to grant an order regulating the procedures to be followed by the Family Advocate in the conduct of its enquiry, as sought by the Applicant in paragraph 1 to 3 of Notice of Motion, but the relief sought by the Applicant in this regard is also in the interest of justice. He further contends that the relief is also necessary in the light of the conduct of the Second Respondent in these proceedings.

First Respondent's

submissions

- [19] The First Respondent contends that the Court does not have the power to prescribe to the Family Advocate how it should conduct an enquiry. The First Respondent contends further that the Family Advocate in Durban has in the past allowed attorneys to be present for the interviews of both parties provided such is in the nature of the watching brief only. According to the First Respondent this is in accordance with the existing directives of the office of the Family Advocate in Durban. The First Respondent further contends that in the light of the past history in other matters, submissions by one or other parties are either misunderstood or not recorded correctly or overlooked. It is logical and in accordance with the existing practice that the attorney should be permitted to attend as a watching brief.
- [20] The First Respondent contends that the submission by the Applicant that the Court has the power to dictate to the Family Advocate how it is to conduct the enquiry is insufficient to establish that the Court has jurisdiction. First Respondent further contends that if the Applicant accepts that the office of the Family Advocate is an extension of the Court, as he has done, then it is arguable that the duly appointed representative of the First Respondent is entitled to be present at all times at the Family Advocate to ensure that matters are conducted fairly and impartially and that there is an accurate recordal of all the submissions by either side since these are to be used, via the report of the Family Advocate in Court proceedings.

The Issue

- [21] The main issue to be determined in this matter is whether the parties' legal representatives should be present at all times during the interviews conducted by office of the Family Advocate.

Evaluation

- [22] It has been indicated above that the Family Advocate is appointed by the Minister of Justice and Constitutional Development to exercise its powers and perform its duties in terms of the Act or any other law. The Minister has in terms of section 5 of the Mediation Act made regulations under the Act and it is clear from the Mediation Act and the regulations that the procedures followed by office of the Family Advocate in the performance of its duties are fairly unregulated.

- [23] Section 5(1) of the regulations under the Mediation Act provides that the Family Advocate shall institute an enquiry in such a manner as maybe deemed “expedient or desirable”.
- [24] Although the application papers in this matter were served on both the office of the Minister of Justice and Constitutional Development and the office of the Family Advocate, neither party sought to be joined in the proceedings. The issue of the non-joinder of the office of the Family Advocate was raised by the Court mero motu. Counsel for the Applicant was, however, of the view that this matter could be proceed without the office of the Family Advocate being joined and indicated that officials from the Family Advocate were present in Court although they did not file any affidavits. The issue was also raised by counsel for the First Respondent. After hearing the parties the Court was of the view that it is the interest of justice to proceed and accordingly proceeded to hear the application.
- [25] This became important to the Court because of the nature of the order sought by the Applicant in paragraphs 1 and 2 of the Notice of Motion. As the order sought in paragraph 2 purports to dictate to the Family Advocate how it is to conduct the enquiry in this matter.
- [26] Save for what is stated in the correspondence referred to in the papers, the Family Advocate has conceded that no policy has ever been established by the Chief Family Advocate’s regarding the presence of attorneys during the enquiry. Reference has been made to the current standing directive at the Family Advocate’s office where attorneys or representative may be allowed to sit in the enquiry but that they may not participate in the enquiry at all.
- [27] No written policy was placed before Court by any of the parties in this regard nor was there any standing directive at the Family Advocate placed before Court dealing with this issue other than the correspondence referred to by the parties annexed to their papers.
- [28] Section 9 of the Children’s Act[8] provides that in all matters concerning the care, protection and well-being of a child, the standard that the child’s best

interest is of paramount importance, must be applied. This is consistent with the objects of the Children’s Act as set out in section 2(b)(iv) which provides:

“The objects of the Act are

2a ...

2(b) to give effect to the following constitutional rights of children, namely –

(i) ...

(ii) ...

(iii) ...

(iv) that the best interest of the child are of paramount importance in every matter concerning the child.”

- [29] In determining the issues in this matter this Court is enjoined by the Constitution and the Children's Act to take into consideration the best interest of the child.
- [30] The First and Second Respondents have contended that the First Respondent is entitled not only to have her attorney present when she is interviewed by the Family Advocate, but also to have her attorney observe the Applicant being interviewed by the Family Advocate. This contention is made by the Respondents on the basis that First Respondent has a constitutional right to legal representation in these proceedings. Furthermore it has also been contended that the enquiry at the family Advocate forms part of these proceedings, she is therefore entitled to have her attorney present to observe the interview of both parties.
- [31] Section 34 of the Constitution provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or where appropriate another independent and impartial tribunal or forum.
- [32] The Constitutional Court in *Magidiwana*[9] made it clear that section 34 deals with disputes that can be resolved by the application of law. The Family Advocate's findings and recommendations are not necessarily to be equated to a resolution of legal disputes by a Court of law. The powers of the office of the Family Advocate are limited to making findings of fact and recommendations.
- [33] As correctly pointed out by counsel for the Applicant, the Family Advocate's role in these proceedings is not to make orders, findings, awards or rulings of a judicial or quasi-judicial nature. It only makes reports and recommendations that can be considered by this Court. The report and the recommendations made by the Family Advocate are not binding on this Court, they are just a guide.
- [34] The First Respondent's constitutional right to a fair public hearing in this matter could never be violated by not being allowed to have her attorney present at the Family Advocate enquiry.
- [35] In the same way as there is common law authority for an order directing a parent to submit to interviews and assessments with a psychologist appointed by the other party (on the basis that any constitutional right to privacy that one may have is trumped by the constitutional principles of the best interests of a minor child concerned), the First Respondent cannot assert that any constitutional right that she may or may have in lieu of procedures being followed which are in the best interest of the child.[10]
- [36] In my view there is no reason why this procedure cannot be adopted in enquiries conducted by the Family Advocate. The enquiry conducted by the office of the Family Advocate does not amount to legal proceedings contemplated in section 34 of the constitution. In my view legal representation of the parties in these enquiries should not be permitted.
- [37] Regulation 5(1) of the Regulations to the Mediation Act provides, inter alia, that:

“(1) The Family Advocate shall as soon as practicable after the receipt of a request to conduct an enquiry institute an enquiry in such a manner as he or she may deem expedient or desirable.”

- [38] Section 6(2)(a) of the Children’s Act requires that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child’s rights and best interests as set out in the Bill of Rights subject to any lawful limitations. Section 6(4)(a) further provides that in any matter concerning a child an approach which is conducive to conciliation and problem solving should be followed and confrontational approach be avoided.
- [39] The behaviour and the conduct of the parties in this matter is far from conciliatory, it is highly confrontational and is not consistent with the provisions of the constitution and the Children’s Act.
- [40] On the same day Acting Justice Moodley delivered judgment ordering the Family Advocate to conduct an enquiry and report to the Court, the First Respondent’s attorney Ms Estelle de Wet addressed an email correspondence to the Applicant’s attorneys of record and to the Family Advocate. This correspondence is dated 22 March 2016[11] and paragraph 3 to 7 thereof are of particular importance and they read as follows:

“3. You will note that the last report prepared by your offices was considered by Judge Vahed when he handed down his judgment on 30 June 2015 (at page 111 of the indexed papers) and it is my client’s contention that nothing has changed since then that warrants another enquiry by your offices, and that the applicant’s insistence that you do so amounts to an abuse of the process. The time that you will be devoting to this matter could and should more properly be spent on matters which actually require investigation, and not, as my client contends, using your offices to effectively “appeal” the Court order made by Judge Vahed, in circumstances where leave to appeal was refused.

4. In any event, most of the relief which the applicant asks for does not fall within your ambit (i.e. the name change etc.).
5. The enquiry by the family Advocate is part of the Court proceedings and it is therefore my client’s constitutional right to be represented throughout the proceedings including at the enquiry.
6. I will be present at the enquiry and it is up to the Applicant if he wants to be represented or not.
7. My client is also not prepared to be in the same room as the Applicant as he has abused her in the past and a perusal of all of the reports attached to her opposing affidavit will reveal that she feels threatened by him and, whilst she is prepared to co-operate with the procedure, she is not prepared to be subjected to this. Unless she can be accommodated in this regard, she will not attend the enquiry.”

- [41] A competent Court has ordered that the Family Advocate conducts an enquiry in this matter and an officer of this Court, Estelle de Wet the First Respondent's attorney, suggests in this email that the enquiry as ordered by the Court was unwarranted since there was no change in the circumstances. She further states that the time they would be devoting to this matter could and should be more appropriately spent on matters which require investigations, and not, as her client's contends, using their offices to effectively "appeal" the Court order made by Judge Vahed in circumstances where the leave to appeal was refused.
- [42] The statement in the above email that the First Respondent would not attend the enquiry if her demands are not met is nothing more than an attempt to prevent the enquiry ordered by this Court from taking place. As the Family Advocate correctly pointed out in the supplementary report, this conduct amounts to obstruction of justice in that despite the standing Court order, the First and Second Respondents will not allow this to happen unless it is in their terms and rules. This conduct by the First Respondent's representative not only undermines the integrity of the office of the Family Advocate but also undermines the integrity of this Court especially in circumstances where there is a Court order directing the Family Advocate to conduct an enquiry and report to this Court. It is therefore clear from the papers and the correspondence attached thereto that the First Respondent's representatives has been obstructive in this enquiry process.
- [43] There is no doubt that prior to the institution of this application, both parties communicated with the office of the Family Advocate without copying such correspondence to each other. Both parties are therefore guilty of such conduct.
- [44] Furthermore the direction dealing with legal representation at such enquiries referred to above also includes options available to either party in a case of a dispute in respect of this aspect, one of the option is that the party who does not wish to be in the same room with the other party's attorney may be referred to another office of the Family Advocate in terms of regulations 6 of the Regulations to Mediation Act.
- [45] It is also clear from the papers that before the enquiry was set down on 14 April 2016 the Applicant informed the office of the Chief Family Advocate in Pretoria that he objected to the presence of the First Respondent's attorney during the enquiry when he was being interviewed[12]. The office of the Family Advocate in Pretoria thereafter advised the Applicant in writing that, in the light of the fact that he objected to the presence of the First Respondent's attorney during his interview with the Family Advocate:
- "you may also have your attorney present at the enquiry only for observation purposes and not for participation, in which case the*
- "shuttle interview" where one party is interviewed at the time will be conducted[13]."*
- [46] The Applicant notified the Chief Family Advocate that:

“I will accept the option of what you referred to as a ‘shuttle interview’ where I am interviewed alone without the respondent’s attorney present[14]”.

[47] The Office of the Chief Family Advocate, Pretoria responded to this written representation made by the Applicant by thanking him for his “understanding and co-operation in this matter[15]”.

[48] The First and Second Respondents in their opposition to this application contend that the Applicant has misconstrued what the

office of the Chief Family Advocate had in mind when it said that a ‘shuttle interview’ would be conducted with the parties being interviewed separately. The First and Second Respondents contends that the office of the Chief Family Advocate did not mean that the First Respondent’s attorney was not entitled to be present while the Applicant was being interviewed separately.[16]

[49] The First and Second Respondents even go so far as to place documentary evidence before this Court in substantiation of their

affirming that the Applicant has misconstrued what the Chief Advocate represented. The First Respondent in her answering affidavit attaches a letter addressed by the office of the Family Advocate, KwaZulu Natal in an unrelated matter[17] (only the first page of this letter is put up, and other portions of the letter are redacted).

[50] The Respondent alleges that it is necessary to redact those portions of the letter (and exclude the balance of the letter) on the basis that “it deals with the parties concerned in another matter”. The Applicant has placed before Court a full copy of this letter with the only reduction being the name of the party concerned[18].

[51] It is quite apparent from the redacted portion of this letter that Advocate Khumalo, the Senior Family Advocate in Durban, explained therein that (in that matter) the Applicant’s attorney “will be sitting in during the interview of the Applicant.” The last part of the redacted paragraph also clearly articulates that the Respondent (in that matter) is “... welcome to have your attorney sit in during your interview”.

[52] The Applicant has contended, correctly in my view, that the redacted paragraph quite clearly demonstrates that the First and Second Respondents contentions regarding the First Respondent’s attorneys right to be present while the Applicant is being interviewed are not only correct but in fact constitute blatant misrepresentations to this Court.

[53] The office of the Chief Family Advocate in Pretoria clarifies what was meant in this letter dated 12 April 2016 (annexure ‘J’ to the founding affidavits pages 46 to 47) by stating that:

“one of the options is that the party who does not wish to be in the same room as the other party’s attorney may be referred to the other office of the Family Advocate[19].”

Despite this clarification, the First and Second Respondents persist with their contentions in the supplementary affidavit delivered thereafter.

- [54] It is disingenuous to suggest that the reduction was done on senior counsel's advice. The submission in the First Respondent's heads of argument is that the contention regarding the reduction of the letter from the Senior Family Advocate in Durban have been explained, but this is in any event again irrelevant because of the uncontroverted statement that the Family Advocate in Durban has previously allowed attorneys to sit in on the interviews on both side cannot be sustained in the light of the above. The contentions regarding the reduction of the letter are relevant for the purposes of this application. There is other correspondence attached to the papers, which I found not necessary to deal with herein.
- [55] In the matter involving the same parties,[20] Vahed J stated that it is about time that both parties realize that they create a mature, responsible and caring approach in their interpersonal relationship so as to achieve the situation and routine that works best for A., for it is ultimately A. that must be the victim in this process not either of the parties. Despite this warning by Vahed J, the parties have continued to litigate against each other and the present application before Court is a clear indication that the parties have ignored this warning by Vahed J.
- [56] In the present application what is before this Court is nothing but a fight between the parties which does not take into consideration the interest of the minor child.
- [57] As indicated above annexure 'SLH2' to the First Respondent's opposing affidavit is redacted. In this opposing affidavit this Court is referred to a portion that purports to support the First Respondent's case as regards the right to legal representation whereas the rest of the contents thereof were deleted. The same annexure was not issued in respect of the matter at hand, but it relates to a different matter which was previously handled by the same office in respect of which a similar question regarding legal representation was addressed. The Court has been referred to an unedited version of annexure 'SLH2' to the opposing affidavit. The Family Advocate in the supplementary report has correctly pointed out that the mere fact that the First Respondent obtained annexure 'SLH2' to the opposing affidavit that addressed a similar query suggests that the First Respondent was at all time aware of the position and practice at the office of the Family Advocate, but had however, decided to unnecessarily prolong this matter which has at this stage led to the present interlocutory application.
- [58] I have not been able to find any previous authority dealing with this particular issue, viz the parties' legal representations during the enquiries conducted by the Family Advocate. I have already dealt with the policy and the directives of the Family Advocate pertaining to this issue earlier on in this judgment.
- [59] In my view Family Advocates should be able to conducts these enquiries freely and unhindered by the presence of third parties or legal representatives.

- [60] As indicated above, the enquiries conducted by the office of the Family Advocate are legal proceedings or quasi-judicial proceedings or commissions wherein legal representation of the parties' would be permitted. Family Advocates should be free to conduct these enquiries without any involvement of third parties including watching briefs by parties' representatives and these should be excluded at all stages of the enquiries.
- [61] In my view it would not be in the interest of justice to set a precedent that parties attending the interviews with the Family Advocate should be entitled to be accompanied by their attorneys. This would adversely affect the mechanism of the interviews of the parties by the Family Advocate from the assessment of the parties and their suitability as parents exercising care of and contact with the children is based. Even though the report and the recommendations made by the Family Advocate are not binding to the Court, they certainly play a role in making a decision on any particular dispute between the parties. In my view, if the parties are interviewed in the absence of their legal representatives that would go a long way in having the effect of encouraging settlements of the dispute between the parties.
- [62] In my view it is not in the interest of justice that legal representatives of the parties be allowed to sit at enquires ordered by Court in the office of Family Advocates. The office of the Family Advocate is created by the Mediation Act to perform its functions in terms of this Act. It is not an extension of the Court as the parties in this matter seem to assume.
- [63] In the circumstances of this case, and in the absence of any regulation or policy dealing with the legal representation at such enquiries, I am of the view that this Court has the power to regulate and direct how the office of the Family Advocate should conduct its enquiries.
- [64] It is clear from the conduct of both Respondents that if the order sought by the Applicant is not granted, the First Respondent will not attend the enquiry ordered by this Court. This is certainly not in the best interest of the minor child as this would have the effect of unnecessarily delaying the determination of the main application. The present interlocutory application has been occasioned by the behaviour of the First and the Second Respondents.
- [65] Considering all the facts of this matter I am satisfied that the Applicant has succeeded in making out a case for the grant of the prayers sought in 1 and 2 of Notice of Motion.

Costs

- [66] It is further submitted that both the First and Second Respondents opposition to this application and indeed their behaviour prior to this application which necessitated this application, warrant a costs order against both of them and such costs to be paid jointly and severally. The Applicant submitted that the Respondents should pay the costs of this application on an attorney and own client scale, but no such claim was sought by the Applicant in the Notice of Motion.
- [67] The First Respondent on the other hand prays for the dismissal of the Applicant's application with costs and such costs to include the costs of senior counsel.

- [68] According to counsel for the Second Respondent Mr Pillemer SC, the issues that required determination related to the Second Respondent, further the conduct of the First Respondent's attorney, should lead to a costs order *de bonis propriis*. The Second Respondent abides the decisions of the Court on the main relief which it opposed by its client the First Respondent and who is separately represented by counsel at the hearing.
- [69] He submitted that even if the Applicant is successful in the application and granted the substantive relief that he seeks, the relief that is sought is against the Second Respondent in prayer 3 and prayer 4.2 is not necessary, as it follows from the other earlier part of the order and, even if it is so to be included for clarity, it is not relief of the kind that would attract a separate additional order as to costs against the legal representatives concerned. This submission appear to be correct.
- [70] Accordingly in respective of the outcome of the application on the merits, no costs order should be made against the Second Respondent.
- [71] The Applicant however does basically seek costs against the Second Respondent which therefore opposes the application on that basis, otherwise abiding by the decision of the Court.
- [72] Counsel for the Second Respondent contended that the substantive relief that is being sought against the Second Respondent is in effect an order for costs *de bonis propriis* and, that being so, he submitted that the test as to when such an order would be made, is the applicable test in this case.
- [73] *Fabricius J in Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*[21] at paragraph 34 and 35 spelt out the position as follows:
1. It is exceptional to order a legal representative to pay the costs out of his own pockets;
 2. The obvious policy considerations underlying the Court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even by the Court.
 3. Legal practitioners must present their case fearlessly and vigorously, but always within the context of a set ethical rules that pertain to them which are aimed at preventing practitioners from becoming parties to deception of the Court.
 4. The Court acknowledged that legal representatives sometimes make errors of law, omit to comply fully with the rules of Court or err in other ways related to the conducts of the proceedings. This, the Court said, is an everyday occurrence. This does not however, *per se* ordinarily result in the Court showing its displeasure by ordering the particular legal representative to pay the costs from his own pocket.

5. Such an order is reserved for conduct which substantially and materially deviate from the standards expected from the legal practitioners, such that their clients the actual parties to the litigation, cannot be expected to bear the costs, or because the Court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty obstruction of the interests of justice, irresponsible and grossly negligent conduct litigating in a reckless manner, misleading the Court, gross incompetence and lack of care”.

[74] Counsel for the Second Respondent contends that it is clear from the affidavits that the Respondent’s attorney was at all times acting in the interest of her client and on her instructions based on advice. He submits that the case of costs de bonis propriis has simply not been made in the papers. He finally submitted that the case against the Second Respondent be dismissed with costs.

[75] I must point out that the conduct of the First Respondent’s legal representative as set out above in this matter is completely unacceptable. It borders on the obstruction of the interests of justice. It is not expected of an officer of this Court to display an attitude with borders around contempt of Court. Despite the above, I am of the view that her conduct does not justify a cost order de bonis propriis.

[76] There is in my view no reason why the costs should not follow the result in this matter.

Order:

[77] In the result I make the following order:

1. The First Respondent is ordered to attend and participate in the enquiry to be conducted by the office of the Family Advocate, Durban, on the date and at the time to be determined by it, on not less than 5 days written notice.
2. It is ordered that no person including any representative of the Second Respondent or any person instructed by the Second Respondent may be present during the enquiry to be conducted by the office of the Family Advocate, Durban, as provided for in paragraph 1 hereof.
3. The First and Second Respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.

COUNSEL

Counsel for the Applicant

: Adv SI Humphrey

Instructing Attorneys

: Justin Ducie Attorneys

Building 13

Greenstone Hill Office Park

Emerald Boulevard

Greenstone Hill

Edevendale

Johannesburg

Gauteng

Ref: Mr J Ducie

c/o

JH Nicolson Stiller & Gashen

Clifton Place

19 Hurst Grove

Durban

Ref: Ms L Stemmet

Counsel for the 1st Respondent : Adv BL Skinner SC

Instructing Attorneys

: Shepstone & Wylie Attorneys

24 Richefond Circle

Ridgeside Office Park

Umhlanga Rocks

Ref: EWD/SG/HARV26618.1

Counsel for the 2nd Respondent : Adv M Pillemer SC

Instructing Attorneys

: Shepstone & Wylie Attorneys

Ref: EWD/SG/HARV26618.1.1

Date of hearing

: 21 June 2016

Date of Judgment

: 3 November 2016

- [1] Section 2(1) of the Mediation Act
- [2] Mediation in Certain Divorce Matters Regulations 1990, published under GNR2385 of 1990, GG12781 on 3 October 1990 as amended subsequent thereto.
- [3] Regulation 5(1) of Regulation under the Mediation Act.
- [4] Section 73 of the Constitution.
- [5] Section 6(2)(a) of the Children's Act 38 of 2005. The supplementary memorandum to the report by the office of the Family Advocate, paragraph 4.1 at page 168
- [6] Section 6(4)(a) of the Children's Act 38 of 2005.
- [7] Section 5 of the Mediation Act
- [8] Children's Act 38 of 2005
- [9] Legal Aid South Africa v Magidiwana and Others 2015
- (6) SA 494 (CC)
- [10] Per Lopes J in DEB v MGB Case No. 4313/2013 KZN (17 May 2013). Durban
- [11] Annexure D to the founding affidavit at page 34
- [12] Annexure G to the founding affidavit at p40
- [13] Annexure J to the responding affidavit at p47
- [14] Annexure K founding affidavit at p48
- [15] Annexure L founding affidavit at p50
- [16] First Respondent's answering affidavit paragraph 12(g) at p113
- [17] First Respondent's answering affidavit annexure SL2 at p130
- [18] Applicant's supplementary replying affidavit annexure SRA1 at page 159 to 161
- [19] Supplementary memorandum of the report of the office of the Family Advocate, Durban paragraph 5.2 at page 172
- [20] Unreported decision in case no10832/2014 delivered on 30 June 2015(DBN)
- [21] 2014
- (3) SA 265 (GP)

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