IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 38371/05

DATE: 28/7/2008

NOT REPORTABLE

IN THE MATTER BETWEEN

J.G.A. APPLICANT

AND

L.A. RESPONDENT

JUDGMENT

POSWA, J

Background

[1] The parties, husband and wife, were divorced on 27 February 2004 and the custody of their only minor child, I, born on [date] 2002, was awarded to the Respondent, the mother. I was under two years when her parents divorced. For record purposes, it should be noted that the Applicant was also the plaintiff during the divorce proceedings.

[2] The custody award was on the basis of a settlement agreement, which the Judge made an order of Court. The net effect of the agreement, and thus the Court order, was that the Applicant was limited to day visits to I, which included his right to take her away, during such visits, on the understanding that she was not to spend the night, ie "sleep-over", at the Applicant's place of residence. That arrangement was to remain until I was of school-going age.

[3] Prior to the parties being divorced, they moved, during September 2002, from Pretoria to Addo, next to Port Elizabeth, in the Eastern Cape. During September 2003, the Respondent and I left for Pretoria, leaving the Applicant at Addo and that was the position as at the time of their divorcing, on 27 February 2004. The Applicant worked and still does work in Port Elizabeth. By arrangement with his employer, he managed to visit Pretoria every third week of the month, in order to avail himself the opportunity of visiting I. During such visits, he would take I, every Saturday and Sunday, to his sister's house in Pretoria. The sister's children were then aged 7, 5 and 3 respectively, and I found the environment there acceptable, with the 5 year old being her greatest friend. The environment also enabled I to relate with the Applicant's closest family members, who used to visit the sister's place during occasions when the Applicant and I were around.

History of Deliberations Preceding the Divorce and Settlement Agreement

[4] The Applicant, in his founding affidavit in the present application, states that he agreed to what he says are unfavourable conditions in an endeavour to bring an end to an acrimonious relationship between them during the course of the divorce proceedings and to facilitate culmination of the proceedings. In this regard, he relies on annexed correspondence between his erstwhile attorneys, Phillip Barnard Attorneys, and the Respondent. In one of such letters, the attorneys stated, in so many words, that the Applicant was unhappy with the restrictions placed on his visits and that he would, should it turn out to be in I's interests that the conditions be changed, apply for variation thereof. The letter in question is annexure "C" to the founding affidavit and is dated 19 January 2004.

[5] There is quite an animated dispute between the parties regarding what, precisely, happened before the divorce proceedings and the advent of the settlement agreement that became part of PATEL, J's order. In his founding affidavit the Applicant attaches a letter, dated 17 0ctober 2003, written by his aforesaid erstwhile attorneys, Phillip Barnard Attorneys, addressed to the Respondent. It is annexure "B". It contained a draft settlement agreement written by the attorneys on the Applicant's behalf. That is contained in paragraph 6 of the founding affidavit. In paragraph 7 of the founding affidavit the Applicant attaches a further letter from his attorneys, dated 19 January 2004, also addressed to the Respondent. It is the aforementioned annexure "C". In annexure "B" of the founding affidavit, the attorneys deal with financial matters between the parties, including payment of maintenance for I, provision for I's medical requirements,

the parties' financial rights in respect of their respective property, payment of rehabilitation support for the Respondent for a period of six months and other related matters designed to ease tension between the parties, such as how and where the summons for the divorce action would be served. In annexure "C", the attorneys referred to a letter received from the Respondent, dated 5 January 2004, seemingly in response to the attorneys' suggest settlement agreement in annexure "B". In paragraph 2 of the letter, the attorneys refer to the Respondent's insistence that I be not permitted to sleep out until she was of school-going age. They state that they have instructions, from the Applicant, to place on record that he is unhappy with that condition. As already stated, the Applicant would, if it appeared to be in I's interests so to do, apply for that restriction to be varied, after the divorce proceedings have been finalised.

[6] In her answering affidavit, the Respondent denies the contents of both paragraphs 6 and 7 of the founding affidavit. In paragraph 6 the Applicant states that he signed the settlement agreement under very difficult circumstances ("*baie moeilike omstandighede*"). He claims that the Respondent had accused him of extremely unbecoming conduct ("*buite-egtelike verhouding*") a false allegation (that he sexually molested I), that allegation created intense emotional conflict which also entailed a threat by the Respondent that, if the Applicant did not accept the restriction, the divorce proceedings would be very acrimonious. In paragraph 7 the Applicant, somewhat restating what he avers in paragraph 6, refers to his attorneys' letter, annexure "C" to the founding affidavit, in support of

the fact that he would, when appropriate to do so, revisit the condition. The Respondent denies the contents of both paragraph 6 (as I have already stated) and paragraph 7. In doing so, however, she makes no mention of annexure "B" but pertinently denies receipt of annexure "C". It appears, however, that she also denies receipt of annexure "B". In paragraph 9.2.1 of the answering affidavit, however, the Respondent annexes a letter from the selfsame Applicant's attorneys, dated 4 December 2003 and addressed to her. That letter discusses financial matters between the parties. Attached thereto, as annexure "B2", is a draft settlement agreement between the parties, as proposed by the Applicant, through his attorneys.

[7] That draft settlement agreement is, in essence, the framework for the ultimate settlement agreement signed between the parties and made an order of Court by PATEL, J. It already contained a clause, 5.1, with regard to I's custody, which would be awarded to the Respondent, with the Applicant being granted reasonable access rights ("*redelike toegang van die Eiser*").

[8] The Respondent also annexes a letter from her attorneys, to the Applicant's attorneys, dated 1 January 2004. That letter, which is annexure "C" to the answering affidavit, responded to the Applicant's attorneys' letter of 4 December 2003. In paragraph 5.1.1 of the letter from the Respondent's attorneys, it is stated that they are of the view that the suggested basis of the Applicant's access to I is too wide and that the Family Advocate might object to it in the manner in which it

is stated. The attorneys had, therefore, taken it upon themselves, to limit the Applicant's access to the child. Seeing, however, that the Applicant was resident in Addo the Respondent would withhold any suggestions with regard to details concerning access to the child.

[9] In view of the fact that the parties ultimately arrived at a settlement agreement, it seems to me unnecessary to further discuss all the various correspondence between them in that regard.

The Issues

[10] There is no doubt in my mind that the Applicant would have liked to have greater access to I than was provided for in the settlement agreement. I am equally in no doubt that, in restricting the Applicant the way she did, the Respondent was actuated by her utter distrust for him, as a father. There is also present, in my view, the natural inclination on the part of the parties to use access to their minor children as a weapon between the two of them. In this regard I am referring, pertinently, to the Respondent.

[11] The Respondent's concerns regarding I are contained, primarily, in paragraph 10 of her answering affidavit. Whilst stating that she has been advised and accepts that the relationship between the parties, which led to the divorce between them, is of no relevance in the present application, the Respondent submits that the Applicant's aggressive behaviour towards him has a direct bearing upon the

question of his access to I. This statement immediately wipes away the preceding disclaimer. She alludes to the Applicant having assaulted her and having generally behaved aggressively towards her, from as early as 1999. She accuses him of having assaulted her even at a time when she was expecting I. When the Applicant obtained employment in July 2002 at Addo, they lived together. Their plan was that she would, after giving birth to the child, remain at home at Addo and look after her. She maintains that the Applicant continued with his physical and verbal aggression towards her even after I's birth. That conduct continued even at a time when I could perceive it. Consequently, so avers the Respondent, I developed great fear of the Applicant. It came to a point where I would hide behind the television when the Applicant arrived from work. During June 2003 the Applicant actually told the Respondent that she was not good enough to be an A. and ordered her and I to leave Addo. Those were the circumstances under which she and I returned to Pretoria. The Respondent avers that the Applicant's aggressive conduct resulted in I continuing, months after they had left Addo, to be traumatised by any form of violence, including stories on television. The Respondent concludes her account, with regard to the alleged Applicant's aggressive behaviour, as follows, in paragraph 10.18 of her answering affidavit:

> "*10.18 Dit was hoofsaaklik die voortdurende onbeheersde aggressie van die Applikant, tesame met die kwesbare ouderdom waarop I was (en steeds is) dat ek aangedui het dat die Applikant se toegangsregte slegs kon uitoefen deur haar vir dagbesoeke by hom te neem. Ek glo steeds dat dit in die beste belang van I is.*"

The gravamen of what is contained in paragraph 10.18 is that the Respondent says, in summary, that is the basis on which she arrived at the decision to limit the Applicant's right of access in respect of I and she believes that such limitation is still justifiable.

[12] The Respondent supported her averments, with regard to the alleged aggressive and abusive conduct on the Applicant's part, with, *inter alia*, a supporting affidavit from Ms A. V., her own mother and, therefore, I's maternal grandmother. She confirms I's alleged reaction to wild scenes on television, pertinently referring to an occasion, as an example, when I exhibited extreme fear, in reaction to wild scenes exhibited in an advert, in the manner that one would not ordinarily expect a child to react. The Respondent also attaches, as annexure "F" to her answering affidavit, her own letter. It is undated. In view of annexure "G" to the answering affidavit - an e-mail report of the Applicant's suggestion to the Respondent, on 25 April 2005, that it was possible for him to visit Pretoria on 7 and 8 (presumably May 2005) - as well as the Respondent's response, on 26 April 2005, to the effect that the Applicant could see I on 8 May, I take it that annexure "F" was written about the same time, i.e. during April 2005.

[13] Annexure "F" to the answering affidavit is a very long and detailed letter (pages 138-143) and represents what appears to me to be a genuine attempt by the Respondent to bring about some understanding between her and the Applicant.

Understandably, emphasis is on the need for the Applicant's change of heart (that the Applicant "*'n hartsverandering sal ondergaan*", in the very opening paragraph of the letter). The letter deals with a number of important topics. Firstly, the Respondent refers to the need for them, as parents, to always have I's interests foremost in their minds. She says, in so many words, that the letter is not intended to be a finger-pointing exercise. She is attempting, in the letter, to act as a mother who tries to give her child a chance in life, so that she will one day be a wholesome person, saying that she, after all, had no choice in finding herself born and living in a broken family. The Respondent acknowledged that she is emotional about the situation and undertakes to endeavour not to be emotional in the course of her writing annexure "F". She mentions a number of aspects about I including the following:

(a) I shows great signs of suppressed aggression, which now and again vests, giving examples thereof.

(b) She refers to I's sudden aggression, in the past three months as at the time of the writing of the letter, from a stage where she had been weaned off nappies and to a return thereto.

(c) I, who was not a child that used a dummy, had now resorted to it.

(d) I was in the habit of experiencing night nightmares, something that was new in her life.

(e) I associates the Applicant, as a father, with violence. The Respondent relates an incident when, two months prior to the writing of annexure "F", she and I were watching DSTV, a man assaulted his wife, I turned around

towards the Respondent and said "*Pappa!*" Even so, the Respondent comments further that that does not make I love the Applicant any less and, significantly, that that does not make the Respondent's own faults correct. She urges that they endeavour, in the future, not to quarrel in her presence, as such quarrels impact upon I's emotional well-being.

(f) The Respondent also comments about I's problems at the school and enumerates some details to the Applicant, in that regard.

(g) She also talks about discipline, mentioning aspects that she finds needing attention with regard to I, including a tendency to kiss, something she picked up at the school, and suggests that the Applicant assist her in eliminating that tendency from I's behaviour.

(h) She, in detail, sets out I's time-table from 10:00 to 15:30, quite clearly with a view to having the Applicant adopt the same time-table when with I.

(i) The Respondent also comments that I struggles to bond with male persons. She mentions plans to let certain persons, including Tito and Archie, presumably her own relatives, to fill in the gap that has been left by the Applicant. She mentions the importance of the Applicant and I meeting more often than they do, pointing out that the long intervals between their meetings create misunderstanding between them, in that the child grows fast during such breaks, without contact with the Applicant.

(j) She even suggests that attempts be made to make I accept the Applicant's parents on the same basis as she does those of the Respondent, to accept

the concept of two equal sets of relatives. She specifically mentions the necessity for I to know that she has grandparents on both sides.

(k) The Respondent mentions her plan to consult with a psychologist (presumably Ms Christa Visagie, whose report dated 24 November 2005, is referred to by both parties), with a view to getting advice on how to deal with I. Expensive as the Psychologist is, the Respondent was of the view that it is important that she be engaged. She expresses the idea that both she and the Applicant visit Ms Visagie.

(l) In his replying affidavit (which is incorrectly referred to, in the index, as his answering affidavit to the Respondent's answering affidavit), the Applicant vehemently denies, in paragraph 8, all the allegations made by the Applicant, in paragraph 10 of the answering affidavit, in which she accuses him of violence, in the form of both physical and verbal abuse. He concedes that he and the Respondent had a tendency of quarreling in I's presence and that they both failed to adhere to a counselling routine that they had begun, in their endeavour to save their marriage. The Applicant does not pertinently make reference to annexure "F" to the answering affidavit, which is contained in paragraph 10.17 of such affidavit. He denies the allegations made by the Respondent's mother, in annexure "E" to the answering affidavit. He also denies the entire contents of paragraph 10.17 of the answering affidavit but does not say, in so many words, that he did not receive annexure "F". It would seem, however, that the Applicant's response to paragraph 10.17 of the answering affidavit, in 8.13

of his replying affidavit, is tantamount to also denial of receipt of annexure "F", apart from disputing the correctness of the contents thereof. The reply, as it is in Afrikaans, reads as follows:

> "8.13 ***AD PARAGRAAF 10.17***
>
> *Ek neem kennis van die inhoud van hierdie paragraaf asook van die verklaring van Respondente se moeder, maar ontken die omvang van I se reaksie soos uiteengesit. Ek voer verder aan dat alhoewel ons gesins konflik sonder twyfel nadelig vir I was, ek nie die alleen outeur daarvan was nie en is dit opmerklik dat Respondente haar aandeel daarin totaal ontken. Ek ontken spesifiek dat ek my nie kan beheer nie, of na die egskeiding my aggressief teenoor Respondente gedra het. Ek ontken dat Respondente se moeder se weergawe korrek is, of dat die brief waarna verwys van die korrekte inligting bevat.*"

[14] The gravamen of the Applicant's response, as contained more pertinently in paragraph 8.13 of his replying affidavit, is as follows:

(a) He denies that there was, as alleged, change in I's behaviour or reaction.

(b) Whilst he admits that their quarrels/conflicts undoubtedly impacted adversely on I, he submits that he is not solely responsible for that. He is of the view that the Respondent is totally distancing herself from the consequences of their clashes on I's alleged adverse reaction, whereas she was also involved in the quarrel between the two of them. He denies

being unable to conduct himself appropriately or to control his temper and behaving aggressively towards the Respondent. He denies the Respondent's mother's version and that the letter referred to (presumably annexure "F") to the Respondent's answering affidavit.

[15] As at what would, ordinarily, be the close of pleadings – the furnishing of the Applicant's replying affidavit – the parties had been engaged in accusing each other of improper conduct and denying the other's accusations levelled against him or her. They had each summoned support, by way of affidavits, letters and/or other items of evidence to such an extent that it appeared to me that there was a conflict of fact right through the pleadings.

Chronology of Events

[16] The notice of motion and the founding affidavit were filed on 28 November 2005. The Respondent's notice of intention to oppose, dated 19 December 2005, bears – certainly incorrectly – the Registrar's stamp dated "2007-05-07". So too does the Respondent's notice in terms of Rule 30(2)(b), concerning an alleged non-compliance, by the Applicant, with the requirements of the Rules in respect of the address he furnished for receipt of notices. The date, in respect of each of those documents, must be a date on or after 19 December 2005, or even early January 2006. (The latter notice was subsequently withdrawn by the Respondent.)

[17] The Respondent's answering affidavit was filed on 3 February 2006. The Applicant's replying affidavit was filed on 20 February 2006, after he had had to apply for condonation for the late filing thereof. Having set the application down, on 22 March 2006, for hearing on 26 May 2006, the Applicant withdrew the set down on 27 March 2006.

[18] 0n 31 August 2006, the Respondent filed a pleading described as the "*Respondent's Further Supplementary Affidavit*". It is not clear why it is described as a "*Further Supplementary Affidavit*", there having been no other supplementary affidavit from the Respondent. Although the Respondent gives reasons for the necessity to file this further affidavit after the filing of the Applicant's replying affidavit, and seeks condonation for that, the affidavit was filed without any condonation being granted by the Court. The Applicant, in turn, filed an "*Answering Affidavit of the Applicant in Response to the Respondent's Supplementary Affidavit*", on 9 November 2006. The filing of this latter affidavit was after the application had been argued before me, on 6 September 2006, and postponed, after the parties were referred back to the Family Advocate, who was ordered to facilitate a suitable meeting of all the experts involved in the application and with the parties having been authorised to approach the Deputy Judge-President for a date of the re-hearing of the matter in November 2006.

[19] Just as the Respondent said, the Applicant states that it is aware that the filing of further affidavits may only be done with the leave of the Court. He prays for

condonation for the filing of this further affidavit, stating that it is important for him "*to respond to the last minute affidavit filed by the Respondent only six days prior to the hearing, and in which some important matters were raised and on which [he] could not then respond in time for the hearing because [he] was not able to consult with [his] attorneys of record in time*" (paragraph 2). The Applicant did not indicate at the hearing, on 6 September 2006, that he was handicapped by the late filing of the Respondent's "*Further Supplementary Affidavit*" on 31 August 2006.

Filing of Further Affidavits

[20] Both the Respondent's "*Further Supplementary Affidavit*" and the Applicant's "*Answering Affidavit in Response to the Respondent's Supplementary Affidavit*" were inappropriately filed. Further affidavits, after the customary three (the Founding, the Answering and the Replying Affidavits, respectively) may, in accordance with the provisions of Rule 6(5)(e) be filed only with the leave of Court. The relevant portion of the Rule reads: "*The Court may in its discretion permit the filing of further affidavits*."

[21] In the light of what the parties did in this application, as well as the many other matters that have come before me in this division, I find it necessary to quote, in full, the relevant portion of the commentary in "*Superior Court Practice*" by Erasmus, at B1-46 to B1-47, which reads:

> "*The Court will exercise its discretion against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. The Court must exercise its discretion.* ***The Registrar is not empowered to exercise it and a party cannot take it upon himself or herself to simply file further affidavits without first having obtained the leave of the Court to do so.*** *It has been held that where further affidavits are filed without the leave of the Court, the Court can regard such affidavits as* ***pro non scripto****. While the general rules regarding the number of sets and proper sequence of affidavits should ordinarily be observed some flexibility must necessarily also be permitted.* ***It is only in exceptional circumstances*** *that a fourth set of affidavits will be received. Special circumstances may exist where something unexpected or new emerged from the applicant's replying affidavit.*"

Numerous authorities cited in footnotes 1 to 6 have been omitted. **Standard Bank of South Africa Ltd v Sewpersadh 2005(4) SA 148 (C)** is one of the authorities cited and states the position very clearly with regard to the registrar not being empowered to exercise a discretion to receive or not to receive a fourth affidavit and the consequences of an affidavit which is received without the Court's permission.

[22] When, in preparation for the hearing of the application on 6 September 2006, I realised that the Respondent had filed an additional affidavit without the Court's permission, I decided to overlook that aspect because it had not resulted in the Applicant filing or seeking to file an additional affidavit in response thereto. Taking into account the nature of the application before me, entailing the interests of a minor child, I decided not to adopt a technical approach to the matter. The issues raised by the Respondent in that additional affidavit, although raised with excessive detail, are not irrelevant. Seeing that I had already come to the conclusion that there were serious disputes of fact on the question as to who of the parties was responsible or more responsible for the stalemate concerning the question of improved access for the Applicant, I did not consider the additional affidavit as causing any further complication – except the extra reading. It had become evident to me that, with or without that additional affidavit, it was necessary for the experts to come together and endeavour to produce a common view with regard to the question whether or not the Applicant was not yet entitled to an over-night visit by the minor child, I. Little did I know that the Applicant would still need to respond, after the application had already been argued in Court, to the Respondent's allegations in her further affidavit. After all, by permitting the case to proceed on 6 September 2006, in spite of the newly-filed further affidavit by the Respondent, the Applicant had indicated that the matter was ripe for hearing.

[23] Be that as it may, the fact of the matter is that the Applicant ultimately filed the "*Answering Affidavit of the Applicant in response to the Respondent's Supplementary Affidavit filed on 30 August, 2006*" on 16 April 2007, seven months and sixteen days after the filing, by the Respondent, of the additional affidavit.

[24] Earlier in the judgment, I mentioned the reason given by the Applicant for the late filing of the additional affidavit. Nothing explains why it took him more than seven months to file the affidavit, even if without the Court's permission, if he was to file it, afterall.

[25] Mention should be made of the fact that the application was duly set down for 28 November 2006, on which day it did not proceed, on account of my indisposition. The Respondent had served a further affidavit on the Applicant's attorneys and the Family Advocate on 21 November 2006. That affidavit was not, however, filed with the Registrar until 18 April 2007, once more, without the leave of Court. The affidavit is referred to, by the Respondent, as the "*Respondent's Replying Affidavit to Applicant's Answering Affidavit to Respondent's Supplementary Affidavit*".

[26] When the application resumed before me, in 2007, I was faced with a further 126 pages of the papers to read. These included 39 pages of the transcript of the previous proceedings, which was a helpful addition, making 87 pages of new

material. The latter pages included the Family Advocate's supplementary report dated 31 0ctober 2006, and a summary of the expert's discussion on 13 0ctober 2006, a total of 10 pages. The papers, all-in-all, total 541 pages.

[27] I mention all this because the length of the papers, with numerous annexures many of which were themselves very long, made for difficult preparation of this judgment. This is more so in that I was not able to prepare the judgment shortly after being addressed by the parties on 15 May 2007, due to factors beyond my control and factors related to the peculiar circumstances of the Pretoria Court with regard to congestion of work. I deliberately avoided regarding the additional affidavits that were filed without the Court's consent as being *pro non scripto*, as stated in, *inter alia*, **Standard Bank v Sewpersadh**, *supra*, in view of the nature of the application before me. I shall, however, return to this aspect in due course.

Gravamen of the Conflict between the Parties

[28] As already stated in this judgment, the real issue between the parties is whether or not I should have sleep-overs with the Applicant. In annexure "F" to her answering affidavit, albeit that receipt thereof is denied by the Applicant, she endeavours to demonstrate how much she would have liked I to have a lot of bonding with the Applicant and how the Applicant, on account of his alleged aggressive conduct, is making it impossible for the Respondent to permit that. It will be remembered that annexure "F" is a letter written by the Respondent to the

Applicant, purely as a matter between the two of them and not intended for public consumption or use in Court.

[29] 0n his side, the Applicant similarly annexed correspondence between himself and the Respondent, in which he said very positive things about himself, the Respondent and I. In an e-mail he forwarded to the Respondent on 4 September 2005, he thanks the Respondent for all that she has done for I. He compliments the Respondent for bringing the best out of I, looking well after her, notwithstanding the fact that she receives minimal assistance from her family, now that her own mother had relocated to Stilbaai. He says, in the letter, that what he admires most is the fact that the Respondent has encouraged I to be positive towards him and his visits. He says I really gets animated when he comes to collect her for her visits and ensures that she wears clothing that he or his own family bought for her. I enjoys the time she spends with him and his sister's children. What really irks him is the fact that these day visits deny him the opportunity to bathe I and see her going to bed. He laments the fact that he is to I merely a visitor and does not feel like a father to her. He is concerned about the fact that the settlement agreement does not permit him to have I visit overnight until she is of school-going age – not when she is three, not even four years old. He finds that strange because he is of the view that I has now fully stabilised. It is, so he says, already two years that the Respondent and I left Addo and yet, in all that time, he has only managed to see her every third week-end of the month. He repeats how much I loves him and is excited by the company of his sister's

children: "*I is gewoond aan my en is tuis in Hannie se huis waar ons kuier. Hannie se kinders is erg oor haar en sy oor hulle.*" The Applicant states that I's well-being is equally important to him and that he will not like that they do anything that is not good for her. He states that he telephoned Christa Coetzer of the Family Advocate's office in Pretoria, regarding I's sleep-overs. Christa Coetzer informed him that it is not normal for babies to sleep over during visits until they are three and a half years old, when it is common for them to sleep over for one night. She also informed him that it was practice for children to be allowed to visit the requesting parent for a few days, during short vacations, from the age of four. He then details other positive comments made by Christa Coetzer with regard to I's positive development, in spite of the quarrels between her parents. He then ends his letter with the following request, for the Respondent to permit I to have sleep-overs during occasions when the Applicant has visited his sister's place, from Port Elizabeth: "*Ek vra mooi of ons nie kan begin om I te laat oorslaap tydens my besoeke nie. As jy ongemaklik is met die hele idee en die moontlike impak daarvan of I, kan ons mos vir Christa betrek en die saak met professionele hulp aanpak.*"

[30] In an earlier e-mail, of 29 April 2005, the Applicant had addressed the Respondent in greater detail. He, *inter alia*, refers to the Respondent's repeated mention of the fact that I gets negatively affected by his visits. He says that he used not to believe the Respondent's statements in that regard, primarily because of the manner in which I was relaxed in his company during his visits and the

extent to which he enjoyed the company of his sister's children. He, however, had no choice but to believe that the Respondent is genuinely concerned about the visits, especially seeing that she had actually gone to the extent of taking leave of work in order to calm I down after one of such visits. He then refers to a specific conflict ("*konflik*") that he and the Respondent had on a given Saturday, in I's presence, which conflict had a definite disturbing effect on her, although she had completely recovered from the effects thereof by Sunday.

[31] He mentions, with approval, the fact that the Respondent had taken I to Christa Coetzer to help ease her emotions, saying that that is a step in the right direction. He also mentions that Christa Coetzer had also telephoned him about the visit, a welcome sign that he is recognised as I's father. He states that he believes that the problem lies neither with I nor himself but jointly with him and the Respondent. He pleads with the Respondent not to speak ill of him to I, even though he acknowledges that he has his own problems as well. He states that, although it might appear to the Respondent that his visits to I have an unsettling effect, he has no desire to stop visiting her because he does not know what greater harm may result from her being denied visits by her father and adds that he cannot, in any event, cope with such estrangement between I and himself. He emphasises that they – the Respondent, himself and I – are a family, albeit a broken family. The Applicant wonders whether it is not about time that he telephones I, daily, so that she does not get the impression that he disappears after visits. Concerning the Respondent's concern that his telephone calls upset I, he wonders whether his

silence will not upset her even more. He also raises the fact that the Respondent's mother is permitted to telephone I and yet he, the father, is not. What I have stated herein is not exhaustive of the contents of that letter. Quite clearly, by September of that year, judging from the letter I previously referred to, the Applicant was of the view that I had stabilised sufficiently for the Respondent to accommodate a closer relationship between him and I.

[32] It is, in my view, not necessary to establish, especially for purposes of my judgment, who of the parties is truthful in the letters I have referred to as well as in their respective averments in the affidavits. The further affidavit by the Applicant has not changed the impression I had before commencement of the proceedings on 6 September 2006 and during the hearing, as I was being addressed by counsel, on that date, viz, that something needs to be done, for I's sake, to ensure that I enjoys a normal relationship with both parents. It was for that reason that I had the proceedings postponed so that the experts could put their heads together in that regard.

Experts' Opinions

[33] It is common cause that the Family Advocate had a consultation with the Applicant, the Respondent and I, during the early part of 2006. That was in consequence of the Applicant's application, filed on 28 November 2005, for variation of a Court order dated 27 February 2004, granted during the parties' divorce proceedings. Such order was based on the settlement agreement I have

referred to, between the parties. The Applicant sought variation of paragraphs 5.2 to 5.4 of the settlement agreement, which agreement was made an order of Court. 0f immediate importance in the desired version of the order are the following:

(a) That, from 1 January 2006, when I would be 3 years and 7 months old, she would be permitted to visit the Applicant on alternative week-ends, with one sleep-over during one of such week-ends;

(b) That, as from the age of 4, which would be on 11 June 2006, I be allowed two nights sleep-overs during the alternative week-end visits;

(c) That, from the age of 4, I be permitted to visit the Applicant for one vacation period of ten days;

(d) That, once I reaches school-going age, she be permitted to visit the Applicant during alternative holiday periods as more fully set out in prayers 1.1.4 to 1.1.6; and

(e) That, the Applicant be allowed telephone communication with the child, twice per week in the manner detailed in prayer 1.1.7. The detailed prayer 1.1 reads as follows:

"1.1 'Die Eiser (Applikant in hierdie aansoek) sal redelike toegang tot die partye se minderjarige kind I hê, soos volg:

1.1.1 Vanaf 1 Januarie 2006 verwydering vir alternatiewe naweke met een nag oorslaap (op die Saterdag aand);

1.1.2 Vanaf ouderdom 4 jaar (11 Junie 2006), verwydering alternatiewe naweke met twee nagte oorslaap (op die Vrydag en Saterdag aand);

1.1.3 Vanaf ouderdom 4 jaar, die reg om I te verwyder vir een vakansie per jaar vir hoogstens 10 dae vooraf gereël met die Verweerderes (Respondente in die Aansoek);

1.1.4 Vanaf skoolgaande ouderdom, verwydering vir alternatiewe naweke vanaf Vrydag middag na skool tot Sondag aand;

1.1.5 Vanaf skoolgaande ouderdom verwydering vir alternatiewe kort en alternatiewe lang skoolvakansies, Kersfees roterend tussen die partye;

1.1.6 Besoeke en/of kontak met I op haar verjaardag, vadersdag en Eiser se verjaardag; en

1.1.7 Redelike telefoniese kontak twee keer per week, verkieslik Maandae en Donderdae tussen die ure 19h00 en 20h00.' "

[34] The Family Advocate engaged the services of the following:

(1) Ms Christa Visagie, a Counselling Psychologist, (**pages 32-35, repeated on pages 249-256**);

(2) Mr Henk J Swanepoel, an Associate Clynical Psychologist in the firm of Vorster, Swanepoel & Soni (**pages 253-271**); and

(3) Dr Lore Hartzenberg (**pages 280-292**).

The Family Counsellor, **Ms Erika Beeslaar**, prepared her separate report, which is attached to that of the Family Advocate, as annexure "A". It is dated 18 August 2006. She is described, in her report, as the principal social worker, with sixteen years experience as a social worker who has, for nine years, been appointed, in terms of Regulation 6 of the Mediation in Certain Divorce Matters Act, 24 of 1987, as Family Counsellor. She states that she, in the company of the Family Advocate, interviewed the parties. They also interviewed a Mr Conradie, the Respondent's lover, and the minor child I. Although she had no direct dealings with Ms Christa Visagie and Mr Henk Swanepoel, she had insight into their reports dated, respectively, 24 November 2005 and 1 July 2006. From her reading of the application papers, the Family Counsellor identified the dispute as being the Applicant's rights of access to his minor child, I.

[35] It is not necessary, for purposes of this judgment, to give a detailed summary of Ms Beeslaar's report. Having taken everything into account, including the two psychologists' reports and the "Suggested Age Appropriate Access" guide used by the Family Advocate's office, she made her recommendations. Her considerations included I's state of development and the extent to which her parents' divorce and their quarrels, some of which occurred in her presence, affected her emotionally.

She also took into account the Respondent's concerns about the Applicant being granted greater access than he had, hitherto, been enjoying and I's own attitude towards him.

[36] According to the Suggested Age Appropriate Access, three items needed to be determined, viz, (a) frequency and duration of contact between the child and the other parent, (b) whether the child would have an "over-night" visit; and (c) the question of "vacation time without contact with [the] primary parent".

[37] (a) In respect of the first enquiry, the following appears in respect of children in the category 3-5 years:

"*Predictable contact is important, weekly time, if possible full week-ends or two other days and nights at this stage*."

(b) In respect of the second enquiry the following appears:

"*Yes. Usually.*"

(c) Finally, in respect of the third enquiry, the following appears:

"*Yes, possibly longer than a week, for younger children higher limits, or two weeks for older children.*"

[38] The Family Counsellor made the following recommendation:

(1) that custody be awarded to Respondent;

(2) that reasonable access be granted to the Applicant, demarcated as follows, in keeping with the minor child's age:

2.1 presently, alternate week-ends, one of them with a sleep-over, with the Applicant;

2.2 from the age of 5, alternate week-ends, two of which have a sleep-over with the Applicant and a short vacation not longer than ten days;

2.3 from school-going age, alternative week-ends, two sleep-overs with Applicant, alternatively, short vacations, long vacations shared between the parents, with Christmas rotating.

3. 0ver and above the above visits, the Applicant should have access to I, should the opportunity arise, taking into account the fact that he resides distantly from I.

4. Both parties should receive professional family guidance.

The Family Advocate adopted the Family Counsellor's recommendations in his own report of the same date.

[39] In filing her "Further Supplementary Affidavit", on 20 August 2006, the Respondent cited the Family Advocate's report, which became available to her only on 21 August 2006, and its recommendations, favouring the Applicant, as the reason for her further affidavit. She also mentioned that she had, in any event, been unhappy with the manner in which the interviews were conducted, on 2 March 2006, when she, the Applicant and I were at the Family Advocate's

office. She said the Family Advocate's representative who dealt with them indicated, in the course of the consultation, that that office was inclined to extend the Applicant's access to I. Moreover, such extension was to be of immediate effect, even before the report was presented to the Court, as per its order of 6 September 2006. She complained that the Family Advocate's decision was arrived at fifteen minutes after commencement of the consultation. That had caused her to contact her attorneys, who then communicated with the Family Advocate with a request that an independent psychologist be obtained to give his/her forensic report. In consequence of such an approach, the attorney suggested that Dr Lore Hartzenberg, who had already finalised her report on 30 March 2006, be approached for purposes of this independent report. In response to the Respondent's dissatisfaction, the Family Advocate nominated Mr Henk Swanepoel as an independent psychologist to have a further consultation with the Respondent, the Applicant and I, which consultation duly took place. The Family Advocate's report is, according to the Respondent, based on Mr Swanepoel's report, dated 1 July 2006.

[40] Before mentioning the next point in the Respondent's further affidavit in this regard, it is appropriate that I allude to one of her major concerns in relation to the extension of the Applicant's rights of access to I, viz, I's allergies. It is common cause that I is allergic to a number of foods, including fresh milk, and reacts vehemently to intake thereof. 0n the occasions when I visited the Applicant, on day visits, the Respondent always emphasised that caution be taken in that regard.

She was of the view that such did not take place, because I often, according to the Respondent, suffered from reaction on her return from such visits. I became so sick that the Respondent was obliged to take her to Dr Willemien Theron on such occasions. She attached, as annexure "E" to her answering affidavit, Dr Theron's summary of such instances, during 2006. These are instances of severe reaction, when home treatment by the Respondent failed to stop or to calm the reaction.

[41] Although the Family Advocate assured the Respondent's attorney, Ms Van Dyke, that, if the Applicant's rights were extended, it would be on condition that he took seriously I's allergies and ensured that she ate the correct food and that he would, personally, take responsibility for I during such visits, the Respondent was of the view that a particular passage on page 8 of Mr Swanepoel's report (page 260 of the papers) bears testimony to her experiences that the Applicant did not pay adequate or any attention at all to I's reactions. That passage reads:

> "*Meneer A. meld dat I tans blykbaar aan 'allerhande siektes' ly wat teen hom gebruik word om sy toegangsregte verder in te perk. Hy meld dat hy bewus is dat sy allergieë het en* ***poog*** *om dit in gedagte te hou tydens sy besoeke, maar meld dat sy suster by geleentheid per abuis koeimelk vir I gegee het wat tot erge frustrasies by Mev A. gelei het. Volgens hom is mev A. oorbeskermend aangesien sy hom bykans na afloop van elke besoek telefonies kontak en 'kla en beskuldig' oor I se gesondheid wat blykbaar in sy sorg agteruit gegaan het. Hy ontken dat hy I siek terug by haar moeder besorg en meld dat sy soms siek aan hom gegee word en dan beskuldig*

word dat hy haar siek gemaak het na afloop van sy besoek." (Emphasis by the Respondent.)

The gist of the import of this passage is that the Applicant accuses the Respondent of making use of I's allergies as a pretext for limiting his access to her. He says he is aware of such allergies and that he merely *tries* to bear that in mind during I's visits and alludes to an incident when his sister, accidentally, gave I cow milk to the Respondent's chagrin. He is of the view that the Respondent is over-protective, alluding to instances when she telephoned him after I's visits accusing him of being responsible for I's sickness. He denies that I returned, after such visits, being sick and claims that there were times when she was brought to him already sick, only for him to be accused of such sickness.

[42] It is on account of what is contained in this passage that the Respondent attached Dr Theron's medical report.

[43] It became evident to the Court, when the matter was heard on 6 September 2006, that the Applicant had not responded to this aspect and that, in any event, the Family Advocate needed to respond to, in particular, allegations to the effect that the consultation had not been professionally conducted and that the decision had been hastily arrived at. All concerns would thus be attended to. It was also prudent, in the Court's view, that Dr Swanepoel be aware of the Respondent's concern with regard to the aspect extracted from his report. It goes without

saying that the Family Advocate would also have an opportunity to reconsider her report, in the light of the information contained in the Respondent's further affidavit.

The Family Advocate's Supplementary Report dated 31 0ctober 2006 [pp317-324]

[44] The Family Advocate's supplementary report was filed on 3 November 2006. It states that a discussion of the experts took place on 13 0ctober 2006

> "*with the following persons present:*
>
> *Undersigned, [Ms Cheryl Grobler, the Family Advocate], Family Counsellor, E Beeslaar, Mr H Swanepoel, Clinical Psychologist and Dr L Hartzenberg, Educational Psychologist. (Ms C Visagie was overseas and unable to attend.)*"

The Family Advocate states that she conducted a telephone conversation with Ms Visagie before the latter's departure. She informed the Family Advocate that she had not seen the minor child for a year now and could not comment any further. She did state that the child should be able to sleep over for one night by now.

[45] It is appropriate, before proceeding further with the Family Advocate's supplementary report, to mention the differing stances between Dr Hartzenberg, on the one hand, and Mr Swanepoel, on the other. Taking into account that I was already 4 years old, Mr Swanepoel had come to the conclusion that she could

immediately sleep over, with the Applicant's rights being extended with time. He was also of the view that the Applicant should be permitted telephone communication with I. The relevant passage reads as follows:

> "*I is reeds vier jaar en blyk toepaslik te funksioneer tydens die dagbesoeke aan haar vader, daarom, op grond van die beskikbare inligting word dit aanbeveel dat mnr A. se toegangsregte gewysig word en I vir een aand onder mnr A. se toesig kan oorslaap tot en met skoolgaande ouderdom, wanneer volledige naweek oorslaapbesoeke asook vakansies ingesluit behoort te word. Mnr A. moet ook toegelaat word om sy dogter telefonies te skakel op alle redelike tye.*"

[46] Unlike Mr Swanepoel, Dr Hartzenberg was clearly against any sleep-over for I at that stage. She expressed herself thus, in paragraph 10.xv of her report:

> "*Die inligting en kennis wat I het rondom haar ouers se egskeiding, verhouding asook die kwessie van die oorslaapbesoeke is ontoepaslik en ongewens vir 'n kind van haar ouderdom [she was three years and seven months then, in March 2006], aangesien dit 'n verantwoordelikheid op haar plaas om 'n keuse en/of opinie uit te spreek.*"

[47] Having read, *inter alia*, Dr Hartzenberg's own report with regard to I's development, Ms Visagie's report on I's development and Ms Swanepoel's report in that regard as well, I was of the *prima facie* view that Dr Hartzenberg's view

was inappropriate and that it was biased in favour of the Respondent and against the Applicant.

[48] Ms Visagie was initially approached by the Respondent, concerned about the ill effects of both the divorce between herself and the Applicant and what she regarded as his aggressive attitude towards him and I, including quarrels they had in her presence, to consider the effect of all that on I's emotional and other life. She had not been called upon to determine the question as to whether or not the Applicant could be afforded more access to I than he already had in terms of the settlement agreement that had been made an order of Court during the divorce proceedings. Although she mentioned that the Respondent stated that she felt very strongly that I should first sleep over when she was six years old, Ms Visagie made no mention of what her own preference was in that regard, in her report. It should be borne in mind that she starts her report by making it clear that it was not to be used for forensic purposes. I do not, on that account, understand the report to be useless for purposes of determining probabilities that depend on the circumstances surrounding I and her parents. Hers was, in my view, a very thorough examination, with no time constraints. She had interviews with the Respondent on 15 April 2005 and 6 June 2005. She then had a telephone conversation with the Applicant on 20 April 2005 and later had an interview with him on 19 August 2005. Finally, she had four interviews (of the nature designed for children of I's age) with I on 20 April, 4 May, 11 May and 16 May 2005). She does state that appropriate evaluation technique for children was limited.

[49] In my view, based on an overall assessment of all the evidence, I emerged with an impressive record with regard to a number of aspects, notwithstanding her experiences. Those include her language and communication skills, which were very good; the ease with which she parted with her mother and dealt with new situations with self-confidence; her inter-personal participation with strange persons, which was good, which factor positively influenced her prognosis ("*Dit is ook 'n faktor wat I se prognose positief beïnvloed. Dit is moontlik dat dit vir haar makliker was om met soveel selfvertroue en selfgelding op te tree in 'n empatiese konteks.*") Ms Visagie was of the view that I had the potential to outlive the adverse consequences of her parents' divorce if they, in turn, assisted in that direction. ("*Beide bogenoemde aspekte kan meewerk dat I die potensiaal het om haar ouers se egskeiding suksesvol te verwerk, indien hulle empaties ingestel is op haar behoeftes en kommunikasie daarvan.*") In her animal games, I made the male animal angry ("*kwaad*"), adding that the young ones upset him ("*die kleintjies het hom so gemaak*") and that they, the young ones, were now hurt ("'*nou voel hulle hartseer*'"). I do not propose, in this judgment, to state all the details in Ms Visagie's report from which I get the impression that she did not, on her part, get the impression that I wanted to distance herself from the Applicant, as her father. Just to finalise the aspect with regard to playing with the animals, especially with regard to the male animal, Ms Visagie writes:

> "*Sy rangskik diere en eenhede wat bymekaar pas. Dan vat sy die grootste dier weg en vra met onsekerheid in haar stem: 'waar is die Pappa?' en sê*

'Hy is weg!' Hierdie spel herhaal deur die sessies. Wanneer sy sê 'hy is weg', het sy 'n verbaasde gesigsuitdrukking en herhaal 'net weg!'

Wanneer sy die gesinseenhede van diere bymekaar pak, sit sy ook een keer 'n ekstra kleintjie by en sê 'Pappa en 'n ander dogtertjie'. Dit is moontlik 'n ervaring van haar niggie Ansie wat by is wanneer sy en pappa kuier."

Ms Visagie concludes that section as follows:

"*I is 'n baie gehoorsame dogtertjie wat graag wil tevredestel en sensitief is vir mense om haar se emosies.*"

For purposes of the present discussion, it is not necessary for me to give a summary of Ms Visagie's recommendations, save to say that they had nothing to do with the question whether or not the Applicant ought to be granted greater access. The nearest in that regard was her mention that: "*I in periodes tussen besoeke meer gereelde voorspelbare kontak met haar Pa het.*" [page 34]

[50] I find in Dr Hartzenberg's facts, describing the emotional picture ("*EMOSIONELE BEELD*"), disturbing features which, in my *prima facie* view, ought to concern a psychologist, in the sense of seeing warning signs that the child may be totally alienated from her father. Before I quote, in full, the relevant passages, I need to mention that it appears, in my view, that the child created a different picture to Dr Hartzenberg, concerning her views of the Applicant, as her father, to that

which she created before Ms Visagie. The relevant passages from Dr Hartzenberg read as follows:

"9 ***EMOSIONELE BEELD***

i. *Dit blyk dat I sensitief is vir haar ouers se wedersydse vyandigheid jeens mekaar. Dit is veral in haar ekspressiewe media waar haar angstigheid rondom hierdie saak vergestalt word.* ***Sy weier dan ook om haar moeder saam met haar vader te teken****. Projeksies van monsters kom ook in haar tekeninge voor.*

ii. *I vermy dit aanvanklik om enigsins met die menslike figure (poppe) te speel en spits haar aandag slegs op die dierfigure. Hieruit kan moontlik afgelei word dat I se spel daarop dui dat sy haar leefwêreld en ervaringe as synde bedreigend beleef.* ***Deur die menslike figure te vermy in haar spel*** *poog sy na sekuriteit en beheer van en in haar omgewing.*

iii. *I begryp dat sy twee huisgesinne het en dat haar ouers geskei is '****omdat pappa baie kwaad was en nie meer lief vir mamma nie****'. [This particular emphasis is by Dr Hartzenberg.] Haar moeder, tesame met haar materne ouma,* ***speel die grootste en belangrikste rol in haar lewe. Dit blyk dat haar vader 'n meer sekondere rol inneem****. '****Pappa Tito' (haar moeder se vaste vriend) speel ook 'n rol in I se lewe en dit blyk dat sy 'n positiewe band met hom gevorm het****. In haar gesinstekening beeld sy slegs haarself uit en vermy sy dit* ***om haar vader en/of moeder te teken.***

iv. *In 'n tweede sessie word I beperk tot die poppe en pophuis vir assesseringsdoeleindes. Deur haar projeksies verbaliseer sy 'n besorgdheid vir die pappa en dat '**dis goed dat ons vir die pappa 'n plek gekry het om te slaap**'. Haar speel-gesin bestaan uit 'n mamma, pappa, dogtertjie en baba asook ouma en oupa.*

v. *I dra kennis van haar ouers se vyandigheid teenoor mekaar en sy verbaliseer '**pappa vertel leuens, mamma sê so**'. [This is Dr Hartzenberg's own emphasis.] Sy noem ook aan die ondertekende sielkundige dat haar vader haar moeder geslaan het en op die vloer gegooi het. 0p 'n vraag van die sielkundige oor hoe sy dit weet, het sy geantwoord dat **haar moeder dit aan haar vertel het**."*

[51] In my view, this passage contains disturbing elements which ought to militate towards finding a way to encourage more communication and bonding between I and the Applicant than the opposite view. It will, of course, be borne in mind that the Court is not bound to swallow an expert witness's views where it is of the view that they are unjustifiably arrived at. (**Stock v Stock 1981 3 SA 1280 (AD) at 1296E-F; Jackson v Jackson 2002 2 SA 303 (SCA) at 311F-G, 323E-324C and 327G-331I.)** It does not appear to me that what is described in the passage creates the overall impression that I dislikes or is negative towards her father, on my interpretation. I find it disturbing that the Respondent reportedly gives I a bad image of the Applicant, by telling her negative things about him,

even if they are true. What appears in Dr Hartzenberg's report, viz, that the Respondent spoke ill of the Applicant to I finds resonance in the following sentence in Mr Swanepoel's report:

> "*Beide ouers vertoon ook persoonlikheidsinperkinge, terwyl mnr A. se inperkinge nie sy ouerskapspotensiaal beïnvloed nie, blyk dit dat mev. A. se insig tot I se ontwikkeling, beïnvloed kan wees." [page 270]*

It appears strange, also, that Dr Hartzenberg only has room for description of the Respondent in paragraph 10 of her report, saying absolutely nothing about the Applicant's qualities, whether positively or negatively. In view, however, of the fact that the Family Advocate and the other experts had not had occasion to comment on Dr Hartzenberg's views, and also the fact that I had not been addressed by counsel on my concerns about Dr Hartzenberg's conclusion, I did not express my *prima facie* view to the parties on 6 September 2006. Moreover, I did not want to, in any way, influence the meeting of the experts.

[52] Both Mr Swanepoel and Dr Hartzenberg are reported by, *inter alia*, the Family Counsellor, as having been in favour, at the experts' meeting, of a one night sleep-over by I at this stage. With regard to Mr Swanepoel's report, the following is said by the Family Counsellor:

> "*1.7 In order to lift the present negative pattern between the parties, I must start sleeping over for one night.*
>
> *1.8 I is ready for one night sleepover at the Applicant.*"

With regard to Dr Hartzenberg's views, the following is said by the Family Counsellor:

> "*2.11 I is ready to be able to sleep over for one evening at the Applicant.*
>
> *2.12 This should however not occur with each visit of the Applicant in order to calm down conflict and reactions of the parties.*" [pages 324-325]

[53] The Family Counsellor's recommendation, after the meeting of the experts, reads as follows:

> "*It is in I's best interest that:*
>
> *4.1 Custody be granted to the Respondent.*
>
> *4.2 Reasonable access to the Applicant which should be phased in, in accordance with undersigned's report dated 18 August 2006.*
>
> *4.3 Both parties receive parental guidance.*
>
> *4.4 The Respondent submit to regular psycho-therapy for at least six months with one of the following persons:*
>
> *(i) Dr Louise 0livier (Clinical Psychologist).*
>
> *(ii) Ms Elmarie Visser (Clinical Psychologist).*"

Departure of the Respondent and I from the Jurisdiction

[54] It is common cause that, as at the time of the hearing of the application, on 15 May 2007, the Respondent and I were no longer within this jurisdiction,

having relocated to the Western Cape. This happened without warning the Applicant and his attorneys. During her involvement with the A. family, from 15 April 2005 to 19 August 2005, Ms Visagie reached a stage where, during her monitoring of the relationship, she was reasonably happy that there was an improvement. By the time she made her report, however, during November 2005, Ms Visagie had already learnt that there was a re-emergence of conflict between the Applicant and the Respondent. She writes as follows in that regard:

> "*Na afloop van hierdie proses het dit later geblyk uit telefoongesprekke met sowel mev as mnr A. dat daar weer meer konflik tussen I se ouers is oor haar.*"

Unfortunately, that tension between the parties was still in existence as at the commencement of 2007. What is more regrettable is that it appears to have also affected the relationship between their legal representatives. I can find no justification, whatsoever, for the Respondent and her attorneys failing to give the Applicant as much as an indication, until the very last moment, that she and the minor child were leaving this jurisdiction. This is more so where there is a pending Court process, preparations whereof were, unavoidably, made within the jurisdiction of this Court.

[55] During argument on 15 May 2007, where Mr Van Zyl addressed me on behalf of the Applicant and Ms Van Nieuwenhuizen addressed me on the Respondent's

behalf, the latter made, *inter alia*, the following submissions during her address, as appears on page 40 of the transcript of those proceedings:

> "*… and I appreciate the fact that* ***it is not the Applicant's fault that the facts have changed****, M'Lord, but surely the Applicant must then at least take I's interest into consideration and first let her settle down, explain properly* ***to this court*** *how am I going to structure my visitation rights now and so forth and then if there are, if there is still a dispute, let the Family Advocate again look at these new circumstances and then we can go forward, M'Lord, but with all due respect, to prepare an application, let all the experts do their job for 403 pages and I, I know I am emphasising the voluminous nature, it is because …, but, M'Lord, this was properly before your Lordship, all the relevant factors to decide in I's best interest were properly before you on paper, M'Lord.*
>
> *Even on the previous occasion, notwithstanding that full and complete reports and affidavits, your lordship said and I am …, it is my respectful submission, quite correctly so, 'let us be cautious, go back to the experts, let us see whether we cannot find common ground'. M'Lord, all of that is now …,* ***well, 80% of that has now fell [sic] away. We are back to square one****, we are once again faced with circumstances that has (sic) not been duly ventIted.*" [Emphasis added.]

Nothing in this passage suggests that the Respondent's attorneys could not have informed the Applicant's attorneys, timeously, of the intended relocation by the Respondent and I.

[56] It is true that, by leaving Gauteng with I, the Respondent has taken herself and I out of this Court's jurisdiction. That is notwithstanding her counsel saying the Applicant should "*explain properly to this Court*". It could not have come by accident to the Respondent's attorneys that the charge would cause a major logistical and procedural problem. In other words, the Respondent's legal representatives could not have been unmindful of that. To mention it in Court as a *fait accompli* has, in my view, an element of arrogance. This is the proverbial pulling of the carpet from underneath, not only the Applicant's, but also the Court's, feet. Which Family Advocate is counsel referring to that will have to "*look at these new circumstances*" and as to how "*we can go forward*"? Who are the "we" to go forward?

[57] This Court finds itself in an invidious position on account of, *inter alia*, the following factors:

(1) Regardless of the parties' procedural indiscretions the Court has alluded to, by their placing further information before the Court without its permission, the fact of the matter is that the minor child, I, is entitled to the Court's intervention concerning the interrelationship between her and her father;

(2) Considerable ground has, at great expense to both parties, been covered towards enabling the Court to come to a conclusion on the question of the extension or otherwise of the Applicant's access rights;

(3) For reasons beyond the parties' control, these proceedings have been delayed, firstly on account of the presiding officer's indisposition in November 2006, and, secondly, due to the work-load in this Division, which has not permitted an earlier decision than now;

(4) I will turn six on 11 June 2008, an occurrence which has a very significant bearing on the question before me;

(5) The experts were in agreement, in different degrees, about the need for the parties, the Applicant and the Respondent, to attend counselling sessions;

(6) It is common cause that, as at 15 May 2007, neither the Applicant nor the Respondent had attended such counselling, let alone their doing it jointly as is required;

(7) During discussion about I's visits to the Applicant, everyone – the parties themselves, the experts, the Family Advocate, the Family Counsellor and even the Court – had in mind I visiting the Applicant whilst he had visited at his sister's place in Pretoria, as he did, once after three weeks each month;

(8) Conditions under which the Applicant stayed whilst at his sister's place were known to the respective experts and, consequently, the Family Advocate and the Family Counsellor;

(9) Notwithstanding the manner in which the Respondent left for the Western Cape, her reasons seem, *prima facie*, genuine and it has to be accepted that that is where she and the minor child now are and are likely to be for some considerable time;

(10) The Respondent's counsel correctly pointed out, during submissions on 15 May 2007, that the Applicant had stressed that he had no suitable family conditions in Port Elizabeth; notwithstanding the Applicant's counsel's submissions to the contrary, on 15 May 2007, no Court can properly order that the Applicant be entitled to visits by I, let alone sleep-overs, at his place of residence in Port Elizabeth, merely on the Applicant's say-so that he has appropriate family conditions for that purpose.

[58] It would, in my view, be utter injustice to both I's rights to relate with her father, the Applicant, to the necessary bondage between the two of them and to the Applicant's rights, as a father, to have access to his daughter, to ensure a continuous relationship between the two of them. That relationship is as essential as that between the Respondent and I, as mother and daughter. The Family Advocate has dealt with the Respondent's criticism of the manner in which the previous report was finalised and how the decision on extending the Applicant's rights was arrived at. She has denied the Respondent's allegations of a rushed job. Nothing in the initial report as the supplementary report by the Family Advocate suggest that the identical recommendations were lightly arrived at. It is, in my

view, essential to speedily correct the relationship, between the Applicant and I, painted in Dr Hartzenberg's report, which includes an apparent displacement of the Applicant, as I's father, by the Respondent's lover. That, in my view, is totally unacceptable and cannot be in I's best interest.

[59] When, on 16 April 2007, the Applicant filed his further supplementary affidavit, he asked for an order, to use his own words,

> "*10.1 0rdering the Respondent to pay a contribution of R1 000,00 per visitation towards my incurred costs;*
>
> *10.2 Granting the visitation rights as set out in paragraph 1.1 of my notice of motion subject to the following:*
>
> *10.2.1 The Applicant shall visit the minor child in Cape Town on two occasions with a two weeks interval during which visits he will be allowed to take her with him for the week-end from Saturday morning 08h30 until Sunday evening 17h30 <u>alternatively</u> have her for day visits only.*
>
> *10.2.2 Thereafter the Applicant shall for three visits with a two week interval personally fetch I in Cape Town and take her with him on Saturday at 08h30, fly her to Port Elizabeth and return her at 17h30 subject to the flight schedules being adhered to by the airline.*

10.2.3 After the above phasing-in the minor child I will fly in accordance with the requirements of the national carrier, South African Airways, every alternate weekend."

The prayer for contribution towards his flight expenses does not, in my view, have merit and deserves no further discussion. 10.2 is a drastic variation of the prayers in the notice of motion filed on 28 November 2005. It is obviously made out of desperation arising from the unexpected drastic change, viz., that the Respondent and I have left the jurisdiction of this Court. That does not, however, entitle the Applicant to just any order he wishes. The Applicant does not indicate where, according to prayer 10.2.1, he will take I to between Saturday morning and Sunday evening. Similarly there are no details of the place where he will accommodate I in Port Elizabeth, after fetching her in terms of prayers 10.2.2 and 10.2.3. I would, were it not for the fact that the minor child's interests are also at stake, have simply ordered that this application, as amended, be dismissed without much more.

[60] It seems to me that everything legitimate has to be done to save the amount of effort already gone into in this matter and to ensure that an intervention is brought about on behalf of both the minor child and the Applicant. After a careful consideration of the views of the various experts, there is no doubt in my mind that I has reached that stage in her life where she ought to be permitted to visit the Applicant on a much wider basis than before and to overnight with him. Details

in that regard must, of course, depend on the avaIbility of suitable accommodation for the Applicant where I will visit him. There should, in my view, be some form of family life where the Applicant resides, taking into account, especially, I's special dietary requirements. It seems to me, therefore, appropriate that the Family Advocate in Pretoria be ordered to make necessary arrangements with his/her counterpart in Port Elizabeth for investigation into the Applicant's living conditions in Port Elizabeth.

[61] Were it not for the change that has come about, I would not hesitate – taking into account I's interests - to order that the application be granted on the basis of the current Family Advocate's recommendations. That would, of course, be done on the basis of the factual situation, in respect of all concerned, as it was before the relocation of the Respondent and I. The Family Advocate's recommendation of 31 0ctober 2006 reads:

> "*That it is in I's best interest that:*
>
> *14.1 Custody be granted to the Respondent.*
>
> *14.2 Reasonable access be granted to the Applicant which should be phased in, in accordance with undersigned's report dated 18 August 2006.*
>
> *14.3 Both parties receive parental guidance.*
>
> *14.4 The Respondent submit to regular psycho-therapy for at least six months with one of the following persons: (parental guidance can be given by the same person)*

(i) Dr Louise 0livier, Clinical Psychologist, Tel no. (012) 997-3715.

(ii) Ms Elmarie Visser, Clinical Psychologist, Tel no. (012) 429-8270.

14.5 The Applicant receive parental guidance from either: Mr Gerhard Goosen, Cell no. 083 625 7868 or Ms Wendy Nunn, Tel no. (041) 585-2769."

There is no reason, in my view, why the order cannot be made in terms of paragraphs 14.1, 14.3, 14.4 and 14.5, in spite of the changed circumstances. With regard to 14.2, reasonable access may be granted to the Applicant on terms to be determined after a report on the Applicant's living conditions, presently.

In the circumstances as they stand it appears to me appropriate to make an order which grants reasonable access to the Applicant in such a manner that it includes sleep-over by I. Details with regard to duration of her visits, including the number of nights of sleep-overs, alternation between short and long vacations and the rotation of Christmas should be left to the High Court in Cape Town. I can think of no harm being caused to either party if the Family Advocate, in Pretoria, is ordered to communicate with his or her counterpart in Port Elizabeth, in the manner I have suggested. Recommendations by the Family Advocate in Port Elizabeth will, no doubt, be communicated to the High Court in Cape Town, for that Court to make the final decision on this aspect. Such an arrangement would

save the High Court in Cape Town the trouble of having to read the papers all over.

Costs

[62] The parties are, in my view, equally guilty, by having filed long additional affidavits without first obtaining the Court's leave to do so. The Court ought to show its displeasure in its costs order, accordingly. Consequently, I find it appropriate to order that each party should pay its own costs.

[63] In the circumstances, I make the following order:

1. Custody is granted to the Respondent.
2. Reasonable access is granted to the Applicant, which includes his entitlement to visits by I, which will not, at this stage, include her sleeping at his place overnight.
3. Commencement of visits by I to the Applicant's place of residence, in terms of paragraph 2 of this order, the extent to which the Applicant and the Respondent will share alternate short school vacations and long school vacations as well as the extent of the rotation or otherwise of Christmas will be determined by the High Court, Cape Town, after receiving a report from the Family Advocate, Port Elizabeth, on the Applicant's living conditions.
4. The Family Advocate in Pretoria shall make arrangements with the Family Advocate in Port Elizabeth, for the latter to make necessary investigations

into the conditions under which the Applicant resides in Port Elizabeth or its surroundings, at the premises where I will pay him visits and spend nights in the manner to be determined by the High Court, Cape Town.

5. In the interim, both parties must immediately arrange for and attend parental guidance lessons on being advised by the Family Advocate, Pretoria, as to which experts they may consult.

6. The Family Advocate, Pretoria, must make urgent investigation as to which experts may be consulted by the parties, respectively, in terms of this order, taking into account their different residential areas and must advise the parties accordingly.

7. The Family Advocate in Pretoria will ensure that the report by his/her counterpart in Port Elizabeth will give his or her recommendations to the High Court, Cape Town, as speedily as is reasonably possible.

8. As soon as the Applicant and the Respondent receive this judgment, they, in person or through their legal representatives, will jointly approach the Judge-President of the High Court in Cape Town to arrange for that Court to determine the outstanding aspects with regard to the Applicant's extended reasonable access, unless they have reached a reasonable settlement that takes I's interest into account and makes the Court's intervention unnecessary.

9. Each party is to pay its own costs.

J N M POSWA
JUDGE OF THE HIGH COURT

38371-2005

HEARD ON: 15/5/2007

FOR THE APPLICANT: G J VAN ZYL

INSTRUCTED BY: G J VAN ZYL ATTORNEYS, TOTIUSDAL

FOR THE RESPONDENT: ADV ME N. JANSE VAN NIEWENHUIZEN

INSTRUCTED BY: H VAN DYK ATTORNEYS

c/o MIKE V D BERG ATTORNEYS, PTA