REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 50685/2021

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 15/06/2023
SIGNATURE OF JUDGE:

In the matter between:

BARBARA CHRISTINA VERSTER **Applicant**

and

JOHANN RIBBENS **Defendant**

JUDGMENT

DELIVERED:

This judgment was handed down electronically by circulation to the parties' legal representatives via email and publication on CaseLines. The date and time of hand-down is deemed to be on 15 June 2023.

L. Meintjes AJ:

Introduction

1. The applicant is Barbara Christina Verster and the respondent is Johann Ribbens. Hereinafter, I shall refer to the parties respectively as Mrs Verster and Mr Ribbens. This is done for purposes of convenience as well as to avoid confusion and no disrespect is thereby intended.

2. I am called upon to decide on an interlocutory application instituted by Mr Ribbens against Mrs Verster in terms of (i) Rule 30(1); (ii) Rule 30A; and/or (iii) the Court's inherent jurisdiction. I am not called upon to determine the merits of the main application instituted by Mrs Verster against Mr Ribbens and for the avoidance of doubt, I confirm that nothing in this judgment should be construed as an attempt to deal with any issue emanating from the main application whatsoever.

Main application

3. On 8 October 2021, Mrs Verster launched a substantive application against Mr Ribbens out of this division of the High Court under case number 50685/2021 [hereinafter "*main application*"][1]. Therein she seeks the following relief, namely:-

    3.1 that Mrs Irma Schutte be appointed as parenting coordinator for the parties and be assigned all the powers and duties as set out in Annexure FA4[2];

    3.2 costs in the event of the application being opposed.

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[1] CaseLines [CL] 0002-1.

[2] CL0002-26 to CL0002-33. This document is headed "Powers and Duties of the Parenting Coordinator" and deals with issues such as (i) the removal of a parenting coordinator; (ii) the manner in which disputes are to be referred by the parties to the parenting coordinator; (iii) rulings by the parenting coordinator and the Court's jurisdiction in respect thereof; (iv) what type of disputes falls within the parenting coordinator's mandate to mediate and/or adjudicate; (v) the procedure to be followed by the parties in referring such disputes and the procedure to be followed by the parenting coordinator in resolving and/or determining such disputes; (vi) the costs in relation thereto; and (vii) record keeping.

4. The Founding Affidavit in support of the main application [and I repeat that with this judgment no issue in the main application is determined] reveals that the foundation for the relief sought by Mrs Verster is essentially as follows:-

4.1 the parties were married to each other and two children were born from their marriage, namely (i) a girl born on 21 April 2006; and (ii) a boy born on 1 March 2013;

4.2 on 2 September 2022, the bonds of marriage subsisting between them were dissolved by order of Court and a Deed of Settlement entered into between the parties was made an order of Court[3]. Both the Decree of Divorce as well as the Deed of Settlement are attached to the Founding Affidavit as Annexures FA1 and FA2;

4.3 after quoting some of the clauses contained in the Deed of Settlement, Mrs Verster concludes in paragraph 10 that a parenting coordinator has not yet been formally appointed[4];

4.4 in view of the provisions of Section 33(2) of the Childrens Act, No 53 of 2005, she purportedly endeavoured to reach an amicable resolve to the disputes between her and Mr Ribbens post-divorce by way of a letter sent via email on 10 August 2021 by her attorney to the attorney of record of Mr Ribbens. The letter is attached as Annexure FA3 and essentially lists certain disputes that Mrs Verster seeks to be resolved and also complaining that the provisions of the Deed of Settlement dealing with a parent coordinating is defective in that it does not set out the powers and functions of the parenting coordinator nor does it set out the manner of how disputes ought to be referred and dealt with. Because of such purported defects, the letter further notes that Mrs Verster was informed by her attorney that until such time that a proper agreement has been reached whereby the role of the parenting

[3] CL0002-5 [paragraphs 5 – 7], CL0002-10 and CL0002-10 to 22.
[4] CL0002-7 to CL0002-8 [paragraphs 9 and 10].

coordinator is regulated, no further disputes ought to be referred to the parenting coordinator[5]; and

4.5 it is because of such deficiency relating to the manner in which disputes are to be referred to a parenting coordinator, the type of disputes and the powers and obligations of the parenting coordinator that is purportedly lacking in the Deed of Settlement, that Mrs Verster complains that it is necessary for the role of the parenting coordinator to be properly defined[6].

5. Speaking for myself and without any attempt to judge any of the issues arising from the main application, the averment made in paragraph 10 of the Founding Affidavit is puzzling in view of the provisions of Clause 2.4.5 of the Deed of Settlement that makes it clear that a certain Dr Eugene Viljoen [hereinafter "*Dr Viljoen*"] was in fact not merely nominated by Mrs Verster to be the parenting coordinator, but that he was actually appointed in such role. Clause 2.4.5 reads *verbatim* as follows:-

> *"It was the plaintiff's[7] suggestion that Dr Eugene Viljoen be nominated and appointed to act as parenting coordinator. Both parties agreed that he be appointed. In the event that he is unable/unwilling the parties will jointly appoint another parenting coordinator or in the event that the parties cannot agree, the parties will request Dr Duchen to nominate a suitable parenting coordinator"*[8].

6. On 16 November 2021, Mr Ribbens served and filed his Answering Affidavit to the main application. The Answering Affidavit consists of 29 pages (excluding annexures) that is divided into 20 paragraphs. In addition, there are various annexures attached thereto that make up another 260 pages. It will suffice for present purposes to state that same dealt with, *inter alia*, the following: (i) attention was drawn to the provisions of clause 2.4.5 of the Deed of Settlement confirming that Dr Viljoen was indeed appointed in such role and that Dr Viljoen had been acting as parenting coordinator ever since January

[5] CL0002-6 [paragraph 7 and 8] read with CL0002-24 to CL0002-25.
[6] Page 7 of Founding Affidavit [paragraphs 11.1, 11.2, 11.3 and paragraph 12] – this particular page was not uploaded onto CaseLines but was handed up by counsel for Mrs Verster during the hearing at my request.
[7] This refers to Mrs Verster.
[8] CL0002-16.

2020 with the result that the Decree of Divorce simply entrenched his appointment. In addition, clause 2.4.5 sets out the circumstances in which a change in parenting coordinator shall take place with the result that it was alleged that the main application was not brought within the ambit of the provisions of clause 2.4.5. It was therefore concluded that the main application constitutes an attempt to wholly bypass and undermine Dr Viljoen's court ordered appointment – a roll which he has fulfilled competently for almost two years. Needless to say, Mr Ribbens denied paragraph 10 of the Founding Affidavit and alleged further that the main application constitutes an attempt to vary the Court order without any factual foundation therefore; (ii) reference was made thereto that from January 2022, Mrs Verster initiated consultations with Dr Viljoen and that she had consulted with Dr Viljoen at least on three occasions before his first consultation with Dr Viljoen. It was also pointed out that Mrs Verster may have had further consultations with Dr Viljoen, but that he is unable to provide details thereof to the Court; (iii) reference was made to Mr Ribbens's first consultation with Dr Viljoen on 11 May 2020 where, *inter alia*, Dr Viljoen explained to him his position as parenting coordinator and the rules of their future engagement were also explained. Mr Ribbens agreed to be liable for the payment of both the children's consultations as well as his own; (iv) on an allegation of certain messages sent by Mrs Verster during January 2021, Mr Ribbens made follow-up appointments with Dr Viljoen where Dr Viljoen consulted extensively and independently with their minor daughter on the 3rd, 10th and 17th of February 2021. In fact, it is alleged that on 16 February 2021, Dr Viljoen also independently consulted with the social worker who was employed by him to conduct the court ordered supervision; (v) reference was also made to a further consultation held between the minor daughter and Dr Viljoen on 3 March 2021 and that Mrs Verster also consulted Dr Viljoen during February 2021, although the exact dates could not be given. After certain happenings during March 2021, Mr Ribbens raised same with Dr Viljoen in writing that was followed-up by Dr Viljoen whereafter Dr Viljoen then consulted with Mrs Verster; (vi) reference was made to Annexure FA3 that was in fact responded to by Mr Ribbens in his personal capacity and from the content of such annexure, that it is based on the advice of her attorney that Mrs Verster simply

unilaterally decided not to attend any further consultations with Dr Viljoen; (vii) in paragraph 4.53 it was testified by Mr Ribbens that the children have routine, structure, consistency and support and that there is no conflict between Mrs Verster and himself, since they only communicate in respect of the children, if and when necessary. He then further indicated that the Deed of Settlement is clear and has been pivotal in securing and safeguarding the best interest of their children; (viii) it was alleged in paragraph 11.7 that in the main application, Mrs Verster failed to indicate anywhere what her disputes are that would require such type of main application to be launched that cannot effectively be dealt with by Dr Viljoen; (ix) with regards to the allegation that the provisions of the Deed of Settlement are deficient in relation to the powers and duties of a parenting coordinator, Mr Ribbens denied same and pointed out, *inter alia*, that Mrs Verster had been consulting with Dr Viljoen for almost two years; it cannot be expected of the Court or court orders to micro-manage people or parties; the Deed of Settlement clearly indicates Dr Viljoen's powers and obligations in clauses 2.4.3 and 2.4.4 thereof that provides that Dr Viljoen must facilitate disputes and formulate a ruling in the event where they cannot reach agreement regarding the disputes and that Dr Viljoen has been effective in dealing with all the issues that have been raised thus far. In fact, it is alleged that their minor daughter is comfortable with Dr Viljoen and that they have spent two years with Dr Viljoen with the consequence that if all processes are to start again *ab initio*, it will most certainly not be in the best interest of their children; and (x) in paragraph 19.12 it was concluded that the proposed mandate as per Annexure FA4 is in conflict with the Deed of Settlement that was made an order of Court and is wrought with so much ambiguity and vagueness that litigation will most certainly follow thereon[9].

7. On 23 November 2021, Mr Ribbens caused to be filed a Supplementary Answering Affidavit dealing, *inter alia*, therewith that Dr Viljoen sent a letter to his attorney confirming that he was formally appointed as parenting coordinator as well as setting out the dates when consultations were held with Mrs Verster and Mr Ribbens respectively. In addition, the letter from Dr

[9] CL0005-1 to CL0005-30.

Viljoen indicated that the parenting process is not finalised because of delaying tactics and that it is necessary for both parties to resume the process as soon as possible[10].

8. In terms of Rule 6(5)(e), Mrs Verster was required to deliver her Replying Affidavit to the main application on 30 November 2021. However, she failed to do so.

9. It is the events post 30 November 2021, and in particular a document (together with its annexures) with the heading "*Amended Notice of Motion*" of 9 March 2022 to which Mr Ribbens objects.

Interlocutory application

10. In what follows I set out the relevant facts underpinning the irregularity and/or impropriety alleged in chronological order.

11. On 6 December 2021, and after the due date for the Replying Affidavit, Mrs Verster's attorney [to wit, Emma Jame Burnett of Burnett Attorneys & Notaries Inc – hereinafter "*BAN*"] sent a letter via email to Dr Viljoen and copied Mr Ribbens' attorney [to wit, Riette Oosthuizen Attorneys – hereinafter "*ROA*"] therein. The letter confirms that BAN is acting for Mrs Verster and indicates that the parenting coordination process is not a secretive process as a result of which Dr Viljoen should have no issue in providing her with certain documentation. The documentation that is sought is then set out *verbatim* as follows:-

> "- *You inform us what you understand and deem your duties, obligations and powers as parenting coordinator to be;*
> - *You furnish us with the signed mandate entered into between you and the parties;*
> - *You provide us with a complete set of all the correspondence between you, Ms Barbara Verster and Mr Johann Ribbens;*
> - *You provide us with the minutes of all of your meetings had with Ms Barbara Verster and Mr Johann Ribbens;*

[10] CL0007-4 to CL0007-6 [paragraphs 2.1 – 2.11] read with CL0007-7 to CL0008.

- *You provide us with all the reports received from the social worker tasked with the supervision of the parties;*
- *You provide us with copies of all directives that you have made in this matter;*
- *You provide a written explanation as to the progress made in this matter from the date of the first consultation until now."*[11]

12. On 9 December 2021, Dr Viljoen responded in an email to the request of BAN refusing the request based on the guidelines from the HPCSA on ethical practice as well POPI compliance. Dr Viljoen stated further:-

"No information regarding this family will be shared with ANY third party unless I have in possession signed documents allowing this practice to share any privileged personal information regarding the members of this family, gathered through consultations as described and requested by yourself."[12]

13. On 15 December 2021, BAN replied via email to Dr Viljoen stating that a parenting process is not a privileged process, but to put his mind at ease, Mrs Verster is prepared to sign an official consent[13]. On 17 December 2021, Mrs Verster signed the Consent referred to in order for Dr Viljoen to release the documentation as sought[14].

14. The aforesaid Consent was provided to Dr Viljoen, but it appears that Mr Ribbens was not prepared to consent to the release of the said information/documentation. As a result, and on 18 January 2022, BAN sent a letter via email to ROA seeking to be provided with reasons as to why Mr Ribbens refuses to allow Dr Viljoen to divulge what transpired in the parenting coordinating process[15].

15. On 31 January 2022, ROA responded by, *inter alia*, (i) noting that the Replying Affidavit in the main application is almost 2 (two) months overdue; and (ii) I quote *verbatim:-*

"It would seem that your client's approach is to attempt to amend the nature of her application through correspondence, which is not under oath, and which contradicts her own application.

[11] CL0010-49 to 50.
[12] CL0010-51.
[13] CL0010-51.
[14] CL0010-53 to CL0010-54.
[15] CL0010-55.

Not only is this an expensive exercise for our client but it will not take the matter any further. We shall no longer entertain litigation through correspondence. We await either your client's withdrawal of the application together with the tender of the relevant cost contribution or in the alternative, should your client wish to continue litigating, we suggest you follow the procedures as set out in the Rules of Court".[16]

16. On 9 March 2022, BAN sent a certain document via email to Dr Viljoen. It is this document and the procedures relating thereto that is the subject of the interlocutory application launched by Mr Ribbens in order to set same aside. This document and its constituent parts shall hereinafter be referred to as *"Amended Notice of Motion"* and I shall deal with its content more comprehensively *infra*. For present purposes it is of importance to quote the content of the email that accompanied the Amended Notice of Motion that was sent by BAN to Dr Viljoen. It reads:-

"Good day Dr. Viljoen,

The above matter refers.

Please find herewith the attached Notice of Motion.

In the event that you supply our offices with the information sought as per our correspondence, we shall withdraw the application against you.

Please do not construe this application as an attack on your professionalism, our client simply wants the information to which she is entitled.

Our client does not expect you divulge the minutes of the therapy sessions with the minor children and respects that those specifically are privileged."[17]

17. On 10 March 2022, the offices of Dr Viljoen provided and or made available the Amended Notice of Motion to ROA and in this manner Mr Ribbens obtained knowledge thereof. ROA testified as follows in the Founding Affidavit in support of the interlocutory application:-

> *"21. These documents were all brought to my attention, in my capacity as the Applicant's attorney on 10 March 2022 by the office of Dr Viljoen."*[18]

[16] CL0010-56 to CL0010-57.
[17] CL0010-97 [Annexure EJB5].
[18] CL0010-11.

18. On 24 March 2022, Mr Ribbens caused to be delivered a Notice of Complaint in terms of Rule 30 and Rule 30A detailing the manner in which the Amended Notice of Motion failed to comply with the Rules of Court and calling upon Mrs Verster to remove the cause of complaint within 10 (ten) days, failure of which he intends to apply to have the Amended Notice of Motion struck out in its entirety, with costs[19]. Mrs Verster failed to remove the cause of complaint within 10 (ten) days or at any time thereafter.[20]

19. Due to the failure of Mrs Verster to remove the cause of complaint, Mr Ribbens proceeded to launch the interlocutory application in terms of Rule 30 and Rule 30A on 6 May 2022 seeking that the Amended Notice of Motion be set aside and that Mrs Verster be ordered to pay the costs of the interlocutory application.[21]

20. On 29 June 2022, ROA sent a letter via email to BAN. This letter is rather lengthy and deals with issues that should rather be dealt with in the main application. However, and for purposes of the interlocutory application, the letter makes reference thereto that a cost order *de bonis propriis* will be sought against BAN.[22]

21. In response to the aforesaid indication by ROA, and on 14 July 2022, BAN responded in a letter via email to ROA. The letter firstly denies that there is any basis for a cost order *de bonis propriis* and then sets out a suggestion that Mr Ribbens withdraw his application in terms of Rule 30 and Rule 30A, failing which BAN shall file answering papers and seek a cost order against Mr Ribbens. Paragraph 4 of this letter is important as it sets out what was ultimately to become the <u>defence</u> of Mrs Verster to the interlocutory application. I quote same *verbatim*:-

> *"4. We are somewhat confused as to the reason why you have brought an application in terms of Rule 30A in instances where the document that you are seeking to set aside,*

[19] CL0010-63 to CL0010-65.
[20] CL0010-15 [paragraph 40].
[21] CL0010-1 to CL0010-2.
[22] CL0010-125 to CL0010-128 [paragraph 25].

was never served or filed in accordance with the Rules of Court. Your offices uploaded our document, which you acquired informally from Dr Viljoen (whom was not yet joined as a party to the proceedings), onto CaseLines. You do not even have a proof of service uploaded onto CaseLines, because it was never served and you never received a copy from us. It was emailed informally to Dr Viljoen with an undertaking that we would not proceed with same if he provided the applicant with the documentation sought."[23]

22. On 22 July 2022, ROA responded via email to BAN indicating the terms upon which Mr Ribbens was prepared/willing to settle the main application, but that the parties are too far apart to settle and, as such, he is proceeding with the Rule 30 application accordingly[24].

23. Thereafter followed the Answering Affidavit of Mrs Verster (that was deposed to by BAN) that was served on 18 August 2022[25] and the Replying Affidavit to the interlocutory application of Mr Ribbens (that was deposed to by ROA) that was served on 5 September 2022.[26]

Amended Notice of Motion and objection thereto

24. The Amended Notice of Motion and its constituent parts consists of 46 pages and appears at CaseLines at 0008-1 to 0008-46. It consists of the following constituent parts:-

    24.1 an Amended Notice of Motion of 5 pages;

    24.2 a Supplementary Affidavit of 27 pages. Of particular importance is to note that from page 10 to the end thereof [paragraphs 23 to 78] appears the Replying Affidavit of Mrs Verster in respect of the main application and wherein she deals on an *ad seriatim* basis with the paragraphs appearing in Mr Ribbens's Answering Affidavit in the main application; and

[23] CL0010-81 [Annexure EJB1].
[24] CL0010-83 [Annexure EJB2].
[25] CL0010-69 to CL0010-70.
[26] CL0010-98 to CL0010-100.

24.3 annexures marked FA5 to FA13.

25. The Amended Notice of Motion consisting of 5 pages evidence, *inter alia*, the following:-

25.1 Mrs Verster is reflected as the applicant while Mr Ribbens is now reflected as the first respondent. In addition, Dr Viljoen is reflected as the second respondent. It contains the same case number as the main application, namely 50685/2022, but strangely refers to the "*Gauteng Local Division, Johannesburg*" and not the "*Gauteng Division, Pretoria*" as per the Notice of Motion in the main application;

25.2 between the double lines and just underneath the heading, appears the title and/or description of the document as *"Amended Notice of Motion"*;

25.3 where the Notice of Motion in the main application only sought relief against Mr Ribbens, the relief now sought is divided into two parts, namely Part A and Part B. Part A is directed against Dr Viljoen and an order is sought whereby Dr Viljoen be directed to provide Mrs Verster with certain documentation/information that is then listed. Such list corresponds *mutatis mutandis* with the list set out in the email of BAN of 6 December 2021 quoted *supra*. In addition, no order of cost is sought against Dr Viljoen, unless he opposes[27]. Part B seeks the same relief against Mr Ribbens as originally sought, but the cost prayer was changed to read "*costs of suit*"[28];

25.4 the first and second paragraphs on page 3 thereof indicates that the attached Supplementary Affidavit together with its annexures will be used in support thereof and that the address of BAN has been appointed where services of all process in the proceedings will be accepted[29];

[27] CL0008-1 to CL0008-2.
[28] CL0008-2 [Prayers 4, 5 and 6].
[29] CL0008-3.

25.5 the third paragraph on page 3 contains a recording in bold capital letters that I quote *verbatim*:-

> ***"IT IS RECORDED THAT THE FIRST RESPONDENT HAS OPPOSED THE APPLICATION (PRE-AMENDMENT) FILED ITS NOTICE OF INTENTION TO OPPOSE AND ANSWERING AFFIDAVIT"***;

25.6 the last paragraph on page 3 thereof and which continues as the first paragraph on page 4 thereof indicates the steps that Dr Viljoen (note: no mention is made of Mr Ribbens) should follow if he intends to oppose the said application. Dr Viljoen is required to notify BAN in writing within 5 (five) days of such intention and within 15 (fifteen) days thereafter to file his Answering Affidavit, if any;

25.7 the second paragraph on page 4 thereof indicates that if Dr Viljoen fails to give Notice of Intention to Oppose, then the application for relief in terms of Part A will be made on a date and time to be determined by the Registrar of the Court. [I observe again that no mention is made of Mr Ribbens in this regard];

25.8 on page 4 it is further evident that same was dated at Pretoria on 9 March 2022 and signed by BAN also setting out its address and contact details as well as the fact that BAN accepts service via email; and

25.9 page 5 indicates that same is directed to the Registrar of the Court (Johannesburg) as well as ROA containing a blank acknowledgement of receipt. In addition, same is also directed to Dr Viljoen and his address details are set out whereafter it is indicated that service to Dr Viljoen is to be: "*via email & sheriff*".

26. The Supplementary Affidavit evidence, *inter alia*, the following:-

26.1 no case number appears in the heading and the heading now again contains the correct court description as per the main application. Otherwise, the heading is exactly the same as that of the Amended Notice of Motion consisting of 5 pages;

26.2 between the double lines, and just after the heading, appears the title and/or description of the document as "*Supplementary Affidavit*";

26.3 same was deposed to by Mrs Verster and signed by her before a Commissioner of Oaths on 9 March 2022 at Pretoria. It is also evident that the Commissioner of Oaths signed same and her details as required by Regulation is then also provided at the end thereof[30];

26.4 in paragraph 4, Mrs Verster alleges that it has become necessary for her to amend the relief initially claimed and to join Dr Viljoen to the main application[31];

26.5 from paragraph 7 to 22 thereof, Mrs Verster sets out the reasons for the Supplementary Affidavit. In this regard she alleges, *inter alia*:-

26.5.1 she is entitled to the documentation sought and despite efforts to obtain same with reference to the correspondence dealt with *supra* from 6 December 2021 to 31 January 2022, Mr Ribbens refuses to state why he will not consent to Dr Viljoen providing her with the information;

26.5.2 although she accepts that Dr Viljoen was nominated to act as parenting coordinator, she persists that there was no proper appointment as the Deed of Settlement does not provide Dr Viljoen with a proper mandate;

[30] CL0008-6 read with CL0008-32.
[31] CL0008-7.

26.5.3 because Dr Viljoen's mandate is alleged to be not clearly defined, she feels as though Dr Viljoen did not assist her, her family and the reunification thereof other than having sat in his office and spoken about her feelings, she feels as though he had not done anything. As a result, she submits that the relationship of trust between her and Dr Viljoen broke down; and

26.5.4 ultimately, she ends off by indicating that the relief she seeks against Dr Viljoen is to be provided with the information sought as same is relevant to the dispute in the main application;

26.6 thereafter and under the heading "*Replying Affidavit*", Mrs Verster confirms that her Replying Affidavit to the main application is late and she requests the Court to condone the late filing thereof. The reason therefore is stated that after having received the Answering Affidavit of Mr Ribbens in the main application, it was necessary to obtain the records of Dr Viljoen. Her attempts to obtain same failed thereby necessitating her to join Dr Viljoen to the main application. Thereafter and from paragraph 26 to 78, she deals on an *ad seriatim* basis with the paragraphs appearing in Mr Ribbens' Answering Affidavit to the main application. In this regard, *inter alia*, she alleges:-

26.6.1 she admits Dr Viljoen was nominated by her to act as parenting coordinator, but submits that there has not been a proper appointment due to the fact that he was not provided with a clearly defined mandate setting out his duties and powers – such as, what kind of disputes may be referred to him; what process must be followed by the parenting coordinator; what are the rules of engagement and how is communication to be directed; in what format is the dispute to be referred; what powers is the parenting coordinator vested with and what kind of directives can he make; and

what kind of evidence can the parenting coordinator call for in coming to a decision[32];

26.6.2 the main purpose of the main application is stated to be concerned about defining the powers and duties of the parenting coordinator, while the identity of the parenting coordinator is a secondary issue. In fact, a recurring theme throughout the "*Replying Affidavit*" is the lack of definition of the powers and duties and/or obligations of the parenting coordinator;

26.6.3 in respect of various paragraphs appearing in the Answering Affidavit of Mr Ribbens, she did not respond thereto and indicated she reserves her right to respond thereto at a later stage[33]; and

26.6.4 she admitted having consulted Dr Viljoen, but states that the role he played has been confused. Because Dr Viljoen has not been provided with a proper mandate, she fears that the role he has been playing is actually that of a family therapist. On this basis, she states that if she is incorrect then it should not be an issue to be provided access to the records of Dr Viljoen[34].

27. As stated, the Notice of Complaint was delivered on 24 March 2022 and Mrs Verster did not remove the causes of complaint within a period of 10 (ten) days or at any time thereafter. Twelve objections are raised and they overlap to some extent. In square brackets I will indicate the extent to which I agree with the particular objection raised. They are:-

[32] CL0010-33 to CL0010-34 [paragraph 32].
[33] CL0010-42 [paragraph 59].
[34] CL0010-42 to CL0010-43 [paragraphs 61 and 62].

27.1 the Amended Notice of Motion was served on Dr Viljoen, but it was not served on Mr Ribbens and which is contrary to the Rules[35] [Rule 6(5)(a) provides that every application other than one brought *ex parte* must be brought on Notice of Motion and true copies of the notice, and all annexures thereto, must be served upon every party to whom notice thereof is to be given. Rule 4(1)(a) provides that service of any process of the Court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiated application proceedings shall be effected by the sheriff in one or more of the manners set out therein. It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such person[36]. The Amended Notice of Motion clearly initiated application proceedings against Dr Viljoen and therefore required to be served in terms of Rule 4. As an interested party to the relief sought against Dr Viljoen, such Amended Notice of Motion therefore also required to be served upon Mr Ribbens. I therefore conclude that this is a sound and valid objection];

27.2 the procedure prescribed by Rule 28 was not followed in order to amend the original Notice of Motion to appear in the form of the Amended Notice of Motion. In this regard, (i) Mrs Verster failed to notify Mr Ribbens of her desire to amend the original Notice of Motion and did not furnish particulars of such amendment; (ii) Mr Ribbens was not afforded an opportunity to object to such proposed amendment(s); and (iii) Mr Ribbens did not consent to the proposed amendments and the leave of the Court was not obtained for the amendment(s)[37] [The procedure prescribed by Rule 28 was clearly not followed. In terms of this Rule, *inter alia*, any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment. Rule 28(2) and (3) provides that the aforesaid notice of intention to amend shall state that unless

[35] CL0009-1 [paragraphs 1 and 2].
[36] *Interactive Trading 115 CC v South African Securitisation Programme* 2019 (5) SA 174 (LP) at 176D-F.
[37] CL0009-2 [paragraphs 3, 4 and 5].

written objection(s) to the proposed amendment is delivered within 10 (ten) days of delivery of the notice, the amendment will be effected and that an objection to the proposed amendment must clearly and concisely state the grounds upon which the objection is founded. Rule 28(4) provides that if an objection is delivered within the timeframe prescribed, the party wishing to amend, may within 10 (ten) days, lodge an application for leave to amend. Rules 28(5), (6) and (7) prescribes that if no objection to the proposed amendment is delivered, then the party proposing to amend may within 10 (ten) days effect the amendment as contemplated by subrule 7. In the event of an objection, the Court must decide on the proposed amendment and unless the Court otherwise directs, an amendment authorised by an order of the Court may not be effected later than 10 (ten) days after such authorisation. A party is accordingly entitled to amend either because there is no objection thereto, or because a Court has authorised the amendment subsequent to an objection. In either case, and upon such authorisation, the party entitled to amend shall effect the amendment by delivering each relevant page in its amended form. It should be clear that the procedures prescribed by Rule 28 in order to amend the original Notice of Motion into the form of the Amended Notice of Motion were simply not followed and I therefore agree that these are sound and valid objections];

27.3 in addition to the Amended Notice of Motion consisting of 5 pages that was not served on Mr Ribbens, the Supplementary Affidavit was also not served on Mr Ribbens[38] [For reasons *mutatis mutandis* in relation to paragraph 27.1 *supra*, I also agree that this is a sound and valid objection];

27.4 because the Supplementary Affidavit seeks to supplement what is contained in the Founding Affidavit to the main application, Mr Ribbens objects thereto on the basis that the leave of the Court was not sought

[38] CL0009-2 [paragraph 6].

to file a Supplementary Affidavit and such Supplementary Affidavit itself does not support an amendment[39] [In terms of Rule 6(5), the affidavits in motion proceedings are limited to three sets, namely the founding affidavit, the answering affidavit and the replying affidavit. In terms of Rule 6(5)(e), a further affidavit above and beyond the aforesaid three sets is allowed only if the Court permits same in its discretion. Although the Replying Affidavit in the main application is part of the three sets, the Supplementary Affidavit (that contains the said Replying Affidavit) from paragraphs 1 to 22 thereof qualifies as a further affidavit that required the Court's leave and which was not obtained. I therefore also agree that this is a sound and valid objection];

27.5 with reference to the bold capital paragraph appearing as the third paragraph on page 3 of the Amended Notice of Motion, Mr Ribbens points out that the relief sought in Part A thereof was not sought in the original Notice of Motion and that accordingly he has not been given an opportunity to answer thereto[40] [In an Answering Affidavit, a respondent is required to deal with the allegations contained in the Founding Affidavit that supports the relief set out in the Notice of Motion. In an Answering Affidavit, the respondent will accordingly either admit, deny or confess and avoid the relevant allegations in the Founding Affidavit. This gives effect to the fundamental principle of natural justice known as *audi alteram partem*. Consequently, it is clear that Mr Ribbens was not given an opportunity to respond to the relief sought in Part A of the Amended Notice of Motion and accordingly I agree that this objection is also sound and valid];

27.6 Dr Viljoen was simply cited as the second respondent without following the joinder procedure as contemplated in the Rules[41] [It is clear that Rule 10 concerning joinder was not complied with. Afterall, Dr Viljoen has a direct and substantial interest having regard thereto that he was

[39] CL0009-2 [paragraph 7].
[40] CL0009-2 [paragraph 8 and 8.1] read with CL0009-3 [paragraph 12].
[41] CL0009-2 to CL0009-3 [paragraph 9].

appointed as parenting coordinator in the Deed of Settlement that was made an order of Court. Now, and in the main application, Mrs Verster wants a certain Mrs Irma Schutte to be appointed in that role. As such, Dr Viljoen who stood to be joined had to be properly identified and the papers properly served on him. Evidently clear, is the lack of any substantive application made in order to join Dr Viljoen and accordingly he was simply cited as a party to the main application. I consequently also agree that this is a sound and valid objection];

27.7 it will be recalled that the Replying Affidavit of Mrs Verster is part and parcel of the Supplementary Affidavit. Mr Ribbens objects thereto on the basis that the said Replying Affidavit was not served on him[42] [For reasons already stated *supra*, I agree that this is also a valid and sound objection as the Replying Affidavit was required to be served on him]; and

27.8 the Replying Affidavit that is part and parcel of the Supplementary Affidavit falls outside the timeframe stipulated by Rule 6(5)(e) and Mr Ribbens objects on the basis that no application for condonation was filed by Mrs Verster[43] [Even though I agree that the Supplementary Affidavit that includes the Replying Affidavit was filed outside the timeframes, I do not agree that this is a sound and valid objection. Condonation will be determined by the Court hearing the main application and, in any event, Mrs Verster did seek condonation in the body of the Replying Affidavit to the main application that I dealt with *supra*. Accordingly, I find this objection to be unsound and/or invalid].

Affidavits exchanged in interlocutory application

28. The Founding Affidavit of Mr Ribbens in the interlocutory application attaches the Amended Notice of Motion in its entirety as well as the Notice of Complaint as annexures. After setting out a short background pertaining to

[42] CL0009-3 [paragraph 10].
[43] CL0009-3 [paragraph 11].

their divorce, the Deed of Settlement and confirming the appointment of Dr Viljoen as parenting coordinator, Mr Ribbens proceeds to indicate that the main application was launched by Mrs Verster on the basis that no parenting coordinator was appointed at all. In addition, it is alleged that Mrs Verster seeks to have a document [I believe this to be a reference to Annexure FA4 to the Founding Affidavit in the main application] incorporated into the Deed of Settlement and which was neither discussed with nor disclosed to Mr Ribbens prior to launching the main application. It is alleged that Mrs Verster is acting in bad faith as the Court already appointed Dr Viljoen and that the Deed of Settlement contains both the mandate of the parenting coordinator as well as the process for appointment of a new parenting coordinator. After dealing with how the Amended Notice of Motion came to the attention of ROA and that there was non-compliance with the Notice of Complaint, the remainder of the Founding Affidavit essentially deals with the grounds of objection already listed and dealt with *supra*. In addition, and in connection with the grounds of objection/complaint the following is alleged:-

28.1 failure to serve the Amended Notice of Motion undermined the legitimacy of the Court process and also jeopardizes Mr Ribbens' rights in terms of *audi alterem partem* and no reason was provided as to why same was served on Dr Viljoen, but not on Mr Ribbens[44];

28.2 new relief is sought in the Amended Notice of Motion that is different from what Mr Ribbens was initially called upon to meet. In short, Mrs Verster is seeking to amend her claim based on allegations made by Mr Ribbens in his Answering Affidavit despite her being fully aware of such facts at the time of deposing to the Founding Affidavit in the main application[45]; and

[44] CL0010-11 [paragraphs 23 and 24].
[45] CL0010-12 [paragraphs 28 and 29].

28.3 not having obtained the leave of the Court to file the Supplementary Affidavit, Mrs Verster has also failed to refer to the potential prejudice of Mr Ribbens through such amendment[46].

29. It is convenient to deal with the Answering Affidavit and the Replying Affidavit in the interlocutory application together. These evidence, *inter alia*, the following:-

29.1 the Answering Affidavit is deposed to by BAN and is not supported by a Confirmatory Affidavit of Mrs Verster. The Replying Affidavit is deposed to by ROA and is supported by a Confirmatory Affidavit of Mr Ribbens;

29.2 the defence of no service and no filing is persisted with and which is disputed in the Replying Affidavit. In addition, the Replying Affidavit also alleges that same constitutes an abuse of process;

29.3 it is alleged by BAN that they attempted to resolve the "*miscommunication*" by sending a letter to ROA in which it was confirmed that no such Amended Notice of Motion was served or filed and that it was ROA who proceeded to upload the Amended Notice of Motion which they obtained from Dr Viljoen. Reference was made to the letter of BAN of 14 July 2022. In reply it was pointed out that BAN is disingenuous to try and excuse the conduct as a "*miscommunication*". This is because the letter of 14 July 2022 was not aimed any at form of resolution and the letter by itself indicated that the email of BAN to Dr Viljoen of 9 March 2022 was an informal email coupled with an undertaking to withdraw such application should the required documentation be provided. It was pointed out that the explanation of "*miscommunication*" does not accord with either the explanation in the letter of 14 July 2022 or the email of 9 March 2022 to Dr Viljoen. In addition, and because BAN is an officer of the Court, it

[46] CL0010-13 [paragraph 32].

was expressly averred that such Amended Notice of Motion that was provided to Dr Viljoen constitutes a ploy used to intimidate Dr Viljoen in providing them with the documentation sought;

29.4 In paragraphs 3.8 and 3.9, BAN states that Dr Viljoen will not release any information to BAN and that same caused BAN to write an email to Dr Viljoen in which they attached a signed "*concept*" Amended Notice of Motion in order to indicate their intention to join Dr Viljoen as a party should Dr Viljoen not provide them with the required information. In other words, Dr Viljoen would first have to be joined as a party to the main application and only thereafter would Mrs Verster be able to formally attend to amendments. It is further stated in paragraphs 3.10 and 3.11 of the Answering Affidavit that neither Mrs Verster nor BAN acted in bad faith and that they are entitled to the information sought. In addition, that none of the requested information has been received from Dr Viljoen to date thereof. It was pointed out by ROA that same constitutes a contradictory version as the said email of 9 March 2022 did not make mention of a mere intention to join Dr Viljoen. This is because the email makes mention of the fact that the application will be withdrawn if the information is not provided and the fact that no mention is made of a "*concept*" Amended Notice of Motion in accordance with its own terms. As a result, the Amended Notice of Motion (together with all its constituent parts) was an attempt to create the impression to Dr Viljoen that the application was in fact issued and that he was joined as a party – in other words, it was an attempt to manipulate Dr Viljoen into releasing notes under the threat of the Court application;

29.5 it was agreed that the merits of the main application is irrelevant. However, it was submitted by BAN that Mrs Verster did not file a Replying Affidavit as she intended to do, if required, join Dr Viljoen and will then only be in a position to file her Replying Affidavit once Dr Viljoen has been joined. This seems to fly in the face of paragraph 3.26 of the Answering Affidavit where it is stated that: "*... it is submitted*

that the Replying Affidavit of the respondent will be addressed in the main application". In other words, in paragraph 3.26 it is alleged that the Replying Affidavit (which now forms part of the Supplementary Affidavit) will indeed be utilised during the hearing of the main application. Furthermore, reference was again made in the Answering Affidavit to a "*concept*" Amended Notice of Motion. In reply it was pointed out that the merits of the main application is irrelevant, but that the so-called Amended Notice of Motion seeks different relief and, in addition, that the filing of the Replying Affidavit in the main application was not conditional upon joining Dr Viljoen;

29.6 because there was no service and filing of the Amended Notice of Motion, BAN alleged that Mr Ribbens suffered no prejudice to which ROA responded that Mr Ribbens indeed suffered prejudice in having to incur costs in order to address the gross irregularities; and

29.7 BAN seeks an order that the interlocutory application be dismissed with costs. On the other hand, ROA sought an order that the Amended Notice of Motion and all documentation attached thereto be struck out and that BAN be ordered to pay the costs of the application *de bonis propriis*.

Deliberation

Rule 30, Rule30A and Abuse

30. Rule 30 is headed "*Irregular Proceedings*" and provides:

> *(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*
> *(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –*
> *(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
> *(b) the applicant has, within 10 (ten) days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of the complaint within 10 (ten) days;*

(c) *the application is delivered within 15 (fifteen) days after the expiry of the second period mentioned in paragraph (b) of subrule (2).*

(3) *If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or against some of them, and grant leave to amend or make any such order as to it seems meet.*

(4) *Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order."*

31. Rule 30A is headed "*Non-compliance with Rules and Court Orders*" and provides:-

"(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in Rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 (ten) days from the date of delivery of such notification, to apply for an order –

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 (ten) days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."

32. A party is not obliged to invoke Rule 30 in order to have the proceedings set aside on the ground of irregularity.[47]

33. What has to be shown is that an irregular step has been taken. A further step in the proceedings is "*some act which advances the proceedings one stage near a completion*"[48]. Different phrases have been used to express the same idea, namely a procedural step that "*advances the finalisation of the case*" or a step that at *"one stage or another affects the development of the suit as a whole*"[49].

[47] *Stockdale Motors Ltd v Mostert* 1958 (1) SA 270 (O), *Burger v De Vos* 1967 (3) SA 63 (O) and *KDL Motorcycles (Pty) Ltd v Pretorius Motors* 1972 (1) SA 505 (O) at 508G.

[48] *Pettersen v Burnside* 1940 NPD 403 at 406.

[49] *Jowell v Bramwell-Jones* 1998 (1) SA 836 (WLD) at 904A-H and *SA Metropolitan Lewensversekerings Maatskappy v Louw NO* 1981 (4) SA 329 (O) at 333H-334E.

34. Proof of prejudice is a prerequisite to success in an application in terms of Rule 30(1)[50]. It is also clear that there are certain situations which fall beyond the scope of Rule 30(1). These will include, *inter alia*, where the relevant objection could be adequately raised at an appropriate stage whilst the cause of objection constitutes no hinderance to the ordinary course of the litigation process. In addition, when there is no prejudice, the purported irregularity may be overlooked[51].

35. The object and/or purpose of the Rule 30(1) is that it was intended as a procedure whereby a hinderance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed. I have no doubt that this object/purpose is shared with Rule 30A. The difference, however, is that Rule 30 is concerned with positive steps and/or actions, while Rule 30A is concerned with a non-compliance and/or failure [therefore omissions] to comply with rules or orders of Court, etc.

36. In *Molala v Minister of Law and Order* 1993 (1) SA 673 (W), Flemming DJP dealt with a case where the respondent therein failed to deliver certain further particulars within a reasonable time. It was contended by the applicant therein that it constituted an irregular step within the meaning of Rule 30. At 675E it was held:-

> *"If it were at all possible for the omission of a step to be regarded as a "step", I am unconvinced that failure to deliver a plea within the permissible time falls within Rule 30. In any event I do not understand what the Court is supposed to set aside if nothing was done; nothing was brought into being."*

37. In *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineering / Masana Mavuthani Electrical and Plumbing Services (Pty) Ltd t/a KRB Masana* 2011 (3) SA 231 (GSJ), the learned acting judge dealt with a case where the appellant therein had filed copies of the record on appeal, but without providing security. The respondent notified the appellant that its proceedings

[50] *Louw NO* at 333G-334G.
[51] *Louw NO* at 333H-334B.

were irregular steps because the record of appeal had been lodged without entering into good and sufficient security as required by Rule 49(13). The respondent's notice invited the appellant to remove the cause of the complaint within 10 days. The appellant thereupon paid an amount of R1,000.00 as security. The respondent then contended that the amount of security paid was insufficient and proceeded to apply under Rule 30(1) to have the appellant's filing of the record and application for appeal set aside. It was held at paragraphs 11 and 12 as follows:-

> *"11. The provision in Rule 49(13)(b) that the Registrar must be approached to fix the amount has the following consequence, namely that if the appellant does not do so, this, at best amounts to an omission, and not a "step" or "proceeding". In my view, Rule 30 does not apply to omissions, but to positive steps or proceedings. The respondent could therefore not use Rule 30 for purposes of complaining about the appellant's failure to approach the Registrar, nor could it rely on the original Rule 30 notice, because the cause of complaint stated there (the omission timeously to furnish any security at all) had been removed.*
>
> *12. The respondent's remedy concerning the inadequacy of the amount was therefore to approach the Registrar itself (the obvious route), or possibly to proceed in terms of Rule 30A, or to seek a mandamus to direct the appellant to approach the Registrar. Its remedy did not lie, in my view, in proceeding with a Rule 30 application."*

38. It is evident from the language of Rule 30 as compared to Rule 30A, that there is a clear distinction between positive steps that are required for Rule 30 and a failure to take steps (ie omissions) as required by Rule 30A. Nevertheless, when positive steps are taken as required by Rule 30, it should be evidently clear that such positive step will usually be accompanied by some or other form of failure to comply with a specific rule and/or requirement of such specific rule. It therefore appears to me that Rule 30 will in most cases involve a positive step coupled with a type of failure. What is clear, however, is that a complete failure to take a positive step will not fall under Rule 30, but indeed Rule 30A. Put differently, Rule 30 may overlap Rule 30A, but not *vice versa* when there is a complete failure.

39. It is also clear from the provisions of Rule 30(2)(a) that a party who takes a further procedural step while being aware of the purported irregularity, may not invoke Rule 30(1). The reason therefore was provided in *Jowell v*

Bramwell-Jones and others 1998 (1) SA 836 (WLD) at 904D-G where it was held as follows:-

> *"I do not find these dicta sufficient. As far as I have been able to discover, none of the cases looks at the limitation (now contained in Rule 30(2)(a)) in the context of the purpose which it serves. Essentially that purpose is to create a species of estoppel: a party may not be heard to complain of an irregular procedural step if he acts in a manner which is at variance with an objection to that irregularity, even though he did not when taking the further step appreciate that the step of the other party was irregular. Presumably, there was a recognition that the taking of the further step was likely to lead the other party to act in reliance on that conduct and it was thought undesirable to open the way to disputes on wasted costs. If that is the thinking behind the limitation, then the Peterson v Burnside dictum needs to be reformulated along the following lines: a further step in the proceedings is one which advances the proceedings one stage nearer completion and which, objectively viewed, manifests an intention to pursue the cause despite the irregularity".*

40. Further to the above, it will be noted that Rule 30(2)(a) provides that the party who complains about an irregular step must not take a further step in the cause with "*knowledge of the irregularity*". In addition, Rule 30(2)(b) provides that the party who complains about an irregular step, must: "*within 10 (ten) days of becoming aware of the step*", by written notice afford his opponent an opportunity of removing the cause of complaint. The importance of these provisions is that in its language it does not refer to service, but to knowledge and becoming aware. Service is merely one form and/or manner in which knowledge or awareness can be gained. The fact that the framers of the Rules did not use the word "*service*" is telling. This is because knowledge or awareness can be gained informally and without formal service.

41. Applying these principles to the facts of the matter, I find as follows:-

    41.1 positive steps were taken. This included not merely the drafting of the Amended Notice of Motion, the Supplementary Affidavit which included the Replying Affidavit to the main application as well as the commissioning thereof, but also then serving same via email on Dr Viljoen. Surely, by anybody's reckoning, these constitute positive steps;

41.2 the aforesaid positive steps taken were however wanting in its failure to comply with various requirements of the Rules as set out in the Notice of Complaint and which I found, for the most part, to be sound and valid complaints. The aforesaid positive steps therefore are irregular and/or improper with the concomitant result that the defence of "*non-service*" and/or "*non-filing*" is unsound and/or meritless in the context of an application in terms of Rule 30(1). In any event, the failure to serve or file by itself would constitute a failure as contemplated by Rule 30A;

41.3 the aforesaid positive steps coupled with their failures constitutes irregular steps as contemplated by Rule 30. This is because they clearly at one stage or another affects the development of the main application as a whole or constitutes a hinderance to the ordinary course of the main application. After all, the Amended Notice of Motion not merely dealt with issues and relief entirely different from that sought initially in the main application, but also included the Replying Affidavit to the main application. Should Mr Ribbens simply have accepted such document in its entirety without objection, Mr Ribbens would be bound by the irregular and/or improper procedure followed by Mrs Verster. This has severe prejudicial consequences for him as Dr Viljoen would be joined without Mr Ribbins having any say therein, and similarly, he will have no say in the amendments and the content of the Supplementary Affidavit in violation of *audi alteram partem*. In addition, it is vividly clear that the documentation sought by Mrs Verster from Dr Viljoen is intended to make out a case in the main application that she failed to make out in the first instance. It is trite that a party is not allowed to make out a case in reply – subject to certain exceptions[52]. In addition to the additional cost burden to be carried by Mr Ribbens, the prejudice he suffers in the procedure adopted by Mrs Verster is manifestly clear; and

[52] *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368H-369B.

41.4 in the result, I find that the defence of a failure to serve and/or file the Amended Notice of Motion does not constitute a defence and accordingly that a proper case has been made out for relief in terms of Rule 30(1) and Rule 30A. The language of Rule 30A(2) providing that the Court may make such order thereon as it deems fit, is in any event wide enough to include an order of setting aside.

42. Section 173 of the Constitution deals with the inherent power of the Courts to regulate their own process and provides:-

> *"173. The Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice."*

43. In *Price Waterhouse Coopers Inc and others v National Potato Co-operative Ltd* [2004] (3) All SA 20 (SCA), the SCA dealt with an abuse of process as follows:

> *"50. An agreement in terms of which a person provides funds to enable a litigant to prosecute an action in return for a share of the proceeds may be relevant in the context of abuse of process. It has long been recognised in South Africa that the Court is entitled to protect itself and others against the abuse of its process, but no all-embracing definition of "abuse of process" has been formulated. Frivolous or vexatious litigation has been held to be an abuse of process and it has been said that an attempt made to use for ulterior purposes machinery devised for the better administration of justice would constitute an abuse of the process. In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of mala fides. In order to prove mala fides a further inference that an improper result was intended is required. Such an application of a court procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic, rather than a definition, of mala fides. Purpose or motive, even a mischievous or malicious motive, is not in general a criteria for unlawfulness or invalidity. An improper motive may however be a factor where the abuse of court process is in issue. Accordingly, a plaintiff who has no bona fide claim but intends to use litigation to cause the defendant financial (or other) prejudice will be abusing the process. Nevertheless, it is important to bear in mind that courts of law are open to all and it is only in exceptional cases that a court will close its doors to anyone who wishes to prosecute an action. The importance of the right of access to courts enshrined by Section 34 of the Constitution has already been referred to. However, where a litigant abuses the*

process, this right will be restricted to protect and secure the right of access for those with bona fides disputes."

44. In the circumstances of this case, I am of the view that the Court's processes have been abused. My reasons therefore are:-

44.1 prior to the institution of the main application, Mrs Verster would probably have been able to gain access to such information and/or documentation by utilising the Access to Information Act. After the institution of the main application, she is precluded from utilising the said Act. This means that she cannot use such Act as foundation for the relief in Part A of her Amended Notice of Motion. In order to obtain such information after the main application was launched, it was required of her to firstly join Dr Viljoen properly and then perhaps ask the Court's leave to direct that the provisions of the Rule 35 relating to discovery apply *mutatis mutandis* to the main application. None of these procedures were followed whatsoever;

44.2 instead, and without following any of the procedures and/or Rules set out in the Notice of Complaint (excluding the issue of condonation), an Amended Notice of Motion was prepared, signed and then emailed to Dr Viljoen indicating that such application will be withdrawn in the event that he provides Mrs Verster and/or BAN with the documentation as sought. I have gone through great lengths to indicate what the Amended Notice of Motion consists of and which clearly would have created the impression in the mind of Dr Viljoen that it is a valid and official court document that requires a response and/or action from him. This procedure adopted by Mrs Verster was undertaken in order to obtain documentation and information in order to make out a case in her Replying Affidavit which she failed to make out initially. *Ergo*, it was a procedure adopted either to extort information from Dr Viljoen in order to overcome the deficiencies in her own case in the main application, or it was simply a procedure to extract information from Dr Viljoen in order to make up the weaknesses in her case in the main

application. On either footing, same constitutes an attempt to achieve an improper end and which then also causes Mr Ribbens additional financial prejudice.

45. In the circumstances, I am of the view that a proper case has been made out for the relief sought by Mr Ribbens in the interlocutory application either in terms of Rule 30, Rule 30A or based on a Court's inherent jurisdiction to prevent an abuse of its own processes.

Costs

46. Mr Ribbens seeks a cost order against BAN *de bonis propriis*.

47. The policy consideration underlying a Court's reluctance to order costs against legal representatives personally was that attorneys and counsel were expected to pursue their client's rights fearlessly, without undue regard for personal convenience. They ought not to be intimidated by their opponent or even the Court. Examples of where such an order would not be inappropriate were dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the Court, and gross incompetence and a lack of care. The purpose of a costs order *de bonis propriis* is to indemnify a party against an account for the legal costs of his/her own representative and it is clear that such an award is only made in exceptional circumstances. At the same time, it is necessary to add that a litigant ought not to be punished for the conduct of his/her legal representative[53].

48. In *Letsi v Mepha* (42/2021) [2022] ZAFSHC 122 (13 May 2022), Opperman J provided a very thorough summary of the principles governing a cost order *de bonis propriis* at paragraph 7 where he held as follows:-

> *"[7] I will return to the facts of the case but pause to state the law to lay the basis on which the facts must be pondered. Erasmus studied the case law on the issue of a*

[53] *Goliath v Chicory SA (Pty) Ltd* (338/2018) [2023] ZAECMKHC 38 (7 February 2023) at paragraphs 24-26.

costs order de bonis propriis as it evolved and it culminated in the finding of the following principles:

1. *Costs orders de bonis propriis are embedded in the Constitution of the Republic of South Africa, 1996. In casu, it goes to the principle of a fair trial and proper and effective access to Court.*
2. *The basic notion underlying such an award is to protect the sanctity of the administration of justice and the veracity of the legal profession. The trust of the public in the justice system is democratically sacred.*
3. *There must be a prayer for an order of costs de bonis propriis before the Court can make it.*
4. *The audi alteram partem rule applies. In MEC for Health, Gauteng v Lushaba 2017 (1) SA 106 (CC) the rule was established:*

   [26] There was no issue on appeal between the attorneys and the respondents regarding the attorney's liability. The attorneys were not participants on appeal. They should at the very least have been invited to make submissions. That did not happen. Consequently, they were not heard. For these reasons the attorneys are entitled to seek the relief in this Court.
5. *The facts must justify the order.*
6. *The Court must give reasons for the order; just as for any other.*
7. *The aim of the order, in this case, would be to indemnify a party against an account for costs from his own representative and the opposition.*
8. *Costs de bonis propriis are unusual and not easily awarded. It must only be awarded in exceptional circumstances.*
9. *It is not unprecedented that costs orders de bonis propriis are made on an attorney and client basis.*
10. *The test is not that the matter must be adjudicated from the point of view of a trained lawyer, but from the point of view of a man of ordinary ability bringing an average intelligence to bear on the question at issue. The perspective of Ms. Letsi, the applicant and Ms. Mepha, the first respondent in casu, is a good indicator.*

    (a) Whether a person who acts in a representative capacity has acted bona fide, with due care and reasonably, must be decided in the light of the particular circumstances prevailing in the case with which the Court is concerned.

    (b) Costs orders de bonis propriis must be supported by facts and cannot be granted in the abstract.

    (c) Ill advised and reckless litigation and egregious conduct is frowned upon. There must be negligence in a serious degree.

    (d) The general rule is that a person suing or defending in a representative capacity may be ordered to pay costs de bonis propriis if there is a want of bona fides on his part or he acted unreasonably.

    (e) The Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) the Court ruled that: "they must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a Court."

    (f) No order will be made where the representative has acted bona fide; a mere error of judgment does not warrant an order of Court de bonis propriis.

    (g) The fact that the party has a substantial personal interest in the outcome of the matter constitutes an important factor in shaping such a decision.

(h) *A person acting in a representative capacity who institutes an action in circumstances in which he can have no certainty that the action will be successful, and makes no provision for the defendant's costs, may be ordered to pay a successful defendant's costs de bonis propriis. In Multi-Links Telecommunications Ltd v Africa Pre-paid Services Nigeria Ltd 2014 (3) SA 265 (GP) it was stated that:*
Costs – costs de bonis propriis – when to be awarded against practitioner – conduct so deviating from norm that it would be unfair to expect practitioner's clients to bear costs – conduct earning displeasure of Court, such as dishonesty, obstruction of justice, irresponsibility, gross negligence, reckless litigation, misleading the Court, gross incompetence, and carelessness – costs de bonis propriis would not always be indicated in case of errors of law and failure to comply with rules.

(i) *In South African Liquor Trading Association and others v Chairperson, Gauteng Liquor Board and others 2009 (1) SA 565 (CC) at paragraph 54 the Constitutional Court considered circumstances where a de bonis propriis costs order was warranted and held that:*

[54] An order of costs de bonis propriis is made against attorneys where the Court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the Court's displeasure. An attorney is an officer of the Court and owes a Court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs de bonis propriis on the scale as between attorney and client".

49. The five fundamental goals that costs orders *de bonis propriis* seem to fulfil were identified in an article appearing in *De Rebus* of May 2023 entitled "*Liability for Refunds of Legal Fees, Disbursements or Personal Cost Orders*". The learned author identifies these five goals *verbatim* as follows:-

"Firstly, they provide the Court with an opportunity to mark its displeasure with the practitioner's conduct and punish them for ultimately having abused the litigation process in some way or another. Secondly, issuing a personal costs order against an erring practitioner may also deter other legal practitioners from similar wrongdoing in the future and motivate practitioners to provide their legal services in a more effective, responsible, and professional manner. In turn, this may promote the constitutional right to access to justice. Thirdly, awarding a costs order against a legal practitioner is a very practical way to hold them to account for their grossly negligent or intentional conduct, which caused the incurring of unnecessary expenses and the delay of justice. Personal costs orders, therefore, promote accountability within the legal profession. Fourthly, ordering legal practitioners to personally pay the costs associated with unnecessary litigation indemnifies clients and ensures that they

are not to be burdened by unnecessary costs. Fifthly, the Court has recently also suggested that personal costs orders may play an important role to ensure that taxpayer funds are not wasted in unnecessary litigation. All in all, the personal costs order promotes justice and is in the interest of the administration of justice."

50. In the exceptional circumstances of this case, I am of the view that a costs order *de bonis propriis* is justified for, *inter alia*, the following reasons:-

50.1 the wrong procedure was utilized to obtain information from Dr Viljoen;

50.2 not merely was the wrong procedure utilized, but Mr Ribbens was not even given notice thereof;

50.3 in addition to the above, the email that accompanied the Amended Notice of Motion clearly created the impression that it is a valid and official application that must be adhered to by Dr Viljoen. In fact, it was stated that such application will be withdrawn if Dr Viljoen complies with previous correspondence where such information was sought;

50.4 I have already found hereinabove that the procedure adopted constitutes an abuse of process;

50.5 a Court simply cannot allow its officers to adopt the *modus operandi in casu* in respect of third persons (such as Dr Viljoen) who is a layperson with the aim to extract documentation and/of information from them to be used in the main litigation and without notice to the actual parties to the main litigation. Such procedure adopted and/or *modus operandi* was not a mere error of judgment, it egregiously deviated from what is expected of an attorney as an officer of the Court;

50.6 despite the Notice of Complaint, BAN did not comply therewith. Had such notice been complied with, all the costs incurred in the interlocutory application could and/or would have been avoided;

50.7 I have pointed out the contradictory explanations and/or excuses appearing in the Answering Affidavit deposed to by BAN and which simply cannot be countenanced by the Court in respect of one of its officers; and

50.8 hereinabove I have set out the timeframe when the Answering Affidavit to the interlocutory application was filed and which was not even accompanied by a condonation application. Nevertheless, I have taken such Answering Affidavit into an account. The point is that BAN not merely followed wrong procedures to the detriment of Mr Ribbens and the potential and/or actual detriment and/or prejudice of Dr Viljoen, but they went further to show a clear laxity and/or disregard for the procedures initiated by the interlocutory application.

ORDER

In the result, I make the following order:

1. The Amended Notice of Motion (dated 9 March 2022) together with its Supplementary Affidavit and annexures attached thereto (to be found at CaseLines at 0008-1 to 0008-46) is set aside.

2. Emma Jame Burnett is ordered to pay the costs of the interlocutory application *de bonis propriis*.

L MEINTJES
ACTING JUDGE OF THE HIGH COURT
DATE OF HEARING:
18 APRIL 2023

DATE OF JUDGMENT:

15 JUNE 2023

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