NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 2540/2007

In the matter between:

T R D M **APPLICANT**

and

E M (born M) **RESPONDENT**

J U D G M E N T

LEEUW JP:

Introduction

[1] The parties were married to each other on the 14th April 2001 and were divorced per order of divorce incorporating the Deed of Settlement granted by this Court on the 4th June 2007, which amongst others provided in respect of the minor child who was 5 years old at the time, that:

- custody be granted to the respondent, with the applicant having a right to reasonable access to the minor child;

- and that the applicant should pay maintenance of R1000-00 per month for

the minor child.

[2] The applicant approached this Court on an urgent basis on the 21 December 2007 seeking an order in the following terms:

"**PART A**

1. Authorizing the Applicant to dispense with the ordinary rules relating to the forms, service and time periods and permitting this application to be brought by way of urgency, in terms of Rule 6(12) of the uniform Rules of the abovementioned Honourable Court.
2. That pending the finalization of PART B hereof, the Applicant be granted interim custody of the minor child.

3. That an investigation be conducted by the Family Advocate.

4. That the Respondent be granted access to the minor child as follows:

    4.1 on every Saturday from 09h00 to 18h00;
    4.2 on alternative Sundays from 09h00 to 16h00;
    4.3 on a Tuesday and Thursday afternoons and/or evenings for 2 (two) to 3 (three) hours at a time.

5. Costs of the application."

[3] The order sought in Part B of the Notice of Motion is:

"1. That the custody of the minor child be awarded to the Applicant.

2. That the Respondent be granted access to the minor child as follows:

    2.1 On every Saturday from 09h00 to 18h00;
    2.2 On alternative Sundays from 09h00 to 16h00;

2.3 On a Tuesday and Thursday afternoons and/or evenings for 2 (two) to 3 (three) at a time;

2.4 Shared Religious holidays;

2.5 For a period of a half a day for the minor child's birthday;

2.6 On his mother's day and Applicant's birthday;

2.7 Reasonable telephonic access.

3. Costs for this application."

[4] When the applicant filed this application on the 21st December 2007, the respondent had been granted an Interim Protection Order in terms of Section 5(2) of the Domestic Violence Act No.116 of 1998 (Domestic Violence Act) a day before on the 20th December 2007 against the applicant. The terms of the order granted by the Magistrate's Court of Rustenburg were amongst others:

"(a) that the applicant should desist from harassing, intimidating and/or threatening the respondent in any manner whatsoever;

(b) that the applicant not enter the complainant's place of employment at the Impala Platinum Mine Shaft, Rustenburg;

(c) the applicant should desist from committing the following acts of abusing the respondent emotionally and that he only communicate with the respondent only in relation to their minor child, and that he be allowed contact or access with the minor child as per arrangement and agreement between them; and

(d) that the applicant be ordered to return the minor child to the respondent no later than the 24th December 2007 before 13h00.

(e) the applicant was granted an opportunity to appear in Court on the 6th February 2008 and to show cause why the Interim Protection Order should not be confirmed and made a final order."

[5] At the hearing of this application on the 24th December 2007, the respondent and a Social Worker, Mrs Molamu, who had interviewed the minor child, gave oral evidence in court. The Founding and Supplementary Affidavits of the applicant were also considered by the Court. There is no written judgment handed down by Lever AJ save for the following order:

"THAT: Pending the finalisation of Part B of the N.O.M. interim custody of the minor child be and is hereby awarded to the Applicant.

THAT: The minor child is to spend from 13H00 on Sunday 30th December 2007 up to 13H00 on 2nd January 2008 with the Respondent. Thereafter the minor child will spend every alternative weekend with the Respondent.

THAT: The Applicant and the Respondent are to meet at an agreed venue three times a week for a maximum of 3hrs per visit to enable the Respondent to spend with the minor child.

THAT: The Respondent is entitled to unlimited telephonic access to the minor child.

THAT: The matter be and is hereby postponed to 28th day of FEBRUARY 2008 for hearing of and finalisation of the substantive part B of the N.O.M.

THAT: The Respondent will have the right to supplement her evidence as advised by her legal advisor, such affidavit to be filed on or before 16H00 on the 18th January 2008.

THAT: The Applicant will file his reply, if any, on or before 16H00 on the 25th January 2008.

THAT: The Family Advocate filed a report on or before 16H00 on the 7th February 2008.

THAT: The Applicant's Heads of Argument are to be filed on or before 16H00 on 14th February 2008.

THAT: The Respondent's Heads of Argument are to be filed on or before 16H00 on or before 21st February 2008.

THAT: Costs are reserved."

[6] Before I proceed to deal with the proceedings or the evidence submitted in respect of PART B of the application, it is imperative that I briefly refer to the proceedings before Lever AJ when the interim order (Part A) was granted as well as the affidavits filed by the parties subsequent to the interim order in relation to the final order (Part B) of this application.

[7] In PART A, the grounds relied upon by the applicant are captured in his founding and supplementary affidavits and oral evidence presented in Court before Lever AJ. In paragraphs 7 to 11 of his founding affidavit, which was deposed to on the 21st December 2007, the applicant states, amongst others,

(a) that pending their divorce in May 2004, the respondent was granted custody of the minor child and he was ordered to pay maintenance for both the minor child and respondent in terms of Rule 43 of the Uniform Rules of Court;

(b) He did not comply with the court order because the respondent made it difficult for him to comply therewith in that she denied him access to the minor child;

(c) He had no contact with the respondent and the minor child and "kept

(his) distance and waited her response". When the respondent did not make any contact with him, he decided to visit the minor child during March 2007 during the day at his maternal grandmother's house.

[8] The reason for approaching this Court on an urgent basis can be summarized as follows:

(a) That when the minor child visited him, and it was time for him to be returned to the respondent, the child would "exhibit an unwillingness to part" with him.

(b) That the minor child's behavioural patterns had changed to the worst in that:

(i) the minor child used vulgar words in Afrikaans, which words he alleges were used by the maternal grandmother against the minor child;

(ii) The child becomes depressed, agitated, frightened and nervous and even refuses to go back to the respondent because "his maternal grandmother and mother assault him and use … vulgar language on him". (***sic***), and is also afraid of the maternal grandmother, who "becomes very angry and beats him up quite severely with her shoe". It is further alleged that the respondent also assaults him with a belt.

(c) According to the applicant, the consequences of this maltreatment manifests itself in the minor child's . . . "severe depression, (and) a short concentration span"; the child is ill-disciplined because of the "uncultured environment" he lives in, and because of lack of "adequate

attention, love and affection from those around him", he has experienced continuous health problems such as recurring eye problems, and symptoms of severe respiratory infection in that, "he has exhibited TB symptoms caused by the exposure to paraffin smoke because the respondent uses a paraffin stove for cooking."

(d) On the 23rd December 2007, the applicant deposed to a Supplementary Affidavit wherein he reiterated what he stated in his founding affidavit, and further added that he is a Psychology and English graduate but not a child Psychologist, and is thus in a position to diagnose and assess the behavioural pattern of the minor child who is being repeatedly verbally abused because he eloquently repeats the vulgar words which he utters with a "deep painful facial expressions".

[9] The respondent denies that the minor child was either verbally or physically abused by her or the grandmother. She however admits that the minor child used to utter vulgar words during the first half of 2007 when the child was in a day care centre called Never Neverland Crèche, which day care centre was closed during the same year. She took up the matter with the teachers at the crèche and also reprimanded the minor child for his behaviour. She further states that the minor child never complained to her about the abuse on him by the grandmother, but that to the contrary, the minor child complained about the abuse suffered by him at the instance of applicant's mother (the paternal grandmother), his other family members and the domestic worker who, on many occasions was left in her care when the applicant was not at home.

[10] In respect of the health condition of the minor child, the respondent testified that is minor child is a beneficiary member in the Xstrata Medical Aid Scheme of Deon Mokhwiti, who is her younger brother. That the minor child does not

have respiratory problems save for the flu and cough contracted when he plays in water. The child has had a problem with his eye from the age of three (3) years which was diagnosed by a paediatrician as an allergic reaction to the fumes coming from the mines. She also stated in her oral evidence that she uses the paraffin stove outside the house when the electricity is off. The child is generally in good health.

[11] The respondent also raised a concern with the Court regarding the applicant's failure to comply with the Divorce Order in that whenever the minor child had to be returned after visiting the applicant, he would either not bring him back as agreed or would bring him back on a date not agreed upon by the parties. The problem persisted to the extent that on 8th November 2007, the applicant did not bring the child back. On further enquiry, he promised to bring him on a Tuesday, but still failed to bring him. She decided to report the matter to the Tlhabane Court on Wednesday and they consequently appeared in the office before Advocate Mphaga on the 13th December 2007. The terms of the Divorce Order were explained to him but the applicant indicated his unwillingness to cooperate. He eventually reluctantly promised to bring back the minor child on the 13th December 2007. He did not return the child but later phoned Advocate Mphaga and told him that he was not returning the child because the child was using vulgar words. Attempts were made to summon the applicant to Court with no avail. The respondent was granted the protection order on the 24th December 2007 referred to in paragraph [4] above.

[12] The Social Worker testified about her interview with the minor child who was 5 years old at the time. She testified that the minor child complained about the assaults on him by the grandmother. However, she was of the opinion that the child was not emotionally traumatized and that there was no cause for concern

with his physical and health wellbeing. At that stage the child indicated his wish to stay with the applicant. She had not had an opportunity to consult with the applicant. It is also not clear as to whether she had consulted with the respondent regarding the minor child.

[13] Lever AJ granted the interim order on the basis of the evidence presented before him. I have already alluded to the fact that no judgment was handed down save for the order of the 24th December 2007 granted and referred to in paragraph [5] above. The grounds relied upon by the applicant when he was granted the interim order in Part A, can be briefly set out as follows as stated in the affidavits:

(a) The child was using vulgar language probably because of the grandmother's influence;

(b) The child was being assaulted and abused by the grandmother and probably the respondent;

(c) The child was experiencing persistent respiratory infections, eye infections and was not enjoying good health;

(d) The child used to cry and would become very sad when he had to be returned to the respondent after visiting the applicant;

(e) The child had indicated his preference to stay with the applicant;

(f) According to Ms Molamu, the Social Worker who interviewed the minor child:

(i) the child did not want to stay with the respondent, because he had a

problem with the grandmother who uses vulgar words and assaulted him; and that nevertheless, the child did not have a problem with the respondent, and that "there is no pressing urgent need at this moment to change the child's present environment";

(ii) The child does not have a problem with his mother or against the maternal grandmother and that the issues raised about her can be addressed by the mother with the help of both parties;

(iii) There is no cause for concern regarding the physical health and wellbeing of the minor child;

(iv) There is no cause for concern on the emotional and physical health of the child, although during cross-examination, she changed her view to submit that the child would be traumatized if he is returned to the mother because of the grandmother;

(v) She further stated that she had not done a thorough investigation into those allegations because that was a "temporary measure";

(vi) She never asked the respondent about the allegations against the grandmother.

[15] The applicant removed the minor child from the custody of the respondent contrary to the Divorce Order. If indeed the applicant had a valid reason for removing the minor child from the respondent on the 7th December 2007, he would have approached the court immediately for the purpose of having the order varied. Instead, the respondent had to approach the Magistrate Court for redress and was granted an interim Protection Order in terms of Section 5(2) of the Domestic Violence Act, wherein the applicant was amongst others ordered

to return the minor child to the respondent on or before the 24th December 2007. I must here pause and remark that this order was granted after several unsuccessful attempts were made to summon the applicant to attend the proceedings.

[16] In terms of Section 5(5) of the Domestic Violence Act, the applicant had the right to anticipate the return date alternatively, return the child to the respondent in terms of order and oppose the interim Protection Order granted.

[17] Furthermore, in terms of Section 8(1) of the Divorce Act No. 70 of 1979 (Divorce Act) the custody or guardianship of, or access to, a child order made in terms of Section 4(1)(b) or 2(b) of the Mediation in Certain Divorce Matters Act, of 1987, shall not be rescinded or varied or even suspended before the report and recommendations made by the Family Advocate in terms of Section 4(1), have been considered by the Court.

[18] When the interim order was granted, there was no Family Advocate's investigation conducted and filed and considered by the Court. I am of the view of that the granting of Part A of the application was irregular. The adjudication of Part B was postponed several times from the 24th December 2007 up to the 12th March 2009 mainly for the Family Advocate's report.

[19] The application for the final relief sought in PART B of the Notice of Motion again served before Landman J on the 24th January 2009. Oral evidence was presented and judgment reserved on the 5th June 2009. Judgment was handed down on the 9th July 2009. Landman J did not give a final order in respect of PART B but decided to recuse himself on the basis that he was intimidated by the applicant's attorney through a letter imputing bias on his part and thus

refrained from delivering a judgment on PART B. I will come back to this issue later in my judgment.

[20] The matter subsequently served before Gura J on the 8th December 2011 where the following order per agreement between the parties was made:

"1. THAT: The minor child, O M has the right of participation in the matter as contemplated in section 10 of the Children's Act, Number 38 of 2005, and that he should be allowed to exercise the aforesaid right in an appropriate way, which has to be determined by the Judge designated by the Honourable Judge President to preside in the matter ("the Presiding Judge");

2. THAT: The matter be and is hereby postponed to a non Motion Court date for allocation of a date by the Registrar of this Honourable Court to give effect to paragraph 1 ***(supra)***, which date has to be arranged in consultation with the Presiding Judge and counsel for the parties;

3. THAT: Leave be and is hereby granted to the parties to deliver supplementary affidavits dealing with their current personal circumstances within ten (10) days of the finalization of the proceedings pertaining to the participation of the minor child.

4. THAT: The record of the court proceedings before the Honourable Mr Justice Landman on 23 May 2010 which appears fro page 255 to 373 of the paginated papers filed of record herein inclusive of the heads of argument already filed on behalf of the parties by the presiding Judge when considering the question whether it would be in the best interest of the minor child that the application be and is hereby granted or not;

5. THAT: Further heads of argument and/or oral argument on behalf of the parties would only be delivered and/or made if required by the Presiding Judge;

6. THAT: Pending the finalization of the matter the interim order granted on 24th of December 2007 by the Honourable Mr Acting Justice L Lever will remain operative;

7. THAT: The costs of the postponement are to be costs in the cause."

[21] In her supplementary affidavit filed per leave of the order granted by Lever AJ, the respondent confirms that she was awarded the custody of the minor child from May 2004 and that from that date the applicant never made any contact with her and the minor child until in March 2007 when the minor child was four (4) years and ten (10) months old. When he visited the minor child at the grandmother's place on the 4th June 2007, four months prior to the hearing of the divorce action, she (the respondent) was at work. He thereafter visited the child regularly and was allowed to have access to the minor child in compliance with the Divorce Order. She continued staying with the minor child until he was removed by the applicant on the 7th December 2007 contrary to the Divorce Order.

[22] She further states that the applicant leaves the child in the care of the domestic worker during those nights when he has to attend to his official duties, despite the fact that she was available to look after the child since she is staying in Tlhabane, which is a few kilometres to Rustenburg where the applicant is staying.

[23] She further avers that the applicant did not comply with the order of Lever AJ in respect of her access to the minor child, and that the Family Advocate and the Family Counsellor were made aware of the applicant's default and yet no reference was made in their reports about the conduct of the applicant. Respondent has amongst others, referred to several incidents in which the

applicant deprived her of access to the minor child, and that he does not allow the minor child to take her telephone calls when she wishes to enquire about the minor child's well being.

[24] She referred to an incident on Friday, 30 August 2008, when applicant brought the minor child to her and the applicant was supposed to fetch him on Monday 1 September 2008. The child was down with chickenpox and the respondent requested the applicant to leave the child with her in order for her to take care of him because she was on vacation leave. The applicant acceded to the request, but only allowed her to stay with the child for the day and later fetched the child in the evening. It came to her knowledge that the applicant was away for the rest of that week and left the child in the care of the domestic worker.

[25] She further alleges that on the 28th December 2008, the applicant brought the child to her without having made prior arrangement. He came on the 11 January 2009 whilst the respondent was in church with the child, to inform her that he would be fetching the child the following day in order to enrol him at a school called Fields College. The child was registered at that school without the respondent's knowledge and when on the 27 January 2009 the respondent went to enquire about the child's performance and progress at the school, the principal refused to give her any information without the consent of the applicant. The respondent was however able to obtain a copy of the school program from another parent whose child was in the same class with the minor child.

[26] On the 12th March 2009, the matter served before Landman J, who postponed the case to the 28th April 2009 and amongst others, made the following Order:

"THAT: The matter be and is hereby postponed to 28 April 2009.

THAT: The Respondent be allowed to file supplementary affidavit.

THAT: The Applicant file supplementary affidavit within fifteen (15) court days.

THAT: The Respondent pay the costs of today.

THAT: The Applicant shall file particulars of claim within ten (10) days of the date of this order.

THAT: The Registrar is directed to issue a subpoena for the attendance of Dowleen Van Zyl of Fields College Rustenburg on the 28 April 2009.

THAT: The Registrar shall notify the family councillor and family advocate of the date."

[27] The applicant filed his supplementary affidavit on the 15th April 2009 in response to the respondent's supplementary affidavit pursuant to the order referred to above. He amongst others, disputes that he denied the respondent access to the minor child. He states that when he realized that the child was using foul language, he impressed it upon the respondent that the minor child will not be returned to her for as long as she was staying with her mother. He however admits that the respondent did not have access to the minor child during week days as was ordered by the Court, the reason being that the respondent did not make the necessary arrangements to fetch the child from the school or his house and further that the respondent did not telephonically contact the minor child.

[28] Applicant further states that he maintained the minor child up to the end of November 2007. He did inform the respondent about the registration of the

child at Fields College in Rustenburg. However, he does admit that he did not submit the particulars of the respondent as the biological mother of the minor child to the school, but did confirm to the principal that the respondent was the child's biological mother when an enquiry in that regard was made. He admits that he occasionally works late at his place of employment and that the child is left in the care of the domestic worker in his absence, and further that whenever he is not available, the child is fetched from school by his friend Isaac Motshegoa and on certain occasions the child was taken to his friend's home from where he would fetch him whenever he worked late.

[29] The applicant alleges that he remarried and has a child who is two years old and that the child has bonded with the minor child; that he and his wife are taking good care of the minor child who has also made friends with the Mayor's children from where he fetched the child when he came home from work.

[30] He further states that the minor child is no longer using vulgar words ever since he stayed with him and that his health has improved. He has also registered the child in his Medical Aid Scheme, Hosmed. He submits that the Family Advocate's Report is objective and not biased as suggested by the respondent and further that he and the respondent should be granted full parental rights and responsibilities in terms of Sections 18, 19 and 20 of the Children's Act No.38 of 2005 (the Children's Act).

[31] I have already alluded to the proceedings held before Landman J on the 24th January 2009 when he recused himself without delivering a judgment on Part B of this application. In those proceedings oral evidence of Ms Mabel Seanokeng Letseane, a Social Worker and Family Counsellor appointed by the

Family Advocate to conduct an enquiry in terms of Section 4(1) of the Mediation in Certain Divorce Matters Act No.24 of 1987, to conduct an investigation into the interests of the minor child as regards custody and access.

[32] The report of the Family Counsellor was filed with the Registrar on the 13th February 2009, almost a year and two months after the Interim Order was granted by Lever AJ on the 24th December 2007. In terms of the order of this Court granted by Lever AJ, the Family Advocate's Report ought to have been filed on or before the 7th February 2008. Ms Letseane's investigations and findings are a repetition of the allegations and counter allegations of the applicant and the respondent stated in their affidavits filed in this application. Ms Letseane stated in her report that during the interview with the minor child, he indicated his preference to stay with the applicant because "they play games together", and that the applicant bought him a play station and that "it is boring at the respondent's place". It is further stated in the report, that the applicant is "contributing meaningfully towards the child's maintenance" and that despite the fact that he was absent from the minor child's life for a period of three years, he had since his reunion with the minor child in March 2007 strongly bonded with him. It is for these reasons and others that she and the Family Advocate recommended that the primary custody of the minor child be given to the applicant.

[33] Ms Letseane evaluation of this case can be summarized as follows:

- There is no communication between the parties especially in relation to matters affecting the minor child;

- The respondent does not have problem with access to the minor child as

there is an existing interim court order;

- The applicant was absent in the child's life for a period of three years but ever since he reunited with the child in March 2007, they have bonded;

- Both parties have a good relationship with their minor child and they each play a positive role in his upbringing. The applicant is the only one contributing meaningfully towards the child's maintenance as the respondent confirmed that she is not contributing anything;

- It is evident that the applicant is actively involved in the child's school activities as the respondent confirmed she is not known at the school as she was not informed about the name of the school;

- It is in the best interest of the child that he remain in the care of the applicant as the child is settled with him. Removing the child from the applicant's custody will disrupt the child's normal daily routine;

- There seems to be no compelling reasons that justify change in the present environment of the minor child. The minor child has bonded well with the applicant and has made his preference to stay with his father and visit his mother during school holidays;

- Regular contact between the minor child and the parents should be encouraged to maintain and strengthen the parent-child relationship.

[34] During cross-examination by both counsel, Ms Letseane recommended that both parents should be awarded joint custody of the minor child. She also stated that during the interview with the minor child, he indicated that he had no problem staying with the mother but that he preferred to stay with his father

because they always play together with his father and whereas his "mother's place is boring". She also made reference to the report she received from both parents about the vulgar words used by the minor child and was given conflicting information about the source thereof.

[35] Ms Douwlene Van Zyl, who is the minor child's class teacher at Field's College, testified amongst others, that:

(a) She received a telephone call from the respondent who set up a meeting concerning the performance of the minor child at the school. It was then that she realized that the applicant did not submit her name at the school as the biological mother of the minor child. He instead gave the school the contact details of his wife, the minor child's step-mother;

(b) The minor child was struggling to cope in class and was very quiet, withdrawn and isolated at first, but with time he opened up and has become naughty and ill disciplined. He is physically well-cared for, however she is concerned about his emotional well-being even though he is polite, well-mannered and friendly. She is nevertheless of the view that with the necessary care, attention and assistance, his school work will improve;

(c) She also observed that the child is "torn between his mom and dad" because the minor child indicated that he wanted to stay with both his parents;

(d) She also stated during cross-examination, that the parents to the minor child did not attend the parents meeting on the 27th March 2009, where the child's progress was discussed. She did indicate in his school report

that his performance was not satisfactory and had expected the father to discuss the concerns raised with him, which never happened. She did not discuss the issue of extra remedial classes with the mother because the father was the legal custodian of the child.

[36] In his judgment for the reasons for his recusal, Landman J stated amongst others following:

"[8] While preparing the judgment it occurred to me that as Oratile had been heard by the court which granted the interim order, I may also be obliged, by that fact and the law, to allow him to express his preferences to me, even though his educator, Mrs Van Zyl, had told me what his views were. What follows next is set out, although not comprehensively, in a letter of 10 June 2009 written by Attorney Mothuloe to the Registrar and handed to the Judge President. This letter was brought to my attention on 29 June 2009. It reads:

"T.R.D. MOTHULOE v ERICA MOTHULOE (BORN MOKHWITING): CUSTODY OF MINOR CHILD: O. NO. MOTHULOE: CASE NO. 2540/07

1. The abovementioned matter refers.

2. It is with great disappointment that we note from our Counsel, Advocate N. Gutta that:

2.1 His Lordship Mr Justice Landman apparently telephoned Adv C Zwiegelaar to inform her of His Lordship's view that His Lordship prefers to interview the child first in accordance with the new Childrens Act before determining who should have the custody of the child between the parties;

2.2 Advocate C Zwiegelaar then delved into the merits with the Honourable Judge away from and in the absence of our Counsel, Advocate N Gutta;

2.3 This she did by mentioning to the Honourable Judge that her clients claim to

have addressed at least THREE letters to us complaining about the alleged breach of the Rule Nisi by our client and that he instructing attorney "slipped up" in not attaching the said letters, excluding only one, and requesting the Honourable Judge if she could hand those up to the Court;

2.4 It appears that the Honourable Judge then asked her to discuss this with her opponent, namely our Counsel, Advocate N Gutta.

3. Our humble view is that this situation is extremely untenable ethically and should be corrected as it has adverse consequences for our client.

4. Much as we have unblemished faith in this Honourable Court, and in the ability of the Honourable Justice Landman to disabuse himself of these irregular circumstances, the question is How are we going to explain it to our client, even if rightfully so, with this background.

5. May I implore your esteemed office to assist in any way it can to resolve this matter, including requesting the assistance of the Honourable Judge President.

6. Much gratitude for your kind assistance herein.

Yours faithfully

MOTHULOE ATTORNEYS
Per: W.T.M."

[9] Paragraph 2 of the letter correctly states the facts save that:

(a) it does not state that Adv Zwiegelaar was asked to relay to Adv Gutta my query whether I should interview the child and that she should ask Adv Gutta to phone me about this; and

(b) it states that the merits were discussed. Adv Zwiegelaar mentioned the three letters. The alleged existence of letters had been raised in the course of argument in open court. She was directed to discuss this issue with Adv

Gutta.

[10] I subsequently met with both counsel. Adv Zwiegelaar said she was instructed to ask that I interview the child. It was agreed that this would happen at 09:00 on the first Saturday after the commencement of the third term. We would meet in my chambers and dress would be casual. I said that I would not allow the child to be cross-examined and that I would draft the procedure to be followed. My secretary was then instructed to communicate this to the parties. Before she could send the letter, Attorney Mothuloe's letter to the Registrar was brought to my attention.

[11] I requested advocates Gutta and Zwiegelaar to meet me in chambers on Friday 30 June. They did so at 17:00. I inquired from Adv Zwiegelaar whether she had received a copy of Mr Mothuloe's letter. She said she had not. Adv Gutta said that she had also not seen the letter. I showed them the letter. Adv Zwiegelaar strongly expressed her opinion and intimated how she thought her client would feel about it.

[12] I informed them that I also could see no way out other than to recuse myself from the matter. They agreed that this would have to be done.

[13] I must recuse myself as my communication, designed to expedite the matter, was made too informally. It is clear that the applicant may conceive a perception of bias should the parental rights not be awarded to him. This intimation by his attorney, which had not been communicated to the respondent's attorney, would in turn cause the respondent to harbour, should I award the right to the applicant, the suspicion that I had found for the applicant as a result of the contents of the letter.

[14] It is all very regrettable. But it would not be in the interests of justice for me to deliver a judgment. In the result I recuse myself."

[37] I must here remark that a decision not to give a final judgment in Part B of the application is unfortunate. It has been almost four (4) years since Landman J handed down the judgment on the 9th July 2009. Although the correct

procedure would have been to set aside the proceedings of Landman J, and let the matter start *de novo*, it will not be in the interests of the minor child to do so due to the passage of time since the commencement of this application. It is common cause that the circumstances of the minor child as well as those of his parents have changed.

[38] On the 20 May 2013 when I had an interview with the minor child, he was ten (10) years old. The applicant has remarried and a child was born out of this relationship. The grandmother died on the 10th May 2013 and was buried on the 18 May 2012. The respondent gave birth to a baby girl in February 2012 from a relationship with another man.

[39] In view of the circumstances and developments referred to above, it was appropriate that the parties be afforded an opportunity to file supplementary affidavits dealing with their current circumstances. On the 20th May 2013, the parties were ordered to file their Supplementary Affidavits on or before the 31st May 2013. I have not received the applicant's supplementary affidavit to date, despite several enquiries made by the Registrar in that regard.

[40] When I interviewed the minor child in my chambers on the 20th May 2013, in the absence of both parents, he indicated that he wanted to stay with his mother because he misses her greatly. He also remarked that he loves both his parents and reiterated the fact that he missed his mother and wanted to stay with her. He further stated that he has many friends at his mother's place which is not the position at his father's place. The outcome of the interview was immediately communicated to both parents and their counsel who had waited outside my chambers during the interview.

[41] In her Supplementary Affidavit, the respondent states that she is gainfully employed by Impala Platinum Mines as a Human Resources Superintendant with effect from 1 September 2012. She has found a new relationship with a man who intends marrying her and they have a child, a girl who was born on the 10th February 2012. Her mother, who is the grandmother to the minor child died on the 10th May 2013. The respondent is presently staying with her siblings and their children in her mother's three bedroomed house. There is a spare bedroom which will be used to accommodate the minor child if custody is accorded to her. She however intends purchasing her own house as soon as she is married to her fiancé.

[42] She further states that she works from 06h00 until 14h30 during the week and on one Saturdays a month from 06h00 to 10h00. She does not intend removing the minor child from Fields College. She has arranged with her friend Nthabi Mabuse, whose son is in the same class as the minor child, to take the minor child to school in the morning and she (the respondent) will collect the child from school in the afternoon. She will be in a position "to assist the minor child with his homework and take care of him and his needs". She has also employed a domestic worker who works from 07h00 to 16h00 during the week.

[43] She also states that she has never received any progress reports of the minor child from either Fields College or the applicant. She has been reliably informed that the child was not attending the aftercare and extra classes at the school. She is prepared to take the responsibility of financially maintaining the child and suggests that the applicant be ordered to pay the annual fees directly to the school because the applicant has always been reluctant to pay any money directly to her as contribution towards the maintenance of the child. She is

paying R1000-00 per month at Old Mutual towards a savings plan for the minor child.

[44] She further states that she will continue taking care of the minor child's religious and moral needs by continuing to attend church with him and teaching and instilling in him good moral values. The minor child has good friends at Tlhabane in the neighbourhood who visit him at home and play with him whenever is at home. She however states that the minor child does not have a lot of toys and games because her family believes in spending more time with each other and "listening and talking to each other". However, her financial position has improved hence she will be in a position to provide the minor child with the necessary toys and other basic needs. She has also registered the minor child in her Medical Aid Scheme.

[45] As regards the health and medical condition of the minor child, she has attached a medical certificate from the paediatrician who noted that he examined the child regularly between the 27th June 2000 when the child was 7 weeks old and on the 30th September 2008 when the minor child was 6 years old. He made a diagnosis of "normal paediatric illness mainly probably viral URT1.. . . ongoing chronic allergic conjunctivitis & Rhinitis, and that the last consultation was on the 30th September 2008".

[46] The respondent also states that ever since the year 2010, the minor child has persistently requested to visit her during the week and the minor child becomes very upset when the applicant fetches him for the week-end. As a result thereof, the applicant is accusing her of influencing the child against him. When the minor child expresses his wish to stay with the respondent, the applicant treats him in an insensitive and harsh manner, and scolds him for

expressing his preference to stay with the respondent.

[47] The respondent, on realizing that the child was expressing his wish to stay with her, gave instructions to her attorney Paul, to request the Family Advocate to conduct an enquiry on the basis that circumstances have changed. A letter dated 20 September 2010 was written by the attorneys to the Family Advocate in that regard.

[48] When there was no response from the Family Advocate, another letter was addressed to Advocate Mampo, the Family Advocate on the 10 March 2011 by the respondent's attorneys of records, wherein Advocate Mampo was referred to the letter of the 20th September 2010 as well as the reminders dated 8 December 2010 and 14 January 2011. Advocate Mampo telefaxed the report dated 11 December 2008 and that of the Family Counsellor dated 4 December 2008. When the attorneys raised their disquiet about being furnished with an old report, Advocate Mampo responded six (6) months thereafter, only to state that he requires a Court Order directing him to conduct a fresh investigation. It was then that the respondent's attorney set the matter down for hearing on the 8 December 2011, which matter was before Gura J.

[49] The applicant sought an order varying the Divorce Order in terms of Section 8 of the Divorce Act. It is trite law that the applicant bears the onus to prove, on a balance of probabilities, that the variation of the Divorce Order should be granted. See **Jackson v Jackson** *supra* at p.307 G-H par.[5].

[50] Section 8 of the Divorce Act provides that:

"**Rescission, suspension or variation of orders**

(1) A maintenance order or an order in regard to the custody or guardianship of, or access

to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of Section 4(1)(b) or (2)(b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said Section 4(1) have been considered by the court.

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

(3) The provisions of subsections (1) and (2) shall mutatis mutandis apply with reference to any order referred to in subsection (1) given by a court in a divorce action before the commencement of this Act."

[51] In order to succeed in an application for the variation or rescission of a custody of or access to a minor child order made in terms of the Divorce Act, the applicant must persuade the Court that the circumstances have changed to an extent that there are sufficient reasons for the custody or access order granted to be rescinded or varied. See **Stock v Stock 1981 (3) SA 1290 G-H; Jackson v Jackson 2002 (2) SA 303 (SCA) at p.307 G-H par.[5] and P v P 2007 (5) SA 94 (SCA) at p.102 I –J par.[27]**.

[52] The best interests of the child are always paramount in deciding the issue of custody and access. Those circumstances are: the age, state of health, social and financial position of the parents, their character, temperament and past

behaviour towards the child, the age, sex, health and character of the child, his educational and religious needs and personal preference. The list is not exhaustive. See **Section 28** of the Constitution of the Republic of South Africa, 1996 (Constitution) and **McCall v McCall 1994 (3) SA 201 (CPD) at 204 to 205 A-F**; **Jackson v Jackson** ***supra*** and **F v F 2006 (3) SA 42 (SCA)**.

[53] When one considers the material issues and conflicts in the various affidavits filed by the parties in respect of the final order sought, it should be noted that the Court is not bound by the parties' contentions, as the guiding principle is the interests of the minor child which are paramount. See **Jackson v Jackson** *supra*. See also **Van Oudenhove v Gruber 1981 (4) SA 857 (AD) at 867**.

[54] As at the 24th December 2007 when Lever AJ granted the interim order, it would seem from the totality of the evidence presented, that there was nothing on record to suggest that the minor child's interests were threatened or in eminent danger which factors would have persuaded the Court to vary or rescind the Divorce Order granted. Instead, there were allegations and counter allegations by both parties with regard to the best interests of the minor child. The Family Counsellor simply gave an opinion based on her interview with the minor child which did not justify the variation of the Divorce Order. The fact that the minor child preferred to stay with his father because they play games on the play station together, does not make the respondent an unsuitable parent. Up to this stage, there is nothing in the applicant's affidavits to indicate that the respondent is not a suitable person capable of exercising custody over the minor child.

[55] Even after the interim order was granted, there is nothing on record prove, on a balance of probabilities, that the respondent as the parent who was granted

custody of the minor child or to whom the primary residence of the minor child was granted, was exercising her powers or failing to exercise her powers in the best interests of the minor child.

[56] The applicant stated in the various affidavits that he sometimes works out of town or comes back home late, and that in those instances, the minor child would be in the care of a domestic worker. In the interest of the minor child, the respondent intimated that she will fetch the child from school during the week and will be in a position to take care of the child in the evenings and even assist with his school work. The involvement of the respondent in assisting the child in his homework is in the best interests of the minor child especially in view of the fact that the class teacher had raised concerns about the minor child's performance at school.

[57] I am of the view that it is in the interest of the minor child that he be left in the care of his mother who will provide both physical and emotional nourishment and support to the child instead of a domestic worker who cannot fulfil and provide the love and care provided by the mother to the minor child. The bond between a minor child and his biological mother cannot be overlooked.

[58] Furthermore, although the applicant had raised a concern about the alleged vulgar words used or uttered by the minor child, there is nothing on record to substantiate the allegations that he was influenced by the grandmother to use the vulgar words. The respondent has conceded that the minor child did use vulgar words at some stage, and that she took the initiative of addressing the problem by complaining to the crèche where the minor child was attending.

[59] The applicant and the Family Counsellors as well as the Family Advocate did

not take any action by investigating the source or the root cause of the child's use of vulgar words, but rather believed what a 5 year old minor child told them. No effort whatsoever was made to investigate the assaults on the minor child attributed to the grandmother.

[60] I have considered the affidavits of the applicant and the respondent as well as oral evidence presented and cannot find anything to refute the respondent's intimations that she will take care of or give love and support to the minor child. If indeed the applicant believed that the grandmother had a negative influence on the minor child, such a threat has become moot because the grandmother has passed away. However, I am not making a finding that there was any truth in the allegations levelled against the grandmother.

[61] The Family Counsellor's evaluation of the circumstances of both the applicant and the respondent is not objective. Great reliance was placed by the Family Counsellor and the Family Advocate on the minor child having bonded with the applicant because of passage of time. It was for that reason that they held the view that the child's program will be disrupted if custody or the primary residence of the minor child were to be granted to the respondent.

[62] It is however, not clear as to how the removal of the child from the interim custody of the respondent would have negatively affected the child. Even when in 2010, several attempts were made by the respondent to persuade the Family Advocate to conduct a fresh investigation regarding the minor child's preference to stay with the respondent, the Family Advocate did not show any interest or urgency in addressing the issue. The first report took the office of the Family Advocate almost fifteen (15) months to prepare. I consequently find that not much reliance can be placed on their investigation and evaluation

of the circumstances of the minor child.

[63] At the time when the minor child was interviewed by the Family Counsellor, he was 5 years old. Things like a play station and games enticed him to prefer to stay with the applicant. Presently, at the age of 10 years, he has indicated his preference to be with his mother because with maturity, he has found fulfilment in the comfort of his mother other than in toys or gargets or playing games with his father. It would be against his interests to deprive him of this right.

[64] In **P v P** *supra* **at par.[14]** the Court held the view that:

> "Determining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children."

I am of the view that because of the communication breakdown between the applicant and the respondent, indicated especially from the lack of cooperation by the applicant, it would not be appropriate to grant an order awarding joint custody of the minor child to both parties.

[65] I accordingly find that the order for the custody and access to the minor child granted in paragraph 2 of the Divorce Order of the 4th June 2007 cannot be varied or set aside save for the regulation of the nature of the access suggested by the respondent. The respondent may approach the Maintenance Court for the variation of the Maintenance Order.

[66] Order

1. The interim order (PART A) granted by Lever AJ on the 24th December

2007 is set aside;

2. The application for the custody of and access to the minor child O N M (PART B) of the Notice of Motion is dismissed with costs;

3. The custody of the minor child namely O N M, is awarded to the respondent in accordance with the Divorce Order granted by this Court on the 4th June 2007;

4. The applicant shall have access to the minor child as follows:

   4.1 On every alternate weekend from 17h00 on Friday until 18h00 on Sunday;

   4.2 On every alternate long school holiday;

   4.3 On every alternate Christmas and New Year holidays;

   4.4 On the applicant's birthday and father's day;

   4.5 Alternate birthdays of the minor child;

   4.6 Reasonable telephonic contact with the minor child between 18h00 and 19h00.

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M M LEEUW
JUDGE PRESIDENT
NORTH WEST HIGH COURT

APPEARANCES:

DATE OF HEARING:	20 MAY 2013
DATE OF JUDGMENT:	12 AUGUST 2013
ADVOCATE FOR THE APPLICANT:	ADV ZWIEGELAAR
ADVOCATE FOR THE RESPONDENT:	ADV SCHOLTZ
ATTORNEYS FOR THE APPLICANT:	SM MOOKELETSI ATTORNEYS
ATTORNEYS FOR RESPONDENT:	VAN ROOYEN TLHAPI WESSELS INC.