IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 2901/2010

In the matter between:

M M **Applicant**

and

A V **Respondent**

Heard: 12, 13, 17, 18, 19 October 2011 and 9 November 2011

Court: Acting Judge J I Cloete

Delivered: 16 November 2011

JUDGMENT

CLOETE AJ:

INTRODUCTION:

[1] This matter comes before me on oral evidence for the determination of certain specific issues pursuant to orders which I made on 23 November 2010. Costs orders are standing over in respect of these orders as well as orders made on 26 February 2010, 17 May 2010, 2 December 2010 and 16 March 2011, together with the costs of an interlocutory application brought by the applicant against the respondent under case no 12660/2010.

BACKGROUND

[2] The parties met one night in August 1999. Their son, M, was conceived that night and the parties' respective versions of events surrounding the child's conception are divergent. According to the applicant he has no recollection of the events of that night due to his state of intoxication and has in fact no recollection of having had sexual intercourse with the respondent on that night. He states that the only proof he has that the parties indeed had sexual intercourse on the night in question is the outcome of the

paternity tests conducted on M, which established the applicant to be M's biological father. M is now 11 years old.

[3] It is the respondent's contention that the applicant stated to her, subsequent to the night in question, that he remembered having had sexual intercourse with her. She says that she has no recollection of having had sexual intercourse with the applicant due to her intoxicated and/or drugged state and that she could not have consented to sexual intercourse in the circumstances. Because, so she contends, the applicant could remember having sexual intercourse with her, he must have been in a position to know that she was not able to consent to sexual intercourse with him: accordingly she was raped and the applicant cannot therefore acquire parental rights and responsibilities in respect of M as contemplated in s 21 of the Children's Act 38 of 2005 *('the Children's Act)* as read with the definition of *'parent'* contained in s 1 of the Children's Act. The allegation of rape was raised for the first time by the respondent on 1 February 2010 when M was 9 years old, shortly prior to the applicant commencing proceedings in this court on 12 February 2010 for the recognition and definition of his parental rights and responsibilities in respect of M.

[4] Section 21 of the Children's Act provides as follows:

''21 Parental responsibilities and rights of unmarried fathers

(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child -

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(b) if he, regardless of whether he has lived or is living with the mother -

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

(2) This section does not affect the duty of a father to contribute towards the maintenance of the child.

(3) (a) *If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1)* (a) *or* (b), *the matter must be referred for mediation to* a *family advocate, social worker, social service professional or other suitably qualified person.*

(b) *Any party to the mediation may have the outcome of the mediation reviewed by a court.*

(4) This section applies regardless of whether the child was born before or after the commencement of this Act.'

[5] The relevant portion of the definition of *'parent'* in s 1 of the Children's Act reads as follows:

' "parent", in relation to a child, includes the adoptive parent of a child, but excludes -

(a) the biological father of a child conceived through the rape of or incest with the child's mother...'

HISTORY OF THE LITIGATION

[6] The parties enjoyed a co-operative and comfortable co-parenting relationship until the respondent became involved with her husband R V during 2007. From that time onwards their relationship steadily deteriorated with more and more issues being raised by the respondent in regard to the applicant's involvement in M's life. This resulted in the applicant eventually appointing a clinical psychologist, Bernard Altman, to conduct an assessment as to what care and contact arrangements would be in M's best interests. The respondent at that stage steadfastly refused to attend mediation with the applicant in order to resolve their differences. (She also subsequently withdrew from Mr Altman's assessment despite initially having agreed to co-operate therein.)

[7] A dispute then arose about the applicant's contact with M over the December 2009/January 2010 school holiday. On 30 November 2009 R V addressed an email to Mr Altman in which he advised that:

As with immediate effect, M will not be going on holiday.

We have been reasonable, but as he has threatened us he must go and get a court order. I suggest that he applies for legal guardianship through the High Court before he applies for the court order. His rights are not automatic and we aggressively defend our rights.

I am not interested in someone taking up all the airtime and distressing my wife over nothing.'

[8] The parties were unable to resolve the holiday contact dispute and the applicant decided to approach court for relief. Before the issuing of that application the respondent was provided with a copy of the notice of motion in the hope that litigation could still be avoided.

[9] Thereafter at a round table meeting held on 10 December 2009 the parties resolved the holiday contact dispute with the assistance of their respective legal representatives. However, the respondent made it clear that she disputed that the applicant had any parental rights and responsibilities in respect of M. It was thus recorded in a letter from the applicant's attorney to the respondent's erstwhile attorney

that:

'In the circumstances, we confirm that we will not be pursuing an application on an urgent basis, but indeed intend proceeding with an application in the new year to confirm our client's parental rights and responsibilities in view of your instructions, as conveyed on today's date, that these are in dispute.'

[10] It appears that the applicant was in the process of finalising the present application when on 1 February 2010 he received an email from the respondent accusing him for the first time of rape and essentially threatening to raise this in the event of him pursuing parental rights and responsibilities in respect of M.

[11] When the application was launched on 12 February 2010 the applicant thus sought both urgent interim relief and long-term relief.

[12] The applicant sought that a rule *nisi* be issued calling upon the respondent to show cause on a day determined by the court why an order should not be made, *inter alia,* recognising that the parties were co-holders of parental rights and responsibilities, that M would reside with such party as recommended by Mr Altman, that the parties should make joint decisions in relation to certain aspects of M's life, that contact should take place during school terms on the basis of alternate weekends from a Thursday until a Monday morning and in the alternate week on a Thursday until a Friday morning, that vacations be shared on an equal basis, that the parties have contact with M on certain special occasions and public holidays, that the parties have certain rights in respect of contact with M's school and teachers and that a facilitator be appointed to address any disputes arising between the parties in the exercise of their parental rights and responsibilities.

[13] On an interim basis, and pending the final determination of the application, the applicant sought an order that his contact with M take place as set out above, that other relief in respect of care and contact periods and contact with school teachers be implemented, that the respondent be directed not to remove M from the Republic of South Africa without the applicant's written consent and that she hand M's passport to her attorney for safekeeping. In addition, an order was sought directing the respondent to co-

operate with Mr Altman and to make herself and M available to Mr Altman as and when he requested for this purpose.

[14] Given that the respondent disputed the applicant's parental rights and responsibilities it was not unexpected that he was advised to proceed with an application in this regard: indeed this was the very route which R V had indicated that he should take.

[15] On 26 February 2010 Cleaver J granted an order ("the February 2010 order"). In terms of such order, the matter was postponed to 17 May 2010 and certain interim relief was granted. This included, *inter alia,* that M would remain in the respondent's primary care (which the applicant did not seek to alter on an interim basis) and that most of the contact and related provisions would be implemented. In addition, it was ordered that neither party would be permitted to remove M from the Republic of South Africa without the other party's written consent. The relief sought in respect of Mr Altman was also granted, with the addition of a condition that Mr Altman would only consult with M after he had consulted with the expert appointed by the respondent.

[16] The respondent recorded in the February 2010 order that she:

'...does not hereby concede that the matter warrants an urgent hearing and reserves the right to argue the question of urgency, the procedure by which the applicant approached this Honourable Court and any question of separation of issues."

[17] In response to the main relief sought by the applicant, the respondent in her opposing affidavit filed subsequent to the February 2010 order, in turn sought an order as follows:

"96. I accordingly humbly pray for an Order in the appropriate terms, namely:

c) *That the application be dismissed with costs;*

d) *Alternatively, that the application be stayed, pending the determination of an action to be instituted, by either party, to resolve the dispute between the parties as to whether-*

e) *The Applicant is a 'parent', as defined in the Children's Act, Act 38 of 2005;*

f) *The Applicant is entitled to 'parental rights and responsibilities', as specified in the said Act; and*

g) *I am obliged to enter into an agreement as envisaged in Section 23 of Act 38 of 2005.*

96.3 Further in the alternative, and only in the event that the application is not dismissed, alternatively stayed, that the matter be referred to oral evidence."

The respondent did not seek any counter-relief in the event of an order being granted which declared the applicant to be a co-holder of parental rights and responsibilities.

[18] On 17 May 2010 the matter was postponed by agreement to 18 November 2010. Provision was made for the interim relief granted to the applicant to remain of force and effect and the respondent repeated the recordals which she had made regarding urgency and the like in the February 2010 order. The parties also agreed that:

"3. The affidavits filed by the parties shall stand as pleadings in this matter, subject to the right of either party to supplement and/or augment the pleadings in accordance with the Rules of Court."

[19] On 18 November 2010 and by agreement the following issues were argued *in limine* on the basis of an exception:

h) whether the respondent was entitled to rely on the exclusionary provision in regard to the definition of a *'parent'* in section 1 of the Children's Act;

i) in the event that the court declared the applicant to be a *"parent"* with full parental rights and responsibilities, whether the respondent could be compelled to enter into a parenting plan with the applicant in respect of M.

[20] On 23 November 2010 I delivered judgment on the points *in limine.* The facts and circumstances giving rise to my findings are fully set out therein and will thus not be repeated herein. I found that:

j) the respondent was not entitled to rely on the exclusionary provision in regard to the definition of a *"parent"* in section 1 of the Children's Act;the respondent could be compelled by the court to enter into a parenting plan with the applicant in respect of M.

After some debate as to whether this was still necessary, I also directed that the remaining issues in dispute nonetheless still be referred for the hearing of oral evidence.

[21] As a consequence of those orders, the parties agreed on 2 December 2010 ("the December 2010

order") that the matter would be postponed to 8 March 2011 for the hearing of oral evidence in respect of the issues which remained in dispute. Provision was made in the order for the interim relief contained in the February 2010 order to remain of force and effect and provision was made for contact between M and the parties during the December 2010/January 2011 vacation.

[22] As a result of the respondent's personal circumstances (she was expecting another child) the matter did not proceed on 8 March 2011. On 16 March 2011 a further order was granted by agreement postponing the hearing to 12 October 2011. The parties also agreed therein upon a detailed and comprehensive co-parenting arrangement and further provided for the appointment of a facilitator with specified powers to assist them in resolving disputes which might arise out of that arrangement. It should be noted however that the parties agreed to the co-parenting regime without prejudice to their respective rights.

ISSUES IN DISPUTE

[23] At the commencement of the hearing on 12 October 2011 the respondent indicated that certain of the main relief sought by the applicant remained in dispute. As a matter of convenience and due to certain wording and similar changes contained in the March 2011 order, as compared to the provisions contained in the applicant's notice of motion, the outstanding issues were identified in accordance with the March 2011 order. The respondent indicated that the issues which remained in dispute were as follows:

k) that the parties make joint decisions in respect of certain aspects of M's life;

l) that M spend Thursday nights with the applicant during term time (i.e. it was the respondent's contention that M should only spend alternate weekends with the applicant during term time from a Friday afternoon until a Monday morning);

m) that public holidays or non-school days preceding or succeeding a weekend should be incorporated therein;

n) that if either party or their spouse were unable to care for M during a contact period, they would first approach the other party to ascertain their availability prior to appointing a third party to care for him;

that neither party would implement a decision regarding M's schooling or education without the written consent

of the other party, which would not be unreasonably withheld. In regard to this issue, the applicant subsequently testified that this provision would not need to be included in an order if he was granted joint decision making powers in respect of M's schooling;

o) that the parties should advise each other timeously of school related and extra-mural events.

[24] Included in the March 2011 order was a provision that during holidays the applicant would not be entitled to have M with him for a period of longer than seven nights at a time. The applicant testified that he would accept the *"seven night rule"* in respect of holidays on the basis that this was an issue which could be determined by the facilitator in due course and need not be determined at the hearing of the matter, despite the fact that he did not consider the seven night rule to be necessary. The question of M's primary residence had already been resolved at the commencement of the November 2010 hearing when the applicant conceded that M should reside primarily with the respondent.

[25] All other aspects of the co-parenting arrangement were agreed to by the respondent and are accordingly incorporated in the parent plan annexed to this judgment and to which I will again refer below.

[26] The applicant thus seeks an order detailing the manner in which the parties' respective parental rights and responsibilities in respect of M should be exercised. In terms of the Children's Act, this has been termed 'a *parent plan'*.

[27] The respondent's primary objection and opposition to the relief sought by the applicant (other than her contention that he is not entitled to parental rights and responsibilities) is that she cannot be *'forced'* to enter into a parent plan with the applicant on the basis sought by him. In her affidavit she claims that she does not like the applicant and that she does not trust him and that in these circumstances she should not be compelled to co-parent M with him. It is thus necessary, before considering the evidence, to sketch the background to the current position of *'unmarried fathers'* in South African law.

[28] Prior to the implementation of the Natural Fathers of Children Born out of Wedlock Act, 86 of 1997 *("the Natural Fathers Act'),* such fathers were obliged, in terms of the common law, to apply to the High Court, as upper guardian of all minor children, to be granted rights in respect of a child born out of wedlock. In the event of there being a dispute, the rights to be conferred on such a father and the manner in which these rights were to be exercised were determined by the court. Such an order was essentially a *'parent plan'* setting out how parental rights were to be exercised.

[29] With the implementation of the Natural Fathers Act, these fathers were afforded, by statute, *locus standi* to apply for certain rights in respect of their children born out of wedlock. Again, in the event of there not being an agreement with the mother of the child, the court was required to determine which rights should be granted to the father. Similarly, if there was a dispute in respect of the manner in which any of such rights were to be exercised, the court made a determination and gave an order setting out the manner in which such rights were to be implemented; again, a *'plan'* setting out how parental rights were to be exercised.

[30] Section 21 of the Children's Act similarly makes provision for parents of children born out of wedlock to agree upon a parent plan. Where the parties are not able to agree either directly or through mediation then either party has the right to approach court in order to determine how their parental rights and responsibilities are to be exercised.

[31] Accordingly, the provisions of s 21 of the Children's Act are nothing new: they simply serve to *'codify'* the legal position which previously pertained. What is important to note is that this is entirely consistent with the *'best interests of the child'* principle enshrined in the Constitution of the Republic of South Africa. Section 28 of the Constitution stipulates that in all matters concerning a child it is the child's best interests which are paramount and that every child has the right to parental care. In my view those provisions recognise and moreover dictate that a court as upper guardian of all minor children must place the interests of the child and the rights of the child above those of his or her parents. I will turn to this aspect again herein below.

[32] In the present matter the respondent has always conceded that the applicant is a devoted father to M and that M is equally devoted to him.

[33] The respondent suggests that because she does not want to co-parent M with the applicant, there should be no order as to parental rights and responsibilities. This is tantamount to submitting that the High Court's jurisdiction (in its capacity as upper guardian of all minor children) must be ousted, notwithstanding that the best interests of M might otherwise dictate. It is in this respect that the respondent's argument is fatally flawed.

[34] Although the respondent agreed to the March 2011 order with reservation of her rights, the fact is that she agreed to the terms of that order. As will appear from what follows she subsequently declined to give any evidence at the hearing or to file any further affidavits. Accordingly she has failed to explain why she agreed to the terms of that order in light of her opposition to the application, in what manner the implementation of that order has not been in M's best interests and on what basis she continues to oppose the exercise of parental rights and responsibilities being detailed in a court order.

[35] It should also be noted that the respondent's husband, R V, who it seems has played a pivotal role in this litigation and who also deposed to an affidavit, similarly declined to give evidence at the hearing.

[36] In fact it appears that the opposition at the hearing to certain aspects of the relief sought by the applicant was on a random basis and that the purpose of pursuing opposition of the matter was to subject the applicant to cross-examination around the issue of M's conception, an issue which I had already found in November 2010 to be irrelevant to the issues at hand.

[37] Before turning to the evidence, and given that the respondent persisted, right up until conclusion of final argument, in claiming that the relief sought by the applicant was not urgent and that he had adopted the incorrect procedure, these aspects are dealt with hereunder.

URGENCY

[38] With regard to urgency, Rule 6(12) reads as follows:

'(a) In urgent applications a court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.'

[39] The rule entails two requirements, namely the circumstances relating to urgency which have to be explicitly set out, and secondly the reasons why the applicant cannot be afforded substantial redress at a hearing in due course: see *Eniram (Pty) Limited v New Woodholme Hotel (Pty) Limited* 1967 (2) SA 491 (E) at 493A-D; *I L & B Marcow Caterers (Pty) Limited v Greatermans SA Limited and Another, Aroma Inn (Pty) Limited v Hypermarkets (Pty) Limited and Another* 1981 (4) SA 108 (C) at 110A-B, 110 *in fine* to 111A and *Salt & Another v Smith* 1991 (2) SA 186 (NHC) at187A-B.

[40] The applicant correctly submits that the circumstances prevailing in February 2010 warranted him approaching the court for clarity on his parental rights and responsibilities and for an order determining how such parental rights and responsibilities should be exercised.

[41] Further, the reasons for seeking relief on an urgent basis were set out in the applicant's founding affidavit and were reiterated in his evidence. In his view there were ongoing attempts on the part of the respondent and R V to restrict his rights in respect of and contact with M. That such attempts were not always successful was as a result either of the applicant refusing to give in to such demands or the respondent withdrawing a demand on the basis of expert advice. The refusal of the respondent to attend mediation and the fact that the December 2009/January 2010 school vacation was resolved only at a meeting involving legal representatives is indicative of the fact that the parties could at that stage no longer make arrangements in respect of M amicably. The respondent's withdrawal from the assessment process by Mr Altman was also a cause for concern to the applicant who wished the assessment to be completed in order to address M's best interests. The respondent's opposing affidavit clearly displays her

attitude towards the applicant: she was prepared to afford him contact with M, but sought to retain control of the process. This was the applicant's very concern and illustrates that his belief that arrangements in regard to M should be incorporated in an order of court pending finalisation of the disputes between the parties was well grounded.

[42] Provision is made in the Children's Act for matters pertaining to children to be dealt with without delay. In Chapter 2, *('General Principles)* it is stated: *'6(4) In any matter concerning a child -*

p) *an approach which is conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided; and*

q) *a delay in any action or decision to be taken must be avoided as far as possible."*

[43] On 26 February 2010 Cleaver J entertained the application and after considering the papers and hearing submissions from counsel granted an order on an interim basis which was substantially in the terms sought by the applicant. He postponed the balance of the relief for hearing on 17 May 2010, i.e. less than three months thereafter. Had it been the view of Cleaver J that the matter did not warrant an urgent hearing, indeed he would not have heard the matter.

[44] In any event a High Court is empowered, in the exercise of its inherent jurisdiction conferred by s 173 of the Constitution, to regulate its own procedure. This includes the determination of whether a matter should be regarded as urgent. The time periods adopted in urgent matters concern not the merits of those matters, but the procedural arrangements most appropriate to the matters. In *Commissioner, SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA) at 299G-H the court said that:

'Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it "as to it seems meet"'

This in effect permits an urgent applicant, subject to the court's control, to forge his own rules.

[45] Section 173 of the Constitution provides that: *'The Constitutional Court, 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 interests of justice.' Accordingly, the only qualification on the exercise of a s 173 power is that a court must take into account the interests of justice. Given that Cleaver J entertained and dealt with the matter on an urgent basis in the exercise of his s 173 discretion, it is not open to the respondent to persist with her argument some 20 months later that (somewhat startlingly in the particular circumstances of this matter) the application should be dismissed on that ground alone. And in any event the Supreme Court of Appeal in the *Commissioner, SARS* case held that an application may not be dismissed for want of urgency (at 299G-300A).

[46] At the hearing in November 2010 I similarly exercised my discretion in terms of s 173 and noted in the judgment which I gave thereafter that: *"after this court expressed the strong view that all matters concerning children are, by their very nature, urgent, the respondent did not persist with this contention, as is apparent from the respondent's heads of argument which were delivered after argument on the first day".* Accordingly, it was entirely inappropriate for the respondent to have persisted in cross-examination of the applicant on the issue of the urgency of the application. It was simply a waste of the court's time.

[47] In any event, in view of the threats contained in the respondent's e-mail dated 1 February 2010, it is quite clear that the respondent had no intention of entering into a co-parenting agreement - *"the notion of us having a co-parenting agreement under the circumstances is ridiculous".* She considered herself to be in a position to *"allow"* the applicant to have contact with M - *"I have been impeccable in allowing you access to* /W""(emphasis supplied) - and she threatened the applicant by stating:

"I have hidden the truth for long enough and should you continue with this I will have to go public with everything as I cannot have a co-parenting relationship with you. M will eventually find out and this will damage your relationship with him. You have left me with no choice as M is being emotionally scarred by what you are putting him through. No woman who went through what I did would consider a co-parenting agreement under these circumstances. I want to focus on my family and your continuous harassment is suspect. You should rather concentrate on your own family and M A." (the applicant's wife)

[48] In the circumstances, the applicant's concerns that in the event of him not securing his contact with M while awaiting the determination of his parental rights and responsibilities were certainly not without merit.

[49] There is also no basis to suggest (as was put to the applicant) that because agreement was reached between the parties in respect of the December 2009/January 2010 vacation under threat of a court application, this somehow bolstered the applicant to approach court in February 2010. On the contrary R V himself in his letter to Mr Altman on 30 November 2009 stated that the applicant would have to apply for 7ega/ *guardianship through the High Court".* As mentioned above the respondent also refused to attend mediation. It thus cannot seriously be suggested that the applicant had any option but to approach the High Court to confirm that he is indeed a parent as defined in the Children's Act and that he holds co-parental rights and responsibilities in respect of M together with the respondent.

REFERRAL TO ORAL EVIDENCE

[50] The respondent contends that the applicant should have proceeded by way of action and reserved *"the right to argue ..... the procedure by which the applicant approached this Honourable Court....."*.

[51] Despite her contention that the applicant should have proceeded by way of action and not motion, the matter was thereafter and by agreement referred for the hearing of oral evidence. And it has not been contended by the respondent that she would have testified at a trial commenced by way of action despite her having declined to testify at the hearing of oral evidence pursuant to the application launched by the applicant.

[52] In addition the applicant could not reasonably have foreseen the extent to which the allegations contained in his founding affidavit (in particular about the history of the parties' co-parenting) would be disputed by the respondent. And I have serious doubts that the disputes raised by the respondent in her opposing papers were *bona fide* and genuine. A dispute of fact disentitling an applicant to the relief sought is not created by a respondent putting up a plethora of facts which, as proved to be the case in the present matter, are legally irrelevant to the relief sought. To my mind, that the respondent did not advance a genuine dispute of fact is also evidenced by the abundance of uncontested oral evidence to the contrary.

[53] In regard to the question of giving evidence when matters are referred to oral evidence, it is stated in

Erasmus, *The Commentary on Superior Court Practice* at B1-51 that:

"Where the application is referred to oral evidence, it can be justifiably expected of the respondent, if he has any confidence in his own version, to reiterate that version in oral evidence and to submit that version to be tested by cross-examination. Where there is a strong prima facie case in favour of the applicant at the close of his case, a Court is entitled to draw an adverse inference against the respondent should he fail to testify in support of the allegation in his opposing affidavit that the applicant has no case whatsoever."

[54] In *Humphrys v Lazer Transport Holdings Ltd* 1994 (4) SA 388 (C) at 400D-F it was said that:

"Thirdly, the Court a quo drew an adverse inference against appellant from his failure to testify. Mr Hodes submitted that the Court erred in doing so. According to Mr Hodes, appellant's answer to the allegations by K was already a matter of record in his opposing affidavit and it was thus not necessary for him to repeat his answer by way of oral evidence. We do not agree with this argument. At the end of the respondents' case there was at least a strong prima facie case in their favour. On appellant's version in his opposing affidavit, the respondents had no case for rectification whatsoever. One of the very reasons for referring the matter for the hearing of oral evidence was the factual dispute regarding this aspect. In these circumstances, we believe, it could justifiably be expected of appellant, if he had any confidence in his own version, to reiterate that version in oral evidence and to submit this version to be tested by cross-examination."

[55] In regard to the calling of witnesses, it was stated in *Galante v Dickinson* 1950 (2) SA 460 (A) at 464 and 465 that:

"In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong, that the party and his legal advisors are satisfied that, although he was obviously able to give material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination."

And later:

"It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant himself was the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of the alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant."

[56] In *Venter v Credit Guarantee Insurance Corporation of Africa Limited* 1996 (3) SA 966 (A) at 980 Grosskopf JA stated (at 980B):

'In my judgment the first plaintiff had done enough to establish at least a prima facie case -one which

called for an explanation by the first defendant. That explanation was not forthcoming. In the absence of any evidence by or on behalf of the first defendant that prima facie case became conclusive.'

[57] The applicant testified and called two witnesses, his wife M A and a family friend Ms Osrin. The applicant was cross-examined for three days by the respondent's counsel. His wife, M A, was not cross-examined at all and her evidence stands uncontroverted. Ms Osrin was cross-examined but her evidence was unchallenged in all material respects. The respondent closed her case without giving evidence or calling any witnesses.

[58] From the evaluation of the evidence which follows there is no doubt that the applicant established a *prima facie* case in regard to the issues which still remained in dispute and that indeed it was one which called for an explanation by the respondent. It should be noted that when the respondent closed her case without giving evidence or calling any witnesses, I pertinently drew the attention of her counsel to the risks which she faced. The respondent nonetheless chose not to reopen her case.

[59] The respondent seems to have adopted the tactic of *'attack is the best form of defence'.* In his closing argument the respondent's counsel focussed essentially on two aspects. The first related to the procedure adopted by the applicant (i.e. urgent motion proceedings) which I have dealt with above and which was nothing other than a *'red herring'.* The other was to attack the applicant's credibility arising out of the three days of cross-examination to which he was subjected. It was submitted that the applicant was evasive and was an untruthful witness who exaggerated or who was manipulative.

[60] I disagree. Whilst it cannot be said that the applicant is eloquent and consistently articulate, having had the opportunity to observe him over a period of four days in the witness box (including his evidence in chief) it is clear that his tendency to wander off the topic at hand is more a reflection of his own personal style of communication than an attempt to be evasive or untruthful. For days he was cross-examined on aspects which largely had nothing or little to do with the remaining disputes between the parties. Despite him being candid in his evidence that he simply could not remember the detail of the night of M's conception, the respondent's counsel continued, undeterred, to canvas the same ground over

and over. In addition on numerous occasions it was put to the applicant that he had made certain averments in his affidavits which it transpired he simply had not made. The respondent appeared to have lost sight of what issues remained in dispute. And in respect of those aspects of the cross-examination which indeed dealt with the remaining issues in dispute, the applicant impressed as an honest witness personally invested in the relief sought: he loves his son and wishes to have as much influence in his life and contact with him as possible.

[61] The applicant sought, as a caring and involved father against whom a serious allegation had been made, to convey to the court his concern for his son and his wish not only to remain an involved father with regular contact with his son but for his son to retain what is an undisputed close and meaningful relationship with the applicant, his wife and his half-siblings.

EVIDENCE CONCERNING ISSUES IN DISPUTE Joint

decision making

[62] It was the applicant's undisputed evidence that he had always been a part of M's life and had always contributed thereto, both financially and otherwise. By making joint decisions he would add value to M's life as he and the respondent had different parenting styles which were both valid. He further stated that M looked up to him and that he believed his input was important. When it was put to him that the respondent had indicated that a parent plan would create chaos and that he would only become *'more demanding',* the applicant replied that since the March 2011 order no parenting issues of any significance had arisen and that it had not been necessary to call upon the services of the facilitator at all. He indicated that a slight dispute in respect of vacation contact in June/July 2011 was resolved between the parties by e-mail. The applicant stated that in the event of there not being joint decisions in regard to major issues, this would potentially cause havoc as he could make one decision and the respondent another, which would in turn have an adverse affect on M.

[63] As to the history of joint decision-making, the applicant testified that:

63.1. In regard to M's name, the respondent had consulted him and indicated that she wished to call the child to be born, M. The applicant indicated that he was in agreement that M be so named. In cross-examination, it was put to the applicant that there had been Very *little discussion'* and that it was in

fact the respondent who chose the name M. The applicant replied (and this was consistent with his evidence in chief) that the respondent had suggested M's name, that he *'loved it'* and that he had consequently agreed. This indeed constitutes a joint decision, regardless of which parent originally suggested the name.

63.2. In regard to M's attendance at creche, the applicant testified that again this was a joint decision, but that he had been guided by the respondent concerning an appropriate creche. In cross-examination it was put to the applicant that he *'was overstating'* the part that he had played in decision-making. The applicant responded that although he had little knowledge of creches and such things and although his input was limited, there was a discussion and he was afforded the opportunity by the respondent to decide jointly with her on the choice of creche.

63.3. In regard to M being christened in the Catholic Church and raised in the Catholic faith, the applicant stated that he had been fully involved in M's christening and although he was not religious he was supportive of M being raised in the Catholic faith given that it was the respondent's faith. This was clearly something which he and the respondent had discussed and agreed upon.

63.4. In regard to M's enrolment at primary school, the applicant stated that he and the respondent had considered various schools and that application had been made both to SACS and to Rondebosch Boys Primary School. He stated that he and the respondent had together attended the interview with the headmaster at SACS and that as a result of the interview had not pursued applications at any other schools. It was put to the applicant in cross-examination that no discussions had in fact taken place and that the joint interview with the headmaster was a requirement of the school. The applicant replied that he had indeed been involved in the process and denied what was put to him in regard to the joint interview. No evidence of such a requirement was set out in the respondent's affidavit and it is common cause that no evidence was led on her behalf in this respect. The applicant's knowledge of the application process and the schools considered is illustrative of his involvement in the process.

63.5. With regard to decisions concerning M's medical treatment, the applicant testified that both parties had been involved therein, *inter alia,* certain operations which M underwent and when M required emergency medical attention after sustaining a laceration to his head. The applicant also stated that in regard to M being placed on Ritalin, although he had wished this to be further investigated, he respected the respondent's view that the child should not be prescribed this medication. In view of M *'doing alright'* at school he did not believe that it was an issue which should be pursued. This is illustrative of the fact that the applicant does not pursue his own wishes or interests at the expense of M's as was

suggested to him in cross-examination.

63.6. The applicant also stated that historically, weekday, weekend and vacation contact had been agreed between the parties. He acknowledged that when the parties approached Carol Phillips, a social worker to whom the parties were referred by clinical psychologist Graham Alexander, the respondent's boyfriend at the time, he was not initially happy with the structure recommended by Carol Phillips as it reduced the time that he spent with M during the week in term time. However, he recognised that the proposed structure (which is the current contact structure during term time) was in M's interests and provided a routine for him. The applicant confirmed that this structure had been in place since M was in Grade 1, in other words, for a period of five years.

[64] As to his involvement in future decision-making in respect of schooling, it was asked of the applicant during cross-examination whether he had any reason to believe that the respondent would remove M from SACS. The applicant indicated that he hoped that the respondent would not do so, but that he had a concern in regard to her making unilateral decisions given her attempts to do so in respect of his Thursday contact with M, the division of school vacations and her attempts to exclude him from being M's parent. The applicant testified that he believed that he could add value to joint decision making in respect of subject choices for M as well as his extra-mural activities while at the same time recognising the respondent's role, given that she had different attributes which he respected. There is no evidence to suggest that the applicant has ever made or sought to make decisions in respect of M which are contrary to his interests. It appears that it is rather the respondent's personal wish not to make decisions together with the applicant than there being any suggestion that his contribution to decision making would be contrary to M's best interests.

[65] In regard to joint decision making on future contact, the applicant testified that the respondent and her husband R V sought to reduce his contact to M both during term time and vacations. The applicant also raised the issue of attending M's rugby matches on weekends when M was in the respondent's care. It was put to the applicant in cross-examination that <u>in fact</u> M continued to spend Thursday nights with the applicant and that the applicant had not been precluded from attending M's rugby games. Of course, the reason why the Thursday overnight contact had continued was because the applicant had approached court for an interim order to that effect. As to the rugby matches, it was only on the advice of Carol

Phillips that the respondent allowed the applicant to continue to attend.

[66] Despite the respondent's (somewhat hollow) protestations to the contrary in her opposing affidavit the evidence clearly shows that the parties have successfully made joint decisions concerning M in the past and that there is no sound reason why they should not continue to do so, if necessary with the assistance of the facilitator.

Thursday night sleepovers

[67] On 18 February 2009 R V had sent an e-mail to the applicant the subject of which was *"Our future structure regarding our relationship with you".* In such e-mail R V stated, *inter alia,* that:

'The foundation for children to thrive is stability and structure. M is an intelligent child, but gets distracted easily, for this reason we want to implement a situation where M has one home consistency. M will not be staying at your house on Thursdays. He will only be with you every second weekend, we do not see the sense that his sleeping structure be changed to give you access of a couple of hours it makes no sense. If you love your son you will not get involved in the EGO but see what is good for him. I hope to receive your support on this matter. M will be with you every second weekend. I would like you to respect our home and also to encourage M to have a respectful relationship with me as he is a fantastic child. I look forward to your support of our process for the good of M.'

[68] It was put to the applicant in cross-examination that the e-mail did not *'come out of the blue'* as the respondent had discussed this issue with him previously. The applicant replied that the Thursday issue had arisen within the context of a discussion with Carol Phillips about a new routine for M. It is common cause that this discussion took place in 2007. Accordingly the e-mail was indeed a shock to him. It was the applicant's evidence that the only reason why the status quo regarding Thursdays has remained in place was because he was not prepared to give in to the respondent's demands and had taken steps by way of this application to have his rights recognised and defined.

[69] It was the applicant's evidence that prior to M commencing Grade 1, he had spent one night of each weekend (and on occasion full weekends) as also a night or nights during the week with the applicant. Since the time of the meeting with Carol Phillips in 2007, the routine has been that M spends Thursday night in one week with the applicant and in the alternate week the Thursday overnight forms part of the

weekend with M being returned to school on a Monday morning. The applicant's uncontested evidence was that this is the regime to which M is accustomed and that he has successfully adjusted to it. The applicant assists M with his homework on a Thursday in preparation for school tests each Friday. The applicant also testified that since he was a few months old there has never been a time in M's life (save obviously for those holiday periods when he is with the respondent) that he has not spent at least one night per week with the applicant.

[70] It was also the applicant's uncontested evidence that he has regular contact with M's school teachers, that they are aware of his involvement with M's school work and that both in his view and due to feedback which he has obtained, the input which he gives is beneficial to M. The applicant indicated that he did not seek to underestimate any assistance which the respondent provided to M in his school work, but pointed out that save for the present time when the respondent is on maternity leave, the only day on which M is fetched early from aftercare is a Thursday when the applicant fetches him, since the respondent works full time.

[71] The applicant testified that it is important for M to have contact on a Thursday with him, his wife M A as well as M's half-siblings. It was the applicant's evidence, and confirmed by M A in her evidence, that the latter had discontinued attending book club as M likes to have his family together on a Thursday evening. It is also an important consideration for his half-siblings, L and S, given their close relationship with M. The applicant said that in his view it would negatively affect M (and his half-siblings) if he did not have Thursday afternoon and evening contact with the applicant and his family. In her evidence, M A stated that she believed that M would be *'very sad'* if he was not able to continue to spend Thursday evenings with the applicant and his family.

[72] In cross-examination it was put to the applicant that as *'a mother'* it was understandable that the respondent would want *'her child'* to be at home with her during week nights. The applicant replied as follows: 7 *think that if we had agreed to this it would have been terrible for M and his brothers. It would be breaking up a consistency that this child has known for years and years. R V talks about "one home consistency". M has always known two homes.'*

[73] It is clear from the evidence of both the applicant and his wife that it is in M's best interests to continue overnighting with the applicant on a Thursday, given the benefits to him of having direct input from his father in respect of his school work, having contact with his step-siblings and stepmother, and that there is no evidence whatsoever to suggest the contrary.

Public Holidays

[74] The applicant testified that since the implementation of the March 2011 order there had been no disputes between the parties about M spending a public holiday immediately preceding or succeeding a party's scheduled contact weekend with him/her. It was the applicant's uncontroverted evidence that since the deterioration in the parties' relationship the respondent has *"not allowed"* these public holidays or non-school days to be incorporated in a weekend, it would appear, at her whim. The applicant and his family regularly go away for weekends (and holidays) and plan these away trips ahead of time. Disruptions to these plans by the respondent not only affect M, but the whole family. The view which the applicant expressed was that it was fair for M to be able to spend alternate public holidays with the parties and extended weekends with them respectively when these arose. It seems to me that there is no reasonable basis as to why I should not grant this relief to the applicant. It will provide certainty, not only for the parties, but in particular for M.

Care arrangements when a parent or step-parent is away

[75] It was the applicant's evidence that in his view should the respondent or R V not be in a position to care for M during periods of contact with the respondent, he (i.e. the applicant) should be given the opportunity to care for M and vice versa. There is no evidence to suggest that this is not reasonable or that such an arrangement would not be to M's benefit, particularly since the uncontested evidence is that M is accustomed to moving easily between the parties' two homes.

Notification of school events

[76] The applicant testified that notification of school events was simply a practical measure to ensure that both parties had notice of all events which took place. The applicant indicated that generally speaking the school contacted both parties but that certain events arose on short notice and one or other parent might not be notified timeously as a result. Given the respondent's view that she wishes to

minimise direct contact with the applicant, it was also the applicant's evidence that e-mail or sms contact was all that was required. The applicant's wife M A testified about an incident when M had become distressed by not knowing whether the applicant would attend his prize giving. It was her evidence that both from a practical point of view and in M's interests, information in respect of such events should be communicated by the parties to each other. In these circumstances I see no reason why the applicant should not be granted this relief.

THE RELATIONSHIP BETWEEN THE PARTIES

[77] It was the applicant's evidence that subsequent to it being established that he was in fact M's father (on the basis of paternity tests being conducted) he and the respondent developed a co-operative parenting relationship. As to the respondent's allegation in her affidavit that he had harassed her during her pregnancy, the applicant stated that this was not the case given that he had fairly limited contact with her during that time. At that stage there was no certainty about M's paternity and the applicant was in the process of reconciling his relationship with M A to whom he was subsequently married. Similarly, the applicant denied the allegation that the respondent was unhappy with him visiting M at creche as alleged.

[78] The applicant testified that indeed the relationship with the respondent had consolidated subsequent to M's birth when M A had approached her. It is common cause that M A and the respondent had become firm friends. The applicant referred to various photographs showing the respondent's involvement, together with him and M A, not only in events particular to M, but also events such as S's christening, L's christening (where the respondent was appointed the sponsor), Christmas and other family events.

[79] The applicant stated that the respondent also went away on a weekend with his family and other families to Onrus and had spent two nights in Umzumbe, KwaZulu-Natal with them during a family vacation. Both the applicant and M A gave evidence about the level of comfort which the respondent displayed in their presence on these vacations, *inter alia* (as appears in the DVD clip discovered) drinking shots and encouraging the applicant to do so. This evidence was not challenged.

[80] It was also the applicant's uncontested evidence that the respondent was in fact involved in discussions pertaining to issues such as L's schooling. M A gave evidence as to how the respondent referred to herself as *'your Annie'* to L and that she would generally *'kick off her shoes'* as she walked in the door to their home, often making her own tea and staying for a drink or supper with them when she fetched M. It was the evidence of both the applicant and M A that this was clearly not required of the respondent, but was a mark of the close and comfortable friendship which had been established between the three of them as well as with extended family members.

[81] It was also the evidence of both the applicant and M A that the close relationship between the three began deteriorating when the respondent met R V. Both the applicant and M A indicated that they had naturally anticipated seeing less of the respondent given her new relationship, but had expected to have contact with both the respondent and R V as they had done with the respondent and her previous boyfriend, Graham Alexander.

[82] It was put to the applicant in cross-examination, *inter alia,* that:

82.1. he was jealous of R V;

82.2. he was aggrieved that the respondent was no longer "a *member of his family",*

82.3. he had feelings for the respondent; and

82.4. he was *'paranoid'* about R V's motives.

[83] It was the evidence of both the applicant and M A that, whether coincidental or not, the change in the good co-parenting relationship and friendship between the adults indeed coincided with the respondent becoming involved with R V. It was the uncontested evidence of Ms Osrin that the respondent had told her in October 2007 that she had ended her relationship with R V because she found him to be domineering and controlling and that he was interfering in the special relationship which she had with the applicant and his wife. Ms. Osrin said that she had therefore been surprised when she had later heard that the respondent had become engaged to R V.

[84] Against this background, for the respondent to have suggested (as she did) that the relief which the applicant seeks stems from his personal animosity towards R V is without merit and is not substantiated by the evidence. It seems that the opposite is the case, namely that it is R V who is unable to put aside his personal insecurities towards the applicant and that this has adversely influenced the respondent.

[85] There is simply no substance to the respondent's allegations that she was ever in any manner afraid of and/or uncomfortable in the company of the applicant. In fact, the evidence suggested quite the contrary.

[86] As mentioned above the respondent elected not to give evidence about the night of M's conception, to explain why she subsequently went on a date, alone, with a man who she now alleges raped her, why she nonetheless involved him in M's life to the extent which she did for years, and why she elected to involve herself in the home and family life of the applicant and M A when her *'reliance'* on them as babysitters (given that she was a single mother) required no more of her than to fetch M and drop him off at the door of their home. Indeed the totality of the evidence rather indicates that the rape allegation was nothing more than a ruse concocted by the respondent in order to try to exclude the applicant from M's life. And again it cannot be ignored that the breakdown of the parties' relationship coincided with the respondent becoming involved with R V.

LEGAL PRINCIPLES IN MATTERS PERTAINING TO CHILDREN

[87] In matters pertaining to children, Section 28(2) of the Constitution reads as follows:

'2. A child's best interests are of paramount importance in every matter concerning the child.'

[88] The concept that the interests of the child are of paramount consideration is also contained in Article 3(1) of the United Nations Convention on the rights of the child. The convention was adopted unanimously by the general assembly of the United Nations on 20 November 1989. South Africa became a signatory to the convention on 29 January 1993 and it was ratified by South Africa on 16 June 1995.

[89] The *'best interests of the child'* principle has underpinned both statutory provisions pertaining to children as well as our case law and is retained in the Children's Act. In fact, the Children's Act goes further and places significant emphasis on child participation in decisions in respect of their care and wellbeing.

[90] It was stated in *Terblanche v Terblanche* 1992 (1) SA 502 (W) at 504C-D that the court has *'extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes'.*

[91] In *September v Karriem* 1959 (3) SA 687 (C) at 689A Herbstein, A J P stated:

'If the Court is of the opinion that it should interfere with the rights of the parents, because the interests of the children demand such interference, it should be at large to act in the manner best fitted to further such interests.'

He stated further *'It seems to me that the Court as upper guardian should be given as complete a picture of the child and its needs as possible. Nothing of relevance should be excluded. For while certain aspects taken separately might appear to be of no real importance, in combination they might build up a strong case in favour of one or other conclusion.'*

[92] In **e** *v S* 1995 (3) SA 571 (A) at 581 A, Howie JA referred to Re *KD (a minor)(ward: termination of access)* [1998] 1 All ER 577 (HL) at 588g-j, and quoted with approval:

'Parenthood, in most civilised societies, is generally conceived as conferring on parents the exclusive privilege of ordering, within the family, the upbringing of children of tender age, with all that that entails. That is a privilege, which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed both by the general law and, where the circumstances demand, by the courts or the authorities on whom the Legislature has imposed the duty of supervising the welfare of children and young persons. When the jurisdiction of the court is invoked for the protection of the child the parental privileges do not terminate. They do however, become immediately subservient to the paramount consideration which the court has always in mind, that is to

say the welfare of the child.'

And further (in reference to rights of contact), that:

'Whatever the position of the parent may be as a matter of law, and it matters not whether he or she is described as having a *'right' in law or a 'claim' by the law of nature or as a matter of common sense, it is perfectly clear that any 'right' vested in him or her must yield to the dictates of the welfare of the child.'*

[93] In Bobera's Law of Persons at page 319 footnote 17 it is stated that:

'It has long been recognised in South Africa that the parental power (or "natural guardianship") is in fact concerned more with duties and responsibilities of parents than with parents' rights and powers - the modern emphasis in this regard being on the rights and interests of children rather than parents'.

[94] The law is thus clear: it is the interests of the child which are paramount in all matters concerning a child and the interests of the child take preference over the interests of the parents. No evidence was placed before me to indicate that the relief sought by the applicant is not in M's best interests. The thrust of the respondent's evidence (on affidavit) pertains to her wish not to co-parent M with the applicant, rather than that the relief sought by the applicant is not in M's best interests.

[95] In this matter, the respondent has now adopted the stance that she does not wish to co-parent M with the applicant: this after, on her own version, facilitating the applicant's involvement in M's life to a significant degree since the time of his birth. It is not now open to the respondent, in the absence of the applicant failing to act in M's best interests, to simply elect not to co-parent with him. This would simply serve to lend the lie to our established legal principles that where arrangements are inconvenient to a parent or parents but serve a child's best interests, then that inconvenience is outweighed by the interests of the child.

[96] In South Africa, and sadly by virtue of its appalling history of human rights failures and the consequent legacy of social and societal disadvantages, it seems to me that the protection and promotion of the rights of children is all important. When these most vulnerable members of our society are protected by our courts so that they can have, *inter alia,* proper parental care it will follow (at least in the majority of cases) that as adults they will in turn inculcate the same values in their own children. If we *'get it right'* with our children we will be making a valuable contribution to our constitutional vision of a society based on human dignity, rights and freedoms.

[97] M is a child who, unlike countless others in our society, has two parents who are equally devoted to him. To deprive M of his father's continued involvement in his life because of the respondent's recently acquired dislike for him would result in a miscarriage of justice.

[98] Accordingly, in all the circumstances of this matter, I am satisfied that the applicant is entitled to the relief sought by him on all of the outstanding issues between the parties, save in respect of costs which I deal with hereunder.

COSTS

[99] It has been held that in disputes relating to children, it may not be appropriate to make a costs order adverse to either party because of the predominant interests of the child involved. King J (as he then was) in *McCall v McCall* 1994 (3) SA 201 (CPD) at 209B-C stated:

"As I have said, both parents have, in contesting this case, acted in what they believed to be in the best interests of their child. There is no winner and no loser. There are two concerned parents. I intend to make no order as to costs. The effect of this is that each party will bear their own costs."

[100] In *Bethell v Bland & Others* 1996 (4) 472 (W) at 475E-I Wunsch J considered that the correct approach would be that generally speaking a successful litigant would be entitled to his or her costs. He states further:

"1. Generally speaking, a successful litigant is entitled to his or her costs.

2. While it is quite true that a custody dispute should not be seen as an adversarial contest in the ordinary sense but rather as an enquiry into the best interests of the child, it cannot be denied that in most cases the litigants are advancing their own preferences and seeking satisfaction of their love of the child. Often, too, the papers contain many attacks on the character and conduct of the opponents.

3. On the other hand it is also a consideration that a party should not be discouraged from putting up a case which he or she, on broadly reasonable grounds, thinks to be in the interests of the child for fear of having costs awarded against him or her if unsuccessful. By the same token, a party who is, on what turn out to be good grounds, confident that his or her case will prevail, should not be discouraged from taking or resisting actions because of the costs which he or she will incur.

4. However bona fide and concerned a party may be, if his or her opponent's judgment of the issue prevails, it is not, in the absence of circumstances justifying it, fair that the opponent should be mulcted in his or her own costs."

[101] In regard to the points *in limine* argued in November 2010, the applicant was successful on both issues and the respondent should bear his costs. There are no circumstances which would justify a departure from the usual approach to costs, despite this being a matter involving a child. In fact, the very nature of the opposition and the issues raised *in limine* by the respondent warrant a costs order being made against her. There is nothing in the respondent's affidavit, nor was any evidence adduced on her behalf, which supports her allegation of rape: in fact the oral evidence of the applicant, his wife M A and Ms Osrin demonstrated quite the opposite.

[102] For years the respondent had a close relationship with the applicant, his wife and extended members of the family, which relationship she at one time sought to protect. She chose to spend time with them, she treated their home as her own and co-parented M with the applicant whom, she demonstrated through her actions, she trusted and respected. The allegation of rape cannot be sustained and the inescapable conclusion is that the only purpose of that allegation was to exclude the applicant from M's life save on terms acceptable to the respondent. Accordingly in the circumstances of this matter a costs order in favour of the applicant is the only fair and equitable order to be made, save for the costs in respect of the dispute pertaining to M's primary residence. The applicant only conceded at the commencement of the hearing in November 2010 that M should continue to have his primary residence with the respondent. It seems to be equally fair that the costs relating to the dispute over M's primary residence should thus be borne by the applicant.

[103] Being mindful of the practical difficulties which the parties and the taxing master will face in determining which costs pertain to the primary residency dispute, and without adopting an overly-technical approach, having regard to the various affidavits filed it seems to me that it would be just and equitable in the net result to thus award the applicant 80% of his costs incurred prior to the November 2010 hearing.

[104] As to the disputes referred to oral evidence, the respondent only conceded that very limited issues still remained in dispute on the first day of the hearing. It also seemed that these were selected in a random fashion and were designed to enable the respondent to subject the applicant to cross-examination

largely on irrelevant issues about M's conception.

[105] The applicant was obliged to incur the costs of five court days in circumstances where it now appears that there was probably never any intention on the part of the respondent to put her version before the court. In these circumstances there is no reason why the respondent should not also pay the costs of the October 2011 hearing.

[106] The parties have agreed that in respect of the interlocutory application, each should bear his/her own costs.

CONCLUSION

[107] **In the result I make the following order:**

'1. The applicant succeeds on the merits in respect of all of the outstanding issues between the parties.

2. The parties shall exercise their parental responsibilities and rights in respect of their minor child, M, in accordance with the Parent Plan annexed hereto marked "X".

3. The respondent shall bear 80% of the applicant's party and party costs incurred prior to the November 2010 hearing, including all reserved costs orders. The costs of the November 2010 hearing (including the costs of two counsel in respect of appearance and preparation therefor) together with all further reserved costs orders, and the costs of the October 2011 hearing, shall be borne by the respondent on a scale as between party and party.

4. In respect of the interlocutory application under case number 12660/2010 there shall be no order as to costs.

5. In the event that this judgment and/or the Parent Plan annexed hereto is published in any manner (whether electronically or otherwise) the reference to the names of the parties and the minor child shall be reflected in such a manner that they cannot be identified.

J I CLOETE

IN THE HIGH COURT OF SOUTH AFRICA **ANNEXURE "X"**

(WESTERN CAPE HIGH COURT, CAPE TOWN)

In the matter between:

CASE NUMBER: 2901/2010

M A M **Applicant**

and

A V (born N) **Respondent**

PARENT PLAN

1. The parties are declared to be co-holders of parental responsibilities and rights in respect of their minor child **M J N** born on 23 May 2000 ("M"), including rights of co-guardianship as provided for in sections 18(2)(c), 18(3), 18(4) and 18(5) of the Children's Act 38 of 2005 ("the Children's Act") and rights of care and contact as referred to in section 18(2)(a) and (b) of the aforesaid Act subject to the provisions set out below.

2. The parties' co-parental responsibilities and rights in respect of M shall be exercised as follows:

2.1 M shall reside primarily with the respondent.

2.2. The parties shall make joint decisions in relation to the following aspects of M's life only:

(a) major decisions about his schooling (including any change and/or choice of school, after-care facility, tertiary institution) and tertiary education; including choices of educational subjects and extra-mural activities;

(b) major decisions about his medical care, including any mental health issues, elective medical treatment that may be required by M, but which shall not include his day to day medical care or emergency treatment. M will not be placed on Ritalin unless the parties agree otherwise;

(c) major decisions about his religious and spiritual upbringing including any significant change in regard to M's upbringing relating to religious beliefs, cultural or traditional values;

(d) decisions in respect of any change in his residency (in the Republic of South Africa) which will impact on the applicant's contact with M;

(e) decisions affecting any change in the regime regulating contact between M and the applicant;

(f) decisions which are likely to significantly change M's living conditions or to have an adverse effect on his wellbeing.

3. Decisions affecting M's every day care and routine shall be made by the party in whose care M is a the relevant time.

4. The applicant shall have contact with M as follows:

Contact during school term

4.1. M shall spend each alternate weekend from a Thursday after school until the following Monday morning when he is returned to school, with the applicant;

4.2. In the alternate week M shall spend from Thursday after school until the Friday morning when he is returned to school, with the applicant.

Contact during vacations

4.3. M shall spend each alternate April and September vacation in each year with each party. Accordingly, should M spend the April school vacation with one party in one year, then he shall spend the September vacation in such year with the other party. Subject to any directive to the contrary by the facilitator referred to hereunder, should any such vacation be longer than 7 nights then the balance of such vacation shall be spent with the other party. If the vacation is more than 14 nights, then the further nights shall be spent with the original party;

4.4. M shall spend each alternate Easter weekend with the applicant;

4.5. M shall spend one half of the June/July vacation in each year with each party. Subject to any directive to the contrary by the facilitator referred to hereunder, the vacation shall be divided on the basis that M spends blocks of 7 nights with the applicant;

4.6. The December/January vacation shall be divided each year so as to ensure that M spends each alternate Christmas (until 09h00 on 26 December) with each party. M shall spend Christmas 2011 with the respondent. Subject to any directive to the contrary by the facilitator referred to hereunder, the December/January vacation shall be divided equally on the basis that M spends blocks of 7 nights with the applicant;

4.7. In regard to the June/July and December/January vacations, the respondent shall provide the applicant with a proposed schedule in respect of such vacations 2 months prior to the vacation in question, setting out when she is able to take leave and proposed dates for contact. The applicant shall revert within 2 weeks of receiving such proposal. In the event of agreement not being reached, the parties shall approach the facilitator.

Other contact provisions

4.8. Both parties shall have the right to attend school functions, school related events and extra-mural activities in which M participates (without requiring interaction between the parties) whether during their contact period or not;

4.9. In the event of a public holiday or non-school day preceding or succeeding a weekend, the public holiday shall be incorporated in the weekend;

4.10. M shall have the right to spend Mother's Day with the respondent and Father's Day with the applicant respectively, from 09h00 on the Sunday until M is returned to school the following morning;

4.11. In respect of M's birthday, M shall be entitled to spend alternate birthdays with each party with M's next birthday being with the applicant. Both parties shall ensure that M's siblings are invited to any birthday parties which he may have with either parent, should M so request;

4.12. M shall be entitled to spend a reasonable period of time with his siblings on their birthdays or attending their birthday celebrations provided that this falls on a weekend and further does not unduly interfere with either party's holiday or contact arrangements;

4.13. The parties shall be entitled to have telephonic and e-mail contact when necessary with M when he is with the other party provided that it is at reasonable times. M shall have the right to

contact the parties telephonically and by e-mail at reasonable times.

5. Should either party or their spouse not be able to care for M during their respective contact periods, they shall first approach the other party to ascertain their availability prior to appointing a third party to care for him.

6. Any school which M attends shall be informed (by either party) that:

6.1. Both parties are entitled to discuss issues relating to M directly with any teacher/educator concerned. The parties shall limit the subject of such discussions to M and M's best interests only. No discussion about the other party or his or her attitude or conduct will be held with the teacher/educator;

6.2. Both parties are entitled to receive school reports and assessments;

6.3. Both parties are entitled to attend upon all school related events and extra-mural activities.

7. The parties shall, where reasonable practicable, advise the other party timeously of all school related events and extra-mural activities in which M may be involved, including, but not limited to, all Parent/Teacher Association meetings and sporting and cultural activities engaged in by M, on the basis that the parties shall not be obliged to attend any meeting with a teacher with the other party.

8. In order to facilitate the resolution of any disputes arising from this Order, Adv Patsi Weyer SC shall continue to act as facilitator.

8.1. Failing her, the facilitator shall be an advocate with at least 10 years of experience, conversant with working with children and families and shall be appointed by agreement, failing which either party may approach the chairperson for the time being of the Cape Bar Council to appoint such a facilitator.

8.2. The powers and duties of the facilitator shall be in accordance with the provisions of Annexure "A" hereto.

BY ORDER OF THE COURT

COURT REGISTRAR

Annexure "A"

Powers and Duties of the Facilitator

1. The facilitator shall continue to act until he/she resigns, or both parties agree in writing that his/her appointment shall be terminated, or his/her appointment is terminated by an order of the High Court. Neither party may initiate Court proceedings for the removal of the facilitator or to bring to the Court's attention any grievances regarding the performance or actions of the facilitator without first meeting and conferring with the facilitator in an effort to resolve the grievance.

2. If the parties are unable to reach agreement on any issue concerning applicant's contact with M or any issue in respect of M's bests interests including any issue where a joint decision is required in respect of M, the dispute shall be formulated in writing (if so required by the facilitator) and referred to the facilitator. The facilitator shall attempt to resolve the dispute by way of mediation, subject to what is set out below, as speedily as possible and without recourse to litigation.

3. If the facilitator, in the exercise of his/her sole discretion, regards a particular issue raised by one of the parties as trivial or unfounded, he/she is authorized to decline the referral of such issue.

4. If the facilitator is unable to resolve a dispute by way of mediation he/she may resolve the dispute by issuing a directive which shall be binding on the parties subject to the provisions herein.

5. Each party and M (if necessary) shall participate in the dispute resolution process as requested by the facilitator.

6. The facilitator shall use his/her discretion in considering the weight and sufficiency of information provided and may expand his/her enquiry as he/she may deem necessary. The facilitator shall have the authority to gather information through interviews, correspondence, email, telephonic and/or other informal means, and to make his/her recommendations upon the information provided and obtained.

7. No record need be kept, except of the findings, decisions and recommendations of the

facilitator and the grounds therefore. No information or observations of the facilitator or communications made by the facilitator shall be deemed to be privileged as to the Court, the participants, their legal representatives and experts or any mental health professional assessing or treating M.

8. The facilitator shall determine the protocol of all communications, interviews and sessions, including who shall or may attend meetings. Legal representatives are not entitled to attend such meetings, but a party shall be permitted to caucus with his or her legal representatives, either in person or by telephone, during such meetings. The parties and their attorneys shall have the right to initiate or receive oral communication with the facilitator. Any party or counsellor may communicate in writing with the facilitator provided that copies are provided to the other party, and if applicable, their legal representatives.

9. The facilitator may confer individually with the parties and with others, including step-family members, extended family members and friends, permanent life partners, household members, school and educational personnel, care providers, healthcare providers for M and therapists for him and the parties, and the parties shall authorise such persons to provide information to the facilitators.

10. The facilitator is authorised to appoint such other person as may be necessary in order for the facilitator to make a decision in respect of the issue in dispute, including the appointment of experts if he/she deems it appropriate or necessary, but provided that the costs of such expert/s are first canvassed with the parties and appropriate arrangements for the payment of such costs are made.

11. The facilitator is *inter alia* authorised to:

(a) facilitate joint decisions in respect of M having regard to his best interests;

(b) regulate, facilitate and review the contact arrangements in respect of M having regard to his best interests;

(c) issue directives binding on the parties on any issue concerning M's welfare and/or affecting his best interests (subject to a Court of competent jurisdiction holding that such directive is not in M's best

interests);

(d) resolve conflicts relating to the clarification, implementation and adaption of the parent plan or any subsequent parental responsibilities and rights agreement having regard to M's best interests;

(e) refer the parties and/or M for psychological evaluations or assessments.

12. The facilitator's services include elements of mediation, expert opinion, counselling and arbitration, but do not purely fall into any of these categories. The facilitator is not appointed as psychotherapist or counsellor for M or the parties. All participants, including the facilitator, the parties and legal representatives, shall use their best efforts to preserve the privacy of the family and, more particularly, M and restrict dissemination of information related to decisions to those who need to know the information.

13. The facilitator may proceed with the facilitation in the absence of a party and shall be entitled to make a decision (which shall be binding on both parties as if they had both participated in such facilitation until such decision has been varied by a court of competent jurisdiction) in the event that a party:

(a) fails to participate in any facilitation despite having been requested to do so by the facilitator; or

(b) fails to attend a facilitation session; or

(c) fails to reply to the facilitator's communications within 5 (five) days, which communications may be by telephone, email or fax, or

(d) fails to pay the facilitator's costs upon request, or

(e) fails to co-operate with the facilitation process in any other way.

14. The parties shall each be liable for 50% of the costs of the facilitator (save for the cost of email, fax and telephonic communication with the facilitator, which shall be borne by the relevant party), unless otherwise determined by the facilitator. The facilitator may order a party against

whom a ruling has been made to refund the costs of facilitation, or part thereof, to the other party.