IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 10757/14

In the matter between:

[M…….] [T…….] Plaintiff

And

[C……..] [H……] [S……] [T……..] Defendant

JUDGMENT DELIVERED ON FRIDAY 11 MARCH 2016 IN RESPECT OF THE MERITS OF THE CONTEMPT OF COURT HEARING.

GAMBLE, J

BACKGROUND

1. This court has been managing, in terms of rule 37(8), the pre-trial procedures relevant to the [T……..] divorce case which was transferred to this Division from the High Court in Durban in 2014. The matter has a long and chequered history having commenced in that court in 2009. Both parties were previously represented by attorneys and counsel but these have fallen by the wayside and since the transfer of the matter to this court they have represented themselves in the divorce action. I do not intend to go into any great detail regarding the background circumstances relevant to this matter: that is dealt with in a very comprehensive report (574 pages exclusive of annexures) filed by the Family Advocate 2 days ago.

2. The plaintiff, Ms [T…….], presently resides in [S……] [W….] with the parties' 9 year old minor son [E……] (whom the plaintiff prefers to call "[B…..]"), while the defendant resides in Johannesburg. He travels down to Cape Town by bus when it is necessary to attend court for a pre-trial hearing, claiming that he is penniless, and when he is in Cape Town puts up at a cheap backpackers' lodge in Long Street not far from the court building.

3. The principal issue in the main action is the care and contact arrangement in relation to [E…….]. The plaintiff has informed the court that this is the only issue. As far as the defendant is concerned it is the principal issue, but he says he also has proprietary claims against the plaintiff which he intends pursuing. The clarification of the issues was finalised by this court at a pre-trial hearing conducted on 22 October 2014. Since then the court has been endeavouring to finalise the pre-trial issues around [E……..] so that the matter can go to trial speedily. I must record that the court has dealt with the [T…….] pre-trial matter differently to the customary

practice: all proceedings have been conducted in open court, on the record and with the judge robed. In addition, a special time slot (usually 11h30 on a Friday) has been allocated for these parties to be heard alone.

4. I should perhaps point, too, out at this juncture that the defendant has not had contact with [E……..] for the last six years, other than for a short period of about 20 minutes during which it appeared as if the child did not wish to see his father. The defendant contends that the plaintiff has alienated the child from him and has effectively demonised him in the eyes of the child, while the plaintiff says that because they separated when the child was still very young (about 18 months old) he does not know his father who has been an absent figure in his life. She is not at all well disposed towards the defendant and complains bitterly that he is in arrears with his maintenance obligations under a Rule 43 order granted in the Durban court, and that such arrears now far exceed R1m. The plaintiff is convinced that [E……] does not wish to see his father at all and that it is accordingly in his best interests not to have any such contact with his father. The plaintiff has manifestly not taken any positive steps to encourage the child to have contact with his father. Rather, it seems to me that she oersistently places obstacles in the way of the father and son establishing a proper relationship.

5. It is of great concern to the court that a child allegedly does not wish to have contact with his father but that is an issue which will ultimately be determined by the trial court. However, before the trial court can do so it is bound by the provisions of section 6 of the Divorce Act 70 of 1979, (which section has to be read in conjunction with sections 6 to 10 of the Childrens Act 38 of 2005) to satisfy itself as to the

appropriateness of the proposed care and contact arrangements and, if an enquiry has been instituted by the Family Advocate, the trial court must consider the report of that office.

6. The Family Advocate, represented in this matter by Adv M.Fourie of Somerset West, has been assisting the court for more than 2 years by endeavouring to complete a report in terms of section 6 in relation to the welfare of [E……] and the recommended care and contact arrangements. In the process of conducting her enquiry, Ms Fourie came to the conclusion that both parents were required to be assessed by an independent psychiatrist before she could complete her report: the parties' mental health is clearly of some concern to the Family Advocate. The plaintiff initially expressed reservations about participating in such an assessment and, in particular, the mental health practitioner to be appointed. Ultimately, and after some considerable to-ing and fro-ing on the part of the plaintiff, the parties were referred to Dr Larissa Panieri-Peter, a forensic psychiatrist now in private practice in Cape Town and formerly attached to the forensic unit at Valkenberg Hospital. At the request of the Family Advocate, this court gave specific directions to the parties as to when and where they were to consult Dr Panieri-Peter. The parties ultimately agreed to be bound by the court's directions and attended on the psychiatrist as directed.

DIRECTIONS GIVEN IN TERMS OF RULE 37(8)

7. The psychiatric investigation was completed during the latter part of 2015 and Dr. Panieri-Peter's report is an annexure to the final report (9 March 2016) of Adv Fourie. However, the Family Advocate informed the court at the time that she

could not complete her section 6 report (which would include the psychiatrist's report) until she had completed a further assessment of [E……] in his domestic environment. Adv Fourie also informed the court that she required a full consultation with the plaintiff, the defendant having long since complied with her request in that regard. At a further pre-trial hearing conducted on 6 November 2015 (which the court had anticipated would be the final pre-trial hearing in this matter) these two outstanding issues were raised by Adv Fourie, who has regularly been in attendance at these pre-trial hearings.

8. After the court had enquired from her what her attitude was in relation thereto, the plaintiff agreed to facilitate a domestic visit at her place of residence on 9 December 2015 for the assessment of [E……], and further agreed to attend a consultation with the Family Advocate in Somerset West at 09h00 on 10 December 2015. These attendances would have put the Family Advocate in a position to file her final report in terms of section 6 by the end of January 2016, and the matter would have been ready to go to trial towards the end of the 1st term 2016. Despite agreeing thereto a month before, the plaintiff kept neither of these appointments, and on 15 December 2015 the Family Advocate informed the court of these developments in a further interim report. The failure to stand by her undertakings meant that the plaintiff was holding up the progress of the litigation.

9. On Tuesday 12 January 2016 this court's registrar informed the plaintiff by email (the customary form of communication with these unrepresented parties) of the Family Advocate's communication regarding her lack of cooperation. The plaintiff was directed to appear before this court 10h00 on Thursday 21 January 2016 to

answer charges of contempt of court in light of her failure to adhere to the directions of 6 November 2015. The plaintiff was informed in that email of her entitlement to legal representation at the hearing on 21 January 2016 and was urged to take the matter seriously. She was also informed that in the event that she wished to reconsider her earlier refusals to participate in the Family Advocate's investigation, she should contact Adv Fourie to make new arrangements to consult with her and to permit the domestic visit to take place.

10. The plaintiff failed to appear before this court on 21 January 2016 and a warrant was issued in terms whereof the Sheriff for Somerset West was directed to take the plaintiff into his custody and bring her through to court at 14h30 the following day. The Sheriff was expressly informed that the court did not wish the plaintiff to be held overnight or in police custody.

THE PLAINTIFF'S RESPONSE

11. At the hearing on Friday 22 January 2016 the plaintiff appeared in the company of the Sheriff who had brought her through to Cape Town during the course of that morning. The plaintiff was informed that the court did not intend conducting an enquiry into her non-appearance on that day. The court issued a rule nisi returnable on Friday 12 February 2016 calling on the plaintiff to show cause why she should not be found to be in contempt of court due to her failure to facilitate the domestic visit on 9 December 2016, to attend the meeting with the Family Advocate the following day and to appear before this court on 21 January 2016. She was also called upon to show cause why she should not be sentenced to 30 days' imprisonment, and to bear

the costs of the Sheriff incurred in securing her attendance at court on 21 January 2016.

12. Thanks to the intercession of the Cape Bar Council, the plaintiff was represented at the contempt hearing by Advocate M.Holderness, who appeared as *amicus curiae*. The court is indebted to Ms Holderness for her assistance in this matter, which is in the finest traditions of the Bar.

13. With the assistance of Ms Holderness the plaintiff filed a detailed affidavit explaining her failure to comply in December 2015 with the court's directions of 6 November 2015 and her failure to appear on 21 January 2016. In relation to the planned home visit of 9 December 2015 the plaintiff said that [E…….] had become increasingly agitated about the prospect of the Family Advocate interviewing him at home and had expressed himself in strong terms in regard thereto. She said that when the Family Advocate and her assistant Ms Baartman (a qualified social worker} arrived at her townhouse on the morning of the visit she refused them entry to the secure complex as [E…….] was too upset, and she said that she told Adv Fourie this through the intercom system at the gate. This was confirmed by Adv Fourie in her report of 15 December 2015.

14. Whether [E…….] was indeed so distressed that the Family Advocate should have been refused access the court will never know. I am, however, most sceptical about the explanation in light of the fact that when Adv Fourie and her assistant were eventually allowed access on 27 January 2016, the Family Advocate

found him to be a well-adjusted boy who engaged freely with her. There was no evidence of the distress attributed to him a month earlier.

15. As far as the consultation on 10th December 2015 is concerned, the plaintiff's explanation under oath is somewhat garbled. She seems to say that she thought that the visit was not necessary because she and Ms Baartman would conduct it via an exchange of emails through a question and answer session. That explanation is at odds with the reasons advanced to Adv Fourie at the time – that the plaintiff was not prepared to participate in the investigation because she believed that the Family Advocate's office had already exhibited bias towards her and that she would not get a 'fair hearing' from them, as it were.

16. In relation to the failure to appear on 21 January 2016, the plaintiff says that she knew about the hearing and did indeed set off for Cape Town from Somerset West that morning to attend court. She says that it is her practice to travel as far as Cape Town International Airport, to park her car there and to take the MyCiti bus through to town, so as to save on the cost of parking in the city. The plaintiff says that on that morning she became nauseous on her way to the airport, to such an extent that she turned back and drove straight home. There is no way of verifying the accuracy of this assertion since no doctor's note was tendered by the plaintiff. What is troubling, however, is that at no time before the Sheriff arrived at her home on the Friday morning did she make any effort to inform the Court or the Family Advocate of the reason for her failure to appear. One would have expected that she would have done so immediately, particularly because she has the email address of the court's registrar (with whom she is in communication when necessary) and the telephone

number of the High Court switchboard, as well as the court's registrar's direct line, which appears at the foot of all her emails. Further, the record shows that the plaintiff does not hesitate to contact the Family Advocate if there is something concerning the investigation which troubles her.

17. A further factor which contributes to the court's scepticism about this explanation is the fact that late on the Wednesday afternoon (15h57) the court's registrar was copied into an email written by the plaintiff to an entity known only by its email address – "*probono*". The plaintiff subsequently informed the court through counsel that she found the address in the newspaper and wrote off for urgent help. In that communication the "*probono*" entity was informed of the prospect of a hearing on Thursday 21st January 2016. "*Probono*" was briefly informed of the background to the litigation and was directed by the plaintiff to obtain a postponement of the matter on the Thursday.

18. In the email of 15h57 to the court's registrar (with which I will deal more fully hereunder), the plaintiff informed the court of her late decision to seek legal advice to meet the charges of contempt and went on to say that she had, in the interim, complied with the November directions – evidently she met with Adv Fourie and Ms Baartman for 4 hours on Monday 18 January 2016.

CONTEMPT OF COURT?

19. As *amicus curiae*, the court requested Ms Holderness to address it on the question as to whether it was appropriate to hold proceedings for contempt of

court against a person who had disobeyed a direction given in terms of Rule 37(8), as opposed to a court order per se. Ms Holderness submitted that such a direction was not an order and that contempt proceedings were accordingly not appropriate. She referred the court to the express wording of Rule 37(8) (c) in which the judge presiding at a Rule 37(8) conference may only give a direction when there is agreement between the parties in relation thereto.[1] Counsel fairly submitted that if a practice direction was given pursuant to such agreement it would be appropriate for contempt proceedings to follow in the event of non-compliance therewith. I shall return to the application of Rule 37(8) shortly.

20. One of the leading cases on contempt of court is Fakie[2] in which Cameron JA extensively analysed the principles applicable to such proceedings in the constitutional era. The Learned Judge of Appeal confirmed, with reference to the common law, pre-constitutional and constitutional jurisprudence, that the core of contempt proceedings was that "*the dignity and authority of the courts, as well as the capacity to carry out their functions, should always be maintained*".[3] Cameron JA observed that contempt of court for disobeying a court order "*is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity and authority of the court.*"

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[1] Lekota v Editor, Tribute Magazine' and Another 1995(2) SA 706(W) at 710E)

[2] Fakie NO v CCII Systems (Pty)Ltd 2006(4) SA 326 (SCA)

[3] Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison 1995(4) SA 631(CC) at [61]

21. At common law, Melius de Villiers[4] wrote that –

> *Contempt of court…..may be adequately defined as an injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated."*

22. In Crockett[5] Bristowe J was of the view that whatever the nature of the actual contempt was-

> *"…whether consisting of disobedience to a decree of the Court or of the publication of matter tending to prejudice the hearing of a pending suit or of disrespectful conduct or insulting attacks", it was "necessary for protecting the fount of justice in maintaining the efficiency of the courts and enforcing the supremacy of the law."*

23. And while the practice more recently[6] has tended to distinguish between contempt *in facie curiae*[7] and *ex facie curiae*[8], Milton[9] noted that –

> *"The concept of contempt of court is one which bristles with curiosities and anomalies. Of the various examples which may be*

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[4] The Roman and Roman-Dutch Law of Injuries (1899) at 166

[5] Attorney-General v Crockett 1911 TPD 893 at 925-6

[6] Herbstein and Winsen, The Civil Practice of the High Courts of South Africa (5th ed) Vol 2 at 1097

[7] "in the face of the court"-i.e. while the court is in session

[8] "outside the face of the court"-i.e. when the court is not in session

[9] JRL Milton 'Defining Contempt of Court (1968) 85 SALJ 387

chosen to illustrate this point, perhaps the most striking is that of the classification of contempt of court into civil contempt (or contempt in procedure) and criminal contempt."

24. In Mamabolo[10] Kriegler J delivered a masterful exposition of the constitutional context in which contempt proceedings (in that matter criticism of a court order and the refusal to comply therewith by a State official) are to be assessed, describing the proceedings as

"…*the Proteus of the legal world, assuming an almost infinite diversity of forms. The breadth of the genus is apparent from the definitions of contempt of Court in standard textbooks on South African criminal law."*

25. Contempt proceedings are invariably initiated by the party who is the beneficiary of an order of court obliging the other party to do, or not to do, something (*ad factum praestandum*) and whose opponent is in default of his/her obligations under that order. Such proceedings are not permissible in respect of judgments sounding in money (*ad pecuniam solvendam*)[11] where the beneficiary of an order must resort to execution proceedings to satisfy the judgment. A number of examples in which contempt proceedings have been initiated are cited by Herbstein and van Winsen,[12] but for present purposes it will suffice to refer to an order regulating contact

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[10] S v Mamabolo (ETV and Others Intervening) 2001(3) SA 409 (CC) at 419G-420

[11] Save for maintenance orders under Rule 43 where contempt proceedings are recognised – Bannatyne v Bannatyne 2003(2) SA 363 (CC)

[12] Op. cit. at 1106-7

with children *pendente lite*, which if disobeyed by the respondent may lead to contempt proceedings, and ultimately imprisonment.[13]

RULE 37(8) PROCEDURES IN THE WESTERN CAPE DIVISION

26. In terms of a directive issued by the Judge President, the Judges of this Division preside over pre-trial conferences in open court on a regular basis during term time. The purpose of these hearings is to expedite the speedy resolution of matters in which the pleadings have closed and which have therefore been enrolled for trial with the Registrar. Judges preside over such matters on a roster-basis at hearings conducted before the commencement of the court day and they do not robe, although the proceedings are held in open court. On any given a day a judge can expect to deal with 10 – 20 matters, some new and others postponed from previous hearings.

27. The parties are represented by attorneys, and sometimes counsel. The legal representatives inform the judge of the status of the trial preparation in the case and usually ask for an agreed timetable for the filing of any further pleadings or notices in terms of the Rules to be authorised by the presiding judge. In the event that a party is in default of a procedural step, e.g. has failed to file a reply to a request for trial particulars, or claims that certain documents are not discoverable, the pre-trial procedure is held in abeyance while the parties take the dispute to the motion court

[13] Bruckner v Brucker (1999) 3 All SA 544 (C)

for resolution there: the Rule 37(8) procedure is not geared to the resolution of pre-trial disputes which invariably require the filing of affidavits and heads of argument.

28. The intervention of the judge at a Rule 37(8) conference is fairly limited. For example, if the time sought for a postponement is considered to be unduly lengthy, or the parties cannot agree on such a date, the judge may fix a date unilaterally. Furthermore, in the event that the parties are unable to agree on a date, or a step to be taken, the judge may be asked by one of the parties to direct accordingly. The function of Rule 37(8) procedures in this Division is to speed up the pre-trial process and to ensure that when a matter is allocated a trial date that it is indeed trial ready. To this end the practice is for the Rule 37(8) judge to issue a compliance certificate when all pre-trial steps have been completed. The practice, for example, in claims involving expert testimony, is that a compliance certificate will not be issued until a joint minute signed by the experts has been filed. Ideally, no matter should need to be postponed at the last minute before the trial due to some or other procedural short-coming.

RULE 37(8) PROCEDURE IN RELATION TO DIVORCE ACTIONS

29. The provisions of section 6 of the Divorce Act, 70 of 1979 are binding on all courts hearing divorce actions, whether opposed or not. The following subsections are relevant to this matter -

> **"6.** ***Safe guarding of interests of dependent and minor children.***
>
> *(1) A decree of divorce shall not be granted until the court-*

(a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances; and

(b) if an enquiry is instituted by the Family advocate in terms of section 4 (1)(a) or (2)(a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section 4(1).

(2) For the purposes of subsection (1) the court may cause any investigation which it may deem necessary, to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance."

30. The Divorce Act must be read in conjunction with sections 6 to 10 of the Children's Act, 38 of 2005, which set out the general principles to be applied in matters involving children. These include

- that in all matters concerning the care, protection and well-being of a child, the best interests of the child are to be regarded as paramount;
- an extensive list of factors to be taken into account relevant to the measurement of the best interests standard;
- the express direction that in a matter involving a child, delays are to be avoided;

- the need for a child to be brought up within a stable family environment and where that is not possible, in an environment closely approximating same; and
- the need for a child to have adequate contact with the parent with whom he/she does not reside.

31. The involvement of the Family Advocate in this divorce matter commenced in 2009 when the case was still being heard in the Durban court. Since the transfer of the case to this division the Family Advocate in Somerset West has been intimately involved in the investigation and monitoring of [E……]' best interests. Her work has included facilitating the defendant's repeated, but regrettably hopeless, attempts to have weekend contact with the child when he (the defendant) has been in Cape Town. In this regard, the defendant has regularly complained to this court at Rule 37(8) hearings that his attempts to see his child have been intentionally thwarted by the plaintiff.

32. Against that statutory and factual background the obligatory report by the Family Advocate in terms of section 6 of the Divorce Act is critical to the trial court coming to a just decision in the interests of [E……..]. The Family Advocate has regularly attended the rule 37 (8) conferences and has furnished the court with a number of interim reports. The final report, which must be completed before the matter can be declared trial ready, was long overdue and was the only matter which, for many months, had been holding up the referral of this case to trial. The Family Advocate was not to blame for these delays. Rather, the court came to the considered conclusion that it was the parties themselves, principally the plaintiff, who were

occasioning the delays. In the circumstances the directions which were given by this court on 6 November 2015 were critical to the finalisation of the pre-trial procedures and compliance therewith by the parties was a *sine qua non* to the matter being brought to its completion after many years of unnecessary delay.

33. In my respectful view it does not matter that the direction which was given on 6 November 2015 was not a court order per se. Disregarding the fact that the plaintiff consented to the order being made, I am of the view that the practice direction in question falls within the broad ambit of instructions which a court may issue to litigants to ensure that efficient and speedy steps are taken to enable the court to properly discharge its functions to the litigants before it. It falls within the purview of the "*curiosities and anomalies*'' referred to by Milton, supra, since, as Cameron JA remarked in Fakie, (also in a passage referred to above) contempt of court "*is part of a broader offence, which can take many forms*". After carefully considering all the facts I am left with little doubt that the failure of the plaintiff to adhere to this court's directions in terms of Rule 37 (8) has led to the undermining of the efficiency, dignity and authority of "*the fount of justice*".

34. In the circumstances I am persuaded that, subject to that which is set out below in relation to wilfulness, the plaintiff's failure to adhere to the direction given on 6 November 2015 is capable of being addressed through contempt proceedings.

WILFULNESS/MALA FIDES

35. In Fakie,[14] Cameron JA dealt with the necessity for the court hearing contempt proceedings to be satisfied that the party in default had intentionally disobeyed the court's order –

> *"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe….. herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*
>
> *[10] These requirements - that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."*

[14] 333 D-F

36. If one applies that test to the facts at hand there are three separate acts on the part of the plaintiff which fall to be considered. In the first place there is the refusal to allow the staff from the Office of the Family Advocate to enter her home for the purposes of interviewing [E…….] in his domestic environment. As I have already said, the plaintiff's explanation of the child's distress on 9 December is at odds with his good-natured behaviour when the Family Advocate ultimately interviewed him.

37. As regards the second incident on 10 December, when the plaintiff refused to meet with the Family Advocate, I am not persuaded that she has discharged the requisite evidential burden. Although she says otherwise in her affidavit filed in the contempt proceedings, the true facts are as set out in a series of emails written by the plaintiff to Adv Fourie and her superior, Adv Ebrahim, early in December 2015 in which she complains of an attitude of bias on the part of the staff of the Office of the Family Advocate.

38. At 14h12 on 8 December 2012 , the plaintiff , after labelling the conduct of Adv Fourie "*appalling*" goes on to say the following to Ms Ebrahim –

> *"There have been numerous lies, distortions and withholding of information, yet your organisation professes to be neutral, but your actions are carefully chosen to place selected information before the Judge.*
>
> *Examples:*
>
> *1…*
>
> *2…*
>
> *3…*

4…

5…

6…

The list of oversights and omissions in the SIX interim reports presented to the Judge by Adv. Fourie, along with the false trumped up charges which she made against me, as well as the blatant lies, exposes that neutrality and ensuring the child's best interest, is not the primary object of her role in this matter."

39. And, just less than an hour later at 15h05, the plaintiff said the following to Adv Fourie , in reply to the latter's email a short while before –

"In any event, I believe you have already drawn your own conclusion and what you seek to have as an outcome. I say this because (sic) the numerous omissions you failed to put before the Judge. You made mention of issues regarding PAS, being worse than sexual or other abuse… and this was prior to your appointment in this matter… Clearly no one is bothered to listen to the child's voice."

40. At 17h18 on the same day , after receipt of an email from Adv Fourie sent at 15h52 in which her neutrality was assured, the plaintiff penned a lengthy email to Adv Fourie which contains further allegations in a similar vein to those made to Adv Ebrahim –

- *"Strangely, you fail to see that "neutral" would mean that you will have had to do a home visit with the other party, at his home.…",*
- *"Your non—impartiality is becoming more and more evident each day, especially where you can even expect me to force my child to see you AGAINST HIS WILL."*
- *"I believe it is time for you to withdraw."*

41. The complaints of bias are, however, not borne out by the various interim reports by Adv Fourie which demonstrate that she and her staff members were, at all times, doing their best to comply with their statutory duties in filing the requisite report under section 6 of the Divorce Act, and most importantly, were seeking to assist the trial court to address the child's best interests.

42. In addition to allegations of bias the plaintiff expressed a litany of complaints about the inappropriateness of the Family Advocate wanting to have access to [E…...]. Her view clearly reflected that she did not think that the Family Advocate was going about her work properly and the plaintiff took her to task for the way in which the boy was approached at school for pre-trial assessment. She then berated her for seeking an interview at the house since "he did not invite you to his home". She went on to tell Adv Fourie that –

> *"… I would like to inform you that which I told you in the meeting of 6th November 2015, that [B…….] does not want to see you or talk to you or [your assistant] Laura Baartman. And when I told him of your email he reiterated that you must not come to his home. Therefore, please adhere to his wishes."*

43. It seems fairly clear that the plaintiff was strongly opposed to the home visit long before it actually was due to take place and her professed concern, on 8 December 2015, regarding [E……s'] alleged state of distress simply does not wash. She knew of the importance of the visit and was under an obligation to ensure that it took place. But she consciously chose not to do so. Indeed, after the court had indicated to the plaintiff that it was contemplating contempt proceedings against her, she hastily set up consultations for herself and [E……] with the Family Advocate in early January 2016. These meetings evidently went ahead without a hitch.

44. In light of the fact that the plaintiff was informed at the hearing on 6 November 2015 of the necessity for the consultation with [E…….] at his home, and considering her agreement in open court to adhere to the court's directions on that day, I am of the view that the evidence shows beyond reasonable doubt that on both occasions in December 2015 the plaintiff wilfully disobeyed the court's directions under Rule 37(8).

45. The final aspect which needs to be considered is whether the plaintiff wilfully failed to appear in court as directed, on 21 January 2016. As already stated the plaintiff was informed by the presiding judge's registrar on Tuesday 12 January 2016 of her failure to comply with the directions of 6 November 2015. She was also advised to take legal advice. On Wednesday 20 January 2016 at 13h42 the plaintiff wrote to the entity allegedly supplying legal assistance under the "*probono*" email address, referring to an advertisement in the Cape Argus newspaper and asking for legal representation:

> *"… I believe that skewed reporting is being placed before the Judge which has resulted in him sounding (sic) prejudice towards me.*
>
> *In addition, I believe that various (sic) child's basic human rights and my Constitutional (sic) are being ignored and violated and I believe I have a right to legal representation in order to present my defence without fear, favour or prejudice.*
>
> *Judge Gamble is presiding in the pre-trial and it **may** be his intention to continue with a hearing on Thursday 21st January 2015.*
>
> *I shall be pleased if you can arrange for a postponement with his Registrar… in order to give us time to meet and discuss matters with the appointed Pro Bono attorney/Advocate who will be representing me." (Emphasis added)*

46. The plaintiff's suggestion to the provider of legal services that a hearing "may" take place the next day is obviously factually incorrect in light of the fact that she had been expressly informed thereof in an email communication more than a week before. Be that as it may, the letter makes it clear that the plaintiff required a postponement of the contempt hearing to enable her to consult a lawyer, and that she assumed that the matter would not continue in her absence, hoping that the lawyer (whom she had not yet met or spoken to) would attend court and secure a postponement in her absence on the strength of the instructions contained in her email.

47. In the email sent to the court's registrar at 15h57 on the 20th January 2015, the plaintiff said the following –

> "*In view of the fact that I believe misinformation or information has not (sic) reaching the Judge, I have taken up my right to apply for legal representation, because I affirm it is incorrect to state that I 'purported' to comply, when in fact the meeting was held for four hours and, I have also made the availability in respect of the home visit. These were addressed in my response which I could only make available today.*
> *I trust that this will be given due consideration*."

48. As for the contention in the affidavit explaining her non-appearance (that she was allegedly nauseous), the plaintiff's failure to contact the court and to explain her absence immediately on the Thursday morning read together with the instructions in the *"probono*" email suggests, not that she took ill, but rather that she had resolved the previous day not to attend court because she believed she was not obliged to do so. In essence, the plaintiff thought that she could control the court proceedings as it suited her.

49. When this email is read in conjunction with the email to "*probono*" it is clear that the plaintiff held the view that the hearing set for the Thursday was no longer necessary because she had attempted to make good (in January 2016) on her failure to adhere to the directions of 6 November 2015 to meet in December 2015 – she manifestly held the view that her attendance was not required and that matters could be left up to the "*probono"* representative to sort out in her absence. This

demonstrates that her non-appearance was a *fait accompli* already on the Wednesday. At the hearing on 12 February 2016 the plaintiff informed the court through Ms Holderness that when she had not received any response from "*probono*", she decided to hasten through to Cape Town by car on the Thursday morning, when she allegedly took ill.

50. In my view the plaintiff's assumptions of bias on the part of the Family Advocate and the court, as collectively expressed in the various emails of the Wednesday (and earlier), were manifestly unreasonable in the context of clear directions to participate in the obligatory investigation being conducted by the Family Advocate, and the later direction to appear in court on the Thursday. Displaying an almost paranoid response to the repeated requests of the Family Advocate for cooperation in order to enable her to finalise her report (something quite reasonable in the circumstances), the plaintiff took it upon herself to attempt to set the terms of the investigation and subsequently for the proposed hearing on the 21st January, and then took a conscious decision not to attend the latter. When the plaintiff's conduct is considered in this context the only reasonable conclusion that can be drawn is that the plaintiff did not wish to adhere to the directions of the court and the Family Advocate, preferring to do things her way. This is a clear and intentional violation of the court's authority and infringement of its institutional dignity.

51. In all the circumstances I am bound to conclude that the plaintiff is in contempt of court for failing to adhere to the directions given on 6 November 2015 and 12 January 2016.

APPROPRIATE SANCTION

52. It has been repeatedly said that, aside from preserving the dignity and moral authority[15] of the institution of justice, the purpose of a finding a party to be in contempt is to ensure compliance with the order previously ignored.[16] Most often the sanction will contain a punitive element (which is suspended either wholly or in part) on condition that the order is complied with.[17]

53. In asking to be heard in relation to the appropriate sanction to be imposed, the defendant pointed out that there had been previous orders made in Durban which the plaintiff had contemptuously ignored. The plethora of proceedings in that court is dealt with extensively in the Family Advocate's report of 9 March 2016, which only came to hand very recently and which by virtue of its length and detail the court has not had an opportunity to fully consider.

54. Nevertheless, it appears from that report that in the Durban court the plaintiff was called for contempt before Ms Justice D. Pillay on 7 January 2013 and on the same day the Learned Judge made an order finding the plaintiff to be in contempt and imposing an appropriate sanction to which various conditions were attached. A copy of that judgment was placed before the court by the Family Advocate yesterday. It seems to me that before an appropriate sanction in this matter can be considered, the parties should be afforded an opportunity to address me afresh. The parties and

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[15] Mamabolo 420G

[16] Brukner 550a, para [21](b) and the cases there cited; Herbstein and van Winsen 1100 *et seq*

[17] cf Bruckner 547h, para [11]

the Family Advocate may wish to deal with the judgment of Justice D. Pillay and bring to my attention any issues flowing therefrom, including compliance (or non-compliance) with the conditions laid down by Her Ladyship.

55. To enable these issues to be dealt with the matter is postponed to Wednesday 30 March 2016 and the parties are afforded the opportunity to file further affidavits on this aspect only by no later than Wednesday 23 March 2016, and the Family Advocate, if she is so minded, may file a supplementary report on Tuesday 29 March 2016 after consideration of the parties' further affidavits.

GAMBLE J