

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	N
Of Interest	O
to other	N
Judges:	O
Circulate to	
Magistrates	N
:	O

Case no: 5617/2023

In the matter between:

G[...] T[...]

Applicant

and

J[...] T[...]

Respondent

CORAM:

MTHIMUNYE, AJ

HEARD ON: 30 NOVEMBER 2023

DELIVERED ON: 29 FEBRUARY 2024

[1] This is a Rule 43 application in terms of which the applicant, who is the plaintiff in the main divorce action seeks, *pendente lite*, the following orders against the respondent who is the defendant in the main divorce action:

(a) *The parental rights and responsibilities, as is contemplated in section 18(2) of the Children's Act 38 of 2005, as well as the minor children's primary place of residence to be awarded to the applicant, subject to:*

- (i) *The Respondent's right of reasonable access at all reasonable times; and the Respondent's right to have the minor children with him for two weekends per month, to be exercised under the supervision of the parental grandparents at their primary place of residence, until the younger one reaches the age of 5.*
- (ii) *Telephonic contact on Mondays, Wednesdays and Fridays between 18:00 and 19:00.*

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- (b) *The Respondent be ordered to retain the Applicant and the minor children as beneficiaries on his medical aid scheme better known and described as Discovery Classic Delta Saver or similar medical aid and further that the Respondent is ordered to pay monthly instalments thereof.*
- (c) *The Respondent be ordered to pay the School Fees and / or Crèche Fees and all reasonable school related expenses of the minor children.*
- (d) *The Respondent is ordered to pay the monthly insurance premiums in respect of the Applicant's motor vehicle.*
- (e) *The Respondent to pay one month's rental deposit to the Applicant within a period of five days after having been notified to do so by the Applicant.*
- (f) *The Respondent be ordered to make a once-off payment to the Applicant the amount of R5 500.00 to enable herself to purchase a dish washing machine within a period of seven (7) days from date of the Order granted by honourable court.*
- (g) *The Respondent be ordered to make a once-off payment to the applicant the amount of R6 000.00 to enable herself to pay for the relocation costs within a period of seven (7) days after having been notified to do so by the Applicant.*
- (h) *The Respondent to pay maintenance to the Applicant in the amount of R4 500.00 per month per child.*
- (i) *The Respondent be ordered to pay maintenance to the Applicant, in her personal capacity, in the amount of R 8 000.00 per month.*
- (j) *The Respondent be ordered to make a contribution towards the applicant's legal costs in the amount of R15 000.00.*
- (k) *The Respondent be ordered to pay the costs of this application alternatively that the costs be costs in the main action.*

[2] Two minor girl children were born of the marriage, the first-born on [...] 2019 and the last born on [...] 2023. Both are currently residing with the applicant and the

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respondent currently exercises restricted contact with the children. The applicant seeks an order in terms of which the respondent would have restricted and supervised visits due to the respondent's alleged abuse of alcohol. For this reason, the respondent requested the Family Advocate to conduct an inquiry as to the reasons why the applicant would seek to restrict the respondent's contact with the minor children.

[3] Counsel for the applicant submitted further that since the respondent's live-in girlfriend also has young children who visit them from time to time, the house where the respondent lives gets crowded when both sets of children are there. Counsel for the respondent submitted that to address that concern, the respondent can arrange for the children not to visit at the same time i.e. one weekend will be for the children of his girlfriend and the other for his children who are the subject of this dispute. Further, it was contended that the applicant had alleged no abuse to the children when they are with the respondent and therefore it is unreasonable to subject the respondent to supervised visits.

[4] To demonstrate that the respondent abuses alcohol, the court was taken through several expenditure items on the respondent's bank statement depicting payments to Spar Tops (the Spar alcohol outlet) and Stuck in the Mud, which the applicant's Counsel averred is a pub that sells alcohol. The respondent did not deny that he drinks alcohol occasionally but denied that he is addicted to alcohol and submitted that Stuck in the Mud is not only an alcohol outlet but also a diner where he and his partner usually go to for a meal.

[5] At the hearing of this matter, the report of the Family Advocate was not yet finalised. It was subsequently provided to this court on 12 February 2024 and I now turn to discuss the report. The recommendation of the Family Advocate was

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that the court should consider the recommendation made by the Family Counsellor, Elizabeth Maria Catherina van der Westhuizen, whose report was attached to that of the Family Advocate. Ms Van der Westhuizen conducted an intensive inquiry which included interviews with all relevant stakeholders as articulated in her report. She stated that she could not find any proof of the allegations that the respondent abuses alcohol. Further, although both parents' accommodations are small, she opined that they are adequately furnished and have enough space to provide for the children's needs. In paragraph 11:9 of her report, she stated:

“11.9. It is in the best interests of the children to be able to have regular and structured contact with the father, which enables them to build, strengthen and maintain a secure attachment with the father.

11.9.1 No reasons could be found during the investigation that the father need to exercise his contact with J[...] and L[...] under supervision.

...

11.9.6. The undersigned is of the professional opinion that both the children can start with phased sleep over contact at the father's residence.”

[6] In matters involving children, the best interests of the children are paramount and the court, as the upper guardian of all minors, is enjoined to safeguard those interests. **Section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996** states that *“a child's best interests are of paramount importance in every matter concerning the child”*. This is also enshrined in **Section 9 of the Children's Act 38 of 2005**, which provides that: *“in all matters concerning the care, protection and well-being of a child, the standard that the child's best interests are of paramount importance, must be applied”*.

[7] Section 7 of the **Children’s Act** sets out facts which **must** be considered when the best interests of a child standard is applied. These are:

- “(a) *the nature of the personal relationship between –*
 - (i) *the child and the parents, or any specific parent; and*
 - (ii) *the child and any other care-giver or person relevant in those circumstances;*
- (b) *the attitude of the parents, or any specific parent, towards-*
 - (i) *the child; and*
 - (ii) *the exercise of parental responsibilities and rights in respect of the child;*
- (c) *the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;*
- (d) *the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from-*
 - (i) *both or either of the parents; or*
 - (ii) *any brother or sister or other child, or any other care-giver or person, with whom the child has been living;*
- (e) *the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations*

and direct contact with the parents, or any specific parent, on a regular basis;

- (f) the need for the child-*
 - (i) to remain in the care of his or her parent, family and extended family; and*
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;*
- (g) the child's-*
 - (i) age, maturity and stage of development;*
 - (ii) gender;*
 - (iii) background; and*
 - (iv) any other relevant characteristics of the child;*
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
 - (i) any disability that a child may have*
 - (j) any chronic illness from which a child may suffer;*
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;*

- (l) *the need to protect the child from any physical or psychological harm that may be caused by-*
 - (i) *subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or*
 - (ii) *exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;*
- (m) *any family violence involving the child or a family member of the child;*
- and*
- (n) *which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.”*

[8] Taking into consideration the submissions made by the respondent to this court in rebuttal of the applicant’s averments; the evidence before this court and the contents of the thorough report of the Family Counsellor, which report was as a result of a vigorous investigation, I find no reason to reject the recommendations of the Family Counsellor as encapsulated in the Family Advocate’s report. As such I am persuaded that the prayers sought by the applicant in respect of the parental responsibilities and the respondent’s supervised access to the children must fail.

[9] I now turn to deal with the financial demands made by the applicant as stated in para [1] above. I do not deem it necessary to repeat these one by one but will

focus on the arguments and concessions made during the hearing of the matter. When regard was had to the respondent's means and the reasonableness of the applicant's demands during submissions, the following concessions and amendments were made by the applicant to the claimed figures:

- 9.1. The amount claimed in respect of maintenance of the motor vehicle was amended down from R5 000.00 to R500.00.
- 9.2. It was conceded that the applicant is not paying for the motor vehicle as it was paid off.
- 9.3. It was further conceded that the R15 000.00 contribution sought by the applicant for legal costs is far above what the court could grant given the respondent's means. Instead Counsel for the applicant asked for R8 000 to R10 000.00 contribution to legal costs.

[10] In response, the respondent submitted to this court and it was undisputed evidence that he has been contributing and continues to contribute the following to the applicant and the minor children:

- 10.1. The School Fees of both children i.e. R2 300 to K[...] K[...]in respect of J[...] and R2 300.00 to K[...] A[...] in respect of L[...] per month.
- 10.2. An amount of R 5 000.00 towards maintenance for the applicant and the minor children.
- 10.3. Both minor children and the applicant are on the respondent's medical aid, which he pays for, together with all extra medical expenses every month.

[11] Having considered the submissions made, the evidence before this court, the contributions that the respondent currently is making and continues to do, as well as the means of both parties, I am persuaded that the recommendations of the Family Counsellor as encapsulated in the report of the Family Advocate be adopted herein. Further, that some of the applicant's demands are unreasonable.

Consequently, I make the following **Order, *pendente lite***:

1. The parental rights and responsibilities, as contemplated in section 18(2) of the Children's Act 38 of 2005 are awarded to both parents.
2. The primary residence of the minor child is awarded to the applicant.
3. The respondent will exercise unsupervised contact the minor children in the following manner:
 - 3.1. During the first month from the date of this Order, he will take the children for a day outing every alternative weekend on Saturdays at 13:00 to 18:00 and Sundays from 09:00 to 17:00.
 - 3.2. From the second month until the end of the third month from the date hereof, he will take the children for a sleepover at his residence from Saturday at 09:00 and return them on Sunday at 17:00, every alternative weekend.

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- 3.2. From the fourth month from fourth month from the date hereof, he will fetch the children from Friday at 18:00 and return them on Sunday at 17:00, every alternative weekend.
 - 3.4. In the event that Father's Day does not coincide with his normal contact weekend, he shall have contact with the children from 09:00 to 17:00.
 - 3.5. Telephone or video call or recording contact with the children on Mondays, Wednesdays and Fridays between 18:00 and 19:00.
4. The respondent to retain the applicant and the minor children as beneficiaries on his medical aid scheme better known, and described, as Discovery Classic Delta Saver or similar medical aid and further that the respondent is ordered to pay monthly instalments thereof.
5. The respondent to continue paying the school fees for the minor children at K[...] K[...] and K[...] A[...].
6. The respondent to continue contributing an amount of R5 000.00 to the respondent as both maintenance towards her and the minor children. For purposes of clarity, the maintenance breakdown is as follows:
 - 6.1. R1 500.00 as maintenance for the minor child J[...] T[...].
 - 6.2. R1 500.00 as maintenance for the minor child L[...] T[...].
 - 6.3. R2 000.00 as maintenance for the applicant.
7. Costs to be costs in the divorce action.

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Appearances:

For the Applicant : Adv C Coetzer
Chambers, Bloemfontein

Instructed by Lovius Block Attorneys
Bloemfontein

For the Respondent : Adv N Van Der Sandt
Chambers, Bloemfontein

Instructed by Webbers Attorneys
Bloemfontein