

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

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO : **2023-104609**

DELETE WHICHEVER IS NOT  
APPLICABLE  
(1) REPORTABLE YES/NO  
(2) OF INTEREST TO OTHER JUDGES  
YES/NO  
(3) REVISED

.....  
SIGNATURE

DATE

In the matter between:

**A[...] N[...] M[...]**

Applicant

and

**M[...] B[...] M[...]**

Respondent

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**JUDGMENT**

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**FRANCK AJ:**

- [1] In this matter the Applicant launched an urgent application, as the mother of two minor children, two sons aged 9 and 12 born from the marriage between the Applicant and Respondent.
- [2] The Applicant sought relief relating to the return of the minor children to her as the minor children's primary caregiver. The children are currently in the care of the Respondent.
- [3] The Applicant also sought relief relating to a referral of the parties to the Family Advocate in order for a full investigation to be conducted into the best interests of the minor children and for a report to be rendered in this regard relating to the parties' parental responsibilities and rights.
- [4] Pending the production of the Family Advocate's report, the Applicant sought interim relief, broadly as follows:
- [4.1] Both parties shall continue to co-hold full parental responsibilities and rights in respect of the minor children as provided for in Section 18 of the Children's Act 38 of 2005.
- [4.2] The minor children's primary place of residence would vest with the Applicant subject to the Respondent's reasonable

rights of contact.

- [4.3] The contact is circumscribed as being every alternate weekend from a Friday afternoon until Sunday afternoon, being a two night sleepover together with reasonable telephonic contact and what amounts to equal contact during holiday periods, with public holidays and special days to be shared on an equal basis.
- [5] The Applicant also sought relief relating to the restoration of possession of a motor vehicle described as a Mitsubishi Outlander. The Applicant avers that the Respondent unlawfully took possession of the motor vehicle thereby spoliating the Applicant from being in peaceful and undisturbed possession thereof. I was advised at the outset of the hearing, that possession of the motor vehicle has been returned by the Respondent to the Applicant.
- [6] The Applicant states that she vacated the former matrimonial home which is owned by her, together with the two minor children, during the temporary absence of the Respondent, whereafter she moved in with her sister.
- [7] The Applicant vacated the former matrimonial home with a view to

instituting divorce proceedings against the Respondent. She avers that she has given instructions to her attorney to issue a summons in this regard. The Applicant further avers that, she vacated the former matrimonial home prior to the institution of divorce proceedings as a result of abuse that she suffered at the hands of the Respondent in respect of which there have been various family interventions over the years. Applicant's counsel argued that it was prudent of the Applicant to remove the minor children from a potentially violent situation, should they have been present in the house, when the Respondent received the divorce summons.

[8] The Respondent denies the allegations of abuse.

[9] The minor children are currently in Grade 6 and 4 at a school in Mulbarton, south of Johannesburg. It is common cause between the parties, as indicated during argument, that special care should be taken with the minor children during this period, until the end of the school term, as the minor children are currently writing exams.

[10] The Applicant moved out of the former matrimonial home on the 24<sup>th</sup> of September 2023. Her sister's residence which is a property similar to the former matrimonial home, is located approximately 10 minutes away from the former matrimonial home.

- [11] The Applicant states that, the Respondent frequently visited Mkhondo, approximately 4 hours away, since January 2022, when his mother passed away. The Applicant avers that during 2022, the Respondent was only occasionally home and spent months at a time, in Mkhondo.
- [12] These visits continued in 2023 and during one of these absences, the Applicant left with the minor children.
- [13] In her replying affidavit, the Applicant avers that she advised the Respondent telephonically on the 26<sup>th</sup> of September 2023, that she had vacated the former matrimonial home together with the minor children.
- [14] On 29 September 2023, the Respondent returned from Mkhondo and located the minor children, where they were present at a friend's residence.
- [15] There is a dispute regarding whether or not the Respondent forcefully removed the minor children from that residence. It is, however, common cause that the Respondent refused contact between the children and the Applicant on the 29<sup>th</sup> of September 2023 which is also the date that he took possession of the Applicant's car.

- [16] On 30 September 2023, the Applicant's attorneys addressed urgent correspondence to the Respondent. He failed to respond to the correspondence.
- [17] The Respondent requested a meeting with the Applicant on 3 October 2023. It was postponed by the Respondent to the 4<sup>th</sup> of October 2023. The Respondent cancelled this meeting. Further correspondence was sent by the Applicant's attorneys of record on the 4<sup>th</sup> of October 2023.
- [18] The Applicant requested that the minor children accompany her on a holiday which is usually taken to the Drakensburg on the 6<sup>th</sup> of October, returning on the 8<sup>th</sup> of October 2023. The Respondent refused.
- [19] The Applicant states that the Respondent has excised her from the children's daily lives and he is not allowing either physical or telephonic contact. This is not denied by the Respondent in any detail, save to state that he has not blocked the children's cell phones and that the Respondent visited on one occasion in October.
- [20] The Respondent avers that, he was unaware that the Applicant vacated the house and he was unaware of the whereabouts of his

children. When he found out where his children were located on the 29<sup>th</sup> of September 2023, he went to that residence and picked them up. He has since restored possession of the motor vehicle to the Applicant. He takes issue with the fact that the Applicant removed movable goods from the former matrimonial home including belongings of the minor children. He further states that the minor children do not wish to reside with the Applicant's sister and that they wish to reside with him, at the former matrimonial home which is the residence that they are used to.

[21] The Respondent launched a counter-application, in which he basically seeks the exact opposite of the relief claimed by the Applicant. He claims intervention of the Family Advocate, that primary residence vests with him and that the Applicant be awarded weekend contact.

[22] The court urged the parties to discuss the matter with each other and to attempt to find a via media, in the best interests of the minor children. Upon court resuming, the court was advised that the parties agree to the appointment of a private social worker, in order to obtain a report on an expedited basis and that both parties would contribute equally to such private social worker. The purpose of such social worker would be to urgently investigate the best interests of the minor children and to produce a report with recommendations regarding

parental rights and responsibilities, primary residence, care and contact *pendente lite*.

[23] The parties could not agree regarding contact between the Applicant, Respondent and the minor children in the interim which necessitates this ruling.

[24] The Respondent indicated to the court during argument, that he would be willing to provide the Applicant with practically unfettered contact during the exam period in order for the Applicant to assist the minor children in preparation of the exams which would include midweek sleepovers at the Applicant's sister's home, with the Applicant every Tuesday and Thursday. The rest of the contact is described in vague and uncertain terms albeit it is stated that it would be practically unrestricted.

[25] Prior to the Respondent collecting the minor children on the 29<sup>th</sup> of September 2023, the Respondent was not on any WhatsApp groups or school platforms. All indications are, that whilst the Respondent is a good and involved father, that the Applicant was the primary caregiver of the minor children up to the 29<sup>th</sup> of September 2023.

[26] The alternate draft order suggested by the Respondent, will be unduly

disruptive of the minor children's routines, especially over the next couple of months, while they are writing exams. The court also takes a dim view of the Respondent's actions in not only spoliating the Applicant from her motor vehicle but also terminating or restricting contact between the minor children and their mother which common sense dictates, would have had a negative emotional impact on them.

[27] I intend to order a social worker to produce a report as a matter of urgency. Contact, in the interim, would have to be as ordered by the court. During argument, and upon direct questioning by the court, Applicant's counsel indicated that, the Applicant would be amenable to allowing more generous contact to the Respondent, than as set out in her notice of motion.

[28] Regarding the issue of costs, the court has a wide discretion. It was possible for the parties to, at the very least, agree on the appointment of an expert in order to expedite proceedings. The Respondent, however, refused to engage in discussions pursuant to letters written by the Applicant's legal representative or to meet with the Applicant on two occasions on the 3<sup>rd</sup> and 4<sup>th</sup> of October 2023. The Respondent unduly restricted the Applicant's contact to the minor children and only returned her vehicle after the urgent application had been issued, and on the 20<sup>th</sup> of October 2023.

[29] In the circumstances, this matter was heard as one of urgency and I am of the view that the Respondent should make payment of the costs of the application.

[30] An order is accordingly made in the following terms:

[30.1] The Respondent shall return the minor children, N[...] N[...] M[...] and K[...] B[...] M[...] to the Applicant on the 26<sup>th</sup> of October 2023.

[30.2] A social worker in private practice shall be jointly appointed by agreement between the parties within three (3) days of the date of this court order. If the parties are unable to agree on the identity of the social worker, the chairperson of the Gauteng Family Law Forum shall nominate a social worker and the parties shall abide by such nomination. The social worker should have availability to accept the mandate on an urgent basis.

[30.3] By agreement between the parties, the Applicant and Respondent shall be equally liable for payment of the costs of the social worker.

[30.4] The social worker shall investigate the best interests of the minor children, on an urgent basis, and produce a report with recommendations to the court regarding parental rights and responsibilities of the parties, primary residence, care and contact.

[30.5] Pending receipt of the report of the social worker, the following is ordered:

[30.5.1] The Applicant shall issue an action for a decree of divorce and ancillary relief within seven (7) days from the date of this order.

[30.5.2] The Applicant and Respondent shall remain co-holders of full parental rights and responsibilities in respect of the minor children as provided for in Section 18 of the Children's Act 38 of 2005.

[30.5.3] Primary residence of the minor children shall vest with the Applicant.

[30.5.4] The Respondent shall exercise reasonable rights of contact to the minor children as follows:

[30.5.4.1] Contact to the minor children every alternate weekend from a Thursday afternoon after school until the following Monday morning, returning the minor children to school, constituting a 4 night sleepover.

[30.5.4.2] The Respondent shall assist the minor children with their studies and homework whilst they are in his care.

[30.5.4.3] Reasonable telephonic contact on each day that the Respondent does not exercise physical contact to the minor children.

[30.5.4.4] Short school holidays and long school holidays to be shared on an equal basis between the parties with the Christmas/New Year period and the Easter period alternating between the parties. Contact in respect of the Christmas 2023 shall be exercised by the

Applicant.

[30.5.4.5] Public holidays shall be alternated between the parties.

[30.5.4.6] The minor children's birthdays shall be shared between the parties, Mothers Day shall be spent with the Applicant and Fathers Day shall be spent with the Respondent.

[30.6] Once the social worker's report has been produced, the parties are given leave to supplement their affidavits.

[30.7] The office of the Family Advocate is directed to investigate the best interests of the minor children and to produce a report with recommendations regarding the parental rights and responsibilities of the parties, primary residence, care and contact in respect of the minor children.

[30.8] The Respondent shall make payment of the costs of this application on the party and party scale.

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**FRANCK, A J**  
26 October 2023