

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



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 25 August 2023 Signature: _____

CASE NO. 2022-

057797

In the matter between:

M D V

Applicant

And

P E T V

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is an opposed rule 43 application wherein the applicant, being the mother of two minor children, prays for the status *quo* regarding primary care with her, and alternative weekend contact for the father, being the respondent, to prevail *pendente lite*, and that the respondent contributes to the children's maintenance as he is presently not contributing anything. The applicant prays for the use and possession of certain items pending finalisation of the divorce action.

B. SUMMARY OF RELEVANT FACTS

[2] The parties have been married since 14 December 2013, with the marital property regime of out of community of property, with exclusion of the accrual system.

[3] Two minor children were born from the marriage, a girl, **A V**, who turns 7 in May 2023 and a boy, **L V**, aged 4. **A V** was born with Pierre Robins Syndrome and suffers from attention deficit disorder and impulsiveness. **A V** requires occupational therapy, speech therapy and therapy by a clinical psychologist. **L V** was born with a squint eye, which is presently being treated conservatively.

- [4] Both parties have been employed during the subsistence of the marriage as teachers and lived on an average scale. The respondent has not yet completed his qualification in this regard. The applicant goes to great lengths to generate an additional income stream, for instance, she marks matric exam papers once per year and she writes study material for a private company.
- [5] The marriage relationship broke down irretrievably during the beginning of October 2022 when the applicant and the children moved out of the erstwhile marital home in the Moot area of Pretoria, to temporarily reside with the applicant's parents in Wierda Park.
- [6] The parties are the joint owners of the erstwhile marital home. The applicant had hoped that the respondent would agree to move out of the marital home for her and the children to reside there, but the respondent insisted on remaining. The applicant has consequently created a new life for her and the children in Wierda Park and does not have the intention to return to the common home. The parties cannot afford the mortgage payment regarding the common home, which is now more than R 12 000.00 per month, and the jointly owned property has to be sold. The parties previously had the benefit of receiving rental income from a tenant of a flat on the jointly owned property, but since January 2023, the rental unit has been vacant.

- [7] The status *quo* in place since October 2022 is that the children are in the applicant's primary care, and that the respondent exercises weekend contact with the children. The respondent has to date taken no steps to change the status *quo*, and the applicant prays for an order that this continues. The respondent mentions that he wants primary care of the children, but in the context of the facts and the applicant's concerns about the respondent's lack of hygiene practices and lack of routine, this shall not be viable and should not be considered prior to an objective investigation by the Office of the Family Advocate.
- [8] According to the applicant, the respondent does not contribute to the minor children's maintenance at present, at all. The respondent tenders a meagre R 500.00 per child per month which is a far cry from the R4000 per month per child which is requested by the applicant.
- [9] The respondent vehemently opposes that the applicant and the children may have use and possession of certain movable items pending finalisation of the divorce action, even though he himself can have little use for these items.
- [10] The respondent claims that he lacks the necessary financial means to afford the maintenance claimed by the applicant.
- [11] According to the respondent his monthly income is R17 391.00 which leaves him with a shortfall of R5 110.64.

[12] Despite being vehemently opposed to the applicant's claims that he is an disinterested and absentee father, the respondent is opposing the claim for primary care and residency of the children. He agrees that this aspect must be referred to the Family Advocate for investigation and recommendations.

[13] Should it be the Family Advocates recommendations that the minor children should reside with the applicant, the respondent tenders an amount of R500.00 per child per month towards the maintenance needs of the minor children.

C. ISSUES FOR DETERMINATION

[14] The core issues that require determination in this application pending the finalization of the divorce are:

- 14.1 Primary care of the minor children;
- 14.2 The children's contact with the non-resident parent;
- 14.3 Maintenance for the minor children;
- 14.4 Use and possession of certain movable items, which use and possession is part and parcel of maintenance.

D. RELEVANT LEGAL PRINCIPLES

[15] The legal basis of children's rights in our law is section 28 of the Constitution Act 108 of 1996 read with section 9 of the Children's Act 38 of 2005. These provisions provide that in all matters concerning minor children, their best interest is of paramount importance.

[16] Ms. Bergenthuin submitted written heads of argument which thoroughly dealt with the provisions of section 7 (1) of the Children's Act and referred to case law on the best interests of minor children. Following below are a few examples:

[17] In *P and another v P and another*¹ wherein it was stated that in considering the best interest of a minor child the Court must consider what happened in the past, until the day of the hearing, and what will in all likelihood happen in the future if a particular order is made.

[18] *P v P (2007)*² where the SCA stated that:

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

¹ 2002 (6) SA 105 (N) at 110C-D.

² 2007 (5) SA 94 (SCA).

*appeal Court will not easily second-guess those findings and conclusions.”*³

And

*“In determining what custody arrangement will best serve the children’s interests in a case such as the present, a court is not looking for the “perfect parent”— doubtless there is no such being. The court’s quest is to find what has been called “the least detrimental available alternative for safeguarding the child’s growth and development”.*⁴

[19] In dealing with the aspect of maintenance, reference was made to the informative matter of *Taute v Taute*⁵ where the court held that:

“...Maintenance pendente lite is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced. The applicant is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, the applicant’s actual and reasonable requirements and the capacity of the respondent to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified, ...”

³ Paragraph 14 of the judgment.

⁴ Paragraph 24 of the judgment.

⁵ 1974 (2) SA 674 (E).

And

“It has been said that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. Similarly, more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his or her lawful obligations than to that of one who is seeking to evade them.”

[20] The submissions on behalf of the respondent are of a procedural and technical nature. On the legal considerations, ten paragraphs are devoted to procedural aspects on rule 43 proceedings. These are elementary matters that do not clarify the respondent’s contentions on the facts.

[21] A similar academic exercise followed, dealing with the interests of the child seeking a dismissal of the application.

[22] It should be kept in mind that the court dealing with custody matters sits as upper guardian of the minor children and *“... 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.”*⁶

⁶ Terblanche v Terblanche 1992 (1) SA 501 (W) at 504C.

E. THE PARTIES' FINANCIAL MEANS

[23] The applicant earns an average of R30 000 per month made up of R20 000 salary plus R9 100 from her work in a private institution. She then earns a once-off R22 000 per annum from marking exam scripts at the end of the year.⁷

[24] The applicant would like the respondent to contribute proportionate to their earning capacity at 63% and 37% respectively. It was submitted on her behalf that the respondent is not making any contribution at all now.

[25] The respondent earns R17 000 per month plus an annual bonus of R17 000.

[26] The applicant further submits that the respondent ought to be contributing R11 337 per month, she is asking for R4000 per child per month.

F. DISCUSSION

[27] No facts are tendered in support of the respondent's opposition to the applicant's quest to have primary care and residency of the minor children. The respondent simply does not like the status *quo* but offers no alternative except for a close relationship that he has with the children.⁸

⁷ Applicant's Financial disclosure form

⁸ Respondent's opposing affidavit Paragraph 2.3

[28] As regards maintenance, the respondent does not refute the applicant's allegation that he is currently not making any contribution. All he contends is that at the time when the Family Advocate's office will have made its determination, then he tenders R500.00 per month per child. He offers a blanket statement that he simply cannot afford the R4000 asked for. This tender appears in the circumstances to be derisive and absurd considering the needs being addressed by the applicant.

[29] Regarding the use and possession of certain movables which are part and parcel of maintenance, the respondent stated that these movables are owned by him and that a claim for these is tantamount to a *rei vindicatio* and are non-suited in a rule 43 application.

[30] The respondent did address in his opposing affidavit the issue of the movables being sought by the applicant. Invoices/receipts have been attached as proof of purchase. The respondent has stated that the applicant may have the printer. That should take care of that item.

[31] As regards the rest of the movables, I am of the view that due to the marital regime of the parties, and the potential for limitless disputes over ownership thereof, the court dealing with the divorce action will be best placed to adjudicate thereupon.

[32] The applicant has made a case for relief pending the finalization of the divorce action as provided for in terms of rule 43. In the result, I make the following order:

32.1 that both parties retain their full parental rights and responsibilities towards the minor children **A V** (born on 16 May 2016) and **L V** (born on 14 January 2019);

32.2 That the primary care of the children vests in the applicant;

32.3 That the respondent enjoys the following specific rights of contact towards the minor children:

(a) Every alternative weekend from 16h00 on the Friday until 17h00 on the Sunday;

(b) The respondent shall pick up the minor children from the applicant's place of residence for purposes of weekend contact and shall bring them to the applicant's place of residence at the end of contact.

(c) Every alternative public holiday and long weekend, with the understanding that a public holiday directly before or after a weekend shall not be singled out as a public holiday but shall be regarded as part and

parcel of the long weekend, from 16h00 the day prior to the public holiday/long weekend; to 17h00 on public holiday/last day of the long weekend.

(d) On both children's respective birthdays for at least 3 (three) hours.

(e) On the respondent's birthday for at least three (3) hours, with the understanding that the minor children shall be with the applicant on her birthday irrespective if this day falls within the respondents contact time as per this order.

(f) On Father's Day, from 09h00 to 17h00, with the understanding that the minor children shall be with the applicant on Mother's Day irrespective of this day falling within the respondents contact time as per this order.

(g) For every alternative short school holiday and for half of every long school holiday, with Christmas and Easter alternating between the parties on an annual basis.

(h) Reasonable telephonic and electronic contact.

32.4 that the office of the Family Advocate be ordered to conduct an investigation into the best interests of the minor children regarding care and contact, and report back to this Honourable Court on its findings.

32.5 That the respondent be ordered to pay maintenance to the applicant for the minor children as follows:

(a) the amount of R3000.00 (Three Thousand Rand) per child per month, this payment to be made on or before the 1st day of the 1st month following this order, and on the 1st day of every month thereafter until finalization of the divorce action; and

(b) payment of half of the minor children's additional medical expenses not paid for by the medical aid fund, by making payment of half of the total expense within 5 (Five) days of a voucher, consisting of a quote, invoice or account being presented to him by the applicant; and

(c) payment of half of the minor children's school clothes, stationery and school necessities and special clothing for extra-curricular activities within 5 (Five) days of a voucher, consisting of a quote, invoice or account being presented to him by the applicant.

32.6 The respondent is ordered to pay the costs of this application.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 26 April 2023

Date of Judgment: 25 August 2023

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 25 August 2023.