

SOUTH AFRICA / JUDGMENT

C.A.L v A.L (DIV31/2020) [2023] ZANWHC 77 (31 January 2023)

[2023] ZANWHC 77

COURT

North West High Court, Mafikeng

BEFORE

S Mfenyana

CASE / FILE NUMBER

DIV31/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG

Case No DIV31/2020

In the matter between:

C A L
Applicant /
Defendant
and
A L
Respondent I
Plaintiff
ORDER
In the result the order

granted by this court on 6
February 2020 is varied
as follows:

Pending finalisation of

the divorce action:

1 . The applicant and the respondent shall be co-guardians and coholders of parental rights and responsibilities in respect of the two minor children as contemplated in section 18 of the Children's Act 38 of 2005.

2.

The primary residence of the minor children shall vest with the applicant subject to the respondent's rights of contact with the minor children at all reasonable times including the

following:

(a)

Contact on every alternate weekend from 14h00 on a Friday to 17h00 on a Sunday.

(b)

Long school holidays to be shared equally between the parties.

(c)

Contact on alternate short school holidays.

(d)

Contact on alternate public holidays and long weekends, to be exercised from after school on the day preceding the public holiday or long weekend.

Reasonable telephonic contact at all reasonable times.

3.

Each party shall pay its own costs.

JUDGEMENT

MFENYANA AJ

Introduction

[1] The applicant approached this court on an urgent basis seeking relief in terms of the provisions of Rule 43 of the Uniform Rules of this Court. The application follows a divorce action instituted by the respondent, against the applicant in the regional court in Lichtenburg and transferred to this court on 6 February 2020, by virtue of an order of this court per Djaje J. The divorce action is pending.

[2] The application is opposed by the respondent.

[3] In his notice in terms of rule 43, alternatively rule 43(6) the applicant sets out the relief sought in the following terms:

"1. That the matter is heard as an urgent application and that the rules pertaining to service and time periods be dispensed with in terms of provisions of Uniform Rule 6 (12).

2. That both parties be co- holders of full parental responsibilities and right in respect of the minor children is contemplated in the sections 18 (2), 18 (3), 18(4) and 18(5) of the Children's Act, 38 of 2005, subject to that hereunder.

3. The minor children shall reside primarily with the defendant.

4. The plaintiff shall be entitled to reasonable rights of contact with the minor children at all reasonable times, such contact to include, but not to be restricted to:

4.1 the right to remove the children every alternate weekend from Friday after school (or 14h00 outside of school term) until 17h00 Sundays;

4.2 the right to remove the minor children for every alternate public holiday and long weekend from after-school on the day

preceding the public holiday (or 14h00 outside of school term) and long weekend until 17h00 on the public holiday or last day of the long weekend;

4.3 The right to remove the minor children for the period of alternate short school holidays;

4.4 The right to remove the minor children for half of every long school holiday, the Christmas and New Year portions of the holy day to alternate annually between the parties;

4.5 The right to remove the minor children for a period of three hours on the birthday of either child;

4.6 The right to remove the minor children for the birthday of the Plaintiff;

4.7 The right to have the children with her on the Mother's Day weekend from after-school on the day preceding the said weekend (or 14h00 outside of school term), until 17h00 on the Sunday;

4.8 The right to reasonable telephone contact with the minor children at all reasonable times;

4.9 The defendant shall mutatis mutandis be entitled to have the children with him on the children's birthday and the Defendant's birthday and Father's Day, if the children are not ordinarily with the Defendant then. "

5. Costs of the application

6. Further and/ or alternative relief.

Issues for determination

[4] What stands for determination is whether the applicant is entitled to the relief sought, and whether there is a material change of circumstance, which warrants a variation of the order granted on 6 February 2020.

Factual background

- [5] The parties were married to each other on 13 March 2010, out of community of property with the exclusion of the accrual system. They have two children (the minor children) aged 11 and 9. The primary residence of the minor is at the heart of the present application.
- [6] When the action was first instituted in the regional court, the minor children resided with the respondent in Lichtenburg, after she moved out of the matrimonial home, taking with her, the minor children. A few months later, in June 2019 the respondent relocated to Vryburg with the minor children. The applicant avers that the move to Vryburg was done without his knowledge which led to him seeking an obtaining an order for the return of the minor children. The said order was not executed owing to further disputes and was subsequently set aside following settlement between the parties on the issue of the children's residence. The parties agreed that the minor children would reside with the respondent pending finalisation of the divorce action. This was followed by a referral to the Office of the Family Advocate, which recommended that the primary residence of the minor children vest with the applicant.
- [7] According to the applicant, following the recommendation by the Family Advocate, the respondent frustrated his rights to have contact with the minor children and without his consent, referred the children for psychological evaluation. This led to the applicant bringing an application to have his contact with the minor children reinstated. The respondent brought a counter application for the maintenance of the minor children. The disputes were settled, resulting in a court order by agreement between the parties on 6 February 2020 that, inter alia, "pending the final determination of the divorce... the primary residence of the minor children (would) be with the ... respondent... with the applicant to exercise the right of contact on alternate weekends, alternate public holidays and half of all school holidays.
- [8] The applicant contends that exercising contact rights with the minor children was not without difficulty as they would become emotional when they had to return to Vryburg. Following several applications and counter applications, the parties on 18 October 2021 reached agreement to have a curator ad litem appointed for the minor children with the responsibility to appoint a neutral expert to conduct an assessment

on the minor children and the parties. The curator appointed Dr Veldsman as an expert. There were several postponements of the divorce action, the last of which was occasioned by the unavailability of the reports of both the curator ad litem and Dr Veldsman. The divorce action was postponed to 12 – 14 September 2022 but was later postponed as the respondent inter alia did not agree with the reports of Dr Veldsman and Adv. Hitge (the curator ad [item]) and required an updated report from the Family Advocate. An updated report by the Family Advocate was filed on 22 December 2022.

It referenced the reports of Dr Veldsman and the curator ad litem which formed part of the divorce action. The essence of all the reports by the Family Advocate, Dr Veldsman and Adv. Hitge in relation to the issue at hand is that they recommended that the primary residence of the minor children should be awarded to the applicant.

[9] In opposing the application, the respondent raised various points of law. The first point relates to the urgency of the matter. In this regard the respondent contended that the matter was not urgent as the children had been residing with her for the past 44 months since the parties' separation in 2019. She further contended that the mere fact that the report of the Family Advocate has been filed at the end of 2022, does not render the matter urgent, and that she disputes the report and maintains that as the

minor children's mother she is better suited to provide primary residence.

[10] The respondent further contends that it would be premature for the court to adjudicate on the aspect of the primary residence of the minor children at this stage, as this issue can only be adjudicated at the trial of the action and at which point the various experts would be subjected to cross examination. "It is only then when proper determination can be made . she adds.

[11] The second and third points in limine relate to the provisions of Rule 43 and 43(6). The respondent challenges the formulation of the application, that it seeks to obtain final relief as opposed to the interim relief for which the rule is designed. It was contended that the application does not fall within the ambit of rule 43. A similar attack was raised in respect of the applicant's reliance on rule 43(6), that the 'mere filing of a Family Advocate's report' can never be considered as a material change of circumstances and that the

order granted by this court on 6 February 2020 should remain in place as nothing has changed. It was further contended that the doors of the court are closed for the applicant in terms of rule 43 as there was a rule 43 application in the past. What this contention overlooks is that the court in hearing the application on 6 February 2020 was not provided with the reports from the various experts as they were not available at that stage. In addition, the order was taken by agreement between the parties. That the respondent is not in agreement with the expert reports does not detract from the fact that all the experts concluded that the best interests of the minor children would be better served if they were to primarily reside with the applicant. As the upper guardian of all minors, this court is entitled to consider what is in the best interests of the minor children and as such, intervene where the best interests of the minor children are in question.

[12] It is less of a concern for the court that such intervention would not suit either of the parties. This is the effect of the ceaseless disputes between the parties, that although the disputes that exist are precipitated by the parties themselves, the minor children bear the greatest brunt of these disputes.

[13] The respondent further decries the fact that the applicant did not apply for separation of issues as contained in the order of this court on 13 September 2022 per Gura J and avers that the application constitutes an abuse of the provisions of rule 43(6). The relevant part of that order states:

"Any party in this matter is free to approach this Court in future, with an interlocutory application (if so advised) after receipt of the Family Advocate's report, for an order for a separation of issues in regard to the parties' divorce and the minor children's principal place of residence, care custody and contact rights. "

[14] In my view the above provision properly dealt with the issue facing the court in those proceedings. It did not, nor is that apparent from the provision that the court created a bar for any of the parties to approach the court "(if so advised)" where circumstances call for it.

[15] The last point in limine relates to the prolixity of the papers. While not included in the papers, counsel for the respondent argued that the affidavit in support of the application was not properly commissioned and thus does not amount to an affidavit. It is trite that the court has a discretion to refuse to admit an affidavit which has not been attested in accordance with the regulations, subject to whether there has been substantial compliance with regulations. The position in this regard is that if an affidavit substantially complies with the requirements for an affidavit, the court may condone the non- compliance. It is settled law that an affidavit commissioned by an attorney should be condoned unless there is evidence of transgression of the relevant legislation that cannot be condoned.

[16] There was a further issue of the lack of jurisdiction of the court which was also not included in the papers but was raised in argument. It appears to me that the respondent conflated the issue of jurisdiction with his earlier contention that only the trial court could deal with the issue of the minor children's primary residence. There is no merit to it.

[17] Mr Maree, counsel for the applicant relied on the decision of the Supreme Court of Appeal (SCA) in *F v F*[1] and stated that where there is a need to remove uncertainty about the future, safety and wellbeing of minor children, that matter will always be urgent. He further submitted that as the upper guardian the court is under a duty and empowered to evaluate all relevant facts placed before it to decide what would be in the best interests of a child (*J v J*).

[18] With regard to the prolixity of the papers, he contended that the sworn statement only consists of 40 pages the remainder being the reports of the Family Advocate and Family Counsellor all of which are necessary for the proper consideration of the application. The approach of the court in this regard is that where a document is relevant to the consideration of the issue at hand, such document should be allowed. To the extent that the applicant sought condonation in this regard, such condonation would be necessary for the proper ventilation of issues.

[19] I dismissed the respondent's contentions and ruled that the matter was urgent. First, all matters pertaining to the best interests of minor children are inherently urgent.

[20] Given the nature of the matter and the continuing impact on the minor children, it does not appear that the minor children will be afforded substantial redress in due course. [2] Any harm that may occur to the welfare of the minor children cannot be undone, their best interests being the main and only consideration.

In my view, the parties' interests in this regard recede to the

background.

[21] Rule 43 is interlocutory in nature. Its purpose is also self-evident from the provision itself. There can thus be no suggestion that a party may seek final relief by employing the rule 43 mechanism, as was contended by Mr Scholtz on behalf of the respondent.

[22] On the merits the respondent avers that as the upper guardian of all minor children, the court is not to merely rubberstamp the

recommendations of the family advocate and is not bound by them. While this may be so, it is trite that the recommendations of the Family Advocate provide the necessary guidance to the courts and may not simply be ignored. What is more is that these recommendations are also supported by the report of Dr Veldsman, the Family Counsellor as well as the curator

ad litem.

[23] Mr Scholtz further argued on behalf of the respondent that the children are too young and cannot distinguish between what is nice and what is in their best interests. The respondent went further to launch an attack on the conduct of the curator ad litem as well as Dr Veldsman.

According to the respondent, she would have been more comfortable if a fresh investigation was conducted without the involvement of the curator ad litem. In this regard the curator ad litem filed an answering affidavit wherein he clarified his responsibility as the representative of the minor children.

[24] The respondent further avers that the applicant had not disclosed to the family advocate that he has a girlfriend whom he introduced to the minor children. She submitted that the younger child was upset when the applicant and his girlfriend shared a bed with her. The remainder of the respondent's answering affidavit pertains to her personal views on the various reports and the best interests of the minor children. She contends that the applicant has embarked on a modus operandi to make himself extremely nice to the minor children, buys them expensive gifts, branded clothes and takes them on vacations which she does not have the financial means to do. She states that this has influenced the children as there are more activities in Lichtenburg than in Vryburg.

- [25] Quite correctly, the respondent avers that no concerns were raised in any of the reports about her living conditions in Vryburg or that she is a bad mother and that the children have continued to show good academic progress while in her care. She views the applicant as someone who does not discipline the minor children and leaves their schoolwork unattended to.
- [26] In essence the respondent avers that the children are too young to decide where they want to stay and what would be in their best interests and dismisses as a fabrication that the minor children have friends in Lichtenburg. She added that the minor children have friends in Vryburg.
- [27] With regard to the applicant's contention that the respondent did not take steps to get professional help, the respondent dismissed this as a 'blatant lie' stating that in September 2021 she took the children to a psychologist. This was countered by the applicant that the minor children's emotional and psychological needs are not being attended to by the respondent.
- [28] She further avers that the order of 6 February 2020 was not an application in terms of the provisions of rule 43, but rather a substantive urgent application and that the applicant can therefore not amend it in terms of the provisions of rule 43(6). I disagree. The said order was granted pending a matrimonial action and, in my view, falls within the ambit of rule 43(6).

Legal framework

[29] The relevant parts of Rule 43 provide:

- (1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
 - (a) Maintenance pendente lite;
 - (b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;
 - (c) Interim care of any child;
 - (d) Interim contact with any child.
 - (6) The court may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or child, or the contribution towards costs proving inadequate.
- [30] The wording employed in the rule envisages a variation of an existing order. It is not a rehearing of the matter or an attempt to review an existing order. The applicant must show a material change in circumstances. During the hearing of the matter, Mr Maree, appearing on behalf of the applicant submitted that there has been a material change of circumstances in that at the time the order was granted in February 2020, the expert reports were not available. He further submitted that at the time, it was envisaged that a trial date would be

set in the near future, which did not happen as the respondent kept shifting the goal post with the last of these being her request for an updated report of the Family Advocate which was filed on 22 December 2022. Any further delay, he continued, would cause harm to the minor children's wellbeing, who despite living with the respondent for 44 months, continue to express that they want to live with their father. This contention finds support in the report of the Family Advocate which records that the minor children still harbor hopes of going to live with their father with {JJ} stating that his worst fear is not being able to live with his father again.

[31] It appears to me that the change in the circumstances cannot be placed anywhere else than at the doorstep of the parties, particularly the respondent. While it may have been thought that the hearing of the matter was at hand, this did not materialize in the wake of the respondent's demands. The effect of this is that the court was then apprised with new facts in the form of the expert reports and the minor children's expressed preferences to live with the applicant. The Family Counsellor in his report states that the minor children stated this "consistently and adamantly".

[32] In my view the filing of the report of the Family Advocate is, on its own a change in circumstances, which cannot be ignored by the court. It belies the respondent's contention that there is no change of circumstance. It does not assist the respondent's case in any way to state that the minor children have been living with the minor children have been living with her for 44 months because those 44 months notwithstanding, the children are still persistent in their desire to stay with the applicant.

[33] Apart from stating that as the minor children's mother she knows best, the respondent does not offer any cogent reason why her views should prevail over those of the experts, including Dr Veldsman, the Family Advocate, Family Counsellor and the minor children's curator ad litem. Instead, the respondent casts aspersions, unworthy, in my view, on all the reports and makes sweeping statements about the influence exerted on the minor children without providing any evidence therefor.

[34] The respondent appears to be laboring under the mistaken impression that as a girl child, {CL's} developmental needs can only be taken care of by her as a mother. This may not be correct. The courts have highlighted the need for fathers to be afforded equal

responsibilities and rights in the care of minor children including 'girl children'. The maternal preference rule was altered with the promulgation of the Children's Act[3]. In PS v AS[4] the court held that a "parent is not merely awarded primary residence of young children because that parent is the mother." The court quoted with approval the dictum in Van Pletzen[5] that mothering is not merely a component of a woman's being, but it is also a part of a man's being. Besides, the children themselves have repeatedly insisted that they want to stay with their father. The respondent may purely be moving from the premise of a parent who is longing to take care of her children, but the best interests of the minor children are paramount in all things pertaining to the minor children. Their view, while not the only consideration, must be taken

heed to. All that is left for the parties is to realize the important role that each of them plays in the children's lives, and work together in supporting their preferences. By contrast the minor children do not seem to harbor any resentment towards the parties although their assessment indicates that they have mixed feelings for the respondent.

Conclusion

[35] Having assessed all the relevant evidence more particularly the reports as well as the additional reports of the experts, I am of the view that it is in the best interests of the minor children that their primary residence should vest in the applicant subject to the respondent's reasonable right to contact with the minor children. Costs

[36] As a general rule, costs are at the discretion of the court and that discretion and that discretion should be exercised judicially. Whilst it is an accepted principle that costs follow the result it transpired during argument that the issue of costs is not a concern to both parties. In view of the foregoing the court is at large to exercise its discretion and grant a cost order that is fair and just to both parties, given the nature of the matter and the interest both parties have thereto. It is my view therefore that an order that each party pays its own costs is reasonable in the circumstances.

Order

[37] In the result the order granted by this court on 6 February 2020 is varied as follows:

2. The primary residence of the minor children shall vest with the applicant subject to the respondent's rights of contact with the minor children at all reasonable times including the following:
 - (c) Contact on alternate school holidays.
 - (d) Contact on alternate public holidays and long weekends, to be exercised from after school on the day preceding the public holiday of long weekend.
 - (e) Reasonable telephonic contact at all reasonable times.
3. Each party shall pay its own costs.

S MFENYANA

ACTING JUDGE OF THE HIGH COURT, NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING : 26 JANUARY 2023

JUDGMENT

RESERVED : 31 JANUARY 2023 DATE OF JUDGMENT : 31 JANUARY 2023

For the Applicant : Adv G V Maree Instructed by : De Villiers Attorneys CIO : Maree & Maree
Attorneys For the Respondent : Adv H Scholtz Instructed by : Kotze Low Swanepoel CIO : Van
Rooyen Thlapi Wessels

[1] 2006(3) SA 42 (SCA)

[2] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others
(11/33767) [2011] ZAGPJHC 196 (23 September 2011)

[3] *supra*

[4](14812/2020)

[2022] ZAGPPHC 389 (3 June 2022) 5 1998

(4) SA 95 (0) IOIB-D/E.

[5] 1998

(4) SA 95 (0) IOIB-D/E.

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Prepared on 13 October 2026 · Esheria