

SOUTH AFRICA / JUDGMENT

D.G.S.F v M.F and Another (347/2024)

[2024] ZAFSHC 207 (2 July 2024)

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Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

347/2024

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 347/2024

In the matter between: D. G. S. F. Applicant (Identity number: 6[...]) and M. F. 1st Respondent (Identity number: 8[...]) THE OFFICE OF THE FAMILY ADVOCATE, RUSTENBURG 2nd Respondent

CORAM:

VAN ZYL, J

HEARD ON: 22 FEBRUARY 2024

DELIVERED ON: 2 JULY 2024

- [1] This matter involves two minor children and therefore the identity of both parties and the minor children are being concealed.
- [2] This is an application brought in terms of Rule 6(12) wherein the applicant, in terms of the notice of motion, is seeking, in addition to condonation, relief in the following terms:

“2. That the court order of the domestic violence court under case number 1060/2022 in the Magistrate’s Court of the District of Tshepong held at Bloemfontein dated 13 April 2022 be set aside, alternatively that the order be varied in accordance with prayer 3 below;

3. That, pending the finalization of the divorce action instituted in the Regional Court Division of North-West (Brits) under case number NW/BRT/RC/116/2022:

3.1 The primary residence of the minor children, ... [A.J.F] and ... [G.L.F] shall vest with the applicant;

3.2 Both parties retain full parental rights and responsibilities, and that the 1st respondent is entitled to have contact with the minor children as follows:

3.2.1 One weekend per month from 16h00 on Friday until 16h00 on Sunday;

3.2.2 Every short school holiday;

3.2.3 Having the minor children with her for half of every long school holiday in the June/July and December with Christmas alternating annually between the parties;

3.2.4 Telephonic and electronic contact at all reasonable times.

3.3 The applicant is authorized to, on a full-time basis, enrol the minor children at Cornerstone Institute (Brits);

3.4 That consent be granted for the minor children to attend therapy in order to provide the minor children with the necessary emotional and psychotherapeutic support;

4. That the 1st respondent pay the costs of the application, only in the event of opposition;

5. Further and/or alternative relief.”

[3] I will refer to the first respondent as “the respondent” and to the second respondent as “the Family Advocate Rustenburg”.

[4] The respondent raised three points in liminé, namely the lack of urgency, lis pendens and res judicata.

[5] This matter served before me for the first time on 8 February 2024 during which week I was tasked to deal with the urgent applications. Due to the apparent haste within which the application was filed and thereupon opposed, counsel did not have time to file detailed and proper heads of argument. For this reason and for the fact that I had a very busy roll for the day, I suggested that the matter be postponed for two weeks in order to give counsel the opportunity to file proper heads of argument and also not to deal with the matter in a hastily fashion in court. After the respective counsel made different submissions to me, I determined that I would hear the points in liminé of lis pendens and res judicata at that stage, without dealing with the merits. I would then give a judgment on those two issues and should the matter not be finalized on one or both of those issues, I will request that the Judge-President to re-allocate the matter to me for hearing in two weeks’ time so as to grant

counsel opportunity to file detailed heads of argument and to have enough time to properly deal with the matter in court.

- [6] I consequently continued to hear arguments on *lis pendens* and *res judicata*. I thereafter reserved judgment and postponed the application for two weeks.
- [7] I subsequently, on 16 February 2024, delivered a short judgment in respect of the two points in *liminé*. I concluded as follows at paragraphs [7] and [8] of the said judgment:

“[7] I have duly considered the arguments presented to me in respect of the points of res judicata and lis pendens. However, I have come to realize that I indeed cannot properly adjudicate the two points without also taking certain aspects of the merits of the application into consideration.

- [8] In my view the application consequently needs to be postponed for the adjudication thereof in totality.”
- [8] The application in its entirety consequently again served before me on 22 February 2024.

Relevant

Background:

- [9] The applicant, who currently resides in Brits, North-West Province, and the respondent, who currently resides in Bloemfontein, are married to each other, from which marriage two children were born, namely a daughter, A.J.F, who is currently 15 years old and a son, G.L.F, who is currently 6 years old. When referring to both of the minor children, I will refer them as “the children”.
- [10] On 29 January 2022 the respondent left the communal home with the children without informing the applicant of her intention to do so. According to the respondent she did so because of the applicant’s continuous domestic abuse and him threatening to kill her. She left with the children out of fear for their lives and, according to her, she had to wait to obtain a protection order before she could tell the applicant where they were. These allegations pertaining to his conduct is being denied by the applicant.
- [11] The first respondent obtained a protection order against the applicant, which according to the applicant, was based on false allegations. During March 2022 the respondent apparently obtained a second protection order against the applicant in the Bloemfontein’s Magistrate’s Court, which order was eventually also set aside. The details of those orders are unknown to me, but I in any event do not consider the details thereof relevant to the present application.
- [12] Of importance is that the parties subsequently agreed to a court order in the Magistrate’s Court (Tshepong), for the district of Bloemfontein dated 13 April 2022, attached to the founding affidavit as annexure “FA1” I will refer to this order as the “domestic violence order”. In the said order the present respondent is the applicant and the present applicant is the respondent. The order reads as follows:

“1. The main application is withdrawn.

2. The following order in terms of the Counter Application is granted:

2.1 The respondent is allowed to contact his children on a daily basis via Video Call for at least twenty

(20) minutes, unheeded and without interference from the applicant;

2.2 That the respondent is allowed to remove his children from the applicant's care at least one (1) weekend per month from 17h00 on Friday until 17h00 on Sunday;

2.3 That the respondent is allowed to remove his children from the applicant's care on Easter Weekend to Welkom from 17h00 on Thursday, 14 April 2022 up until 17h00, Monday, 18 April 2022.

2.4 That the respondent is allowed to remove his children from the applicant's care, every short school holiday being March to April and September to October; and

2.5 That the respondent is allowed to remove his children from the applicant's care for half of every long school holiday being June/July and December/January with Christmas and New Year alternating between the parties, whereby the first part of the December holiday will be up until 30 December and the second part thereafter.

3. Paragraph 3 (including sub-paragraphs) will operate as interim order pending the finalization of the children's court matter, alternatively until varied by a competent court's order.

4. The applicant to pay contribution towards the respondent's legal costs in the amount of R5 000.00 in five (5) monthly payments of R1 000.00 per month with a first payment to be made on or before 31 May 2022 and thereafter on or before the last day of each and every succeeding month.”

[13] On 9 March 2023 the first respondent launched a Rule 58 application in the Regional Court, Brits, seeking, inter alia, the interim primary residence of the children. The applicant opposed the application and also filed a counter-application, which counter-application was also opposed. The matter was not enrolled for hearing at the time by any of the parties. Any further reference to “Rule 58” in this judgment is to be understood to be a reference to Rule 58 of the Magistrates' Courts Rules and a reference to “Rule 43” is to be understood to be a reference to Uniform Rule 43.

[14] On 21 August 2023 the Family Advocate, Rustenburg issued a report in the matter, which report recommends that it would be in the best interest of the children for their primary care and residence to be with the applicant and to have contact with the respondent.

[15] On 28 September 2023 the applicant's attorney of record wrote a letter to the first respondent enquiring from her whether she is willing to settle the divorce matter. Reference was made to the report of the Family Advocate, Rustenburg and it was stated that it was consequently in the best interest of the children that they should stay with the applicant. At that stage the attorney of record on behalf of the respondent had withdrawn.

[16] On 29 September 2023 the applicant responded to the aforementioned letter of the applicant's attorney of record by stating as follows:

“Ek erken ontvangs van u e-pos gedateer 28 September 2023 en neem kennis van die inhoud daarvan. Die voorstel met betrekking tot ‘n skikking is onaanvaarbaar. Onder geen omstandighede gaan ek toestem dat die kinders op ‘n permanente basis by u kliënt bly nie en is enige besoek van die kinders vir die vakansie aan hom onderhewig aan ‘n skriftelike onderneming dat die kinders aan my terugbesorg sal word na afloop van die vakansie. Die posisie met betrekking tot waar die kinders sal bly moet onveranderd bly tot tyd en wyl die hof daaroor ‘n beslissing gemaak het nadat ek, behoorlik verteenwoordig deur ‘n regsverteenvoordiger die geleentheid gehad het om my saak te stel.

My regsverteenvoordiger moes onttrek vanweë ‘n gebrek aan fondse. Ek is deur die plaaslike Legal Practice Council na die Regskliniek van die Universiteit van die Vrystaat verwys en ek wag vir ‘n finale antwoord van die Regskliniek met betrekking tot verteenwoordiging. Ek sal u in kennis stel van die uitslag daarvan sodra dit bekend is.”

[17] The applicant thereupon states as follows at paragraph 43 of his founding affidavit:

“At this stage, there was only about 2.5 months left until the end of the 2023 school year. Though I was very concerned about the children, I hesitated to take steps that would have resulted in the minor children being taken out of their schools before the end of the school year. I also did not at that stage have the necessary funds to pursue litigation. On advice also of my legal representatives, and reluctantly, I considered it best for the children to complete the 2023 school year without disruption. I further had hoped that the matter could be resolved amicably with the first respondent. I reasoned – perhaps in retrospect foolishly, that the first respondent would come to the realization that it would be in the best interest of the children to relocate to Brits once the school year was concluded.”

[18] In a WhatsApp dated 24 October 2023 the respondent agreed that the applicant could fetch the children on the 24th of November 2023 and return them to her on the 20th of December 2023, since it was her turn to have the children with her. A subsequent dispute developed in this WhatsApp message, whereupon the first respondent indicated that she was not going to reason with the applicant anymore and will make the necessary arrangements with the applicant's attorney.

[19] The applicant alleges that only on 20 November 2023 did he realize that the matter would not be resolved amicably when the first respondent informed him that she intended to ignore the Family Advocate, Rustenburg's recommendation.

[20] Thereupon, on 9 December 2023, the applicant launched an urgent application seeking similar relief to the present application in the Regional Court of Brits. The judgment delivered in the said matter, dated 14 December 2023, is attached to the founding affidavit as annexure “FA18”. In terms thereof the hearing was due to be held on 13 December 2023 but since the fact that the court building was closed as a result of a water shortage, the court directed that the application will be dealt with on the papers. The parties were, however, granted the opportunity to file heads of argument.

[21] In terms of the said judgment, the relief which was sought by the applicant was summarised to have been the following:

“2.1 The non-compliance with the rules be condoned and that the matter be heard as urgent in terms whereof the normal time period for service and filing be condoned;

2.2 The court order under domestic violence court case number 1060/2022 in the Magistrate’s Court of the District of Tshepong held at Bloemfontein dated 13 April 2022 be declared void, alternatively be set aside and replaced by the order that the primary residence of the minor children, ... [A.J.F] and ... [G.L.F] be forthwith vested with the applicant; further that both parties retain full parental rights and responsibilities and that the respondent be entitled to have contact with the minor children as set out in 4.1 to 4.5 in the notice of motion. Costs of the application to be paid by the respondent on a punitive scale in the event of opposition.”

[22] The respondent unsuccessfully raised a point in liminé, which is not relevant for present purposes. The respondent raised the lack of urgency as a second point in liminé. The court made the stated as follows and made the following determinations and findings in its judgment:

“15. The applicant stated that the need for the urgent intervention by this court, is based on the reports of the Family Councillor as well as that of the Family Advocate, that recommend that both minor children should urgently be released from the care of the Respondent. More specifically so that they will be forced to be in the care of an incompetent parent, will be inconvenienced by changing schools and will suffer the harm of the Respondent’s conduct, be that manipulation, intimidation or threats.

16. The Respondent disputes the existence of urgency, stating that the Applicant is the creator of his own urgency as he could have launched the application 3 months back already when he received the report of the Family Advocate. To quote from the Nelson Mandela Metropolitan Municipality case, I am of the view that the delay in instituting proceedings is not, on its own a ground for refusing to regard the matter as urgent.
17. The court is aware that the best interest of a child is of paramount importance in every matter concerning the child as envisaged in section 28(2) of the Constitution of South Africa.

18. In order to determine urgency, the court is considering the respective reports as referred to by the applicant as Family Advocates evaluate the circumstances of the parents in divorce proceedings and make recommendations to the court regarding care, contact and guardianship.
19. Both the Family Councillor and the Family Advocate are recommending that the children involved should primarily reside with the applicant. They do, however not recommend that the children should be released urgently from the care of the respondent as alleged by the applicant. Inconvenience and the possibility of future events, on its own, do not constitute urgency.
20. I am satisfied that the applicant can be afforded substantial redress at the hearing in due course. The second point in limine is accordingly upheld.” (My emphasis)

[23] The following order was consequently made:

“22. Having regard to the papers as well as the written heads of argument filed by both parties, the court is making the following order:

1. The application is removed from the roll due to lack of urgency;
2. Applicant to pay the costs of the application.”

[24] On the very same date of 14 December 2023 the applicant set down the Rule 58 application for hearing on 17 January 2024 as per the notice of set down attached to the founding affidavit as annexure “FA19”. The respondent’s attorney of record objected to the set down since it constituted short service as required by the relevant rule. The applicant’s attorney of record subsequently removed the matter from the roll on 11 January 2024 and on the same date re-enrolled the Rule 58 application on 11 for 12 March 2024.

[25] Despite the pending Rule 58 application, the applicant also launched the present application on 22 January 2024 to be heard on 8 February

2024. According to the applicant he could not have launched this application earlier as the offices of his attorneys were closed from 14 December 2023 until 8 January 2024.

[26] In the meantime a report from the Family Councillor Bloemfontein came to hand, dated 17 January 2024. The said investigation was done on request of the Family Advocate Rustenburg. The children were assessed on 28 November 2022 and the respondent on 13 December 2022. Although the Family Councillor concluded that she cannot make a recommendation since she only interviewed the mother and assessed the minor children and not also the respondent, I will return to this report.

[27] On 5 February 2024 the applicant withdrew the urgent application which had previously been struck from the roll due to the lack of urgency and with regard to the rule 58 application, he withdrew his counterclaim thereto, but not his opposition thereto. I will return to the said withdrawals.

[28] At the time of the first hearing of the present application on 8 February 2024, the respondent's Rule 58 application and the applicant's opposition thereto were still pending. This is presently still the situation.

Rule 58 of the Magistrates' Courts Rules:

[29] This rule is similar to Uniform Rule of Court 43 in High Court matters. Rule 58 regulates the procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters. The extracts from the Rule applicable to the present matter read as follows:

“(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

- (a) interim maintenance;
- (b) a contribution towards the costs of a pending matrimonial action;
- (c) interim care of any child; or
- (d) interim contact with any child.

(2)(a) An applicant for any relief contemplated in subrule (1) shall deliver a sworn or an affirmed statement in the nature of a declaration, setting out the relief claimed and the grounds therefore...

...

(3)(a) The respondent shall deliver a sworn or affirmed reply in the nature of a plea within 10 days after receiving the statement and the notice contemplated in subrule (2).

(4) either of the parties may set the matter down for summary hearing...

(5) The court may hear such evidence as is considered necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision.” (My emphasis)

[30] From the use of the word “shall” in Rule 58(1) it is evident that this procedure is prescriptive.

[31] The object of the rule is that applications of this kind should be dealt with as inexpensively and expeditiously as possible; prolixity in averments and the unnecessary proliferation of papers and affidavits should be avoided. See *Nienaber v Nienaber* 1980 (2) SA 803 (O) at 806 C – G. In the unreported judgment of C.A.D. v J.D. (4017/2021) [2023] ZAECKMKHC 66 (18 May 2023) at paragraph [2], the non-compliance with the aforesaid object of Rule 43 (as with Rule 59) was considered to constitute an abuse of the court process.

[32] In *Jones & Buckle: Civil Practice of the Magistrates' Courts in South Africa*, DE van Loggerenberg, Volume II, 10th Edition, at RS 34, 2023 Rule – p. 58-3 the following important principles are summarized with reference to applicable authority:

“Rule 58 is a special rule governing certain specific applications in contrast with the provisions of rule 55 which govern applications in general. Urgency does not take applications for relief under rule 55(5) outside the scope and limitations of this rule. The provisions of rule 55 can find application only in respect of aspects which are not governed by this rule. The only such provisions are those relating to urgency contained in rule 55(5)(a) and (b), but the applicability of those provisions does not mean that an applicant has a choice which enables him to proceed under rule 55 and thus escape the limitations imposed by this rule.” (My emphasis)

[33] In support of the aforesaid principles see, inter alia, *Henning v Henning* 1975 (2) SA 787 (O) and *Leppan v Leppan* 1988 (4) SA 455 (W).

The general principles regarding urgency in terms of Uniform Court Rule (12):

[34] Rule 6(12) determines as follows:

“6(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

(b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is [sic] averred render [sic] the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.” (My emphasis)

[35] In *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC & Others* 2004 (2) SA 81 (SE) the court referred to the judgment which is considered to be the locus classicus on self-created urgency, namely *Schweizer Reneke Vleis (Mkpy) (Edms) Bpk v Minister van Landbou & Andere* 1971 (1) PH F11 (T) where the following was stated at F11 – 12:

“Volgens die gegewens voor die Hof wil dit vir my voorkom dat die applikant alreeds vir meer as ‘n maand weet van die toedrag van sake waarteen daar nou beswaar gemaak word. Die aangeleentheid het slegs dringend geword omdat die applikant getalm het en omdat die tweede respondent, soos die applikant lankal geweet het, of moes geweet het, van die besigheid in Schweizer-Reneke geopen het. Die applikant mag gewag het vir inligting van die eerste respondent soos in die skrywe aangevra maar dit was geensins nodig vir die doeleindes van hierdie aansoek, wat op die nie-nakoming van die audi alteram partem-reël gebaseer is, om so lank te wag om die Hof te nader nie. Al hierdie omstandighede inaggenome is ek nie tevrede dat die applikant voldoende gronde aangevoer het waarom die Hof op hierdie stadium as a saak van dringendheid moet ingryp nie.

Ek is dus, in omstandighede, nie bereid om af te sien van die gewone voorskrifte van Reël 6.”

[36] In *Tukela v Minister of Public Works* (P578/17)

[2017] ZALCPE 29 (19 December 2017) the Court referred to the aforesaid *Schweizer Reneke Vleis*-judgment and held as follows at paras [14] – [15]:

“[14] It is trite that an Applicant cannot create his or her own urgency by delaying bringing an application. This Court will not come to the assistance of an applicant who has delayed approaching the Court. See National Police Services Union & Others v National Negotiating Forum & Others (1999) 20 ILJ 1081 (LC) at 1092 paragraph [39] where Van Niekerk, AJ (as he then was) stated the following:

‘The latitude extended to parties to dispense with the rules of this court in circumstances of urgency is an integral part of a balance that the rules attempt to strike between time-limits that afford parties a considered opportunity to place their respective cases before the court and a recognition that in some instances, the application of the prescribed time-limits or any time-limits at all, might occasion injustice. For that reason, rule 8 permits a departure from the provisions of rule 7, which would otherwise govern an application such as this. But this exception to the norm should not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief in this court. For these reasons, I find that the union has failed to satisfy the requirements relating to urgency.’

[15] I am in light of the afore-going of the view that the Applicant has created her own urgency by the substantial delay. I am of the view that the application falls to be struck of the role.”

[37] In Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E TV 2006 (3) SA 92 (C) the aforesaid principle was stated as follows at para [47]:

“[47] The next question to determine is whether the matter was urgent or that an urgency was self-created. It is correct that an applicant cannot create its own urgency by delaying bringing the application until the normal rules can no longer be applied.”

[38] Arising from and connected to the aforesaid principle, is the consequent obligation on an applicant in an urgent application to explain all periods of delay for purposes of making out its case for urgency. The relevant principle applicable to condonation applications in this regard is consequently mutatis mutandis applicable to an urgent application. In High Tech Transformers (Pty) Ltd v Lombard (2012) 33 ILJ 919 (LC) the importance of a reasonable and acceptable explanation for a delay was accentuated at para [25] of the

judgment:

“[25] ... Condonation is not merely for the asking as was duly pointed out by the court in NUMSA & another v Hillside Aluminium [2005] ZALC 25; [2005] 6 BLLR 601 (LC):

‘[12] Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. ... Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process.’” (My emphasis)

Factual consideration of the alleged urgency (for now without considering the nature of the process followed):

- [39] Only months after the respondent left the communal home with the children the parties settled the dispute between them in respect of the interim residence and contact rights in respect of the children by means of the domestic violence court order dated 13 April 2022 in terms whereof the care and primary residence of the children was awarded to the respondent. After that the applicant initially took no further steps to obtain an order to the contrary.
- [40] On 9 March 2023 the respondent was the party who initiated a Rule 58 application seeking interim care and primary residence of the children pendente lite, which was the correct procedure to have followed. Although the applicant opposed the application and filed a counter application, he took no steps to expedite the enrolment and the hearing of the application, despite the minor children being resident at and in the care of the respondent.
- [41] The reports of the Family Advocate, Rustenburg and the Family Councillor, Rustenburg were received on 21 August 2023. Despite the recommendations in those reports that the primary care and residence of the children should vest in the applicant, he took no steps in response thereto despite his averment in his founding affidavit that the respondent was not willing to accept the recommendation therein.
- [42] As previously quoted, the applicant's failure to take any further steps at that stage to obtain the interim care and residency of the minor children, is explained in his founding affidavit by the following averments at paragraph 43 thereof:

"At this stage, there was only about 2.5 months left until the end of the 2023 school year. Though I was very concerned about the children, I hesitated to take steps that would have resulted in the minor children being taken out of their schools before the end of the school year. I also did not at that stage have the necessary funds to pursue litigation. On the advice of my legal representatives, and reluctantly, I considered it best for the children to complete the 2023 school year without disruption. I further had hoped that the matter could be resolved amicably with the first respondent. I reasoned – perhaps in retrospect foolishly – that the first respondent would come to the realization that it would be in the best interest of the children to relocate to Brits once the school year was concluded."

- [43] What the applicant, however, does not explain, is why he did not enrol the Rule 58 application/counter application at that stage already so as to ensure that it be finalized when the children complete their 2023 school year. That would, from his point of view, have been the most sensible, reasonable and affordable thing to do.
- [44] According to the applicant he realized by 20 November 2023 that the parties will not be able to resolve the matter amicably. At that stage, again instead of enrolling the Rule 58 application, the applicant filed the urgent application in the Regional Court on 9 December 2023, alleging that it then had become urgent that the children should be removed from the primary residence of the respondent, although that request was based on the reports of the

Family Advocate, Rustenburg and the Family Councillor, Rustenburg which had come to hand during August 2023 already.

- [45] In my view the Regional Court correctly struck that urgent application from the roll for a lack of urgency. The fact that the matter was only decided on papers does not decrypt from the correctness and the consequences of that order.
- [46] Without (for now) dealing with the correctness or not of the procedure the applicant followed by having filed the present application in the High Court, his explanation for not having done so immediately after the other urgent application was struck from the roll, is that the offices of his attorneys were closed from 14 December 2023 to 8 January 2024. With all due respect to the applicant and the offices of his attorney, this can never be an excuse for a party's failure to have timeously and urgently approached court where the interests of minor children are concerned. Surely arrangements could have been made in order for the present application to have been issued at that stage, already, instead of only on 22 January 2024.
- [47] Having said that, it is evident from the papers that the only "new event" which occurred after the other urgent application was struck from the roll due to a lack of urgency, was the incident of 6 January 2024. That event, in my view, when considered in conjunction with the respondent's version thereof, in any event was not as disruptive and upsetting to the children as the applicant makes it out to be. Be that as it may, more importantly, what had been additionally obtained in the meantime after the previous urgent application was struck from the roll due to a lack of urgency, was a report of the Family Councillor, Bloemfontein. Although the said councillor did not make a recommendation, it is in my view evident from a proper reading of the said report that in the view of the Family Advocate, Bloemfontein, there was no reason, let alone any urgent reason, why the children for the interim had to be removed from care the first respondent. The applicant, however, despite the previous finding of lack of urgency in the other urgent application and despite the report of the Family Councillor, Bloemfontein which was favourable for the respondent, the applicant merely proceeded persisted with the present urgent application. This, with respect, boggles my mind.
- [48] Leaving the issue of the procedure which the applicant followed aside for a moment, the applicant, in my view, dismally failed to make out a proper case for urgency. Not only were there time periods during which he took no steps whatsoever to obtain the interim care and residence of the children, but, even more importantly, when all the facts and circumstances are objectively considered, there is in my view no reason or grounds why the children should be removed from the interim care and residence of the respondent, let alone on an urgent basis. Should the applicant wish to obtain the interim or the permanent care and residency of the children, he will be afforded substantial redress at a hearing in due course.

The procedural issues:

- [49] It is clear from my discussion above regarding the applicability of Rule 58 in the present circumstances that the applicant fatally erred in having filed the present application in the High Court. From the outset of the applicant's intention to obtain the interim care and residence of the children on an urgent basis (should a proper case for urgency have been made out) the required procedure would have been to follow Rule 58. Considering that the respondent issued a Rule 58 application and the applicant filed a counter-application therein, merely means that the applicant should have persisted with that counter-application and should have expedited the enrolment thereof.
- [50] Insofar as the applicant was of the view that the said application was out dated pertaining to relevant facts and events, he could have made use of Rule 58(5) to ensure that all relevant material was to be placed before Court. He could otherwise have properly withdrawn the counter-application, by also tendering the costs thereof and then have instituted an updated Rule 58 counter-claim.
- [51] With regard to the letter dated 17 January 2024, the contents of which the applicant blames for having decided to withdraw the Rule 58 counter-application, is in my view irrelevant. The applicant was (and is) dominus litis in respect of that counter-application and should have dealt with it in accordance with his own instructions and advice from his attorney. He cannot place the responsibility for his own decision before the door of the other side.
- [52] I agree with the submission of Ms Nortje, on behalf of the respondent, that the applicant did forum shopping in the present dispute. Instead of having persisted with the Rule 58 application-process, he launched the urgent application in the Regional Court during December 2023. When that was not successful, he filed the present application, after which he withdrew (or rather attempted to withdraw) his counter application in the Rule 58 application and the other "urgent application" in the Regional Court.
- [53] I cannot but find that the present application constitutes an abuse of process in a number of respects.
- [54] In my preparation of this judgment I came across a reported judgment of which the facts, although not identical, are very similar to the present matter and which judgment deals with a number of principles relevant to the present matter:

54.1 In the judgment of *SW v SW and Another* 2015 (6) SA 300 (ECP) divorce proceedings were pending before the Regional Court, Port Elizabeth. The central issue between the parties was the care and residence of a 6-year old minor child. At the time the minor child was in the care of the first respondent in accordance with an order granted by the Regional Court in terms of Rule 58. The applicant instituted an urgent application in terms of Rule 43 in the High Court, Port Elizabeth. It was opposed on the ground that it is not urgent and that it constitutes an abuse of process. The matter was heard on 30 July 2015.

54.2 In May 2015 the applicant launched a Rule 58(2) application in the Regional Court. Before the hearing of that application, the applicant, on 21 July 2015, launched a further application in terms of Rule 58. On 24 July 2015 the applicant withdrew the rule 58 applications, although no costs were tendered in the notice, and immediately launched the Rule 43 proceedings in the High Court. Following a very insightful discussion of different applicable

principles, the court found, inter alia, as follows at paragraphs [34] and [37] of the judgment:

“[34] Finally, there is the form of this application. I have already pointed to the fact that the applicant brought the application on an urgent basis when he was not entitled to do so. In addition the applicant sought to obtain relief from this court in circumstances

where he had plainly failed to obtain such relief in the regional court. The conclusion is inescapable that the applicant,

dissatisfied with the process before the regional court, sought to circumvent the difficulty by approaching this court. That in my view is an abuse of the process. If the applicant were unrepresented this court might have been prepared to excuse such conduct on the basis that the applicant is a lay person. But that is not the position in this case.

[37] On the basis of all of these considerations I come to the conclusion that the application must be dismissed on the basis that this court lacks jurisdiction to hear the application. I consider also that the application is an abuse of the process of court for the reasons set out above.”

The consequences of the findings made above:

[55] In view of my finding that the applicant failed to make out a proper case for urgency (in addition to having used an incorrect procedure), the application stands to be struck from the roll.

[56] In addition, the applicant’s abuse of process by having filed the present application instead of having dealt with the dispute by means of Rule 58, constitutes a further reason why the application stands to be struck from the roll.

[57] Both the last-mentioned two conclusions make it unnecessary to adjudicate the other two points in liminé. I do, however, deem it necessary to further quote from the aforesaid SW v SW-judgment, firstly in respect of the principles that make *lis pendens* applicable to the present matter (without deciding same) and secondly to illustrate the similar abuse of process in the present matter as in SW v SW:

“[25] Rule 58, it should be said, is the equivalent of rule 43 in the magistrates’ court. As already indicated, the applicant purported to withdraw those applications immediately before launching the present application. ...

[26] When asked whether the withdrawal of the applications had the effect of terminating those applications, it was submitted that it did. This was despite rule 22 of the Magistrates’ Courts Rules, which entitles a party to whom no tender of costs is made in a notice of withdrawal to

apply for the matter to be set down in order for the costs to be determined. Counsel was, however, constrained to concede that the effect of rule 22 is to keep alive the application until the question of costs is determined. Upon realisation that this would be fatal to the present application (leaving aside the jurisdictional issues), applicant's counsel made a tender of costs in those applications from the bar, no doubt seeking thereby to terminate the pending proceedings before the regional court. As it turned out, the tender was rejected by the first respondent, who pointed out that throughout those proceedings she had contended that the applications were an abuse of the process and had sought a punitive costs order.

[27] There can, to my mind, be no doubt that the proceedings initiated in the regional court were still pending at the time that this

application was launched. The applicant's purported withdrawal amounted to no more than that — a purported withdrawal in order to enable these proceedings to be launched. The withdrawal was not effective and did not terminate the lis between the parties in the regional court. The subsequent tender of costs from the bar also did not bring the matters in the regional court to an end. The irregular attempt to present to this court a copy of a formal 'notice of withdrawal' of the applications in the regional court, after argument had been presented and judgment had been reserved, also cannot assist. Firstly, it was irregular to make such an attempt. Secondly, such withdrawal suffers from the same deficiency that the tender from the bar suffered, namely it did not address the first respondent's entitlement to have the costs determined on a punitive scale. Thirdly, as long as the costs issue remained to be decided, so too the merits of the application remained in issue, thereby precluding this court from making any pronouncement on the merits which would have the effect of fettering the regional court's discretion on the issue of costs.

[28] The above illustrates the fundamental difficulty that the applicant faces in this application. Not only does the applicant seek relief which it is not competent to grant in terms of rule 43, but, as is indicated, this court's jurisdiction was sought to be invoked in circumstances which point to the process of this court being abused.

[29] That such a conclusion is warranted emerges from consideration of the alleged urgency upon which the applicant relied; the basis upon which the 'best interests' of the minor child were invoked; and the form in which the application was brought. ..." (My emphasis)

[58] The most important remaining question what the status of the children is as a result of all these events.

[59] If the present application is to be struck from the roll, the domestic violence court order dated 13 April 2022 will remain the determining order in respect of the interim care and residence of the children.

[60] I have considered the possibility of making an order regarding the interim care and residence of the children, purely for the sake of clarity and to remove any uncertainty for the children. Ms Nortje also requested accordingly in her arguments.

[61] A High Court can exercise its inherent common-law jurisdiction to act in appropriate circumstances in the interests of minor children to make an order, notwithstanding that there are proceedings pending before another court. See *SW v SW*, supra, at para [20]. However, the court also determined as follows at paragraphs [20] and [22] of its judgment:

“[20] ... The second is that in order to invoke that common-law inherent jurisdiction the applicant must establish (a) that considerations of urgency justify the intervention; and (b) that the intervention is necessary to protect the best interests of the minor child.

[21] Even although the High Court has such jurisdiction, it is not a jurisdiction that will be lightly exercised. The court retains an inherent discretion not to exercise such jurisdiction in order to avoid a multiplicity of suits with the concomitant risk of jurisdictional conflict (see *Steinberg v Steinberg*; *Schlesinger v Schlesinger*).

[22] These considerations of jurisdictional conflict are in my view all the more significant in the light of the significant changes to the jurisdictional scheme relating to matrimonial matters. In this regard it is important to note that when *Green* was decided only the High Court (as it is now known) had jurisdiction to adjudicate matrimonial matters. Now regional courts, whose jurisdiction is conferred by statute, also enjoy jurisdiction to adjudicate matrimonial matters. A regional court is an entirely

separate court exercising wholly distinct jurisdiction and it is, furthermore, a court which is bound, on the principle of stare

decisis, by the judgments and rulings of the High Court. These considerations will undoubtedly weigh heavily in the exercise of this discretion.” (My emphasis)

[62] In the present matter, should I make no further order, the children will for the interim remain with the first respondent as per the domestic violence court order, at least until a competent court orders otherwise. That is, in my view, presently in the best interests of the children. There is consequently no considerations of urgency which justify my intervention and my intervention is not necessary to protect the best interests of the children.

[63] Secondly, should I indeed make an order regarding the interim care and residence of the children, and circumstances change in that the Rule 58 application or a new Rule 58 application be brought before the Regional Court, issues of jurisdictional conflict will definitely arise.

[64] In the circumstances I find that it is not an appropriate instance where I should make any further order than that the matter be struck from the roll and an appropriate order as to costs.

Costs:

- [65] In view of the totality of my findings, especially with regard to the applicant's abuse of process, I am of the view that despite the fact that this is a dispute regarding the best interests of minor children, it is an instance which necessitates me, in the exercise of my discretion, to not only order that the applicant be ordered to pay the costs of the application, but that he be ordered to do so on a punitive scale.
- [66] With regard to the reserved costs of 8 February 2024, I deem it appropriate that those costs be costs in the application. The applicant will consequently also be responsible for those costs, also on a punitive scale.

Order:

[67] The following order is consequently made:

1. The application is struck from the roll.
2. The applicant is ordered to pay the costs of the application, which costs are to include the reserved costs of 8 February 2024 and all of which costs are to be paid on an attorney and client scale.

C. VAN ZYL, J

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