

SOUTH AFRICA / JUDGMENT

F.P.K v A.K (2023-055679) [2023] ZAGPJHC 1279 (9 November 2023)

[2023] ZAGPJHC 1279**COURT**

South Gauteng High Court, Johannesburg

BEFORE

De Wet

CASE / FILE NUMBER

2023-055679

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE NUMBER: 2023 –****055679****NOT REPORTABLE****NOT OF INTEREST TO OTHER****JUDGES****REVISED****09/11/23****In the matter between:**

K,
F P
APPLICANT
and
K,
A
RESPONDENT

JUDGEMENT

DE WET AJ:

1. The applicant brought an application in terms of rule 43 of the Uniform Rules of Court in which he inter alia seeks defined rights of contact with the child born of the marriage between the parties. The respondent opposed the relief sought and brought a counter application for a contribution towards her maintenance, a contribution towards the maintenance of the child as well as a contribution towards her legal costs. Both parties seek an order that the other pay the costs of the application.

BACKGROUND

2. The parties were married to one another on 2 October 2016 which marriage is out of community of property and subject to the accrual system as envisaged in Chapter 1 of the Matrimonial Property Act, 88 of 1984.
3. One child, a son, E.K, was born from the marriage on 2 November 2019 (“the child”). He is four years old.
4. As a consequence of the breakdown of the marriage between the parties, cohabitation between them came to an end during or about October 2022, since when the child has lived with the respondent whilst the applicant has had irregular contact with him.
5. It is common cause that the child’s primary residence should vest in the respondent.
6. It is further common cause that the issue pertaining to the best interests of the child with reference to the contact that the applicant should have with him should be referred to the Family Advocate for investigation and upon finalization of the investigation, a report that contains the findings and recommendations of that office should be made available to the parties. Such a referral has been included in the court order below.
7. The first dispute that the Court is herein called upon to determine is the interim contact that the applicant should have with the child.
8. The applicant herein seeks an order in the following terms:
 - 8.1. That the primary residence of the child vests in the respondent;
 - 8.2. that he has contact with the child as follows:
 - 8.2.1. every Wednesday after school until Thursday morning when he will return the child to school;
 - 8.2.2. every alternative weekend from after school on the Friday until Monday morning when he will return the child to school;

8.2.3. on Father's Day from 17h00 from the day preceding Father's Day until 17h00 on Father's Day;

8.2.4. reasonable daily telephone contact, video calling, webcam and skype;

8.2.5. every alternate public holiday from 17h00 on the day preceding the public holiday until 17h00 on the public holiday;

8.2.6. on the child's birthday for a minimum period of 3 hours should his birthday fall on a weekday, alternatively 5 hours if his birthday falls on a weekend, as agreed between the parties;

8.2.7. on his, the applicant's birthday, from 17h00 on the day preceding his birthday until 17h00 on his birthday;

8.2.8. every alternate short school holiday and alternate mid- and half-term breaks as well as one half of every long school holiday provided that Christmas and Easter shall alternate between the parties. Neither party shall be entitled to have contact with the child on both Easter and Christmas during any calendar year.

9. The respondent opposed the relief sought in respect of contact between the applicant and the child, both in her papers as well as at the hearing of the application and only tendered supervised contact between the child and the applicant.

THE APPLICANT'S CLAIM FOR DEFINED CONTACT

10. Following upon termination of cohabitation, and numerous letters having been addressed to the respondent's attorneys of record to arrange contact between the applicant and the respondent, the respondent on 9 December 2022 tendered contact between the applicant and the child each alternate weekend from the Friday until the Sunday as well as midweek contact on a Wednesday at the former matrimonial home. The applicant held the view that the contact tendered was too limited and accepted and exercised the contact tendered under protest.

11. The respondent recorded that initially, and whilst the applicant resided with his mother, the child was properly cared for. She contended that the applicant now lives with his girlfriend and has no true interest in the child and fails to properly care for him during contact time.

12. The applicant's case is that there was a change in the state of affairs as a consequence of the relationship between the parties becoming strained and acrimonious. Such acrimony impacted on their parental relationship. The respondent started to restrict, frustrate and deny the applicant's contact with the child. She supervised the midweek contact at her home, which was rife with tension and often culminated in acrimonious arguments between the parties and or the applicant terminating the contact session earlier than the allocated time, due to the hostility between the parties during the contact. The acrimony between the parties made contact under such circumstances untenable with the result that the applicant declined to continue exercising midweek contact.

13. The applicant experienced further difficulties in exercising contact, which includes being denied telephone contact, not being granted access to the child on spurious grounds that he was ill, without any medical proof being provided that the child was indeed ill. He was denied the full extent of contact with the child over the 2023 Easter weekend, to which the applicant contends he was entitled. Handovers became problematic and the parties agreed that handovers of the child for purposes of contact should take place at a neutral public venue and not at the child's home.
14. It is common cause that on or about 2 June 2023 the respondent addressed a WhatsApp message to the applicant in which she unilaterally informed him that he would no longer have sleepover contact with the child and that he would only have day visits on alternate Sundays. The respondent's unilateral curtailing the applicant's contact with the child precipitated this application. The applicant thereafter, for reasons that are not clear, elected not to accept the limited contact directed by the respondent, but refrained from exercising the restricted contact pending finalization of this application. He has not had physical contact with the child for in excess of five months.
15. The respondent, when she curtailed the applicant's contact with the child, did not advance any cogent reasons for doing so. In her opposing affidavit to the relief sought by the applicant the respondent relies on vague and unsubstantiated allegations that inter alia include that the applicant no longer lives with his mother in Alberton but rather with his girlfriend at an unknown address, that

he fails to properly take care of the child during contact, fails to wash the child's clothes when he has contact, exposes the child to unknown older male persons who consume alcohol. At no stage prior to filing her opposing affidavit did she raise any such concerns and or objections against the applicant's parenting and contact with the child.

16. The respondent further for the first time in her opposing affidavit contended that there is no bond between the applicant and the child, and that contact should be supervised. She alleged that the child made it clear that he is not happy in the circumstances or the treatment of him by the applicant. She provides no facts to substantiate these bald allegations. The respondent's position at the hearing of the application remained steadfast that the applicant should only have supervised contact with the child and that the child could have contact with the applicant on alternative weekends, but only upon him reaching school going age, which is in excess of two years away.
17. On considering the facts and circumstances of this matter, the Court finds that there is no cogent evidence before the Court to support the respondent's contentions that the applicant is not committed to the child, cannot and does not take proper care of the child, or that he has failed to demonstrate any true interests in the child.
18. The applicant placed evidence before the Court which confirms that he resides with his mother and stepfather in Alberton, in a cottage on their property, and not with his girlfriend as contended by the respondent. The applicant informs that he has contact with the child at

his mother's home. He furthermore contends that, to the knowledge of the respondent, he very rarely consumes alcohol as a consequence of some medical complaint. He denies the contentions of the respondent that he exposes the child to persons who uses alcohol and confirms that he takes care of the child when the child is with him, keeps to a structured routine, feeds the child balanced meals and washes his clothes.

19. The respondent has without any justifiable reason to do so, denied the applicant his parental responsibilities and rights to care for the child and have contact with him. In terms of inter alia section 7 of the Children's Act, 38 of 2005, the child is entitled to the love and care of both his parents as well as contact with his paternal family. It appears that the respondent is piqued by the applicant's new relationship such that she does not take

the child's best interest into account when limiting and denying the applicant contact with the child. Moreover, the respondent is denying the child contact with his father, to which he, the child, is in law entitled.

20. The respondent's tender for supervised contact only between the applicant and the child and no sleepover contact until the child reaches school going age is not reasonable nor in the child's best interests. The very limited contact tendered by the respondent will not enable the applicant to nurture and develop his bond with the child. Such limited contact will compromise the child's relationship with his father as well as his paternal family.
21. There is no need for supervised contact and neither any grounds upon which the applicant's contact should be limited or restricted. Taking into account further that the respondent averred that the child was well cared for whilst in the care of his paternal grandmother, as well as that the applicant exercises contact with the child as his mother's home, the respondent should be comforted that the child will be properly cared for during contact between the applicant and the child such as to enable her to prioritize the child's best interests and facilitate proper structured and predictable contact between the applicant and the child.
22. The Court concludes that there is no reason why the child should not have proper contact with the applicant, his father. As a consequence of the interruption of contact between the applicant and the child between at least June 2023 to date of the hearing, the Court finds that it is in the best interest of the child that contact between him and the applicant be restored forthwith, albeit by phasing in contact over a short period to assist the child with transitioning between no contact with the applicant to the contact directed hereunder. It is in the best interests of the child that the handovers are harmonious. In the short term the handovers

will take place at the respondent's residence until the contact period, as in the order, is extended to sleepover contact and it is practical that handover take place in a neutral manner and at a neutral venue.

THE RESPONDENT'S MAINTENANCE CLAIMS

Maintenance for the child

23. The applicant in his founding statement tendered maintenance in respect of the child as follows:
 - 23.1. a cash contribution in the amount of R1 500,00 per month;
 - 23.2. 50% of the medical expenses not covered by the respondent's medical aid scheme of which the child is a registered dependent;
 - 23.3. payment of R1 600,00 per month in respect of 50% of the child's school fees and other ancillary charges raised on the school invoices;
 - 23.4. 50% of the costs of the child's extra mural activities including the costs of the apparel and equipment.
24. The respondent in her counter application claims maintenance pendente lite for the child in the amount of R10 000 per month.
25. The applicant opposes the relief sought by the respondent in respect of the maintenance for the child inter alia on the following grounds:
 - 25.1. during co-habitation the parties shared the child's expenses;
 - 25.2. the respondent has inflated the expenses of the child;
 - 25.3. the respondent incorrectly allocated expenses to the child, both in respect of certain items as well as the portion of the expense ascribed to the child;
 - 25.4. he cannot afford to pay the maintenance claimed by the respondent in respect of the child.
26. In *TS v TS* 2018 (3) SA 572 GP the Court stressed that in matters of this nature the actual maintenance needs and expenses of the child need to be established. This is not possible on the facts before the Court.
27. The financial information placed before the court by both parties is less than satisfactory. Furthermore, the Financial Disclosure Forms ("FDF") delivered by both parties appear to have been completed with less care than required as both contain errors, including computation errors and misstatements. Neither party has made a clear and precise disclosure of their income in their FDF which necessitated further computations and explanations at the hearing. It is not possible to determine from the evidence before court what the exact income of the parties is.
28. The FDF's evidence that both parties have limited means.

29. The applicant has assets to the value of approximately R758 355,23. His liabilities total approximately R454 346,00. Included in his liabilities is the balance owing on his Toyota Installment Sale Agreement which necessitates monthly repayments on his motor vehicle in the amount of R7 106,04. The applicant's net asset value is approximately R304 009,00. He has no liquid assets.
30. The respondent has assets to the value of approximately R501 948,59. Her liabilities total R80 000,00. The respondent's net asset value is approximately R421 948,59. She has not disclosed any liquid assets.
31. The applicant criticized the respondent's FDF as being incomplete. There seems to be merit in such criticism in that it appears from the respondent's disclosed bank statements that there is a further undisclosed bank account from which and to which regular transfers are affected by the respondent. The respondent did not disclose any information about her personal loan in the amount of R80 000,00. In addition, she contends that she has utilized the entire amount of approximately R138 983,71 received by her from the proceeds of the sale of the matrimonial home to sustain herself and the child. She does not provide any evidence in support of such contention.
32. The absence of a full and frank disclosure by parties of their financial position in their respective FDFs has a very detrimental effect on the Court's ability to determine the true means and true income of parties. It further undermines a proper and just adjudication of the issues in rule 43 applications. As a consequence of the lack of full and frank disclosure by the parties herein, the Court is not able to determine with any precision the issues raised by both parties in respect of the financial position of the other.
33. The Court, for purposes of determining the maintenance contribution by the applicant to the needs of the child, concludes that the applicant earns a fixed disposable income of R22 750,00 per month, that he earned a bonus of R2 750,00 during the past financial year and that he earned commission in certain months. Ms. Rodrigues, counsel for the applicant, submitted that the average income of the applicant over the period November 2022 to October 2023, including his commission and the bonus, was R23 455,55 per month.
34. Ms. Rodrigues submitted that upon totaling the credits in the respondent's bank account identified as "salary", her average monthly income is R17 046,00 per month. Mr. Khaba, the respondent's counsel, did not contend differently.
35. The applicant has disclosed monthly expenses in the amount of R24 202,00. He contends that he has a monthly shortfall.
36. The respondent, whilst living with her parents, has disclosed her and the child's monthly expenses to be R39 310,00. This amount is R1 191,55 short of the parties' combined income and does not take into account any expenditure by the applicant to meet his personal maintenance requirements. The applicant's expenditure is clearly overstated, and the Court cannot accept the respondent's case in this regard.

37. In *Taute v Taute* 1974 (2) SA 675 (E) at 676 the Court held 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 lawful obligations than to one who is obviously, albeit on paper, seeking to evade them.”

38. In *Du Preez v Du Preez* 32009 (6) SA 28 (T) the Court frowned upon the tendency of parties to misstate the true nature of their financial affairs in rule 43 applications. Parties are required to act with the utmost good faith and to disclose fully and accurately all material information regarding their financial affairs.

39. The applicant contends that he has a monthly shortfall and is not able to increase his monthly cash contribution of R1 500,00 per month. Notwithstanding the respondent's overstatement of her and the child's monthly expenses, the applicant's tender of a cash contribution to the maintenance requirements of the child in the amount of R1 500,00 per month is inappropriate.

40. The child's primary residence is with the respondent who earns less than the applicant. She cannot be left to bear the more substantial maintenance burden in respect of the child. The applicant will of necessity have to reduce his unnecessary expenditure on non-essential items as appears from his bank statements in order to ensure that he makes a larger contribution to the maintenance needs of the child.

41. Both parties reside with parents and both parties receive indirect support from their parents. The respondent pays an amount of R3 000,00 to her mother in lieu of accommodation for her and the child, as evidenced by a written agreement between them. The applicant contends that he pays R6 000,00 per month to his mother in respect of his accommodation. There is no evidence of a monthly payment of R6 000,00 by the applicant to his mother. His affidavit and his bank statements record a single large payment of R55 000,00 to his mother and further ad hoc transfers on his bank statements between him and his mother. These transfers and the inconsistency thereof are not explained.

42. On considering the list of expenses set out in the respondent's amended FDF dated 20 October 2023, and upon excluding from the list of expenses such direct expenses of the child in respect whereof the applicant has made a tender, the Court finds that the needs of the child will be met upon the applicant contributing a cash amount of R3 750,00 per month in respect of

the child's maintenance needs.

43. In addition to the above, the applicant's tender is incorporated in the order below.

Maintenance for the respondent

44. The respondent claims maintenance for herself, pendente lite, in the amount of R5 000,00 per month.
45. The applicant opposes the respondent's claim for maintenance inter alia on the grounds that:
- 45.1. at no stage during the marriage and cohabitation between the parties did he contribute to the personal maintenance needs of the respondent;
- 45.2. at all material times the respondent was self-sufficient and used her personal income derived from her employment with the Ekurhuleni Metropolitan Municipality to provide for all her maintenance requirements;
- 45.3. he is not able to afford the respondent's claim for maintenance, including her claim for costs.
46. It is trite that a maintenance claim, be it pendente lite or on divorce, is determined by considering the reasonable and necessary maintenance needs of the party claiming maintenance and the ability of the other party to pay the maintenance sought.
47. The respondent does not dispute that she provided for her own maintenance requirements from her personal income during the marriage. Even in the event that the respondent has proved a true need, it is clear that the applicant does not have the means with which to make a contribution to her maintenance in addition to the maintenance contribution to be made by the applicant to the needs of the child.
48. The Court finds that the respondent has not made out a case for personal maintenance from the applicant pendente lite.

CONTRIBUTION TOWARDS THE RESPONDENT'S LEGAL COSTS

49. The respondent seeks a contribution to her legal costs in the amount of R25 000,00.
50. The claim for a contribution to legal costs is sui generis. In *Chamani v Chamani* 1979 (4) SA 804 (W) at 806 the Court held that it arises out of the reciprocal duty of support that spouses owe one another. The quantum, if any, falls within the judicial discretion of the court.
51. In determining this issue the Court has regard to inter alia the following:
- 51.1. The nature and extent of issues to be determined in the divorce action;
- 51.2. the complexity of the issues and the extent of evidence and documents required;
- 51.3. the respondent, should she require it, is entitled to a contribution to her costs such as to enable her to adequately present her case on an equal footing with the applicant;

51.4. the applicant is entitled to litigate on a scale commensurate to that on which the respondent litigates.

52. It is common cause that both parties shall retain full parental responsibilities and rights in respect of the child and that the child's primary residence shall vest in the respondent.

53. The limited issues to be determined at the hearing of the divorce action include:

53.1. the contact that the applicant should have with the child;

53.2. the extent of the applicant's contribution to the child's maintenance needs;

53.3. the parties respective accrual claims against one another;

53.4. which party should pay the costs of the action.

54. At the hearing of the application it was common cause that the matter will be referred to the Family Advocate for an investigation. The respondent's counsel submitted that the issues pertaining to contact between the applicant and the child may be resolved upon the parties having received the recommendations of the Family Advocate.

55. The respondent failed to take this Court into her confidence in neglecting to make a complete financial disclosure of all her bank accounts as well as the exact manner in which she utilised the capital received from the sale of the matrimonial home.

56. The respondent has further not placed any evidence before the Court in regard the steps that need to be taken by her to bring the matter to trial readiness and trial, her estimated future litigation costs, amounts already expended in the divorce action, what is required to properly prepare her case and place it before the Court at the hearing of the action or the costs incurred by the applicant in the divorce litigation.

57. The respondent contended that she requires a contribution towards her legal costs in the amount of R25 000,00. She attached an invoice from her attorney of record evidencing that an amount of R25 837,58 is due to her attorneys. Upon considering the invoice submitted by the respondent's attorney of record and attached to the papers it appears that such amount is due for professional services rendered in respect of the rule 43 application and not for trial.

58. The respondent has not placed evidence before the Court that the applicant is able to afford the contribution to her legal costs sought. Consequently, the Court finds that the respondent has failed to make out a case for a contribution towards her costs in the divorce action as claimed.

COSTS OF THE APPLICATION

59. The respondent's restricting of contact between the applicant and the child and particularly her suspension of sleepover contact on 2 June 2023 precipitated this application. The applicant was well justified in bringing the rule 43 application.

60. Similarly, the respondent's counter application was necessitated by the applicant's inadequate contribution to the child's maintenance needs and his inadequate tender for a future contribution towards the child's maintenance requirements.
61. Consequently, neither party is blameless and in the result each party should pay its own costs in this application.

In the result, the following order is made:

1. Both parties shall retain full and equal parental responsibilities and rights in respect of E.K ("the child") as envisaged in section 18(2) of the Children's Act, 38 of 2005, as amended;
2. The primary residence of the child shall vest in the respondent;
3. The issue pertaining to the best interests of the child, in relation to the contact that the applicant should have with him, is referred to the Family Advocate for an investigation and a report which shall contain the findings and recommendations of the Family Advocate;
4. Upon receipt of the report by the Family Advocate, both parties shall be entitled to supplement their papers and approach the Court for further relief;
5. Pending the report by the Family Advocate, the applicant shall have contact with the child as follows:

From 8 November 2023 to 17 December 2023

6. The applicant shall have unsupervised contact with the child, which shall include the right to remove the child from respondent's home, on the following dates:

6.1. Saturday 11 November 2023 from 10h00 to 17h00 when the applicant shall collect the child from the respondent's home and return the child to the respondent's home;

6.2. Sunday 12 November 2023 from 10h00 to 17h00 when the applicant shall collect the child from the respondent's home and return the child to the respondent's home;

6.3. On Wednesday 15 November 2023, 22 November 2023 and 29 November 2023 from after school until 17h00 when the child shall be collected from school and returned to the respondents home;

6.4. Saturday 18 November 2023 from 10h00 to Sunday 19 November 2023 at 17h00 when the applicant shall collect the child from the respondent's home and return the child to the respondent's home;

6.5. Friday 30 November 2023 from after school to Sunday 2 December 2023 at 17h00 when the applicant shall collect the child from school and return the child to the respondent's home;

6.6. Friday 15 December 2023 from 9h00 to Sunday 17 December 2023 at 17h00 when the applicant shall collect the child from the respondent's home and return the child to the respondent's home;

December 2023 holidays

7. The applicant shall, subsequent to 17 December 2023, be entitled to have the child with him for two blocks not exceeding 6 days and 5 nights, which shall include Christmas Day, when he shall collect the child from the respondent's home at 9h00 on the day that his contact commences and return the child to the respondent's home at 17h00 on the day that his contact ends.

As from 15 January 2024

8.

8.1. Every Wednesday from after school until 1700 hours when the child shall be collected from school and returned to the respondent's home;

8.2. every alternate weekend from after school on the Friday when the child shall be collected from school until Monday morning when the child shall be returned to school;

8.3. every Father's Day from 9h00 until 17h00 irrespective of in whose care the child is over such weekend, on the understanding that the respondent shall be entitled to have contact with the child on Mother's Day from 9h00 until 17h00 irrespective of in whose care the child is over such weekend;

8.4. every alternate public holiday from 17h00 on the day preceding the public holiday until 17h00 on the public holiday, on the understanding that a public holiday/s that immediately precedes or follows upon a weekend is/are deemed to form part of the weekend and the party who is entitled to have the child with them over that weekend shall be entitled to have the child on such public holiday/s;

8.5. on the child's birthday for three hours should his birthday fall in a school week and half of his birthday, as agreed between the parties, should the child's birthday fall on a weekend during which the respondent has the child in her care, on the understanding that the respondent shall be entitled to have similar contact with the child on the child's birthday should the child be in the applicant's care;

8.6. on the applicant's birthday for three hours should his birthday fall in fall in a school week and for the day from 9h00 to 17h00 should the applicant's birthday fall on a weekend, on the understanding that the respondent shall have similar contact with the child on her birthday should the child be in the applicant's care;

8.7. half of the short school holidays and alternate mid- and half-term breaks;

8.8. half of every long school holiday in blocks not exceeding 7 days 6 nights until the child commences with grade 0, whereafter the applicant shall be entitled to half the long school holidays;

8.9. Christmas and Easter shall alternate between the parties such that neither party shall be entitled to have contact with the minor child on both Easter and Christmas during one calendar year;

8.10. telecommunication contact by telephone, video calling, webcam and Skype between 18h00 and 18h30 on such days as the applicant does not have contact with the child on the understanding that the respondent shall have similar contact with the child on such days as she does not have contact with the child;

9. The applicant shall pay to the respondent an amount of R3 750,00 per month as a cash contribution to the child's maintenance needs, the first payment to be made on or before 1 December 2023 and thereafter on the first day of each and every succeeding month;
10. The respondent shall, at her costs, retain the child as a dependent member on her medical aid scheme;
11. The plaintiff shall be liable for and pay, on production of an invoice and where applicable proof of payment, 50% of all medical expenses of the child not covered by the medical aid scheme;
12. The applicant shall be liable for and pay 50% of the child's school fees as well as 50% of any ad hoc ancillary expenses raised by the school on the school statement;
13. The applicant shall be liable for and pay 50% of the costs of the child's extramural activities, including but not limited to outfitting and equipment.
14. Each party to pay their own costs.

DE WET AJ

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 9 November 2023.

Heard on: 6 November 2023

Delivered on: 9 November 2023

Appearances:

Ms Rodrigues: for the Applicant

Mr Khaba: for the Respondent

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Prepared on 10 October 2026 · Esheria