

SOUTH AFRICA / JUDGMENT

## L[...] D[...] K[...] v L[...] D[...] K[...] (2022/21021) [2024] ZAGPJHC 1051 (14 October 2024)

[2024] ZAGPJHC 1051

### COURT

South Gauteng High Court, Johannesburg

### BEFORE

Poswa-Lerotholi

### CASE / FILE NUMBER

2022/21021

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#### Policy

#### REPUBLIC

#### OF SOUTH AFRICA

#### IN

#### THE HIGH COURT OF SOUTH AFRICA

#### GAUTENG

#### LOCAL DIVISION, JOHANNESBURG

#### Case

Number: 2022/21021

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

In

the matter between: D[...]  
K[...], L[...]  
and  
Applicant  
D[...]  
K[...], L[...]  
Respondent

## JUDGMENT

POSWA-LEROTHOLI AJ

### Introduction

- [1] There are two applications. In the first application, the Applicant sought custody of the minor children. The Respondent lodged a counter application for interim maintenance and custody, in terms of rule 43. The Applicant has not responded to the Respondent's sworn reply and counter-application, neither has he responded to any of the four supplementary affidavits filed by the Respondent. Thus the allegations made therein remain unchallenged and therefore they stand. It is important to mention that the Respondents attorneys filed a notice of withdrawal as attorneys of record on 13 August 2024, ten days before the matter was heard. The Applicant was self-represented.
- [2] The Applicant is a chartered accountant, employed at Servochem (PTY) LTD in the province of KwaZulu-Natal. The Respondent is an industrial psychologist. The parties were married on 10 December 2010. There are two minor children born of the marriage: K[...] A[...]r D[...] K[...] born on 31 July 2012 and L[...] J[...] D[...] K[...] born on 25 November 2014. The parties are currently in the process of a divorce instituted by the Respondent before this court, under case number 22/16953.
- [3] In the founding affidavit, the Applicant advances a myriad of reasons, some of which are contradictory, for the relief sought. Short of accusing the Respondent of being an unfit mother, the Applicant alleges that the Respondent cannot take care and provide for the children and that he is better suited to do so.
- [4] In the counter-application, the Respondent refutes the allegations made by the Applicant and contends that the main cause of the problems with the Applicant is that he abuses alcohol and in the process neglects the children. She asserts that it is in the best interests of the minor children to have a relationship with both parents. However, contact with the minor children must be supervised if the Applicant does not want to use the Isobar breathalyser test.

- [5] The Rule 43 application was lodged in 2022, almost two years ago. Naturally, circumstances of the parties and the minor children have changed, necessitating an amendment to the papers and the relief sought. Thus, the Respondent has sought leave to file the fourth supplementary affidavit, which was duly granted. The Applicant did not object to the filing of the said affidavit. The Applicant undertook to use the Isobar breathalyser test.

#### Respondent's counter-application

- [6] In an endeavour to settle the dispute out of court, the parties had concluded a Settlement Agreement, which provided inter alia for the parties and minor children to submit to a forensic investigation by Dr Duchon, a senior counselling psychologist. Pending finalisation of the forensic assessment:
- The primary residence and care of the minor children was to be the Respondent.
  - The Applicant was to have supervised contact, including sleepovers with the minor children.
  - The Applicant was obligated to abide by the stipulated maintenance obligations to the minor children.
- [7] The parties undertook to abide by the recommendations of Dr Duchon.

THE

#### ISSUES

- [8] During the proceedings, there was no clarity as to whether the Applicant persisted with the relief sought in the initial application as he seemed to challenge only the relief sought by the Respondent. In any event, as asserted by the Respondent, most of the issues raised by the Applicant have been overtaken by events. Therefore, the issues that need to be decided are the following:
- Whether the primary residence and care of the minor children should remain with the Respondent.
  - Whether the Applicant's visitation rights with the minor children should be exercised under supervision.
  - The appointment of a parenting co-ordinator.
  - Maintenance for the minor children.
  - Payment of the costs relating to the former matrimonial home.

Non-compliance with Practice Directive 2 of 2020 in terms of the Revised Consolidated Practice Directive 1 of 2024 (amended on 12 June 2024).

- [9] The Applicant failed to make full financial disclosure as required by the Practice Directive. A party seeking or challenging an interim maintenance order in Rule 43 proceedings is obliged to make full disclosure of their financial position.[1] The failure to do so, will result in the court drawing an adverse inference against the litigant. Furthermore, non-disclosure prevents the court from adjudicating the matter with all the facts before it.
- [10] The very nature of Rule 43 applications is for the parties to be granted just and expedient relief.[2] The court is granted a wide discretion in granting the interim relief. It is therefore important that the party demonstrates its bona fides by being transparent and taking the court into its confidence about its financial status.
- [11] The Respondent in turn did not seek a compelling order as she was entitled to do once the Financial Disclosure Form was overdue. However, this does not absolve the Applicant. Consequently, this court will only take into account the version of the Respondent, with regard to the financial standing of the parties.
- [12] The Applicant is a chartered accountant who was employed in Nigeria from March 2023 to January 2024. He has since secured permanent employment with a local company in Newcastle, KwaZulu-Natal and earns a gross monthly salary of approximately R90 000.00 (ninety thousand rand). The Applicant has however, failed to serve his financial disclosure form as required in terms of Practice Directive 2 of 2020 in terms of the Revised Consolidated Practice Directive 1 of 2024 (amended on 12 June 2024).
- [13] It is common cause that the Applicant's financial contribution to the maintenance of the children has been erratic at best. According to the Respondent, he has only made a contribution of R110 900.00, which amounts to R11 090 per child per month, in the past year. The Respondent explains that she currently earns R68 7799:53 a month. The monthly expenses for the minor children amount to R37 641.00 and she has a shortfall of about R27 071.47 per month.
- [14] The Applicant earns R90 000.00 per month and also receives an undisclosed amount from the rental of the former matrimonial home. In the Schedule of Assets and Liabilities annexed to the Founding Affidavit dated 10 June 2022, the Applicant declared a net asset value of R5 584 146.00 and a total asset value of R7 972 951.00. The Respondent avers that the minor children are accustomed to a middle class lifestyle.
- [15] It is trite that there is a legal obligation on the Applicant to maintain the minor children. Maintenance is predicated on three factors: reasonable needs of the minor children; depending on the lifestyle; as well as affordability on the part of the parent.[3] I am bound by legal precedent to acknowledge and follow these principles.
- [16] Magnanimously, the Respondent is not seeking a 50% contribution for the maintenance of the minor children, from the Applicant, she is content with a contribution making up her monthly shortfall. During argument, the Applicant stated that he cannot afford to pay the amount sought by the Respondent asserting that the amount should be determined on a pro

rata basis by the income of each party. As aforesaid, the Applicant did not comply with the Practice Note relating to the Financial Disclosure Form. As a result, the version of the Respondent cannot be gainsaid.

- [17] In any event, it is common cause that the Applicant's contribution towards the financial maintenance of the children has been erratic, a position which is totally untenable.

#### Dr Duchen's Report

- [18] I must point out that the assessment and issuing of Dr Duchen's Report ("the Report") was done whilst the Applicant was living and working in Nigeria. This is a substantial factor which has changed. Therefore, in considering the Report, I have left out all references to Nigeria.
- [19] The stated objectives of the investigation was: to recommend the contact arrangements with the minor children; to resolve the disputes relating to contact that arise between the parties. Dr Duchen issued the assessment report in December 2023. The Respondent complains that the Applicant has refused to abide by the recommendations of Dr Duchen as agreed in the settlement agreement. In particular, the Applicant is inconsistent in complying with the requirements relating to the sobriety tests. Consequently, the Respondent seeks the intervention of this court to compel the Applicant to abide by the report pending finalisation of the divorce.
- [20] The forensic assessment is detailed and was conducted over a number of months engaging the parents and the minor children. The recommendations are based on the findings of the counselling psychologist. I shall only refer to the recommendations which are relevant to the issues in these interim proceedings. Dr Duchen's recommendations concerning the minor children are as follows:

#### *"CONCLUSION AND RECOMMENDATIONS"*

819. The assessment finding supports that the children should be resident with Mrs D[...] K[...]. The assessment findings do not support a shared residency arrangement.
820. The assessment finding is that the children want to see their father. They do not have the capacity to express their distress about problems during contact directly with him.
821. The assessment finding supported that his contact with the children should be optimised when Mr D[...] K[...] is sober and emotionally settled. The children love him, and he has much to offer them in ways that are different from what they experience in their relationship with their mother. The assessment finding indicated that Mr D[...] K[...]s emotional and psychological functioning fluctuates, which causes difficulty in his relationship with the children and their sense of safety.
822. There is a need to create a structure where these difficulties can be addressed, relationships can improve and contact can be normalised.

823. Mr D[...] K[...]’s alcohol use has been identified as a risk to the children. Mr D[...] K[...] will have to abstain from alcohol use when the children are in his care. As a point of departure, it is recommended that he use the iSober device to confirm this aspect. The frequency and manner in which these readings must be provided must be formalised so that this does not become a further dispute.
824. It is further recommended that Mr D[...] K[...] further explore his alcohol use with a substance use expert, Laura Edmonds. She must have access to Dr van der Merwe’s diagnosis and this report.
825. Mr D[...] K[...] and the children need an intervention during which the trauma of his past behaviour, rules of engagement and possible protective factors could be explored. It is respectfully recommended that Mr D[...] K[...] and the children consult psychologist Dr Ian Opperman in this regard. Dr Opperman, if he so wishes, could include Mrs D[...] K[...] in this process.
- ...
828. Supervision is not required for shorter visits as long as the iSober device is used. It is envisaged that until the process with Dr Opperman is concluded, these shorter visits should be organised on the basis of day visits.
831. It is recommended that a Parenting Coordinator be appointed to mediate disputes. If the parents cannot reach an agreement in a dispute, the Parenting Coordinator must formulate a ruling binding on the parents until a Court makes a different order.
832. In addition to directing contact once the intervention reports are received, several issues may require the PC’s input:
- a. Parental communication strategies
  - b. Parental dispute resolution strategies
  - c. Parental decision-making strategies (general incorporation of Section 31 of the Children’s Act and in defined areas such as education, extra-mural activities, medical care and religion)
  - d. Information exchange between the parents
  - e. A detailed and specific year planner that provides predictability around public holiday-, school holiday-, Mother’s and Father’s Day, Birthday contact and Religious holiday contact.
833. The Parenting Coordinator should also work with the parents to develop and draft a relapse plan. Because inconsistency is the primary problem in this matter, there is a need to have a strategy and structure for when problems emerge that can clearly set out interim steps.”

The Best Interests of the Child

[21] The yardstick for determining issues of custody and contact with minor children is the best interests of the child.

[22] The principles and guidelines as to what constitutes the best interests of the child are set out in the legislation governing children

discussed hereunder.

[23] It is a constitutional imperative that the interests of the child are paramount in all matters involving children. Section 28 of the Constitution[4], stipulates:

*“A child's best interests are of paramount importance in every matter concerning a child.”*

[24] The Children's Act[5] (“the Act”) gives effect to this constitutional imperative, and is expressed in section 9 as follows:

*“In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.”*

[25] Section 6 of the Act, makes provision for the general principles, that must guide the interpretation and application of the Act. Pertinently, section 6(2) inter alia provides that:

'(2) All proceedings, actions or decisions in a matter concerning a child must -

(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation. . . .'

[26] Section 7(1) of the Act provides:-

7 Best interests of child standard

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely -

(a) the nature of the personal relationship between -

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards -

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other

care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from -
  - (i) both or either of the parents; or
  - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child -
  - (i) to remain in the care of his or her parent, family and extended family; and
  - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's -
  - (i) age, maturity and stage of development;
  - (ii) gender;
  - (iii) background; and
  - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
  - (i) any disability that a child may have;
  - (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by -
  - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
  - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and

- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section parent includes any person who has parental responsibilities and rights in respect of a child.' "
- [27] The counselling psychologist inter alia took into account the following factors which are in line with the principles and guidelines stipulated in determining the best interests of the child quoted above.
- [28] The likely effect on the children of a change in circumstances, including the separation from both or either parent, siblings or caregivers. In this regard, she found that the children have a close relationship with both parents and they value their relationship with both parents highly. Therefore, a change in the circumstances would not be beneficial to them.
- The impediments to the child's right to maintain personal relations and direct contact with both parents, or any specific parent on a regular basis. Dr Duchen found that alcohol abuse by the Applicant to be a possible hinderance.
- [29] When considering the need for the children to remain in the care of their parents, extended family and to maintain a connection with their culture and tradition. She found that the children value their relationships with extended family and it is important for them to continue to have the opportunity to sustain these connections.
- [30] Dr Duchen assessed the children's physical and emotional security and their intellectual, emotional, social and cultural development. She found both display emotional immaturity and feelings of vulnerability. Result they shows the need for nurturing and attachment.
- [31] The Respondent has provided a stable family environment for the children, whilst the Applicant has not consistently provided them with stability.
- [32] The Court has no reason to contradict the findings of the counselling psychologist.

## CONCLUSION

- [33] An attempt to provide a stable home environment is essential and the Applicant must endeavour to make provision for the minor children. Such could be achieved by complying with the conditions for contact with the children.
- [34] The Applicant is providing a stable home environment and therefore it is justifiable that she provides the primary residency for the children and the Respondent's rights be limited to visitations which are temporarily supervised.
- [35] The parental friction and disputes over the care and contact of the minor children persist and therefore the need for a parental co-ordinator is important.

[36] Having considered the report of the counselling psychologist I believe that it is in the best interests of the minor children that the custody arrangement remains.

[37] The Respondent's claim for the Applicant to make a financial contribution towards the maintenance of the minor children is reasonable and in line with the family's standard of living.

#### Order

[38] In the result, an order is granted in the following terms:

1. The primary residence of the minor children born of the parties' marriage, K[...] A[...]r D[...] K[...] and L[...] J[...] D[...] K[...] (jointly referred to as ("the Children")) shall vest with the Respondent.
2. The Applicant shall abstain from alcohol use when he is exercising contact with the Children.
3. The Applicant shall, at his own cost, acquire the use of an Isober breathalyser device and subscription to the Isober application to be used by him in conjunction with the breathalyser device and that the Applicant shall utilise the Isober system whenever he exercises contact with the Children, both at the commencement of the contact and upon the conclusion of the contact for purposes of evincing the fact that the Applicant has not consumed any alcohol.
4. The Respondent shall make use of the Isober application for purposes of receiving the results of the Applicant's breathalyser tests (which results shall be made available to the Respondent by the Applicant through the Isober application) as envisaged in terms of paragraph 3 above.
5. The Applicant, at his own cost, shall explore his alcohol use with substance use expert, Ms Laura Edmonds, who must be provided with access to Dr Dorothea van der Merwe's diagnosis and the report issued by Dr Ronel Duchon on 13 December 2023. All of Ms Laura Edmonds' costs are to be paid for by the Applicant.
6. The Applicant and the Children shall consult with Dr Ian Opperman with a view to Dr Ian Opperman providing an intervention pertaining to the Applicant's past behaviour, rules of engagement and possible protective measures to be explored. The Respondent is to make herself available to take part in the aforesaid process to the extent that the Respondent's involvement is recommended by Dr Ian Opperman. All of Dr Ian Opperman's costs are to be paid for by the Applicant.
7. Subject to the provisions of paragraph 2 and 3 above, the Applicant shall exercise contact with the children as stated below, in addition to daily telephone / video call contact with the children between 17H00 and 18H00:

7.1 For half of all long and short school holidays, which contact shall be exercised in the presence of the Applicant's mother, Mrs Gretchen D[...] K[...], alternatively the Applicant's brother Dr Gideon Charl D[...] K[...];

7.2 Unsupervised contact with the Children from 09H00 until 17H00 every alternate Saturday and Sunday when the Applicant is in Johannesburg;

7.3 Unsupervised contact with the Children from 09H00 until 17H00 every alternate public holiday when the Applicant is in Johannesburg;

7.4 Unsupervised contact on each of the Children's birthdays, for a period of 2 hours when the Applicant is in Johannesburg;

7.5 Unsupervised contact on the Applicant's birthday for 2 (two) hours in the event that the Applicant's birthday falls on a school day, which is not a school day and when the Applicant is in Johannesburg. The children shall remain in the Respondent's care on her birthday; and

7.6 Unsupervised contact with the Children from 09H00 until 17H00 on Father's Day and when the Applicant is in Johannesburg. The Children shall remain in the Respondent's care on Mother's Day.

8. Ms Laura Edmonds and Dr Ian Opperman shall file reports pertaining to their processes and interventions for the family, which reports shall be filed with the parenting coordinator appointed in terms of paragraph 9 below.

9. Ms Tanya Kriel is appointed as parenting coordinator to mediate disputes between the Applicant and the Respondent, which costs are to be shared equally between the Applicant and the Respondent.

10. Ms Tanya Kriel, in her capacity as parenting coordinator, shall be tasked with:

10.1 Formulating binding rulings if the Applicant and the Respondent are unable to reach an agreement pertaining to a dispute regarding the best interests of the Children which dispute requires the parties' agreement, which rulings shall be binding upon the Applicant and the Respondent subject to the overriding jurisdiction of this Court;

10.2 Directing further contact between the Applicant and the Children once the intervention reports to be provided by Ms Laura Edmonds and Dr Ian Opperman are received by the parenting coordinator;

10.3 Assisting the Applicant and the Respondent with parental communication strategies;

10.4 Assisting the Applicant and the Respondent with parental dispute resolution strategies;

10.5 Assisting the Applicant and the Respondent with parental decision making strategies (general incorporation of Section 31 of the Children's Act and in defined areas such as education, extra-mural activities, medical care and religion);

10.6 Assisting the Applicant and the Respondent with information exchange;

10.7 Formulating a detailed and specific year planner that provides predictably around public holiday, school holiday, Mother's and Father's Day, Birthday contact and Religious holiday contact;

10.8 Working with the Applicant and the Respondent to draft a relapse plan.

11. The Applicant shall pay maintenance to the Respondent in respect of the Children in the sum of R9 000.00 (nine thousand rand) per month, which amount shall be paid, without deduction or demand, by electronic funds transfer into the Respondent's nominated bank account, with effect from the first day of the month following the date on which this order is granted and monthly thereafter on the 1st day of every month.

12. The Applicant and the Respondent shall be equally liable for the following expenses incurred in relation to the Children;

12.1 All of the Children's educational costs including but not limited to school fees at K[...] E[...] V[...] Preparatory School, or a school with a similar fee structure, schoolbooks, school uniforms, extra mural activities (including sports equipment attire), extra lessons, school tours, sports tours and any other prescribed equipment;

12.2 The Children's monthly medical aid premiums, payable in relation to the Respondent's medical aid on which the Children are dependents. The Applicant shall reimburse the Respondent his share of the aforesaid medical aid premiums on a monthly basis, payment to be made by way of electronic funds transfer into the Respondent's bank account;

12.3 All medical excesses directly attributed to the Children as well as all medical and related expenses reasonably incurred in relation to the Children which are not covered by the Respondent's medical aid, including but not necessarily limited to medical, dental, orthodontic, optical, ophthalmological, surgical, psychotherapy, play therapy, physiotherapy, occupational therapy, homeopathic therapy, pharmaceutical and other medical or related expenses.

13. Notwithstanding the provisions of paragraph 12.3 above, the Applicant shall procure and pay for K[...] A[...]r D[...] K[...]s current prescription medication for ADHD monthly and ensure that same is made available as and when necessary.

14. In the event that the Respondent has incurred any expense referred to in paragraphs 12.1, 12.3 or 13 above in full, the Respondent shall provide the applicable invoice and proof of payment to the Applicant and the Applicant shall be required to effect payment of his half share (alternatively the full amount incurred in terms of paragraph

13) of the amount owing in terms thereof to the Respondent within 7 (seven) days of the Respondent having sent the applicable invoice and proof of payment to the Applicant.

15. Applicant shall remain liable for all costs incurred in relation to the former matrimonial home, situated at 1[...] D[...] Road, G[...] E[...], Johannesburg, including but not limited to the monthly bond repayments, homeowner's insurance, rates, water and electricity accounts payable in relation to the former matrimonial home.
16. The application instituted by the applicant is dismissed.
17. Cause to be costs in the divorce action.

Poswa-Lerotholi AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be 16 October 2024

COUNSEL FOR THE APPLICANT: IN PERSON

COUNSEL FOR THE RESPONDENT: A SALDULKER

INSTRUCTED BY: BRAND POTGIETER IC

DATE OF ARGUMENT: 21 AUGUST 2024

DATE OF JUDGMENT: 17 October 2024

[1] C.A v H.A (95578/2022) [2024] ZAWCHC 25.

[2] Du Preez v Du Preez (2009) 6 SA 28.

[3] Taute v Taute 1974(2) SA 675 (E) at 676.

[4] The Constitution of the Republic of South Africa No.108 of 1996.

[5] The Children's Act 38 of 2005.

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