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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: 18042/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

F..... T..... N.....

Applicant

And

M..... J..... N.....

Respondent

JUDGMENT

GRAVES AJ

1. The applicant seeks relief in terms of Rule 43 of the Uniform Rules of Court pending the outcome of divorce proceedings which she instituted in the Regional Court for the Regional Division of Gauteng, held at Roodepoort under case number 840/2013. The summons in this regard was issued on 10 June 2013.
2. The relief sought in the applicant's affidavit in terms of Rule 43 originally included a request for interim maintenance for the three minor children born of the marriage, H.....presently thirteen, X.....presently nine and N....., now 23 month old. From the Bar I was informed that the applicant restricts her relief in this application to:-
 - 2.1 an order in terms of Section 18(2) of the Childrens' Act 38 of 2005 to the effect that both herself and the respondent be declared co-holders of parental responsibilities in terms of this section;
 - 2.2 that "*residence*" of the minor children be shared between the parties on a weekly basis;
 - 2.3 that both parties have reasonable contact with the minor children during the week that they are with the other party, and reasonable contact for birthdays, public holidays and other important events.

3. The Rule 43 application was served on the respondent's attorneys on 20 May 2014. The respondent did not respond within the ten day period referred to in Rule 43(3) and the applicant proceeded to enroll the matter for hearing. On 18 July 2014 the respondent delivered an opposing affidavit in which he complained about the conduct of the applicant during the divorce proceedings, which he says was essentially vexatious and irregular. He also raised an objection *in limine* to the jurisdiction of this court to entertain the Rule 43 application because of the pending divorce proceedings in the Regional Court. He pointed to Rule 58 of the Magistrate's Court Rules which permits a party to seek interim relief *pendente lite*, and he said that he had brought such an application in the regional court on 26 May 2014 (just less than one week after the launch of the applicant's Rule 43 application). The application papers in the regional court were not placed before me.
4. Mr Nkuna for the applicant objected to the late delivery of the answering papers. He however indicated that he was prepared to argue the matter with the inclusion of the opposing papers, particularly as the principal point raised was the objection to jurisdiction.
5. Before dealing with the jurisdictional objection I should note that the papers paint a picture of considerable matrimonial discord characterized by accusations and counter accusations, including a previous Rule 43 application, subsequently withdrawn, and an *ex parte* application launched by the present applicant in December 2013 in terms of Section 5(4) of the

Domestic Violence Act 116 of 1998, subsequently withdrawn. Both parties have awaited a report by the Family Advocate which was ultimately filed on 3 June 2014. Included in the papers was a report of a Family Counsellor, Ms N Lange, being a Family Counsellor in terms of Section 3(1) of the Mediation in Certain Divorce Matters Act 24 of 1987. This report summarized the features of the breakdown in the relationship between the applicant and the respondent and recorded the desire of both parties to have what was termed “*primary residence*” of the three minor children. I take this to mean primary custody. Hlengiwe was interviewed and, although his inclination was to live with his father, he appeared to accept that the best solution would be to spend equal time with both parents, in separate residences. Xihluke presented as emotionally distressed but was comfortable with both parents and on explanation from the Family Counsellor appeared to accept separate residences as referred to above. Nhlovutelo could not be interviewed due to his tender age.

6. The Family Counsellor recommended the relief set out in paragraph 2 above, and added that custody of the minor children should be shared between the parties on a weekly basis from Friday after school to the next Friday, with the children being collected from school.
7. In support of the jurisdictional objection Mr Edwards for the respondent referred me to **Venter v Venter** 1970 (1) SA 11 (T) and **Green v Green** 1987 (3) SA 131 (SECLD). In **Venter** there were divorce proceedings pending in

the Witwatersrand Local Division when the applicant moved the Transvaal Provincial Division for interim custody of a daughter aged seven years old pending the outcome of the divorce proceedings. The application was struck from the roll on the basis that issues which were connected to the main case should be heard in the same division, notwithstanding that there was concurrent jurisdiction. The lack of urgency also disinclined the court to grant relief.¹ In **Green** (*supra*) the respondent in then application (plaintiff in the action) had issued summons in the Durban and Coast Local Division. The defendant in the action in turn launched an application in terms of Rule 43 in the South Eastern Cape Local Division for maintenance *pendente lite* for herself and three minor children and for a contribution towards costs. Jones J found that in the absence of considerations of urgency the law and practice of procedure precludes a party seeking interim relief when there is litigation pending in a court of another division.² The learned judge found support for his view in **Venter** (*supra*). Neither of the judgments relied upon suggest that there are no instances where two courts of equal competence can exercise concurrent jurisdiction.³

8. There are a number of distinguishing features in the present case. First, this court is superior to that of the Regional Court in the hierarchy of cases

¹ At 13A-C

² At 132E-I

(notwithstanding concurrent jurisdiction regarding divorce proceedings) and there can be no question of separate judgments of equal weight on the same point. Second, there is clearly an element of urgency in this matter, particularly from the perspective of the minor children. The report of the Family Counsellor highlights the tension between the parents which has caused a degree of polarization and stress to the two elder children. Correspondence from the applicant's attorney seems to suggest that cohabitation is practicable; this is unwarranted optimism given the evidence of marital tension. The applicant has secured suitable alternative accommodation for herself at which she can accommodate the children during her period of custody; she is self-supporting and afford this accommodation which appears to be in a townhouse complex.

9. The report of the Family Advocate and the Family Counsellor emphasizes the paramouncy of the interests of the minor children and concludes that joint custody in separate residences will be preferable.
10. The authorities which indicate the undesirability of proceedings in two different courts are distinguishable. I am satisfied that this court, as upper guardian of minor children, has jurisdiction, in appropriate circumstances, to grant interim relief in terms of Rule 43 notwithstanding that there are pending

³ See **Green** at 143A

divorce proceedings in the Regional Court. In this application the applicant did not seek an order for costs against the respondent, and I do not think that the lateness of the respondent's opposing papers should alter this. The applicant's case is not entirely straightforward, and the respondent was reasonably entitled to challenge the jurisdiction of this court.

11. Although the parties are both legal guardians of the minor children the acrimonious relationship justifies an order in terms of Section 18(2) of the Childrens' Act. This is in any event the recommendation of the Family Advocate and Family Counsellor, and such an order may well limit the potential for future disputes.

12. I accordingly make the following order:-

- 12.1 The applicant and respondent are declared co-holders of parental responsibilities and rights in respect of their minor children, H....., X..... And N..... as contemplated in Section 18(2) of the Childrens' Act 38 of 2005.

- 12.2 Custody of the minor children must be shared between the parties on a weekly basis, preferably from Friday after school until the next Friday, or otherwise as mutually agreed, with custody being transferred in a manner which is most conducive to the wellbeing of the children.

12.3 Each party will be entitled to reasonable contact with the minor children during the week they are residing with the other party including:-

12.3.1 Reasonable telephonic contact;

12.3.2 Mother's Day and the applicant's birthday to be spent with her and Father's Day and the respondent's birthday to be spent with him;

12.3.3 Half of all short school holidays irrespective of whose week it is during those particular holidays;

12.3.4 A division of long school holidays between the parties;

12.3.5 Christmas, New Year and Easter alternating between the parties.

12.4 This order above is made pending the final outcome of the divorce proceedings between the applicant and the respondent in the Regional Court, Roodepoort, under case number 840/13.

Dated at Johannesburg on this 23rd day of July 2014.

**N J GRAVES
ACTING JUDGE OF
THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date of hearing : 22 July 2014

Date of Judgment : 24 July 2014

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