

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION LOCAL, PORT ELIZABETH)**

CASE NO.: 1596/2015

In the matter between:

MAVA MAJIKIJA

Applicant

And

NOTHEMBA PAMELA MXO

1st Respondent

MAGISTRATE TANDEKA MASHIYI N.O.

2nd Respondent

JUDGMENT

BESHE J:

[1] Today being the 25 February 2016 is the return day of the *rule nisi* that was issued on the 1 December 2015. The said rule is in the terms following:

1. An interim order is granted with a return date of 25 February 2016, calling upon the First Respondent to show cause, if any, why the following order should not be made a final order of Court:

1.1 the Applicant is awarded forthwith and from 1 December 2015 primary care of the minor child, M. L. M., a boy born on [...] 2013, which will include the right to provide the primary residence of the child, subject to the First Respondent's right to reasonable contact with the child, including but not limited to the following:

1.1.1 the First Respondent shall have the right to have the child with her and in her care for a period of seven (7) days every short school

holiday and seven (7) days every long school holiday until the child attains the age of five (5) years, when the parties will revisit the issue of contact between the child and the First Respondent;

1.1.2 Christmas and New Year shall rotate between the Applicant and the First Respondent with Christmas 2015 to be with the Applicant and New Year 2016 with the First Respondent;

1.1.3 the First Respondent shall have the right to have the child with her and in her care for a period of seven (7) days during the December 2015 school holiday, starting from 31 December 2015, which right will include to remove the child to Mthatha;

1.1.4 The First Respondent shall return the child to the care of the Applicant on/or before 8 January 2016;

1.1.3 the First Respondent shall have reasonable contact with the child at all reasonable times as arranged between the parties when she is in Port Elizabeth.

2. Costs to be reserved.

[2] Prior to the issuing of the *rule nisi* first respondent had given notice that she opposes the relief sought by the applicant which concerns their minor child. The child a boy was born on the [...] 2013. I will refer to the minor child as “J.” which appears to be his pet / nick name.

[3] Because of the nature of relief sought, it became necessary that the Family Advocate investigates the circumstances relating to parental responsibilities and rights, primary care, primary residence etc, of the minor child. Pending the conclusion of this investigation and the availability of the Family Advocate’s report the exchange of further affidavits was held in abeyance.

[4] It appears to be common cause that the Family Advocate’s report was made available to this court in November 2015. However, up until the 24 February 2016 the day preceding the return date, some three months down the line, first respondent, who is the mother of the minor child had not filed an answering affidavit.

[5] When the matter was called on the return date, **Mr Dyke** who represents the first respondent moved an application for condonation of the late filing of the first respondent's answering affidavit. The condonation, if granted would of necessity result in the postponement of the matter to enable Family Advocate to investigate the matter further and for the applicant to file a replying affidavit which he desire to do so or if so advised.

[6] The application for condonation is opposed by the applicant on the basis *inter alia* that the law requires matters concerning minor children to be dealt with without delay; there is not proper condonation application; first respondent does not tell court why it took her six weeks to file her answering affidavit. Further that seeing as it is that it is suggested that she was cash strapped which affected her ability to consult with her legal representatives, she fails to explain how she managed to travel from Gauteng to Mthatha fortnightly.

[7] It is trite that a child's best interests are paramount in every matter concerning the child.¹ This principle is also countenanced in the *Children's Act 38 of 2005*. *Section 9 of the Children's Act* provides as follows:

"9 Best interests of child paramount

In all matters concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance, must be applied."

In *Section 6 (4) the Children's Act* provides that:

"(4) In any matter concerning a child—

- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
- (b) a delay in any action or decision to be taken must be avoided as far as possible."

¹ Section 28 (2) of the Constitution.

It is with these principles in mind that I will approach this matter together with what is stated in *Section 7 of the Children's Act* which outlines factors that must be taken into consideration when determining what would be in the best interest of the child.

[8] *Rule 27 (3)* of the *Uniform Rules* of this court provides that “The court may, on good cause shown, condone any non-compliance with these rules”. Condonation is usually sought on notice. In first respondent’s notice of motion, there is no mention of condonation. Hence the submission on behalf of the applicant that there is no condonation application. Paragraph two of the notice of motion states that an order that first respondent be granted leave to file her answering affidavit will be sought. The notice of motion contains four other prayers. As rightly pointed out by counsel for the applicant, it is only in paragraph 190 that for the first time the word condonation appears where first respondent states:

“I have been advised that it appropriate (*sic*) for me to apply for condonation of the late filing of these papers.”

She then goes on to explain why she was unable to file her answering affidavit timeously. Chief amongst those reasons being that she was not possessed of means to consult with her attorney and counsel. Having been away in Gauteng in search of employment opportunities.

[9] Even though the application for condonation is proceeded with in an unconventional and confusing manner, I will accept that the papers disclose a request for this indulgence (condonation) as well as an explanation for failure to timeously file an answering affidavit.

[10] It is common cause that when the acrimony between J.’s parents started around April 2015, first respondent was unemployed. This was prevailing even at the time of the issue of the *rule nisi* in December 2015. It also emerges from the first respondent’s affidavit that she has since

secured a job in the Gauteng Province. One of the first respondent's prayers according to her notice of motion is a request for the postponement of the matter for further investigation by the Family Advocate. (In light of the change in her circumstances).

[11] A member of the Family Advocates' Office, **Mr Mpushe**, who appeared and acts to advise on what will be in the best interest of the minor child made certain submissions in a bid to be of assistance to the court. **Mr Mpushe's** submissions were essentially that: In view of the new developments, namely that first respondent now has a job, there is a need for a further investigation to be carried out. The purpose of the investigation would be to look into the changed circumstances of the first respondent, *inter alia* how much she earns, the environment and conditions of her accommodation, whether it would be appropriate or conducive to the upbringing of the minor child, etc. He also made the point that the re-evaluation of first respondent's circumstances will not negatively affect the minor child because the *rule nisi* is still in place and will remain in place until a court makes a determination in light of Family Advocate's report after the re-evaluation.

[12] In my view, the best interest of **J.** can best be determined if the court has all the relevant factors pertaining to him and his parents at its disposal. It is only then that the court will be in a position to determine what is in the best interest of the minor child. It is only then that the court will have insight into the factors mentioned in *Section 7 of the Children's Act*. That will not be possible without recourse to first respondent's answering affidavit and the Family Advocate's further report. Even though this will result in delaying a decision in this matter, in my view more harm will be done if a decision is taken without considering first respondent's circumstances, and for a situation to arise later that will necessitate the variation of that order.

[13] I am of the view that for the reasons given above, this is a proper case where I should exercise my discretion in favour of the first respondent being granted leave to file her answering affidavit. So that matters pertaining to J. can be properly ventilated as to what would be in his best interest in so far as who should be awarded his primary care. I agree with what *Revelas J* said in the ***Bouwer Collins Insurance Brokers (Pty) Ltd and Sandra Alice Margaret Hopgood & Another Case Number 2012/12*** an unreported judgment I was referred to by **Ms Veldsman**, namely that: “[22] Generally, judges are reluctant (as they should be), to close the doors of court to a litigant purely for reasons relating to non-compliance with court proceedings”. I believe this is more so in disputes concerning children. That in these cases the child’s best interest should not be held at ransom for the sake of legal niceties.²

In my view this is a case where the doors of court should not be closed to first respondent in order for a proper evaluation to be made as regards J.’s welfare / best interest.

[14] In the result the following order will issue:

1. The first respondent is granted leave to file her answering affidavit.

2. The office of the Family Advocate is requested to, on an urgent basis, conduct a further investigation into the circumstances relating to:

2.1 the full parental responsibilities and right as set out in Section 18 (2) of the Children’s Act 38 of 2005 in respect of the minor child born from a relationship between the applicant and the first respondent who is the subject of this application.

² De Gree and Another v Webb and Others 2007 (5) SCA 184 at 220 [99].

2.2 the primary care and primary residence of the said minor child and contact with the minor child and

2.3 to report on its further investigation and make a recommendation to this court in relations to primary care and primary residence of the minor child and contact therewith.

3. The return date of the *rule nisi* that was issued on the 1 December 2015 is extended until 22 March 2016 pending the availability of the Family Advocate's report and the filing of applicant's replying affidavit if so advised.

4. Costs reserved.

**N G BESHE
JUDGE OF THE HIGH COURT**

APPEARANCES

For the Applicant : Adv: Veldsman
Instructed by : KAPLAN BLUMBERG ATTORNEYS.
1st Floor, Block A, Southern Life Gardens
70 Second Avenue
Newton Park
PORT ELIZABETH
Ref.: L Ferns
Tel.: 041 – 363 6044

For the Respondent : Adv: Dyke
Instructed by : BUKKY OLOWOOKORUN ATTORNEYS
15 Annerley Terrace
Central
PORT ELIZABETH

Ref.: Bukky Olowookorun

Tel.: 041 – 450 1694

Date Heard	:	25 February 2016
Date Reserved	:	25 February 2016
Date Delivered	:	8 March 2016