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NOT REPORTABLE

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

Case no: 3628/2014

Date heard: 20th January 2017

Date delivered: 9th February 2017

In the matter between:

S. F. J.

Applicant

vs

N. C. J.

Respondent

JUDGMENT

TSHIKI J:

[1] The applicant herein has filed an application against the respondent on An urgent basis for an order in the following terms:

- "1. Condoning the applicant's non-compliance with the Rules of Court relating to form, time limit and notice, and to hear the application in terms of the provisions of Rule 6(12) as one of urgency.
2. Directing the respondent to immediately return the minor children S. Q. S. and K. E. J., to the care of the applicant and in the event of her failing to do that, directing the Sheriff to take all steps necessary to place the minor children in the applicant's care.

3. Interdicting the respondent from removing the minor children from the care and custody of the applicant pending the finalisation of this application.
4. That a Rule *Nisi* be issued calling upon the respondent to advance reasons (if any) to this Court on Tuesday, 31 January 2017 at 09h30 why it should not be ordered:
 - 4.1 that the minor children S. Q. S. and K. E. J., shall remain in the care and custody of the applicant, pending the finalisation of the divorce proceedings between the parties in this Court under case number 3628/2014;
 - 4.2 that the respondent shall have only supervised contact with the children pending the finalisation of the divorce proceedings between the parties in this Court under case number 3628/2014;
 - 4.3 that the respondent shall pay the costs of this application on a scale as between attorney and client.
5. That the order contained in the paragraphs 4.1 and 4.2 above shall serve as an interim interdict pending the finalisation of this application.”

[2] The respondent has opposed the application mainly on the following grounds. That the parties have two minor children (both boys) born of their marriage namely S. Q. S. (born [....] 2004) and K. E. J. (born on [....] 2012). When the respondent moved to Gauteng in September 2013, the two minor children remained behind in Port Elizabeth under the care of the parties' nanny, at the respondent's parents' house. There is also a pending divorce proceeding between the parties which have been set down for trial on the 14th February 2017. According to the applicant, the respondent has further failed to procure or file any current expert report addressing the issue of the best interests of the minor children relative to their primary care. The family advocate has earlier recommended that the minor children remain in the care of the applicant. The respondent has not yet procured or files any contrary expert report contending otherwise. The applicant is of the view that it seems as being

unlikely that the divorce action will proceed on the arranged trial date, however some documents filed by professional counsellors including that of the Family Advocate Elaine Botha which have been filed and deal with the pertinent issues to be dealt with during the divorce proceedings.

[3] When this application was argued *Ms Mey* appeared for the applicant and *Mr Nobatana* represented the respondent.

[4] It is unfortunate that this application has been argued without this Court having been assisted by an updated report of the Family Advocate. However, the final divorce, according to the papers will be finalised on the 14th February 2017 and I hope that the divorce Court could not finalise the divorce action unless the report of the Family Advocate has been filed to assist the divorce Court. Hopefully by the 14th February 2017 the divorce Court would have been equipped with the Family Advocate's report, failing that report the divorce proceedings will be postponed more so that there are minor children involved.

[5] In my view, and also at this stage of the proceedings it would not be in the interests of the children to have them taken away from the parent who has their custody. I say so, in view of the fact that the divorce action date has been set down for the 14th February 2017 and for that reason it would not be wise to shift the custody of the children from the current custodian.

[6] My recommendation is to have the divorce proceedings finalised if they are ready and this will also benefit even the current parties in these proceedings. Should

that not be the case, I would then advise the parties in this case to have the application postponed until they are ready to finalise their divorce action.

[7] However, should the divorce proceedings be postponed the parties would have to approach the family advocate for its recommendation before the parties proceed to approach the Court for an order for custody.

[8] in the result I make the following order:

[8.1] The application is hereby postponed *sine die*.

[8.2] There shall be no order as to costs.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

For the applicant	:	Adv Mey
Instructed by	:	Brown Braude & Vlok Inc
		PORT ELIZABETH
		Ref: I Lambrechts/Dianne

For the respondent	:	Adv Nobatana
Instructed by	:	Lulama Price & Associates
		PORT ELIZABETH
		Ref: Ms Prince