

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

CASE NUMBERS. 22143/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

22/08/2022

In the matter between:

R [....] 1, R [....] 2 R [....] 3

Applicant

And

C [....] : A [....]

Respondent

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

1.The crux of this matter boils down to the determination of the question whether or not a rule 43(6) order, regulating parental rights and responsibilities, more specifically contact rights - which is non-appealable according to statute - is suspended as a result of a pending appeal in respect of a point in limine, namely *lis pendens*, which was dismissed.

2.The Rule 43(6) order which was granted concerns twin minors, namely a boy, Aarav, and a girl A [...] born on 4 December 2017 and currently 4 years and 8 months of age (“*the minor children*”).

3.The twins’ parents – the applicant and the respondent - are embroiled in an acrimonious divorce action.

4.During **2019** the applicant launched a Rule 43 application to obtain contact to the minor children. In terms of the court order, dated **31 October 2019**,¹ Mabesele J, made the following orders in respect of the parties’ parental rights and responsibilities in respect of care and contact:

“1. Pendente lite

1.1The applicant and the respondent are awarded full parental rights and responsibilities with regard to guardianship of, contact with, care of and maintenance of the two minor children as contemplated in section 18(2) of the Children Act no: 38 of 2005.

1.2The minor children’s primary residence shall be with the respondent, subject to the applicant being entitled to exercise contact with the two minor children as follows:

1.2.1every Tuesday from 11h00 to 12h00.

1.2.2every Wednesday from 18h00 to 19h00 the applicant to be accompanied by the social worker as appointed in terms of paragraph 1.2.5 infra to assist the applicant.

1.2.3every Thursday from 11h00 to 12h00.

¹ 052-57.

1.2.4 every alternate Saturdays from 11h00 to 14h30 on condition that a social worker shall accompany and assist the applicant during the full period of the contact session and whose costs shall be shaved equally between the parties.

1.2.5 The experts, Dr Fasser and Mr. Carr, will jointly recommend a social worker to be appointed to supervise and assist the contact between the applicant and the children when he has contact with the minor children as set out in paragraphs 1.2.2 and 1.2.4 above.

1.2.6 The contact sessions as set out here in before will commence as follows:

1.2.6.1 paragraphs 1.2.1 to 1.2.4 from the 5th of November 2019; and

1.2.6.2 the contact set out in paragraph 1.2.4 commencing on the 9th of November 2019.

5. Mr. David Barlin ("Mr. Barlin") was appointed as supervisor in terms of the aforesaid court order. It is evident from Annexure **RR2**² attached to the Founding Affidavit that Mr. Barlin is a registered social worker. He has supervised the contact between the Applicant and the minors since **November 2019** for over 30 hours on 16 separate occasions.

6. Mr. Barlin is of the view that the applicant's contact should be extended and take place more frequently away from the Respondent's home. The contact should also be regularly and lengthened to include sleep times at the Applicant's home.

7. In a joint expert minute prepared by Mr. Carr and Dr. Fasser dated **9 October**

² 052-60.

2020 ³ it was stated that there was no evidence to suggest that the contact between the Applicant and the minors should not be normalized into standard and age-appropriate contact, including sleep-over contact.

8.The Applicant accordingly on **20 November 2020** launched a rule 43(6) application seeking to extend his contact rights, which was struck of the roll in the urgent court, due to lack of urgency.

9.During **May 2021** the Honourable Mr. Justice Nyathi heard the rule 43(6) application on the normal rule 43 opposed roll. The Applicant had served the same rule 43 affidavit used during **November 2020** but with an amended Notice of Motion. The Respondent raised *lis pendens* as a point *in limine*.

10.However, His Lordship Mr. Justice Nyathi dismissed the *lis pendens* point and on **27 May 2021** handed down a Rule 43(6) court order under case number **22143/2018**. The latter order varied and substituted the Rule 43 order by the Honourable Mabesele J.

11.The Court Order by His Lordship Mr. Justice Nyathi ⁴ reads as follows:

“...the court order dated 31 October 2019 be varied and be substituted with an order pendente lite that the Applicant be entitled to exercise contact with the two minor children, subject to the minor children’s educational, social, religious and sporting activities as follows:

1.1.On every Tuesday and Thursday from 15h00 – 19h00 when the Respondent shall drop the minor children at the Applicant’s home at 15h00 until 19h00 when the Applicant shall return the minor children to the Respondent’s home at 19h00);

³ RR 3; 052-64

⁴ 047-12.

1.1.1. The weekday contact to commence on Tuesday 1 June 2021.

1.2. On every alternate weekend from Saturday at 17h00 until Sunday 10h00; when the Respondent shall drop the minor children at the Applicant's home by 17h00 on Saturday until 10h00 on the Sunday when the Applicant shall return the minor children to the Respondent's home by 10h00:

1.2.1. The sleepover contact to commence on Saturday 5 June 2021 and thereafter on alternate weekends thereafter.

1.3. During 2021 for half of every long school holiday and the short school holidays shall alternate between the parties, provided that the Christmas/New Year week and the long Easter weekend shall alternate between the parties so that neither party shall have the minor children for two consecutive periods:

1.4. On every alternate public holiday but provided that if a public holiday precedes or immediately follows a weekend during which one of the parties has the children with him/her, then the said weekend shall be extended by the day of the public holiday;

1.5. The parties shall share the minor children's birthdays if it falls over a weekend but if the birthdays fall on a school day then on such day the Applicant shall have the minor children with him for a period for not less than 3 hours, at times to be agreed;

1.6. The minor children shall be with the Applicant on his birthday for no less than 3 hours if on a school day and if his birthday falls on a weekend, then the minor children will spend the entire weekend with the Applicant; and the same will apply on the Respondent's birthday;

1.7The minor children will spend the weekend of Father's Day with the Applicant and the same will apply on the weekend of the Mother's Day, when the minor children shall be with the Respondent;

1.8The 4 days of the Dewali festival alternate between the parties on an annual basis from 17h00 on the first day to 17h00 on the last day;

1.9Reasonable daily telephonic contact or face time or similar contact with the children when they are in the care of the other party, between 17h00 and 18h00.

2.An order that the parties make joint decisions relating to the minor children's education, religious activities and extra mural activities.

3.An order that neither party may remove the children from the Republic of South Africa without the written consent of the other party, which consent shall not unreasonably be withheld.

4.In the event of either party wishing to remove the children from the province of Gauteng, each party must apprise the other party at least one week in advance of precise details concerning the planned holiday such as but not limited to times, dates, flights, itineraries, accommodation and destinations.

5.An order that a senior mental health practitioner of at least 10 years' experience be agreed upon by the parties and appointed as a parenting coordinator. The parenting coordinator should function as a mediator and manager and as a monitor regarding any potential dispute that may arise between the parties or any occurrence of unhealthy parenting."

12.In terms of this rule 43(6) order by Nyathi AJ the Applicant was accordingly afforded greater contact to the minor children including sleep overs. The contentious

and problematic issue in the aforesaid order for the Respondent relates to be the sleep-over contact.

13.The order was granted by Nyathi AJ on **27 May 2021** and was circulated on **1 June 2021**.

14.On **1 June 2021** the applicant then demanded implementation of the order.⁵

15.However, an application for leave to appeal against the dismissal of a point *in limine* relating to *lis pendens* was served on the applicant's attorney on the same day.⁶

16.After service of the application for leave to appeal on the applicant's attorney on **1 June 2021**, the applicant's attorney wrote:

"As an experienced family law and divorce attorney, you are clearly aware that an interim order and, in particular a Rule 43 order is not subject to appeal and the attempt to avoid that by complaining of the dismissal of the points in limine is similarly contrived and improper.

Should your client not comply with the order, my client will apply urgently for relief against both you and your client".⁷

17.The respondent's attorney responded⁸ thereto as follows on the same day:

*"The dismissal of the point in limine of lis pendens was a **final order** which stands separate from the interim relief of the Rule 43 application and which,*

⁵ Caselines 052-215 Paragraph 5.9.

⁶ Caselines 052-024 Paragraph 37.19; Caselines 052-24 Paragraph 37.24; Caselines 052-230 Paragraph 16.

⁷ Caselines 052-282. Emphasis added.

⁸ Caselines 052-283. Emphasis added.

if granted, would have had the effect that no consideration would have been given to the merits of the Rule 43 application”

and further

“Our instructions are that our client is entitled not to adhere to the terms of the court order and any actions taken by you or your client will be opposed.”

18.To which the applicant’s attorney responded as follows on **7 June 2021**:

*“The recent order **remains in place and your client is in contempt of said order...**”*⁹

19.The respondent’s attorney re-iterated the respondent’s position on **7 June 2021** when she wrote that:

“the Rule 43(6) court order has been and is currently suspended but ... the Rule 43 order of 2019 is still intact”.¹⁰

20.On the **2nd of June 2021** the Respondent also launched an application to set aside Nyathi AJ’s order.¹¹ This application was heard on **27 January 2022** by Her Ladyship Ms. Justice Keightley and was postponed pending the appeal at the request of the Respondent granting costs in the Applicant’s favour.

21.On **11 November 2021** His Lordship Mr. Justice Nyathi granted leave to appeal concerning the issue of *lis pendens*.

22.The applicant in the current application before me initially sought relief in the

⁹ Caselines 052-285. Emphasis added.

¹⁰ Caselines 052-287.

¹¹ Par 37.21, 052-24.

following broad terms:

22.1an order holding the respondent in contempt of the order granted by Nyathi, AJ on 27 May 2021,¹² (the “Nyathi, AJ order”) and, consequent upon such finding, for the direct imprisonment of the respondent without any coercive element to the sanction;¹³

22.2*Alternative* to a finding of contempt, a declaratory order that the Nyathi, AJ order is **not** suspended pending the outcome of an appeal currently pending, and directing the respondent to comply therewith, failing which she will be in contempt;¹⁴

22.3A pre-emptive order for the direct imprisonment of the respondent should she fail to comply with the Nyathi, AJ order after such declaration;¹⁵ and

22.4An order that the respondent be directed to surrender her passport and those of the minor children pending the outcome of the divorce action; *alternatively*, that the respondent surrender the passports of the minor children pending the outcome of the divorce proceedings.¹⁶

22.5Costs of the application.

23.However, Adv RR Rosenberg SC on the Applicant’s behalf, after taking instructions, addressed this Court and during argument sought the following relief in

¹² Caselines 052-02 Paragraph 2.

¹³ Caselines 052-02 Paragraph 3.

¹⁴ Caselines 052-02 Paragraph 4.

¹⁵ Caselines 052-02 Paragraph 5.

¹⁶ Caselines 052-02 Paragraph 6.

terms of the Notice of Motion:¹⁷

23.1 Prayers 2 and 3 of the Notice of Motion¹⁸ to be postponed *sine die* (the contempt of Court and the sanction for contempt);

23.2a declarator that the order of Nyathi AJ of **27 May 2021** is not suspended pending the outcome of the appeal and that the respondent must comply with the declarator.

23.3 that the Respondent must comply with the said declaratory relief failing which she will be sanctioned.

23.4 the safe-keeping of only the children's passports by the Sheriff of Johannesburg Central (the Applicant is not persisting with wanting the safe-keeping of the Respondent's passport).

23.5 costs of this application on the attorney and client scale *alternatively* on the party and party scale.

SUCCINCT MATERIAL BACKGROUND

24. The parties are, as alerted to here in before, in the throes of an acrimonious divorce (*"the divorce action"*), and in an action concerning alleged loans and donations made by the respondent to the applicant (*"the loans action"*), both actions having been initiated by the respondent on **26 June 2018**, when the minor children were a mere 6 months old.

25. The divorce action and the loans action were consolidated by the order of Van Der Merwe AJ dated **30 July 2021**. The respondent is currently appealing this decision, leave to appeal having been granted by Van Der Merwe AJ on **20**

¹⁷ 052-6.

¹⁸ 052-7

December 2021.

26.The parties have competing versions concerning what led to the breakdown of the marriage.

27.When the minor children were discharged from the hospital during **January 2018**, the respondent returned to her parents' home and chose not to return the matrimonial home.

28.The respondent, who comes from a wealthy family ceased all meaningful communication with the applicant.

29.The respondent has brought an appeal and an application to set aside the rule 43(6) court order.

30.Nyathi AJ granted leave to appeal concerning his determination of the *lis pendens* point in limine, which appeal is pending.

31.The respondent's application to set aside Nyathi AJ's court order which was initially brought on urgency, was set down for hearing on **27 January 2022**. The respondent however brought a postponement application of the application to set aside Nyathi AJ's order, citing the pending appeal as the main basis thereof, on about **17 January 2022**.

32.The application to set aside and the postponement application came before Keightly J on **27 January 2022**, and she postponed the matter *sine die* because of the pending appeal, but granted wasted costs occasioned by the postponement in favour of the applicant. Keightly J also took the opportunity, as the upper guardian of minor children, to voice her discontent with the manner in which the respondent was conducting the litigation and noted that the respondent's strategy was not in the

children's best interests¹⁹.

33.The applicant contents during argument that the respondent is utilising all the legal avenues to stop the minor children's contact with their father, the applicant. Advocate RR Rosenberg SC argued that: i) the game must end and that ii) the minor children must be allowed to see their father in terms of the Nyathi order.

34.I pause to state that it is extremely sad that litigation processes seem to be utilized as chess matches played by parties to the prejudice of the children.

35.In this matter the parties may perceive themselves as winners but it is at a costs of their own children.

36.It is the children's right of contact which are negated and negatively impacted upon.

COMMON CAUSE :

37.It is common cause that Nyathi, AJ's order was granted on **27 May 2021** and that both the parties have knowledge of the order.²⁰

38.That on **1 June 2021** the respondent filed an application for leave to appeal, which leave was granted on **11 November 2021**, and that the appeal is still pending.²¹ (The appeal will apparently be heard on **12 October 2022**.)

39.That the appeal lies against the point in limine of *lis pendens*²²and not against the merits of the Rule 43(6) order.

¹⁹ FA, paras 37.25 to 37.31, 052-25 to 052-27.

²⁰ Caselines 052-229 Paragraph 15.

²¹ Caselines 052-024 Paragraph 37.19; Caselines 052-24 Paragraph 37.24; Caselines 052-230 Paragraph 16.

²² Par 76 052-268.

40. The applicant currently exercises contact with the parties' minor children as follows, which contact is exercised away from the respondent's home and without any requirement of supervision:²³

(The respondent states that this extension of contact beyond that provided in the October 2019 order was by agreement between the parties,²⁴ while the applicant alleges the terms thereof were unilaterally imposed by the respondent.²⁵)

40.1 Every Tuesday from after school at 12h30 until 17h00;

40.2 Every Thursday from after school at 13h15 until 18h00; and

40.3 Every alternate Saturday from 09h00 until 15h00.

ISSUES TO BE DETERMINED:

41. The first issue to be determined is whether this matter is one of urgency.

42. The second issue to be decided is whether the application for leave to appeal, and the subsequent appeal following the granting of leave, suspended the operation and execution of the order of Nyathi, AJ. The applicability of Section 18 of Act 10 of 2013 has to be assessed.

43. Thirdly, consideration must be given to whether the respondent must be sanctioned for non-compliance with Nyathi AJ's order.

44. A further issue to be decided is whether the applicant has made out any case or a

²³ Caselines 052-33 Paragraph 51.1, 052-34 Paragraph 51.3; Caselines 052-220 Paragraph 5.24; 052-234 Paragraph 26.

²⁴ Caselines 052-220 Paragraph 5.24; 052-234 Paragraph 26.

²⁵ Caselines 052-33 Paragraph 51.

sufficiently cogent case to warrant an order that the children's passports (the Applicant during argument did not pursue the safe-keeping of the Respondent's passport) be surrendered for safe-keeping pending the outcome of the divorce proceedings; *alternatively*, whether the children's passports should be so surrendered.

45.Lastly, the issue of costs needs to be determined.

URGENCY:

46.It is abundantly clear that the matter was initially enrolled on the urgent roll.

47.However, the parties agreed that pending mediation processes, the matter was removed from the urgent roll.

48.The matter came before me as an opposed motion set down in the normal opposed motion court.

49.Almost at the end of the arguments by both advocates, Advocate PJ Greyling, appearing for the Respondent, raised the point that the matter is urgent and that he is persisting with the argument of urgency.

50.The Applicant's Counsel referred me to the Applicant's Heads of Argument where paragraph 2 states that the matter was removed from the urgent court and placed on the normal opposed motion court by agreement between the parties.²⁶

51.Initially in the Respondent's Counsel's Practice Note dated **8 April 2022** the following was said:

"By agreement between the parties, this application was removed from the roll of 1 March 2022. However, contrary to the applicant counsel's assertion

²⁶ 052-516.

in her practice note, it was not agreed that the matter would be enrolled in the ordinary course. In fact, the applicant reserved the right to persist in having the matter heard on the urgent roll should mediation between the parties be unsuccessful.”

52.The discretion to proceed on an urgent basis was therefore placed within the hands of the Applicant.

53.However, In paragraph 1 of Advocate Greyling’s Practice Note dated the **8th of July 2022** the following was stated:

“The application was initially brought on urgency, but by agreement between the parties was removed from the urgent role roll and was subsequently enrolled on the opposed motion roll.”²⁷

54.I am of the firm opinion that both the Applicant’s and the Respondent’s Counsels, would surely have:

i)addressed urgency at the outset before commencing with their arguments and

ii)would have requested the matter to be referred to the urgent court.

55.I think that from the abovesaid Practice Note and Heads of Argument it can be inferred that the parties had known and agreed that the matter was to be heard on the normal opposed motion court and not in the urgent court.

56.The matter was furthermore set-down to be heard on the normal opposed roll for the **18th of July 2022**.

57.I accordingly find that the matter was not an urgent matter as dealt with in the

²⁷ 052-739

urgent court.

NON SUSPENSION OF ORDER BY NYATHI AJ:

58. It is of the utmost importance to note that Nyathi AJ granted leave to appeal **only** against his dismissal of the special plea of *lis pendens*. The Respondent's counsel confirmed this to be the position when he remarked in paragraph 6.4.6 of his Practice Note dated 8 April 2022 that:

“the respondent applied for leave to appeal against only the dismissal of the point in limine relating to lis pendens by Nyathi AJ which leave was granted on 11 December 2021.”²⁸

59. The *lis pendens* point entailed that:

59.1 there was pending litigation;

59.2 the litigation was between the same parties;

59.3 it was based on the same cause of action and

59.4 the pending proceedings were in respect of the same subject matter.²⁹

60. A failure to uphold a plea of *lis pendens* is indeed appealable.³⁰

61. In matters where interim relief is sought, the full bench of this division in **Nedbank Limited v Kloppers**³¹ has had no difficulty in finding that the upholding of a plea of *lis pendens* as a point *in limine* was appealable.

²⁸ Par 6.4.6 052-513.

²⁹ Nestlé (SA)(Pty) Ltd v Mars Inc 2001(4) SA 542 (SCA)

³⁰ Socroutus v Grindstone Investments 2011 (6) SA 325 (SCA).

³¹ [2017] ZAGPPHC 360 (29 June 2017)

62.The appeal clearly does not relate to the merits of the rule 43(6) order. I say this in lieu of section 16(3) of the Superior Court Act 10 of 2013.

63.The wording of section 16(3) of the Superior Court Act 10 of 2013 clearly prohibits an appeal against a rule 43 order. The said section reads and I quote:

“Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application-

(a) by one spouse against the other for maintenance *pendente lite*;

(b) for contribution towards the costs of a pending matrimonial action;

(c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or

(d) by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or about to be instituted.”(Underlining added)

64.Rightly so because such a rule 43(6) order is interim in nature and therefore susceptible to variation.

65.In **S v S and Another** ³² it was pointed out that if appeals against rule 43 orders be countenanced there would be a risk of suspension of the orders which would run counter the best interests of the child. It is undeniable that an appeal process would significantly delay the finalization of rule 43 applications and will also bring about immense financial expenses. Recalcitrant spouse could use the appeal process to generate a plethora of unmeritorious applications.

66.Section 18(2) of the Superior Courts Act 10 of 2013 furthermore provides as

³² 2019 (6) SA 1 CC (27 June 2019)

follows:

“Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.” Underling added.

67. There can be no dispute that the Rule 43(6) order of Nyathi AJ is:

i) an **interlocutory order** granting interim relief in a matrimonial matter – it clearly states that it is *pendente lite*. Rule 43 makes provision for “*preliminary procedural skirmish[es] between two spouses intent on divorcing each other.*”³³

ii) it does not have the effect of a **final judgment**. The purpose of such interim relief is to regulate the position between the parties until the court finally determines all issues between them.³⁴

iii) in existence and that

iv) the parties are aware of the court order.

68. The reason that the order of Nyathi AJ falls squarely within the purview of section 18(2) of the Superior Court’s Act and is not suspended by the appeal is as follows:

68.1 The order is not **final** in effect and is susceptible to alteration by the

³³ Swil 1978 1 SA 790 (W) 791D

³⁴ Green 1987 3 SA 131 (E)

Court of first instance, as is the nature of Rule 43(6) orders³⁵;

68.2The order is **not definitive of the rights of the parties**, which will be determined on divorce, or which may be amended by changed circumstances;

68.3It does not have the effect of **disposing of at least a substantial portion of the relief claim in the main proceedings**³⁶.

69.The Nyathi AJ order is not comparable to a situation where children are plucked from the care of one party and placed in the care of another, which would quite clearly be final in effect³⁷.

70.As a matter of law and logic, the order of Nyathi AJ is an order as contemplated in section 18(2) of the Superior Court's Act. It is accordingly not suspended pending the outcome of the respondent's appeal. It must also be borne in mind that, allowing litigants to by-pass the clear and unambiguous provisions of section 18(2), such as what the respondent is attempting to do, will render section 18(2) nugatory.

71.Advocate Greyling also stated the following to Her Ladyship Ms. Justice Keightley which confirms that the rule 46(3) order is not suspended and I quote:

"There is an order that has been made by Nyati. That order has full effect but has only been suspended pending the application for leave to appeal and then later on when he at a later stage granted leave to appeal, is not suspended pending the finalization of the appeal process."

³⁵ Jeanes v Jeanes 1977 (2) SA 703 (W) at 706G where the Court held as follows: "Rule 43 (6) provides that the Courts may on the same procedure vary its decision in the event of a material change taking place in the circumstances of either party or a child or the contribution towards costs proving inadequate."

³⁶ Zweni v Minister of Law and Order of the Republic of South Africa 1993 (1) SA 523 (A) at 532I – 533B read with Cf South African Broadcasting Corporation SOC Ltd v Democratic Alliance 2016 (2) SA 522 (SCA) at 557I – 558D.

³⁷ R v R [2021] ZAGP JHC 35 (18 March 2021).

72. Advocate Greyling informed the Court that his words to Judge Keightly was a Freudian slip as he was Afrikaans-speaking and that he had addressed the learned Judge in English. This explanation is unacceptable and cannot pass muster.

73. The aforementioned must be read in tandem with section 28(2) of the Constitution which provides that a child's best interest are of paramount importance in every matter concerning the child.

74. As upper guardian of the minor children the court has an inalienable right and authority to establish what is in the best interests of the children and to make corresponding orders to ensure that such interests are effectively served and safeguarded.³⁸

75. One of the objectives of the Children Act, Act 38 of 2005 is that in any matter concerning a child, an approach which is conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided and a delay in any action or decision to be taken must be avoided as far as possible.

76. In **B v S**³⁹ it is stated that the right of a child to have contact with a parent vests primarily with the child. Essentially therefore, if one is to speak of an inherent entitlement at all, it is that of the child, not the parent.

77. Generally a child's welfare is usually best promoted through contact with the non-custodian parent, especially where there is already a developed parent child relationship.⁴⁰

78. The purpose of a rule 43 application is to obtain interim relief pending the divorce action as expeditiously and inexpensively as possible.

³⁸ Girdwood v Girdwood 1995 (4) SA 698 (C) at 708J -709A.

³⁹ 1995 3 SA 571 A.

⁴⁰ T v M 1997 1 SA A.

79. In the matter before Court the twin minors who are of a tender age have rights of contact to the applicant parent. The contact arrangements as stipulated in the Rule 43(6) court order is part of the interlocutory order. The Rule 43(6) contact establishes an interim measure of contact pending the divorce action. It gave the minor children right of contact to the Applicant without any delay.

80. The right to contact which the minors have with the Applicant can never be said to be suspended pending an appeal of a technical nature which was dismissed and in circumstances where a rule 43(6) application is non-appealable.

81. The argument that the appeal suspends the rule 43 order can never succeed in light of the very essence of the nature of rule 43 relief namely to be expedient, inexpensive and to counter the delay of the relief granted.

82. The *lis pendens* issue was dismissed by Nyathi AJ and accordingly determined. Nyathi AJ then persisted in dealing with the rule 43(6) application and granted orders *pendente lite*.

83. The *lis pendens* can only at appeal stage have an impact on how the appeal court deals with Nyathi AJ's order. Prior to the appeal court making a decision on the issue of *lis pendens* Nyathi's order must stand and is enforceable. The respondent has sought legal interventions in order to postpone the implementation of the said rule 43(6) orders. Not only did she launch an application for leave to appeal on the date when the Rule 43(6) order was circulated namely **1 June 2022** but on the very next day **2 June 2022** launched an application to review Nyathi AJ's order.

84. It is abundantly clear that the respondent does not seek implementation of Nyathi AJ's order, but wants contact to the children to be limited to what is currently the position.

85. The real victims in this matter seem to me to be the children. The children's rights to contact to the applicant are negatively impacted upon despite experts who promotes more contact and sleep-over contact.

86.If the order is suspended, which I find can never be, the minors' best interests - which are of paramount importance - will be severely prejudice. The minors will be deprived of regular and normalised contact with the applicant. This can simply never be and is not in the spirit of the Children's Act, 38 of 2005.

87.I understand the respondent's argument to be that the *lis pendens* point and the decision to proceed with the Rule 43(6) is final and appealable. The caselaw is clear it is appealable as it is final in its effect.

88.However, the argument further goes that leave to appeal on the *lis pendens* issue has the incidental and unavoidable consequence that the rule 43(6) application is also suspended.

89.This can with respect never be as the rule 43(6) order is not appealable and is interlocutory in nature.

90.The *lis pendens* point was dismissed and the appeal court will have to consider whether the applicant's *lis pendens* argument was proper.

91.The applicant's real point of contention is not the *lis pendens*, which is appealable, but the rule 43(6) application which grants more regular, over-night - and holiday contact to the respondent (which is not appealable).

92.It is important to note that Nyathi AJ gave his rule 43(6) order on **27 May 2021** and that the order has not been given effect to us a result of a technical defence of *lis pendens* been raised by the respondent. The children's right to contact to the Applicant has been sacrificed on the altar of a pending appeal in respect of a *lis pendens* point, which was dismissed by the court of first instance. This sacrifice – namely a suspension of the rule 43(6) order - is contrary to what is in the children's best interests – for their proper and healthy physical and emotional well-being and development.

93.This can simply never be. It is for this very reason that the Constitutional Court in

S v S and Another 2019 (6) SA 1 (CC) indicated that Rule 43 applications should not be appealable as it would lead to and result in extended and expensive appeal processes which causes unnecessary delay. These processes are contrary to the very nature and purpose of a rule 43 application – being expeditious and inexpensive.

94.The Respondent has several legal applications pending all set to stop the Nyathi order from being implemented.

95.I am however of the firm opinion that the Nyathi order is not suspended by the appeal against the *lis pendens*– the rule 43(6) order is always subject to variation. It happens as was stated in **S v S and Another 2019 (6) SA 1 (CC)** in our urgent courts on a daily basis.

96.The admission by the Respondent's legal representative to Keightley J that the order is not suspended confirms not only my firm view but also the position of our law.

97.The appeal court has to first hear the *lis pendens* argument and make its decision. Until such time the rule 43(6) order remains in place and enforceable.

SANCTION UPON NON - COMPLIANCE WITH NYATHI AJ'S ORDER:

98.If either of the parties do not comply with Nyathi AJ's order it is their right to approach the Court to then seek orders for

i)contempt of court and

ii)to sanction non-compliance with the Nyathi AJ's order.

99.I do not believe that it is necessary to have pre-emptive relief as a party seeking to place reliance on contempt of court has to make out a proper case and establish his/her cause of action.

100.I am not going to grant relief on actions or omissions which may or may not be committed by a party.

101.The party who relies upon contempt of court will have to proof the following:

101.1 the existence of a court order

101.2 service of the court order or that the party has knowledge of the court order

101.3wilful and *mala fide* breach of the order of court beyond a reasonable doubt.⁴¹

THE SURRENDER OF THE CHILDREN'S PASSPORTS FOR SAFE KEEPING

102.The Applicant further sought the surrender of the children's passports for safe-keeping by the Sheriff Johannesburg Central. The applicant no longer pursued the safe-keeping of the respondent's passport.

103.I do not believe that this relief is necessary based upon the fact that the children cannot utilise their passports without the consent of both parties - the applicant and the respondent. The applicant accordingly has to give his consent for any travels abroad.

104.The respondent in her answering affidavit stated that she did not leave South Africa with the minor children without the applicant's consent. She admitted that she took the children to India without informing the applicant, without his consent and simply on the strength of him having given her permission to take the minor children to Dubai. The respondent played open cards with the court and took the Court into her confidence.

⁴¹ *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

105.I am not of the opinion that the applicant has made out a case that the Respondent will flee with the minor children. No case has been made out that the respondent is a flight risk and that she will abscond with the children. There is not even a suspicion of such conduct.

106.I am not inclined to curtail the freedom of movement of these children. However, the parties are reminded of prayer 3 of Nyathi AJ's order which addresses the need for a party to seek the consent of the other party when he or she wants to travel abroad. Permission needs to be obtained.

COSTS:

107.The applicant and the respondent are both asking for costs of this application including the costs of two counsel on a punitive *alternatively* party and party scale.

108.The applicant is successful in seeking a declarator that the Nyathi AJ rule 43(6) order had not been suspended in terms of section 18(2) of the Superior Courts Act 10 of 2013. I am of the firm view that Adv Greyling himself knows that the rule 43(6) order is not suspended. I say this in light of Adv. Greyling's explanation to Keightley J which cannot simply be brushed aside.

109.This matter has been strenuously opposed by the respondent, despite knowledge by her legal team that:

i)a rule 43(6) is not appealable, that

ii)the order is an interim order (*pendente lite*) and

iii)not final in nature – the relief is pending the divorce action.

110.I am convinced that the respondent's main purpose in appealing the *lis pendens* point is to commence with a new rule 43(6) application. To have a clean slate so to speak - a second bite at the cherry.

111.The respondent has utilised the leave to appeal and the review applications to halt Nyathi AJ's order. In doing so the respondent is negatively effecting her children's rights of contact and of a bond with the applicant. I say this in light of the experts Mr. Carr and Dr. Fasser who are all in agreement that the applicant should have more liberal contact and sleep-overs. These views were already held when the rule 43(6) application was heard during **2021**. We are now more than a year later without the implementation of the rule 43(6) order. The clock is ticking and the respondent has been acting contra the Children's Act 38 of 2005 by:

i)limiting the applicant's contact rights and

ii)delaying the implementation of the Nyathi AJ order where the Children's Act endorses a speedy resolution of matters concerning children.

112.The applicant however persisted with the declaratory relief sought and in doing so the children's rights of contact to the applicant have been protected. The protection of the minor's rights, who are of a tender developmental age, are of paramount and grave importance for the Court as upper guardian. These children's best interests dictate against a suspension pending an appeal based upon *lis pendens*. Any suspension will be contradictory to the nature and aim of a rule 43 namely to be expeditious and inexpensive. Orders regulating parental rights and responsibilities of parents towards their children must be adhered to unless varied by a court.

113.The respondent in my mind seeks a way via her pending legal applications – the appeal and review – to have the Nyathi AJ's order set aside. She has done everything in her power to prevent the implementation of the Nyathi AJ's order, despite experts who had advised both her and the court otherwise. The respondent's actions as aforesaid, have delayed the normalisation of the children's right to contact, which according to the experts will serve the children's best interests. I cannot but frown upon the *modus operandi* of the Respondent to grant contact to the children only on her terms. The respondent's actions hinder age appropriate contact.

114.I accordingly find that the applicant was substantially successful in his application and grant the applicant costs of this application including costs of two counsels on an attorney and client scale.

CONCLUSION:

115.Having regard to the aforesaid detailed considerations I grant the following orders:

115.1Prayers 2, 3 and 5 of the Notice of Motion dated 18 February 2022 are postponed *sine die*;

115.2It is declared that the rule 43(6) order of Nyathi AJ is not suspended and that the applicant and the respondent must forthwith comply with the said order and the implementation thereof, in the best interests of the minor children.

115.3The applicant is entitled to the costs of this application, inclusive of the costs of two counsel on an attorney and client scale.

ACTING JUDGE VAN ASWEGEN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

APPEARANCES:

FOR THE APPLICANT: ADV RR ROSENBERG SC

ADV T GOVENDER

INSTRUCTED BY DAVID C FELDMAN ATTORNEYS

FOR THE RESPONDENT: ADV PJ GREYLING

ADV M FOURIE

INSTRUCTED BY HANLIE VISSER ATTORNEYS