

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA**

CASE NO: 89753/14

DATE: 22 JANUARY 2015

IN THE MATTER BETWEEN:

M[...] S[...] R[...]

APPLICANT

VERSUS

K[...] K[...] T[...]

RESPONDENT

JUDGMENT

BAM, J

1. The applicant, on an urgent basis, applied for an order in terms of the provisions of Rule 43(6), as follows:
 - i. That the primary residence of the minor child vests with the applicant, subject to the respondent's rights of contact;
 - ii. That all maintenance obligations of the previous court order in terms of the provisions of Rule 43 be rescinded;
 - iii. That the family advocate urgently undertakes an investigation as to the best interest of the child;
 - iv. That the respondent be ordered to pay the costs of the application;
 - v. That the fee limits of Rule 43(7) and 43(8) be dispensed with.
2. The matter concerns the child of the parties, born on 27 September 2012, presently 2 years and 4 months

of age at a time the parties were residing together. The marital problems between the parties resulted in a Rule 43 application and subsequent court order dated 24 May 2013. The said court order provided, *inter alia*, that the child's primary residence should be with the respondent with reasonable access by the applicant.

3. The divorce matter was apparently enrolled for hearing on 24 November 2014 but later postponed *sine die*. The respondent purportedly wanted to apply for an amendment of the Rule 43 order but the application did not materialise.

4. At the time the respondent was studying in America since February 2014. This the applicant only became aware of on 11 November 2014. The respondent apparently would have returned to the RSA on 21 November 2014.

5. The applicant stated that he have not seen the child since November 2013.

6. It appears that mainly because of the fact that the respondent was out of the country, and that she will continue with her studies in America for the next year. The respondent did not inform the applicant who had been looking after the child whilst she was in America. This situation prompted the applicant to lodge the present application.

7. The applicant further motivated the application stating that the respondent is not presently caring for the child and that he, as father of the child, should be granted the order he is seeking.

8. The respondent's attorneys also informed the applicant that he could visit the child during alternative weekends at the common home and visitation rights every Saturday. It was also pointed out by the applicant's attorneys that the last time the applicant has visited the child was in December 2012.

9. According to the respondent, in her opposing papers, the applicant, in a letter by his attorneys dated 2 October 2014, disputed that he was the father of the child.

10. The child is presently cared for at the parties' common home, by her cousin, A[...] K[...], and a domestic servant employed by the respondent since the child was 5 months old.

11. The papers are voluminous and contain a lot of irrelevant matter. In view of the fact that no permission was requested by the applicant to file replying papers, I also indicated to applicant's counsel, Mr van Wyk, that I was in the circumstances not prepared to consider the contents of the applicant's replying affidavit. I also pointed out that I was concerned about the alleged urgency of the application. However, as submitted by Mr van Wyk the application concerns the interests of a child. For the latter reason I was accordingly amenable to accommodate the application as urgent.

12. After having considered all relevant facts and allegations made by the parties, as submitted by Ms Erasmus on behalf of the respondent, I could not find any reason to say that the child was not properly cared for or in need of better care.

13. I also took into consideration the fact that the applicant is the natural father of the child and that he has a right and is obliged to look after, and care for his child. However, the fact that the applicant did not have contact with the child for approximately 2 years I arrived at the conclusion that an order to grant the applicant custody of the child at this point in time may be disruptive to the child and not in the child's best interests.

14. In view of the fact that this court is the upper guardian of the child it was incumbent on the court to consider what would have been in the best interests of the child. This led me to find that an order to grant the applicant primary residence of the child at this stage, without proper investigation by the Family Advocate, will not be in the best interests of the child.

15. The issue between the parties pertaining to the common home was abandoned by Mr van Wyk.

16. The order I accordingly make reads as follows:

1. The application is postponed *sine die*;
2. The applicant's access to the child is provided for in the Rule 43 order dated 24 May 2013 and remains in place;
3. The Family Advocate is requested to investigate the situation and to furnish a report as soon as possible.
4. Costs are reserved.

AJ BAM

JUDGE OF THE HIGH COURT

20 January 2015