

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Case No: 268/2013
Heard: 22/02/2013
Delivered: 15/03/2013

In the matter between:

T MC

Applicant

v

T C

Respondent

JUDGMENT

MAMOSEBO AJ

[1] I had ordered the following after hearing the argument on 22 February 2013:

1. Applicant and respondent shall be co-holders of full parental rights and responsibilities in respect of the two minor children, **M** and **M T**, as contemplated in s 18 of the Children's Act, 38 of 2005;

2. The minor children shall have their primary residence with the applicant;
3. The applicant shall have the responsibility and right to care for the children as contemplated by ss 18(2)(a) and 1(1) of the Act; 38 of 2005;
4. The respondent is to forthwith return the minor children to the care of the applicant;
5. The respondent shall have the right and obligation to maintain reasonable contact with the children as contemplated by s 18(2)(b) read with s 1(1) of the Act, in Kuruman.
6. In the event that the respondent fails to comply with para 4 of this order the sheriff of the district where the minor children currently resides is authorized and ordered to remove the children from the care and residency of the respondent and to place them in the care and residency of the applicant;
7. The family advocate, Kimberley, is ordered to immediately investigate the dispute pertaining to the contact rights and care of the minor children and to submit a report to this court;
8. The orders set out in paras 1-5 are to operate with immediate effect pending the Court's determination of the issues under case 1547/2012.
9. The issue of costs will be dealt with in the judgment;

10. Reasons are reserved.

I now provide my reasons.

[2] This matter first came before me as an urgent application on 19 February 2013 and was postponed to Friday 22 February 2013 at 14:15. A draft order by agreement was submitted which was made an order of court affording the respondent the opportunity to file her opposing affidavit on or before Wednesday 20 February 2013 at 16:00 and the applicant to file his replying affidavit on or before Thursday 21 February 2013 at 16:00.

[3] The following relief was sought by the applicant, M C Te:

3.1 Condoning the applicant's failure to comply with the Rules of this court in relation to forms, time periods, and service, and permitting this matter to be heard urgently in accordance with the Uniform Rules of Court 6(12)(a).

3.2 That a rule nisi be issued calling upon the respondent to show cause or submit reasons, if any, on or before Friday 15 March 2013 at 10:00 why the following order should not be made:

(a) That the respondent be ordered to return the parties' minor children M C and M to the applicant's care;

- (b) That the respondent pay the costs of this application;
- (c) That an interim order for immediate execution be made to the Sheriff of the district where these minor children may be found, authorizing him or her to remove the minor children from the care of the respondent and to hand them over to the applicant; and
- (d) Further and/or alternative relief.

[4] This matter, which is clearly urgent, involves two minor children aged eight and four years. They were removed by the respondent, their mother, from Kuruman to Thabazimbi. Hence applicant's request for urgent relief for the minor children to be returned to Kuruman. Uncertainty around the children with regards to their permanent residency and best interests being of paramount importance contributed to the urgency and was a factor I considered in granting the relief.

[5] The matter was heard on the afternoon of 22 February 2013. Argument was presented by Ms Sieberhagen on behalf of the applicant and Mr van Tonder on behalf of the respondent.

The background

[6] The marriage between the applicant, M C T, and the respondent, C T, still subsists. They resided at 33 Hibiscus Street until 13 February

2013 when Mrs T left the common home surreptitiously with the two minor children for Thabazimbi. Prior to her leaving Kuruman there was already a pending divorce action and a Rule 43 application, both under case number 1547/2012. The applicant is opposing both the divorce action and the Rule 43 application. He further states at para 5.3 of his founding affidavit:

‘Een van die grootste dispute tussen my en respondente in die egskeiding, is die versorging van ons minderjarige kinders. Die respondent het aanvanklik die Reël 43 aansoek geplaas vir argumentering op 15 Februarie 2013, maar sou die aansoek nie behoorlik bereg kon word alvorens die Gesinsadvokaatsondersoek nie gefinaliseer is nie. Die respondent se prokureur van rekord het bygevolg voortgegaan om die aansoek van die rol te verwyder’.

- [7]** The applicant’s attorneys of record have in anticipation requested the Family Advocate’s office to conduct an investigation with a view to the primary care and residency of the two minor children.

- [8]** The chain of events between the parties was triggered in January 2013 when applicant saw application forms among respondent’s documents for Koedoeskop Primary school, which is in Thabazimbi. In his words: ‘ek was opreg bekommerd dat die respondent ‘n impulsiewe en irrasionele besluit sou neem om ons kinders uit hul stabile omgewing te verwyder’.

[9] Consequently, applicant contacted his attorneys who wrote a letter to Mrs T's attorneys on 14 January 2013 requesting an undertaking in writing not to remove the minor children out of school and out of Kuruman until the Rule 43 application has been heard. Seeing that there was no response, a follow-up letter dated 4 February 2013 was dispatched. There was still no response from the respondent's attorneys.

[10] I was referred to an e-mail marked "annexure D" exchanged between Mrs T and her husband dated 31 January 2013 in which Mrs T wrote, inter alia:

"....maar ek het nuwe geleenthede in my lewe gekry waar ek myself kan vestig in 'n beroep met goeie geleenthede en 'n maatskappy met baie groei potensiaal, ek sal ook die vryheid hê om my skedules so te skeduleer om aan te pas by die kinders... Ek wil graag so gou as moontlik trek, verkieslik voor middel Februarie. Ek verloor te veel besigheid omdat ek nie kliente betyds kan sien nie".

[11] In response to this e-mail, on the same day, applicant wrote:

"Dankie vir jou eerlikheid. Ek vra jou om my tyd te gee voordat ek en jy praat. Miskien tot na die naweek, maar ek sal jou laat weet indien ek reg is. Vir my om te kan besluit het ek egter nog inligting nodig rondom jou werk. Is dit moontlik dat jy my meer inligting rondom dit kan gee?"

[12] In the midst of all the suspense of not knowing what the response or

the reaction of the respondent would be due to the non-response to the applicant's attorney's letters, the respondent surreptitiously left the common home, taking the minor children without the knowledge or involvement of the applicant.

[13] The guiding principle when a court is faced with issues involving minor children is to move from the premise that their best interests are of paramount importance as provided in s 28(2) of the Constitution of the Republic of South Africa 108 of 1996. This standard is echoed in s9 of the Children's Act, 38 of 2005, which states that *'in all matters concerning the care, protection, and well-being of a child the standard that a child's best interest is of paramount importance, must be applied'*.

[14] International law also requires parties to adhere to the standard of the best interest when dealing with the issues of children. See art 3(1) of the United Nations Convention on the Rights of the Child (CRC) and art 4(1) African Charter on the Rights and Welfare of the Child (ACRWC). See also F Viljoen "The African Charter on the Rights and Welfare of the Child" in Boezaart (ed) *Child Law in South Africa (2009)* 331 342 and T Davel 'The African Charter on the Rights and Welfare of the Child: Family Law and Children's Rights' (2002) 2 *De Jure* 281 283.

[15] Ms Sieberhagen, for the applicant, argued that the removal of the minor children while there is pending litigation, namely divorce

action and the Rule 43 application under case number 1547/2012, as well as the outstanding Family Advocate's report, amounts to the respondent taking the law into her own hands. I must agree with the submission that Mrs T could not unilaterally decide to relocate without proper consultation or agreement with the father of the minor children and while the legal processes were pending. Her conduct would also delay the legal process for the interim relief sought by the applicant and the compiling of the report by the Family Advocate because it will necessitate the involvement of the Family Advocate serving in Thabazimbi.

[16] Rule 43 of the Uniform Rules of Court is meant to be dealt with as inexpensively and expeditiously as possible. This Rule, in terms of which Mrs T sought interim relief pending the divorce action, provides for these applicable instances:

- (1) *This rule shall apply whenever a spouse seeks relief from the court in respect of one of the following matters:*
 - (a) *Maintenance pendente lite;*
 - (b) *A contribution towards the costs of a pending matrimonial action;*
 - (c) *Interim custody of any child;*
 - (d) *Interim access to any child.*
- (4) *As soon as possible thereafter, the registrar shall bring the matter before court for summary hearing, on ten day's notice to the parties, unless the respondent is in default;*

(5) *The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit **to ensure a just and expeditious decision** (my emphasis).*

[17] Ms Sieberhagen further argued that uncertainty pertaining to the child's future, safety and well-being on its own forms the basis for the court to hear the matter on an urgent basis. Chaskalson P stated in ***Fraser v Naude and Others 1999 (1) SA 1 (CC)*** at 5 para 9D:

"Continued uncertainty as to the status and placing of the child cannot be in the interests of the child."

[18] Further arguments around uncertainty were amplified by both counsel referring to Exhibit A and "CT 3". Exhibit A is an order of the court in Thabazimbi under Master's Reference 23124/08 dealing with the estate of CEM Cornelius. Mr van Tonder, for the respondent, argued that the sale of the farms, one of which is where the respondent and the two minor children are currently residing, may still be delayed. Ms Sieberhagen raised a counter-argument supported by "CT3", a letter by Baartman Attorneys dated 28 January 2013 from which para 4 reads:

"Inlig van die feit dat die eksekuteur nou al voortgaan om die eiendom van die hand te sit, word u derhalwe versoek om die eiendom te ontruim voor of op 28 Februarie 2013, by versuim daarvan, ons opdrag hou met 'n uitsettingsbevel voort te gaan".

[19] Mr Van Tonder further argued that the children knew and were aware of the impending relocation and that they are familiar with the environment because Mrs T's parents lived there. Counsel's argument that the process preceding the eviction from that farm was going to take long, referring to the order granted in 2009 by Thabazimbi magistrate's court, if anything, compounds the uncertainty. The children's wellbeing cannot be experimented with or compromised.

[20] Mr Van Tonder has referred to ***Bashford v Bashford 1957 (1)SACR 21 (NPD) at 24 f.*** There Holmes J was considering the paramount factor being the welfare of the child in the light of the facts as they existed. Counsel suggested that maybe the relocation of these two minor children may be seen as change for the better. This is mere speculation. There is no evidence before me that the environment in the applicant's home is detrimental to the welfare of the children.

[21] It is quite evident that the removal of the minor children from their home was not carefully thought through. The decision that was taken was not to enhance the best interests of the children as paramount but to address an employment need for Mrs Terblanche. As stated by Maya AJA in ***F v F 2006 (3) SA 42 (SCA) at 53 A*** *"Genuine as the appellant's motivation is, however, I am constrained to agree with the conclusion of the trial court that the practicalities of her decision were certainly not as well researched and investigated as they should have been"*.

[22] Schäfer in Family Law Services Issue 58 October 2012 para E32 on page 25 says “once a court has been persuaded to invoke its powers as upper guardian, it will generally adopt a robust approach towards procedural constraints. The conventional adversarial model of civil proceedings generally yields to what has been termed a ‘judicial investigation’ into what is in the child’s best interests”. See **B v S 1995 (3) SA 571 (A)** and **T v M 1997 (1) SA 54 (A)**.

[23] I am enjoined as the upper guardian of these two minors to judiciously exercise my discretion and to ensure that their best interests are not compromised by spousal feud and spite at the expense of stability for their care, protection and wellbeing. I am equally mindful as did Miller J in **Du Preez v Du Preez 1969 (3) SA 529 (D) at 136 B-C** that

“this is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside, the Court takes upon itself a grave responsibility if it decides to override the custodian parent’s decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reason for the custodian parent’s decision and the emotions or impulses which have contributed to it.”

[24] I have made the initial order to apply with immediate effect and have asked that the Family Advocate, Kimberley, immediately investigate the matter further and to provide an updated report to this court. It is not in dispute that the matter needs to be prioritized by their office

in the circumstances.

[25] I now turn to the order for costs. In my initial order I had indicated that the issue of costs will be addressed in this judgment. It matters in which the custody of children are involved, there is no winner or loser because what matters is the best interests of the child. For that reason, unless there are compelling circumstances to order otherwise, which none exist, the most appropriate allocation ought to be that there be no order as to costs or each party pays his/her own costs.

[26] I am aware that the respondent, Chrystelle Terblanche, has lodged an application for leave to appeal my order issued on 27 February 2013. If she persists in her application for leave after having read this judgment, it would be preferable to lodge an amended application for leave to appeal if the initial grounds are departed from. This would eliminate a piecemeal process of application for leave to appeal.

ORDER:

1. It is for the foregoing reasons that my order was made.
2. Each party is to pay his/her own costs.

M C MAMOSEBO
ACTING JUDGE
Northern Cape High Court, Kimberley

On behalf of the Applicant:	Adv. AS Sieberhagen
Instructed by:	Duncan & Rothman Attorneys
On behalf of the Respondent:	Adv. AG Van Tonder
Instructed by:	M Du Toit, Attorneys