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REPUBLIC OF SOUTH AFRICA



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

Case Number: 2024-068431

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED.

DATE: 13/2/2025

SIGNATURE: MOKOSE SNI

In the matter between:

H[...] E[...]

Applicant

and

M[...] M[...]

Respondent

JUDGMENT

MOKOSE J

Introduction

[1] The applicant approaches this court with an application in terms of Rule 43 in which he seeks *inter alia*, the primary residence of the minor child, T[...] who was born on 27 July 2023. The application is premised on allegations of alcohol abuse, domestic violence and parental alienation. Maintenance has now been resolved and is no longer an issue between the parties.

Brief Facts

[2] The applicant, a teacher at P[...] Boys' High School, resides at the accommodation provided to him by the school. The applicant alleges that he has resided thereat since February 2024 until June 2024 with the respondent who denies that she is ordinarily resident at the said premises.

[3] The parties had met in Cape Town at a time when the applicant was employed at a school, R[...] House. He subsequently left his employ there after an unfortunate incident had taken place when a co-worker made false allegations about him. The applicant contends that he left R[...] House with the encouragement and support of the respondent. He was not dismissed from his employment there.

[4] The parties were married to each other in Cape Town on 23 March 2023, out of community of property, which marriage still subsists. T[...] was born of the marriage between the parties. During June 2024 the applicant instituted divorce proceedings against the respondent and claimed, *inter alia*, the primary residence of the minor child.

[5] The applicant makes serious allegations against the respondent which includes but not limited to passing out around the toilet after excessive alcohol consumption; excessive alcohol consumption in the presence of the minor child; allegations that the respondent drives whilst intoxicated with the minor child in the vehicle; allegations that the respondent acts in a violent and abusive manner towards the applicant and uses inappropriate language in the presence of the minor child; allegations that the respondent unilaterally circumscribes the applicant's

contact with the minor child; and that the respondent metes out corporal punishment to the minor child.

[6] The respondent vehemently denies that the parties' primary residence is in Pretoria despite it being so alleged by the applicant. She denies all the allegations against her and challenges the applicant's relief sought in all respects including a contribution towards the legal costs.

Application to file a further affidavit

[7] The applicant applies to this court to file a further affidavit. It is alleged that it is premised on new facts and circumstances which occurred after the issuing and service of the Rule 43 application. In particular, the applicant makes allegations pertaining to the applicant's previous employment whereby the respondent, in answer, alleges that he was dismissed for alleged sexual misconduct; the applicant's alleged inability to care for the minor child; the respondent's refusal for contact including blocking the applicant's WhatsApp communication; the respondents failure to appear for a scheduled appointment with the office of the Family Advocate; the respondent's continued alcohol consumption; the applicant's alleged alcohol abuse; the applicant's failure to contribute towards the minor child's maintenance; and the respondent's recent request for assistance to move her assets from Pretoria to Cape Town.

[8] Ordinarily, and in Rule 43 proceedings, two sets of affidavits are filed, being the affidavit founding the application and the answering affidavit by the respondent. The court may, in certain circumstances, exercise its discretion and permit the filing of further affidavits by the parties. It must be in exceptional circumstances that such affidavits are permitted and where the court considers it advisable to do so.¹ There must, however, be a proper and satisfactory explanation as to why the facts or information contained in the additional affidavit was not placed before the court earlier and the court must also be satisfied that the opposing party would not be

¹ Riesenbergs v Riesenbergs 1926 WLD 59

prejudiced which prejudice cannot be remedied by a costs order, by the introduction of a further affidavit.

[9] Rule 43(5) provides further that the court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision is made. A cursory look at the applicant's further affidavit furnishes the court with information which is relevant to this application. Furthermore, it is important for this Court to have all relevant facts before it. I have not been apprised of any prejudice which will befall the respondent if this Court were to authorise the filing of a further affidavit. Accordingly, I am of the view that the further affidavit may assist the court in coming to a just and expeditious decision and is therefore admitted.

Primary Residence

[10] The first issue in this matter is that of primary residence of the minor child. The applicant admits that the parties were previously resident in Cape Town however, since February 2024, he contends that they have been resident in Pretoria. The applicant contends that in June 2024, the parties travelled to Somerset West from Pretoria on holiday with the minor child and were set to return to Pretoria on 10 July 2024. The applicant further contends that on 19 June 2024 a fight ensued between the parties resulting in the parties separating. The applicant attempted to report a domestic violence incident in Cape Town but was advised to report same in Pretoria where the parties were ordinarily resident.

[11] The following day the respondent allowed the applicant to exercise unsupervised contact with the minor child for a period of four hours only. The applicant further contends that thereafter, communication between the two of them was blocked by the respondent for a couple of days after which he was informed that he may only have supervised contact with the minor child. The applicant was informed of the reason being that her legal representative had advised her not to give him unsupervised contact and that such contact should only take place at the home of the respondent.

[12] The respondent's legal representatives have now tendered supervised contact which the applicant contends is unrealistic, impractical and impossible. The contact tendered is Tuesdays and Thursdays and alternative Saturdays and Sundays at the respondent's home in Somerset West. The applicant contends that there are no proper reasons proffered for supervised contact as he is more than capable of being the minor child's primary care giver. Furthermore, the minor child is no longer breastfed, nor is he reliant on the respondent for sustenance; the applicant is not abusive nor aggressive; he is an educator and fully aware of the correct manner in instilling discipline; he has formed an attachment with the minor child; he has cared for the minor child unsupervised and attended to all necessary parenting tasks; and that he has a support structure in Pretoria where he had been enrolled in a local creche.

[13] The respondent denies that the applicant has a bond with the minor child and contends that the applicant has no knowledge of caring for a minor child. She further alleges that although she had in the past granted the applicant unsupervised contact, she had obtained instructions from her legal representative to the contrary. Moreover, the respondent contends that the applicant has "*questionable family values*": an allegation which it is noted, is not made in the plea.

The Law

[14] As upper guardians of all minor children, this Court is empowered and is also under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue, which is of paramount importance, being the best interests of the minor child. The Court has extremely wide powers in establishing what is in the best interest of the minor child and is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties.²

Evaluation

² J v J 2008 (6) SA 30 (C) at para 20

[15] The applicant contends that the respondent's behaviour as described above requires censure and is accordingly to the prejudice of the minor child. Furthermore, he contends that he has a right to a relationship with his minor child, which is being hindered, contrary to his right to exercise parental rights and responsibilities. Furthermore, the applicant contends that the minor child has a right to be protected from family violence, something he has been exposed to as described above.

[16] I accept that the minor child has been in the primary care of the respondent. I also accept that mothering is not only the function of a mother but that of both parents. The best interests of the minor child need to be considered, and the facts and particular circumstances of each case need also be considered.

[17] The child in this case is now about 15 months old. He has been living primarily with his mother in the Western Cape although it is disputed that the parties' primary place of residence is in Gauteng. The applicant also alleges alcohol abuse on the part of the respondent as also a propensity for violence. This is of course denied by the respondent. The applicant is also concerned for the minor child's safety citing the respondent's intention to mete out corporal punishment to the minor child. These are all circumstances which the applicant has requested the court to take into consideration in this application for the primary residency of the minor child being awarded to him.

[18] I have considered this matter and all the circumstances which have been brought to the attention of this Court. It is not the intention nor the job of this court to look for the "perfect parent" between the two parties. However, as the upper guardian of all minor children, I am enjoined to decide the best interests of the minor child in the circumstances. No evidence is before this court that the applicant is a bad father and that he will harm the minor child in any way. Furthermore, he is entitled to contact with the minor child on the same basis as the respondent.

Contribution towards legal costs

[19] The applicant claims a contribution be made by the respondent in the sum of R50 000,00. Annexed to the application is a proforma account for fees to be

expended in the conclusion of the divorce. The amount quoted is exclusive of counsel's fees which are in themselves estimated to be in the region of R34 500,00. The applicant contends that he is a teacher with a fixed income and that the respondent has caused him to incur unnecessary expenses by virtue of her constructive conduct in not returning to Pretoria.

[20] When considering a contribution towards costs, the court relies on the principle of "equal footing" between spouses. This means that the financially weaker spouse should be provided with sufficient funds to adequately present their case in divorce proceedings, regard being had to the parties' financial position and the complexity of the case. The quantum of the contribution is in the discretion of the court which will assess the specific circumstances of the case.

[21] The applicant contends that he is a teacher and earns very little money for him to be able to litigate on an "equal footing" with the respondent who works as an SAP specialist. The respondent denies that she is employed and further contends that she has no income.

[22] I have looked at the financial disclosures of the parties and I failed to ascertain any earnings on the part of the respondent. I did not see that the respondent is litigating at a much higher level to the applicant. Furthermore, the contribution for costs is not intended to reimburse the applicant for unnecessary expenses which he alleges have been incurred. Accordingly, I dismiss the relief sought by the applicant in respect of a contribution towards the legal fees.

Conclusion

[23] In light of the finding pertaining to the issue of primary residence, I am of the view that an urgent assessment and report be filed by the office of the Family Court setting out the best interests of the minor child in view of the numerous allegations and cross allegations of the parties. The court will then be able to make an informed decision as to the best interests of the minor child. Accordingly, the following order is granted:

1. The parties shall retain the full parental rights and responsibilities in respect of the minor child, T[...].
2. Primary residence of the minor child shall continue to vest in the respondent, pending the urgent assessment and report by the office of the Family Advocate.
3. Pending the outcome of the assessment of the office of the Family Advocate, the applicant shall be entitled to exercise contact every alternate weekend from Friday 17:00 to Sunday 17:00.
4. The application for a contribution towards the legal costs is dismissed.
5. The parties are to bear their own costs in respect of this Rule 43 application.

MOKOSE J
Judge of the High Court of South Africa
Gauteng Division, Pretoria

For the Applicant: Adv A Koekemoer

On instructions of: Zinta Coetzee Attorneys

For the Respondent: Adv A Korf

On instructions of: MLV Attorneys

Date of Hearing: 8 October 2024

Date of Judgment: 13 February 2025