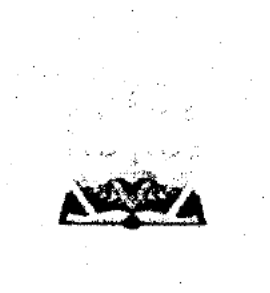


REPUBLIC OF SOUTH AFRICA



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

Case Number: 016689/2025

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
17/03/25	
DATE	SIGNATURE

In the matter between:

P, S.

Applicant

and

P, C. H.

First Respondent

OFFICE OF THE FAMILY ADVOCATE, PRETORIA

Second Respondent

JUDGMENT

Joyini AJ

INTRODUCTION

- [1] The applicant and the first respondent ("the parties") and their minor children are cited in court papers by their full names. It is now standard practice in our courts that in order to give effect to the paramountcy principle entrenched in section 28 of the Constitution, the interests of minor children must be protected in legal proceedings, including, divorce proceedings. In this case, the parties have two minor children. I accordingly deem it appropriate to refer to the parties and their minor children by their initials only.
- [2] This is an urgent application in terms of which the applicant seeks an order, in terms of Part A of the application, that:
- [2.1] The second respondent is ordered to conduct an urgent investigation into the parental responsibilities and rights to be exercised by the applicant and the first respondent in respect of L, a minor girl born on 8 April 2020 and R, a minor boy born on 8 August 2017, and to deliver the report on the findings to court.
- [2.2] Pending the determination of the relief sought in Part B of this application, that both L and R will be in the primary care and residence of the applicant, subject to the first respondent's supervised contact with L and R, which rights shall include:
- [2.2.1] Supervised contact with the minor children every Tuesday from 15h00 to 18h00, every Thursday from 15h00 until 18h00 and every Sunday from 14h00 until 17h00.
- [2.2.2] The above supervised contact will take place under the supervision of the minor children's *au pair* in a public place or, in the alternative, in the presence of an independent social worker agreed upon by the parties, the cost of which will be for the first respondent's account.
- [2.2.3] Reasonable telephonic including video contact on weekdays between 17h00 to 18h00.
- [3] The first respondent should be ordered to pay the costs of the Part A of the application.
- [4] The respondent opposes the application with a counter-application.

- [5] The court appreciates the insightful and engaging submissions from both parties' legal representatives, which greatly assisted in adjudicating this matter and, of course, compiling this judgment.

BACKGROUND FACTS

- [6] The applicant and the first respondent are the biological parents of L and R, approximately 5 and 8 respectively.
- [7] The parties were previously married to each other. They separated during January 2022 when the first respondent left the matrimonial home.
- [8] The parties divorced in accordance with a decree of divorce which was granted by this court on 29 May 2023 under case number 23515/2022. The decree of divorce incorporated both a settlement agreement and a parenting plan.
- [9] In terms of the divorce decree, incorporating the terms of a settlement agreement, the applicant was awarded with primary care and residence of L and R.
- [10] In terms of the divorce decree, the first respondent was granted, in short, unsupervised contact with L and R every alternative weekend.
- [11] During February 2023, the parties, by agreement and with assistance of a court appointed mediator, being Ms Chantell Kur, extended the first respondent's contact with the minor children.

ISSUES ALLEGEDLY CAUSED BY EXTENDED PERIODS

- [12] The applicant alleges that a result of the extended periods of contact with the first respondent, the minor children's behaviour has changed and deteriorated significantly. Some of the children's concerning behaviour includes situations where L, who is potty trained, wets herself after having visited the first respondent; R inappropriately exposes himself to L; R has, on occasion, requested that L "takes his pants off"; the minor children are exposed to age-inappropriate television show; etc. The first respondent denies having exposed

the minor children to age-inappropriate television show. He contends that they might have seen the show in the neighbour's house.

- [13] The applicant decided to inform the first respondent that his unsupervised contact with the minor children has been terminated (unilaterally by applicant). This is despite the fact that, in terms of the divorce decree, the first respondent was granted unsupervised contact with L and R every alternative weekend. Be that as it may, the applicant has approached the court on urgent basis for the necessary order.
- [14] In the first respondent's answering affidavit, it is conceded that the matter is urgent and that the second respondent should be ordered to investigate the parental responsibilities and rights to be exercised by the parties in respect of L and R.
- [15] Accordingly, there are only two issues that the court is called upon to determine, namely, (i) whether the first respondent's contact with the minor children ought to be supervised and (ii) whether there is any merit in the first respondent's counter-application.

FIRST RESPONDENT'S COUNTER-APPLICATION

- [16] The first respondent is seeking relief in terms of his counter-application to restore the children's *status quo ante* and to allow the children to revert to having proper contact with the first respondent.
- [17] The first respondent contends that the termination of his unsupervised contact with the minor children has negatively affected them.
- [18] The first respondent submits that, at the very least, the contact arrangements which were included in the decree of divorce should be adhered to by the applicant.
- [19] The applicant opposes the first respondent's counter-application.

APPLICATION FOR CONDONATION FOR LATE FILING OF THE APPLICANT'S COMBINED REPLYING AND OPPOSING AFFIDAVIT

- [20] In this late combined affidavit, the applicant is responding to the respondent's opposing/answering affidavit as well as his counter-application.
- [21] With regard to the application for condonation, counsel for the respondent did not argue against granting the condonation application for late filing of the applicant's combined replying and opposing affidavit.
- [22] In weighing up the prejudice of condoning the late filing of the applicant's combined replying and opposing affidavit on the first respondent versus the prejudice on the applicant, the balance tips in favour of the applicant.
- [23] It is my considered view that condoning the late filing of the applicant's combined replying and opposing affidavit does not prejudice the first respondent in any way and it will in fact assist the court in reaching a decision. It should thus be allowed.

ISSUES FOR DETERMINATION

- [24] The court is called upon to determine whether:
- [24.1] The first respondent's contact with the minor children ought to be supervised.
- [24.2] There is any merit in the first respondent's counter-application.

LEGAL PRINCIPLES

- [25] In *P v P*,¹ it was held that: "*Determining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgment based on its finding of facts in the exercise of its inherent jurisdiction as the upper guardian of minor children...*"
- [26] The Constitutional Court in *AD & DD v DW*,² held that: "*To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interest of the child concerned*".

¹ 2007 (5) SA 94 (SCA) at para [14].

² [2007] ZACC 27; (2008 (3) SA 183 (CC).

- [27] It was held in *Van Pletzen v Van Pletzen*,³ that mothering is not only a component of a woman's being, but is also part of a man's being, and that a father, depending on the circumstances, possesses the capacity and capability to exercise custody over a child as well as a mother.

ANALYSIS

- [28] It is common cause that in the first respondent's answering affidavit, it is conceded that the matter is urgent and that the second respondent should be ordered to investigate the parental responsibilities and rights to be exercised by the parties in respect of L and R. Accordingly, there are only two issues that the court is called upon to determine, namely, (i) whether the first respondent's contact with the minor children ought to be supervised and (ii) whether there is any merit in the first respondent's counter-application.
- [29] According to the applicant, it is as a result of the extended periods of contact with the first respondent, that the minor children's behaviour has changed and deteriorated significantly. Some of the children's concerning behaviour includes situations where L, who is potty trained, wets herself after having visited the first respondent; R inappropriately exposes himself to L; R has, on occasion, requested that L "*takes his pants off*"; the minor children are exposed to age-inappropriate television show; etc. The first respondent denies having exposed the minor children to age-inappropriate television show. He contends that they might have seen the show in the neighbour's house.
- [30] This is the reason why the applicant decided to terminate unilaterally the first respondent's unsupervised contact with the minor children. This is despite the fact that, in terms of the divorce decree, the first respondent was granted unsupervised contact with L and R every alternative weekend and the fact that there is nothing that alleges that the first respondent personally abuses the children. Even in court during the proceedings, it was not disputed that the first respondent did not personally abuse the children.

³ 1998 (4) SA 95 (O) at 101 B-D/E.

- [31] In the circumstances, it is my considered view that undue weight should not be placed upon any one factor. Like all other relevant factors, must first of all be considered against the backdrop of the specific circumstances of each case and secondly weighed against all other relevant factors to be considered in determining what would be in the best interests of the children.
- [32] Ordinary human experience tells one that the continued involvement, companionship, love and support from both father and mother after separation and divorce, enhances a child's sense of security.
- [33] In *Chodree v Vally*,⁴ it was held that: "... love and affection from both also enhance the security and stability of a child..."
- [34] The Court should further not only take a short-term view of the possible unsettling effects occasioned by any change in the children's lives, but also consider the possible long-term benefits to be obtained in each specific case.
- [35] Divorce inevitably occasions change in the lives of children such as adjusting to the daily absence of one parent, while living with the other and going back and forth between two different households. Each individual child also responds differently towards a divorce.
- [36] In *M v M*,⁵ it was held that: "*Where the parents have separated and one has the care of the child, access by the other often result in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long term advantages to the child of keeping in touch with the parent concerned so that they do not become strangers, so that the child later in life does not resent the deprivation and turns against the parent who the child thinks, rightly or wrongly, has deprived him, and so that the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the child's development which that parent by its companionship and otherwise would make.*"

⁴ 1996 (2) SA 28 (W) at 32 F-G/H.

⁵ 1973 (2) All ER 81 (Fam Div.).

- [37] The first respondent in his counter-application argues that, at the very least, the contact arrangements which were included in the decree of divorce should be adhered to by the applicant.

CONCLUSION

- [38] The court is called upon to determine whether the first respondent's contact with the minor children ought to be supervised and also whether there is any merit in the first respondent's counter-application.
- [39] To decide this, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective affidavits, heads of arguments and oral arguments and submissions by parties' counsel.
- [40] The applicant and the first respondent divorced in accordance with a decree of divorce which was granted by this court on 29 May 2023 under case number 23515/2022. The decree of divorce incorporated both a settlement agreement and a parenting plan. In terms of this divorce decree, the applicant was awarded with primary care and residence of L and R and the first respondent was granted, unsupervised contact with L and R every alternative weekend. This divorce decree still stands as it has never been set aside by court.
- [41] The first respondent in his counter-application argues that, at the very least, the contact arrangements which were included in the parties' 2023 decree of divorce should be adhered to by the applicant. Having gone through the parties' decree of divorce, their settlement agreement and their parenting plan which are both incorporated into the divorce decree and after considering certain inferences and weighing probabilities as they emerge from the parties' respective affidavits, heads of arguments and oral arguments and submissions made by parties' counsel, I am persuaded by the first respondent's argument. Complying with the 2023 decree of divorce by both parties is the way to go.
- [42] In considering the matter, and taking into account all the facts, circumstances together with submissions and authorities cited by parties' counsel, I am of the considered view that the applicant has not made out a case for the relief sought.

COSTS

[43] Having exercised my discretion, I am of the view that, considering the circumstances, the parties shall bear their own costs.

ORDER

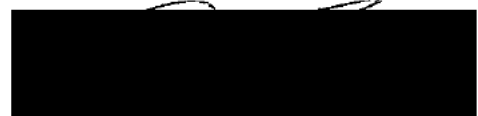
[44] **In the circumstances, I make the following order:**

[44.1] The application and the counter-application are declared urgent.

[44.2] The application for condonation for late filing of the applicant's combined replying and opposing affidavit is hereby granted.

[44.3] The applicant and the first respondent are ordered to comply with a decree of divorce (which incorporated both a settlement agreement and a parenting plan) that was granted by this court on 29 May 2023 under case number 23515/2022.

[44.4] The parties shall bear their own costs.



T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the applicant: Adv BC Bester

Instructed by: Chantel van Heerden Incorporated

Email: ben@lawcircle.co.za / zane@cvhattorneys.co.za

For the first respondent: Adv I Ossin

Instructed by: Diederiks Oudegeest Attorneys Inc.

Email: diederiks@diederiksattorneys.com

Date of Hearing: 25 February 2025
Date of Judgment: 17 March 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 17 March 2025 at 10h00.