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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1909/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 13/05/2025

SIGNATURE

In the matter between:

B[...] P[...] M[...]

(Identity Number : 8[...])

APPLICANT

AND

J[...] L[...] M[...]

(Passport Number : G[...])

RESPONDENT

JUDGMENT : RULE 43(6) APPLICATION

MANGENA AJ

- [1] On the **21 August 2024**, **Morgan AJ** issued a Rule 43 order at the instance of the Respondent. There is consensus between the parties that the order contains errors in certain respects, more especially in relation to the cash contribution towards the maintenance of the children. Nothing turns on this.
- [2] Subsequent to the order, the office of the family advocate conducted an enquiry into what would be in the best interests of the minor children with regard to primary residence, care and contact. The family counsellor interviewed both the children and their parents and made her conclusions based on what she established during the inquiry. She recommended the following:-
- 2.1 Both parties remain co-holders of full parental responsibilities and rights with regard to care, guardianship and maintenance of the children.
 - 2.2 The primary residence of the children be retained by the Mother.
 - 2.3 The parental responsibilities and rights with regard to contact be retained to the father as follows:-
 - 2.3.1 Contact to be exercised every second weekend on Friday to Monday morning. One day sleepover during the week. The one day during the week will be only applicable when the mother is still residing in Polokwane.
 - 2.3.2 Short school holidays should be alternated between the parties and long school holidays should be shared equally between the parties.

2.3.3 Parties should make arrangements with regard to special days celebrations.

2.3.4 Telephone contact at reasonable times.

2.3.5 Additional contact should be per arrangements between the parties.

[3] Over and above the recommendations mentioned above, the family counsellor stated as an advice that “it is the parties responsibility to foster good feelings about future time to be spent with the other parent. It is important for the parties to also:-

- Honour their obligations to provide for their children.
- Always show respect for each other in front of the children.
- Keep arrangements, or
- Be flexible, and make effort to modify arrangements when the other parent has conflicting commitments.

[4] The report was made available to the parties through their legal representative who had an obligation to interpret it to them as part of their duty towards the court. It will be appropriate to recall what **Satchwell J said in *Soller NO v G and Another, 2003 (5) SA 430 WLD***. She said:-

“[22]The office of the Family Advocate was created in terms of the appropriately named “mediation in certain Divorce Matter Act”. The title of this legislation comprises within its use of the work ‘mediate’, the concepts of ‘negotiation’ perhaps leading to a settlement and in so doing acting as a sort of go-between the parties. If such attempts at moderation of disputes through discussion and counselling are unsuccessful then the Family Advocate, as required by legislation, reports to the Court on the facts which were found to exist and makes recommendations

based on professional experience. In so doing the Family Advocate acts as an advisor to the court and perhaps as a mediator between the family who had been investigated and the court.

[23] The Family Advocate is not appointed the representative of any party to a dispute-neither the mother, father or any child. In a sense, the Family Advocate is required to be neutral in approach in order that the wishes and desires of disputing parties can be more closely, examined and the true facts and circumstances ascertained.

[24] The function of the Family Advocate has been described 'to be of assistance to a court by placing facts and considerations before the court. The Family Advocate should make a balanced recommendation and should not take sides against one party in favour of the other . (Whitehead v Whitehead, 1993 (3) SA 72 (SE)).'

- [5] Had the parties heeded these words and accepted that an office of the Family Advocate is an independent structure created to provide support to the court as an upper guardian of all minors, this application together with its sister cross-application would not have been necessary. This is not to say that a court is bound *holus bolus* by the recommendations of the Family Advocate. There may be and there are instances when a court, acting diligently, may reject the recommendations. There however has to be a good reason to disregard the report and its recommendations. This is so because a court is not possessed of the skills to enquire into and investigate the physical and emotional well being of the minor children. In the rare instances where the court may feel obliged to take over the responsibility of the Family Advocate and conduct an enquiry, it needs to do so fully aware of its limitations and conscious acknowledgement that the

legislature had assigned that role to the Family Advocate. **Satchwell J** puts it between when she says:-

“The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer”.

[6] With the above said, I return to the matter at hand. The applicant seeks to vary the Rule 43 order based on what he calls changed circumstances, in particular the observations made by the family counsellor during the enquiry.

[7] In the report, the Family Counsellor stated as follows:-

“The undersigned wishes to address the information around the mother’s way of excluding the father on important decision concerning the children’s wellbeing, being the primary care-giver does not mean taking sole decisions concerning the children, these include taking the children to therapy and excluding the father from getting progress reports”. Another issue is denigrating or talking negatively about the father to the children. This might be done innocently but it has long term effects on the emotional and psychological wellbeing of the children”.

[8] The Family Counsellor further states that the older child had informed her during the interview that his mother told him that his father used to go out a lot to drink but he has not seen that. The child’s way of answering questions according to the family counsellor “suggests that he avoids choosing sides, even though there is a suggestion that the mother had tried to coach him”.

- [9] The Applicant contends that the Family Advocate's report has revealed that the respondent has embarked on a deliberate and concerted effort to alienate him from his children. Unless this is curbed, it will result in him being perceived as a bad person by his children who may not want to associate with him. This, he argues, is not in their interest as he is their father and like all other children they deserve to have him in their lives. Apart from the wellbeing of the children, it is also not good for him as he needs to have a relationship with them.
- [10] In support of his contention that the respondent wants to cut him out completely from interacting with the children, he states that on several occasions she (the Respondent) failed to hand-over the phone to the children when he wanted to talk to them. She simply ignored his calls until he asked a gardener helping in the house to check on her. The feedback he got was that the respondent is fine but is just not answering the phone.
- [11] The Applicant's fears may not be rejected out of hand. Parental alienation syndrome (PAS) has serious emotional effect on the wellbeing of the children. In **G v G, 2003 (5) SA 396 (ZHC)** some of the symptoms were mentioned as follows:-
- The child has a relentless hatred for/toward the targeted parent.
 - The child parrots the obsessed alienator;
 - The child does not want to visit or spend any time with the targeted parent;
 - Many of the child's beliefs are enmeshed with the alienator;
 - The child's beliefs are delusional and frequently irrational;
 - The obsessed alienator is not intimidated by the court;
 - The child's reasons are not based on personal experiences with the targeted parent but reflect what he/she is told by the obsessed alienator;
 - The child has no ambivalence in his or her feelings-it is all hatred with no ability to see good;

- The child has no capacity to feel guilty about how he or she behaves towards the targeted parent or to forgive any past indiscretions;
- The child shares the obsessed alienator's cause-together they are in lockstep to denigrate the hated parent;
- The child's obsessional hatred extends to the targeted parent's extended family without any guilt or remorse.

[12] It is said that this syndrome becomes worse if the child has no time with the targeted parent. Time is on the side of the alienating parent. Children who are exposed to PAS may develop mental illness and can have long-term consequences.

[13] To avoid the long-term effect of PAS on the children, applicant seeks to vary the original Rule 43 order to create a situation where he is able to spend some considerable amount of time with them. In this way, it is submitted, he will have enough time to ameliorate the negative comments the Respondent makes against him whenever she is with the children. He proposes to have shared residency with the Respondent where they each alternate to have the children in their care and custody. He says this will not be disruptive in any way as both he and the Respondent stay in the same farm but in different houses which are close to each other. In the alternative he seeks that the recommendation of the Family Advocate be implemented with a slight change allowing him a longer period with the children, from Thursday after school to a Monday morning before school on alternative weekends and every other Thursday from after school to a Friday morning before school. (i.e this will be on the weekend that the children are with the Respondent). Tight to this will be the appointment of an independent psychologist to evaluate the best interests of the children.

[14] In addition to the above, he also seeks to vary the spousal maintenance from **R22 722.00 per month** to **R15 000.00**. He says this is because he cannot afford

as over and above this he pays **R10 000.00** towards the maintenance of the children as well as their medical aid cover which includes the Respondent.

- [15] The Respondent is opposing the relief sought by the applicant and has brought her own Rule 43(6) application in cross. She seeks to have an order directing applicant to pay rental deposit and rental expense capped at **R25 000.00** per month for a property of her choice in Polokwane. The applicant must further be ordered to assist her by making transport vehicles and workers available for her relocation. She also needs additional **R100 000.00** towards legal fees as the initial **R100 000.00** ordered by the Rule 43 court has been exhausted.
- [16] She motivates for the relief in the answering affidavit and states that the divorce has become acrimonious so much that she does no longer feel safe to stay at the farm controlled by the applicant. She says applicant spies on her through his employees.
- [17] Regarding the costs contribution, she says that the **R100 000.00** initially awarded to her was exhausted by the litigation she was forced to embark on including defending herself on this Rule 43(6) application. She argues that Applicant is determined to make life unbearable for her and has even ordered employees (domestic workers and gardeners) to stop performing services at her home. If they are to work, their salaries will be deducted from the amount he contributes towards maintenance.
- [18] I have had regard to the documents attached to the affidavits in the adjudication of the substantive issues requiring my attention. I may as well just indicate that the majority of the documents attached to the affidavits were either irrelevant or unnecessary and indeed the parties did not even refer to them in their heads of argument or in amplification during oral submissions. Once again, the legal practitioners in this case, failed to heed many admonitions by the court regarding

the abuse of Rule 43 procedures. In **Du Preez v Du Preez, 2009 (6) SA 28 TPD**, the court said :-

(3) Rule 43, it is well known, is a special procedure aimed at the expeditious and inexpensive resolution of maintenance issues *pendente lite*. In **Colman v Colman 1967(1) SA 291C at 292A Theron J** pronounced upon the purpose of and approach to Rule 43 proceedings as follows:-

'The whole spirit of rule 43 seems to me to demand that there should be a very brief statement by the applicant of the reasons why he or she is asking for the relief claimed and equally succinct reply by the respondent, and that the court is then to do its best to arrive expeditiously at a decision as to what order should be made pendente lite.

(4) *The applicant's papers are anything but brief and the respondent's reply is less than succinct. The tendency by parties, aided by their legal representatives, to engage in prolixity in Rule 43 proceedings has been criticized more than once by courts across the country. Yet the criticism has been insufficiently heeded. I align myself with the remarks made by Kroon J in Visser, 1992(4) SA 530 (SE) at 531D where he observed:-*

"It is my experience, and I understand that of my Brothers to be the same, that there is a tendency for the provisions of rule 43 to be disregarded and for the applications and the reply thereto to assume voluminous proportions. That practice must be firmly discouraged.

(5) *Prolixity in a rule 43 proceeding is an abuse of process because it defeats the purpose or object of the rule ... which is to provide for an expeditious and inexpensive resolution of marital disputes pending divorce.*

- [19] With regard to the variation of the Rule 43 order on primary care, I have already remarked that the court hearing an application on the “best interests” of the child is enjoined to give due regard to the report of the Family Advocate. The observations made by the family counsellor that the Respondent is influencing the children to be negative towards their father is a matter of serious concern. The effects of parental alienation outlined in the preceding paragraph requires of the court to intervene and arrest the situation before it harms the relationship between the children and their father.
- [20] The report makes it clear that the Applicant is a good father, and the children would want to continue to have a good and healthy relationship with him. This is in their interest as it is important for children to grow in an environment where they have access to both parents. It therefore becomes incumbent upon those parents to behave responsibly around them and ensure that they do not alienate children from each other.
- [21] I am persuaded that Applicant has made a case for the variation of the Rule 43 order to provide for more time with the children than it was initially ordered. I say so because at the time the Rule 43 order was made, the Family Advocate had not conducted the enquiry and had this information been available to the court, the terms would have been different.
- [22] Regarding spousal maintenance, I am not persuaded that Applicant has advanced a case to warrant variation. All what he said was that he cannot afford but has not taken the court in his confidence by disclosing how he had been paying all the expenses prior to the divorce. It needs to be stated that the Respondent is still his wife until the divorce court rules otherwise. For as long as he still married to her and she is in need of support, he should carry out that duty unfailingly – of course within his means. On the available evidence before me, he can afford to pay the amount ordered by the Rule 43 court as an interim

maintenance. He however still retains the right to request that the court fixes a lesser amount as maintenance post-divorce.

[23] With regard to the respondent's counter-application I am not persuaded that she is entitled to the relief she seeks. It only needs to be stated that the court has already ordered that she stays with the children in the house they are familiar with. The court was also aware that it will be easy for the Applicant to provide the support required regarding domestic and gardening services. Her relocation to Polokwane will result in her uprooting the children in circumstances where there is no agreement between them and this may not be good for the children.

[24] On the issue of additional cost contribution of **R100 000.00**, the court has already determined what it considered to be reasonable cost. Parties to divorce proceedings should always be aware that litigation is expensive and to the extent that they may be able to resolve their issues amicably, they should work very hard to do so in order to save whatever money they may have towards the welfare of their children. When they fight endlessly over small issues like handing over a telephone to a child so that he/she can talk to the other parent, it is their estate and their children's inheritance that suffers. **Van Den Heever J's** words more than 40 years ago are worth recalling. He said: -

"The facts laid before me in this application if accepted emphasise the pettiness and malice that adults are capable of where the bonds of marriage chafe. A Free State Judge once commented that the lawyers seeking the appointment of a series of curator ad litem seemed intent upon ensuring that the estate was not frittered away amongst the heirs. In the present, a different context. I would stress what I conceive to be the moral duty of lawyers: to dissuade their clients from indulging in petty bickering to the good of no one save the lawyer's finances. One

realises of course that clients do not always heed their lawyer's advice in this regards

*The entire matter should be settled and should not be difficult to settle if both parties decide not to be greedy and selfish, and bear in mind that the prime aim should never be to hurt the opposition. That "opposition" was for half a lifetime a partner, and a partner in the fundamental business of producing and raising and launching into the world a family" **Belford v Belford , 1980 (2) SA 843 (CPD).**"*

[25] I do not find it necessary to deal with the issue of costs. Each party will pay its own costs.

[26] Consequently, the following orders are made:-

[26.1] The initial Rule 43 order issued by this court on 24 August is varied in so far as it relates to the Applicant's reasonable access to the minor children as follows:-

26.1.1. Primary care is awarded to the Respondent pending the finalisation of the divorce proceedings with specific rights of contact to be awarded to the Applicant as follows: -

26.1.1.1. Alternative weekends from a Thursday after school to a Monday morning before school.

26.1.1.2. Every other Thursday, from after school to a Friday morning before school.

26.1.1.3. All holidays to be shared equally, with the understanding that Christmas, New year and Easter alternate between the parties.

26.1.1.4. Contact on Father's Day and vice-versa.

26.1.1.5. Contact on the Applicant's birthday from the day before from after school or 12h00 in the afternoon to the next morning before school or 12h00 in the afternoon and vice versa applied to the Respondent.

26.1.1.6. Daily telephonic electronic format.

[26.2] The Applicant shall not enter the marital home unless a case of emergency exists or invited by the Respondent.

[26.3] The Applicant shall continue to ensure provision of domestic and gardening services to the Respondent's house until the finalisation of the divorce proceedings.

[26.4] The parties shall jointly approach the HPCSA to appoint an expert if the Applicant requires one to conduct forensic investigation to determine the best interest of the children about primary care. The Applicant shall be solely liable for the costs of the expert so appointed.

[26.5] Respondent's cross application is dismissed.

[26.7] Each party shall pay its own costs.

M. MANGENA
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR APPLICANT : **ADV. F BOTES SC**
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HEARD ON : **08 MAY 2025**
DELIVERED ON : **13 MAY 2025**