

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2025/047056

DATE: 27 May 2025

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:

Date: 27 May 2025

In the matter between:

D[...], M[...] A[...]

Applicant

(Identity No. 8[...])

and

G[...], R[...]

Respondent

(Identity No. 9[...])

Coram: M Van Nieuwenhuizen, AJ

Heard on: 20 May 2025

Delivered: 27 May 2025

JUDGMENT

M VAN NIEUWENHUIZEN, AJ:

[1] On or about the 6th of May 2025 the applicant launched an urgent Rule 43(6) application out of this Court pertaining to the parties' 4 year old minor

daughter (referred to herein as “E[...]”). The applicant in essence seeks an order varying an urgent Rule 43 Court Order of Van Deventer AJ dated the 17th of April 2025 (“*the Rule 43 order*”) on the basis that the Order is “*patently unjust*”. For his contention in this regard the applicant relies on the Constitutional Court decision in **S v S and Another**.¹ The applicant argued that this was an exceptional case where there is a need to remedy a patently unjust and erroneous order, whether a change in circumstances exists or not.

[2] The existing Rule 43 order² *inter alia* provides that:

[2.1] The applicant in the Rule 43 application (the respondent in this application) and the respondent in the Rule 43 application (the applicant in this application) shall exercise a shared residency arrangement, alternating every 2 (two) weeks;

[2.2] The two week period is to continue for a period of 4 (four) months;

[2.3] During the two week period, the non-resident parent is entitled to reasonable telephonic contact on 1 (one) hour’s notice;

[2.4] E[...] shall not be subjected to any therapy or assessments or expert intervention during the 4 (four) month transition period;

[2.5] At the conclusion of the 4 (four) month period the primary residence of E[...] shall vest solely with the respondent (the mother) at her appointed address and the applicant shall be entitled to contact *inter alia* every alternative weekend from a Friday to a Sunday, mid-week contact on a Tuesday and a Thursday from 14h00 until 17h00 as well as telephonic and video contact at times mutually agreed upon between the parties;

[2.6] After the 4 (four) month period, if necessary, the parties shall take steps to refer the matter to the office of the Family Advocate or expert mutually agreed upon and to be appointed by the parties to conduct the relevant assessment and therapy, which intervention may only begin after the 4 (four) month interim period set out in Order 2;

¹ 2019 (6) SA 1 (CC)

² Caselines, 022-2 to 022-9

[2.7] The applicant (the father) shall be solely liable for and pay the costs of the experts and therapists appointed to conduct such investigation and therapeutic interventions;

[2.8] This order is to operate as an interim order pending the finalisation of all assessments to be conducted and pending the final determination of the residence of E[...] by the applicable Court of law;

[2.9] Each party shall pay his or her own costs.

[3] The respondent has taken various points *in limine* as set out hereunder:

[3.1] The matter is not urgent;

[3.2] There has not been a “*material change in circumstances*” as contemplated by Rule 43(6);

[3.3] This application is essentially “*an appeal*” disguised as a Rule 43(6) application;

[3.4] The “*report*” of educational psychologist Ms Van Jaarsveld is inadmissible.

Urgency

[4] In respect of urgency, the respondent *inter alia* argued that:

[4.1] The current interim Court Order is applicable for a period of 4 (four) months with little under 90 (ninety) days remaining until therapy and assessments may commence;

[4.2] There is no imminent danger to E[...]. The respondent alleges she is “*happy*” and “*adjusting well*”;

[4.3] The applicant waited from 17 April until 6 May 2025 to launch this application.

[5] I heard this application as one of urgency as it concerns the interests of a minor child of tender age.

“Report” by Ms Van Jaarsveld

[6] At the outset the respondent wanted this Court to make a finding regarding the admissibility of the “*report*” compiled by Ms Van Jaarsveld – even prior to the arguing of urgency. I allowed the admission of the “*report*” tentatively, but advised the parties that I would view the “*report*” with caution as Ms Van Jaarsveld has not seen any of the parties or E[...] and no assessment of E[...] had been conducted by Ms Van Jaarsveld.

No real Rule 43(6) application

[7] The respondent *inter alia* argued that there was no material change in circumstances and that this point *in limine* goes hand-in-hand with the point *in limine* raised by her that this application constitutes “*an appeal*” of the judgment and order of Van Deventer AJ. When this point *in limine* was argued both parties substantially ventured into the merits of the matter – the applicant’s counsel contended that the arguing of this point is closely intertwined with the merits of the application.

APPLICABLE LEGAL PRINCIPLES

[8] The applicant has requested this Court to take a stance as envisaged in **S v S**.³ The Constitutional Court considered the available remedies as the prohibition against appeal proceedings to Rule 43 or interim orders might serve to be prejudicial.

[9] In paragraph 34 the Constitutional Court held that:

“[34] *In any event, should any rule 43 order be contrary to the best interests of a child, this can be immediately rectified. The High Court regularly hears, on an urgent basis, applications where it is alleged that the best interests of the child are under threat.*”⁴

³ *Ibid*

⁴ See **NS v Presiding Officer of the Children’s Court** [2018] ZAGPJHC 59; **S v L**, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 72839/2016 (30 September 2016) and **Chief Family Advocate v G** 2003 (2) SA 599 (W)

[10] In paragraph 58 the Constitutional Court held that:

“[58] There may be exceptional cases where there is a need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted. In those instances, where strict adherence to the rules is at variance with the interests of justice, a court may exercise its inherent power in terms of section 173 of the Constitution to regulate its own process in the interests of justice.”⁵

[11] In **Dodo v Dodo**⁶ the Court, while acknowledging that Rule 43 applications were intended to afford the parties a quick, short and inexpensive procedure, held that there was no reason why special circumstances should not justify a deviation from the norm where the complexities are unusual.

[12] In the matter of **KKA v KNT**⁷ Bezuidenhout AJ also considered the requirement of material change in circumstances in Rule 43(6) proceedings and *inter alia* held:

“[85] What constitutes a material change in circumstances is not defined by the rules nor by the various reported and unreported authorities that I have considered. And for good reason. It allows a court faced with such an application to apply the rule expansively and being mindful of the Constitutional dispensation of our country as a court is entitled to do and as was stated by the Constitutional Court in S v S⁸:

“In addition, there is no reason why rule 43 should not be expansively interpreted as some courts have already done

[86] It is not surprising that the Constitutional Court expressed the obiter view that Rule 43 may be wanting in certain respects and that there may well be grounds for a review of rule 43(6) in the future to

⁵ Section 173 of the Constitution states:

“The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

⁶ 1990 (2) SA 77 (W) at 79D-E

⁷ 2025 JDR 0581 (GJ)

⁸ *Ibid* at paragraph 56

include not only changed circumstances but also “exceptional circumstances”.⁹

[87] In *Dodo v Dodo*¹⁰ the court held that there was no reason why special circumstances should not justify a deviation from the norm where the complexities are unusual. I align myself with this decision as it certainly cannot be argued with any conviction that the facts and issues before me are not extraordinary.”

[13] I am mindful that as the upper guardian of minors, this Court, is empowered and under a duty to consider and evaluate the relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child. When a Court sits as upper guardian in a custody matter it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. Furthermore, the interests of minors should not be “held to ransom for the sake of legal niceties” and the best interests of the child “should not be mechanically sacrificed on an altar of jurisdictional formalism”.¹¹

[14] In *Terblanche v Terblanche*¹² it was stated that when a Court sits as upper guardian in a custody matter “... It has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have resource to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes”.

[15] In *P and Another v P and Another*.¹³
“I am bound in considering what is in the best interests of P, to take

⁹ Paragraph [53]

¹⁰ *Ibid* at 79B-D

¹¹ *J v J* 2008 (6) SA 30 (C), paragraph [20] at 37D-38A, paraphrased

¹² 1992 (1) SA 501 (W) at 504C

¹³ 2002 (6) SA 105 (N) at 110C-D

everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.”

[16] In ***AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)***¹⁴ the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be “*held to ransom for the sake of legal niceties*”.¹⁵ And now that in the case before it the best interests of the child “*should not be mechanically sacrificed on the alter of jurisdictional formalism*”¹⁶

THE APPLICANT’S CONTENTION WITH REGARDS TO A “PATENTLY UNJUST AND ERRONEOUS ORDER”

[17] The applicant argued that the Court granted an order prohibiting therapy and furthermore granted an order regarding primary residency without any expert involvement in a highly contentious matter.

[18] It was argued that section 28(1)(c) of the Constitution of the Republic of South Africa¹⁷ guarantees that every child has the right to basic nutrition, shelter, basic healthcare services and social services. This must include therapeutical intervention which is currently denied by virtue of the existing order.

[19] During the handing down of judgment it was indicated that:
“This Court also orders specifically that no assessment by any expert or therapy sessions may take place within the first 4 (four) months of this

¹⁴ 2008 (3) SA 183 (CC) (2008 4 BCLR 359 paragraph 30 at 370A)

¹⁵ ***De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)*** 2007 (5) SA 184; SCA paragraph [99] at 2201

¹⁶ ***AD and DD v DW and Others (Centre for Child Law as Amicus Curiae, Department for Social Development as Intervening Party)*** 2008 (3) SA 183 (CC) (2000 4 BCLR 359, paragraph 30 at 370A)

¹⁷ Act 108 of 1996

order. It is in the minor child's best interests that there is stability in her life going forward, which she needs to learn to navigate for the rest of her life. After the initial 4 (four) months, the necessary steps can be taken towards therapy, assessments, schools, extramurals, and the office of the Family Advocate, whereafter this order can be amended."

[20] Ms Ferreira argued that the reasons for the judgment do not expand on the prohibition on therapeutic intervention, assessments and investigations, save to state that it was indicated that *"This Court could not see how such interventions would in any way be conducted on equal footing if the minor has not had any chance to even, visit the applicant in a new environment where she now lives with her parents. The respondent does not want to take any responsibility for his role, suitably qualified third parties, and therapists need to explain to his daughter what "separation" is and how it will work"*.

[21] Ms Ferreira argued that it appears that the Court reasoned that the 4 year old minor child was required to learn to navigate the difficulties on her own as she will have to do *"for the rest of her life"*.

DELIBERATION

Whether therapy should be implemented without delay

[22] During the Rule 43 proceedings both parties were of the view that E[...] suffered from anxiety, albeit for different reasons. The respondent (the applicant in the Rule 43 proceedings) on more than one occasion stated that the applicant (the respondent in the Rule 43 proceedings) could obtain all the therapy sessions and expert assessments for E[...] that he wants as long as E[...] is placed in the applicant's primary residency pending such therapeutic interventions/assessments.

[23] The Court confirmed that E[...] suffered *"anxiousness"*:

"[30] Lastly the Court considered, after the initial period, which had to stop undue attachment to one parent only, and possible alienation, establish stability and ease the anxiousness of the minor child, more

reasonable contact with longevity in mind."¹⁸

[24] Van Deventer AJ further stated that *"The respondent in the answering affidavit or in his submissions never took any responsibility on his part in his daughter being traumatised and terrified"*.¹⁹

[25] In these proceedings the applicant alleges that E[...] suffers from anxiety having been removed from her stable environment and from him. This has manifested in E[...] wetting her bed on the 4th of May 2025, being the first night at home after E[...] had spent two weeks at the respondent's home. This is disputed by the respondent (mother).

[26] The respondent avers that the applicant is obsessively controlling and this is unhealthy, unsafe and emotionally detrimental to E[...]. The applicant argues that despite these allegations, which the applicant disputes, the respondent now however during these proceedings opposes therapy.

[27] The respondent however states the following in her answering affidavit:

*"42.2 ... If this Court is satisfied that the arrangement is unsatisfactory and open to variation then I ask the Court to move the next phase forward and order that E[...] move to live with me now and the order that there is no therapy can then be relaxed."*²⁰

[28] The applicant argued that E[...]’s interests cannot be held *"hostage"* until the respondent is vested with primary residency of her – this is exactly what the respondent seeks.

[29] There has been a significant change in the life of E[...] who went from living under one roof with both parents to splitting a month in half between two parents and two different schooling arrangements. The applicant argued that it is

¹⁸ Paragraph [30], CaseLines, Judgment 023-16

¹⁹ Paragraph [9], CaseLines, Judgment, page 20, 023-16

²⁰ Paragraph 42.2, Answering Affidavit, CaseLines, 026-26

unimaginable that the respondent can still allege that *“a 4 year old toddler does not need therapy because her parents are living separately. She can hardly appreciate the distinction.”*²¹

[30] On the papers before this Court there are conflicting versions as to E[...]’s experience during the initial handover to the respondent and the implementation of the shared residency regime. The applicant reported that E[...] was crying hysterically during handover. The applicant alleges that the video footage (Annexure **“UA6”**) aligns with the applicant’s version. This is disputed by the respondent. This Court does not know what transpires in between video recordings and photographs that forms part of this application or what transpired before and after the video recordings provided. This Court does not know the attachment E[...] has with any of her parents. The respondent alleges that E[...] is *“happy and well-adjusted”* in her care. This is disputed by the applicant.

[31] It is undesirable to unnecessarily interfere with a judgment of another Court, however in circumstances like this where the interests of a child have to be placed as paramount importance the Court may remedy such order.

[32] During the Rule 43 proceedings there was a clear indication and it was common cause that E[...] was suffering from anxiety and it would be more undesirable to leave such anxiety unattended. I am mindful of the confirmation by the Court hearing the matter previously that E[...] is suffering from anxiety, a condition which neither parent in the current circumstances and with the existing animosity are placed to attend to or to remedy. This Court as upper guardian of all minor children has an unfettered discretion to make any order in relation to the best interests of a minor child in its area of jurisdiction as this Court may deem meet. E[...] has a constitutional right to healthcare, which includes therapy. In the absence of therapy E[...] is left to navigate an uncertain world fraught with the animosity of a high conflict divorce of her parents unsupported and without any professional assistance. With the level of animosity between the parents E[...] is at significant risk of becoming conflicted, something that she too would

²¹ Paragraph 104.3, CaseLines, 026-60

have to navigate unassisted.

RESIDENCY AND EXPERT ASSESSMENT

[33] At this stage the Court is not going to interfere with the Court Order currently in place in relation to the interim residency of E[...] and orders relating to expert assessment (being prohibited for a period of four months after the granting of the Rule 43 order). This Court is not placed in possession of sufficient evidence as to determine what is in the best interests of E[...] pertaining to her medium to long-term residency.

FAMILY ADVOCATE

[34] In the best interests of E[...] and so as to enable the future Court to make an informed decision the matter is to be urgently referred to the Family Advocate for investigation into what is in the best interests of E[...].

The role and function of the Family Advocate

[35] In ***Soller NO v G and Another***²² Satchwell J gave some consideration as to what the role and functions of the Family Advocate are.

“[21] The Mediation in Certain Divorce Matters Act 24 of 1987 provided for the appointment of persons in the public service at each division of the High Court to be styled “the Family Advocate”. The powers and duties of the Family Advocate are set out in section 4 of the legislation and provide, inter alia that “The Family Advocate shall ... after an application has been lodged for the variation ... of an order with regard to the custody ... or access to a child, made in terms of the Divorce Act, if so requested by any party to such proceedings ... institute an enquiry to enable him to furnish the Court ... with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or ... regarding such matter as is referred to him by

²² 2003 (5) SA 430 (W)

the Court.”

[36] The office of the Family Advocate was created in terms of the appropriately named “*Mediation in Certain Divorce Matters Act*”. The title of this legislation comprises within its use of the words “*mediate*” the concepts of “*negotiation*” perhaps leading to “*settlement*” and in so doing acting as a sort of go-between between the parties. If such attempts at mediation of disputes through discussion and counselling are unsuccessful then the Family Advocate, as required by legislation, reports to the Court on the facts which it will find 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 has 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.”*²⁵

[37] In ***Terblanche v Terblanche***²⁶ the Court described the Family Advocate as:

“... particularly well equipped to perform such functions and duties, having at his or her disposal a whole battery of auxiliary services from all walks of life, including family counsellors appointed in terms of the Act and who are usually qualified social workers, clinical psychologists, psychiatrists, educational authorities, ministers of religion and any number of other

²³ ***Soller NO v G and Another*** *supra* at paragraph [22]

²⁴ ***Soller NO v G and Another*** *supra* at paragraph [23]

²⁵ ***Whitehead v Whitehead*** 1993 (3) SA 72 (SE) and ***Soller NO v G and Another*** *supra* at paragraph [24]

²⁶ 1992 (1) SA 501 (W) at 503E-I

persons who may be cognisant of the physical and spiritual needs or problems of the children and their parents or guardians, and who may be able to render assistance to the Family Advocate in weighing up and evaluating all relevant facts and circumstances pertaining to the welfare and interests of the children concerned.”

[38] The fact remains that the parties cannot agree on a medium to long-term residency and contact regime in respect of E[...]. An objective investigation and recommendation is therefore imperative in order to assist the Court ultimately in finding what arrangements would serve E[...]'s best interests. The Family Advocate has been established by virtue of legislation. Both parties have agreed to the appointment of the Family Advocate during the Rule 43 proceedings. I am accordingly inclined to grant the applicant the relief that he seeks for the immediate referral of the matter to the Family Advocate.

ORDER

[1] A therapist/play therapist shall be appointed by the parties for E[...] to assist and guide E[...] during this transition phase and to address her alleged anxiety, and if necessary, to equip E[...] with the necessary tools to assist her in coping with the effects of her parents' pending divorce. Such appointment shall be done immediately.

[2] The costs of the therapist shall be paid by the applicant.

[3] Should the parties be unable to agree on a therapist within 2 (two) days after the granting of this order, they shall immediately approach the Chairperson of the Gauteng Family Law Forum, with or without their legal representatives, for urgent nomination of a suitable therapist.

[4] The matter shall immediately be referred to the offices of the Family Advocate by the parties to investigate what would be in E[...]’s best interests pertaining to *inter alia* her care, residency and contact arrangements. The referral shall incorporate a full copy of the initial Rule 43 application and a full copy of the papers in this application. Copies of both applications shall be made available to the offices of the Family Advocate within 5 (five) days of the granting of this order.

[5] The Family Advocate is requested to convene an inquiry and to provide a report to the parties and the Court as a matter of urgency.

[6] The costs of the application shall be costs in the divorce action.

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 27 May 2025.

HEARD ON: 20 May 2025

DATE OF JUDGMENT: 27 May 2025

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