

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: **2024-067811**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
16 JULY 2025

In the matter between:

V[...] D[...] B[...], S[...]

Applicant

and

V[..] D[...] B[...], H[...] E[...]

Respondent

JUDGMENT

MAHOMED J

INTRODUCTION

[1] This matter was before me in terms of R43(6) and Rule 6, the applicant sought an interim interdict on an urgent basis to prevent his wife from relocating to Cape Town with their two children, pending the finalisation of a forensic investigation, in terms of R6 and for an order varying the primary residence of the

children in terms of R43(6), furthermore to order the extension of the psychologist's mandate to include an investigation into the best interest of the children, in the event of their moving to Cape Town with their mother. The respondent filed a conditional counterapplication, in the event the matter was urgent, that she be granted leave to move to Cape Town with her children, and to vary the contact periods ordered by the R43 court, pending the finalisation of the report. The R43 court ordered a forensic investigation after each party made allegations of abuse of drugs and alcohol against the other and it granted the mother primary residence of the children with the father to exercise contact.

[2] I granted the respondent mother leave to move to Cape Town with the children, having noted that she suffered serious financial difficulties and had secured employment in Cape Town. She was unable to pay the bond for the home that the children lived in, amongst other challenges and having regard to the approach of our courts..¹ The submissions made by both legal representatives were for relief pending the outcome of the forensic psychologists report and obviously the final decision on the contact and care will be for the decision of the divorce court. The applicant was dissatisfied and pursued an application in terms of section 18 of the Superior Courts Act 10 of 2013, when the full court found that my order dismissing the application for an interdict, was final in effect and therefore appealable. The court furthermore ordered that the children return to Johannesburg. The chronology of the litigation proceedings appears on file.² This court is bound by that decision and accordingly the leave to appeal prayer 3 of my order of 20 March 2025 must succeed.³

[3] Ms Ferrira submitted that the order is not appealable and submitted that the full court erred if one has regard to the fact that an investigation is to be finalised and the expert is to report to a court on the relocation issue, "for final determination." She argued it cannot be final if another court is to still pronounce upon the divorce and the issue of care and contact. She argued that both parents have care and contact rights, the Children's Act does not provide any definition for primary residence and therefor it matters not where the children live, it is meant to be interchangeable

¹ CI 0-24 to 37 paras 18 to 22

² CL 1-103.

³ CI 0-35

between the parties and therefor she submitted no right has been finally adjudicated upon, the applicant on his version accepts that a report must be presented to a court to determine contact and care finally. However, she accepts that the full court has stated that in the interim the children must return to Johannesburg. Although she argued further that whether in the form of an interdict or in terms of R43, the orders sought relates to care and contact and falls squarely within the provisions of R43, they cannot be seen as separate applications, she advanced the argument of form over substance.

[4] Advocate Ferriera submitted that the full court did not pronounce on the orders regarding the applicant's contact with the minor children and for a contribution toward costs which she contended are interim in nature, and not appealable.

[5] The order on contact was granted having ordered the relocation to Cape Town, she argued that this is in terms of section 16 not appealable it is not final. The order was made pendente lite, pending the finalisation of the report, it is susceptible to final determination and therefore must stand. The applicant has a remedy in terms of R43(6) for a change in contact, if he can demonstrate a change in circumstances. I agree that a final determination on contact will be made by the divorce court, the order is therefore susceptible to alteration by a court of first instance, see *Zweni v Minister of Law and Order* 1993 (1) SA 523 J to A, and is not final.

[6] Regarding the contribution toward costs, Counsel for applicant submitted that the applicant was not concerned with the figure which I awarded but rather that the "procedure adopted" was unfair to him. The applicant was of the view that he ought to have been afforded an opportunity to file updated financials and that new financials may well have resulted in no order regarding a contribution toward costs. It was argued that the provisions of section 16 of the Superior Court Act do not apply, in that the applicant's complaint is based on a procedural unfairness. I ordered a contribution toward costs as per paragraph 26⁴, the objective facts supported my view, it is the case that the financial disclosure documents are all too often never a true reflection of the parties finances.

⁴ CL-34

[7] Advocate Ferriera for the respondent reminded the court of the extensive litigation which the parties have been involved in both prior to the matter before me and since my judgment of March 2025. She submitted that the applicant simply argues the procedure adopted and not the amount awarded and contended that the amount awarded has been exhausted in the protracted litigation to date, she proffered that the respondent will be forced to approach the court for a further contribution. Counsel for the applicant submitted that the order for a contribution was a once off payment arising from the R6 application, it has the effect of a final order and is therefor appealable. It was submitted that neither of the parties presented an argument regarding a contribution and therefore the order is irregular. I disagree with counsel and reiterate that I relied on the objective facts and awarded a relatively conservative amount to current charges in divorce litigation.

[8] The award for a contribution was made within the ethos of Rule 42 and having considered the protracted litigation in this matter, the objective facts before me were sufficient to persuade me regarding the order for a contribution, and therefore I requested parties to file a chronology of litigation which reinforces my view. The contribution toward costs is not appealable, and must stand. No court in the future, having regard to the chronology of litigation would arrive at a different conclusion on this contribution, against the objective facts of the matter.

[9] Accordingly, I make the following order,

1. Leave to appeal of prayers 3 of my order of 20 March 2025 is granted to the Full Court of this Division.
2. Leave to appeal regarding contact and a contribution to costs is refused.
3. Cost of the application shall be costs in the appeal.

Mahomed J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 23 June 2025

Date of Judgment: 16 July 2025

Appearances:

For applicant: Ms F Bezuidenhout instructed by Vanessa Fernihough & Associates

For Respondent: Ms R Ferreira instructed by Zita Coetzee Attorneys INC