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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION: PRETORIA)

Date: 16 July 2025

Case No: 041781/2024

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

In the Rule 43(6) application between:-

B H G H

Applicant

(Identity number: 8[...])

and

G H

Respondent

(Identity number: 9[...])

JUDGMENT

MINNAAR AJ

[1] On 13 August 2024, this Court (Nyathi J) granted the following relief, *pendente lite* in respect of the parental rights and responsibilities, primary residence and contact of the minor child (a girl born on 13 October 2022):

- a. That both parties retain their Parental rights and responsibilities, and guardianship of the minor child as contemplated in terms of Section 18 of the Children's Act, Act 387 of 2005 ('the Act'), subject thereto:
 - i. That the primary care and residence of the minor child be awarded to the respondent.
 - ii. That the applicant have contact, as is contemplated in terms of section 18(2)(b) of the Act, with the minor child and that the applicant's rights to contact with the minor child be exercised as follows:
 - 1. Every Saturday from 07:00 to 17:00, the minor child to be removed by the applicant and to be returned to the residence of the respondent;
 - 2. Every alternate Sunday from 09:00 to 15:00, the minor child to be removed by the applicant and to be returned to the residence of the respondent.
 - 3. Telephonic contact every second day between 18:00 to 18:30.

[2] On 30 June 2025, the applicant lodged urgent proceedings in terms of the provisions of Rule 43(6), as it is alleged by the applicant that there was a material change in circumstances following the order of 13 August 2024.

[3] The material change of circumstances are:

- a. On 20 June 2025, the respondent obtained an *ex parte* interim protection order, which was served on the applicant on 23 June 2025 ('the interim protection order').
- b. The protection order provides that there is to be no contact between the applicant and the minor child (referred to in the protection order as 'the complainant') and that:

'The prohibition of all contact with the complainant will remain in force until the outcome of the professional assessment by a qualified specialist psychologist or social worker [illegible] the minor child until another competent court makes another order.'

- c. Since the issuing of the interim protection order, the applicant has had no contact with the minor child.

[4] The applicant lodged this urgent Rule 43(6) application to reinstate his contact rights, alternatively to obtain an interim variation which provides for supervised contact, pending the outcome of the forensic investigation by Ms. L[...] V[...] N[...].

[5] The interim protection order was obtained on allegations of sexual misconduct towards the minor child. In this regard, the respondent mentioned the following incidents in her affidavit in support of the interim protection order:

- a. On 10 June 2025, 14 June 2025, 15 June 2025, 16 June 2025, and 18 June 2025, the respondent observed various instances where the minor child acted inappropriately and appeared to be emotional and upset. The minor would utter words like “*Tannie L[...] my koekie speel en my koekie lek*” and “*Pappa H[...] my koekie lek*”. The minor child further placed a cucumber vertically between her legs and said: “*Kyk, ek is Oupa*”. She also put a toy dinosaur between her legs, pressing it against her genital area.
- b. On 19 June 2025, the respondent lodged a complaint against the applicant for sexual abuse and molestation against the minor children. CAS285/6/2025 was registered.

[6] From the papers before me, it is evident that ‘L[...]’ is the applicant’s girlfriend. Save for some reference in correspondence leading to this application, no details are provided regarding the specifics of who ‘L[...]’ is, her role in the household, or her involvement in caring for the minor child during visits to the applicant.

[7] In terms of the interim protection order, the applicant is allowed to anticipate the return date (the return date is 12 September 2025). This court finds it strange, in light of the serious allegations being made against the applicant and L[...] in the respondent’s complaint affidavit, that the applicant elected not

to take any steps to anticipate the return date of the interim order and to clear his name.

[8] Instead, the applicant approached this Court on an urgent basis, under the provisions of Rule 43(6), to amend the terms of the Rule 43 order. It is the case of the applicant that the court that issued the interim protection order had no jurisdiction to intervene in the applicant's contact rights with the minor child.

[9] It is further the case of the applicant that it would be in the best interest of the minor child if the applicant continues to exercise contact rights with the minor child pending any investigation.

[10] The allegations made in the respondent's complaint affidavit are serious, and it is paramount in my consideration as to what the best interest of the minor child would be.

[11] The interests of the child are paramount in all matters concerning the child, and these interests take precedence over the interests of the parents.¹

[12] Section 9 of the Children's Act 38 of 2005 echoes s 28(2) of the Constitution and provides as follows:

'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

[13] Section 28(2) of the Constitution provides:

'A child's best interests are of paramount importance in every matter concerning the child.'

[14] The Constitutional Court has held that s 28(2) extends beyond and creates a right independent of the other rights listed in s 28(1).² In *Laerskool*

¹ *J v J* 2008 (6) SA 30 (C) at par 36; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at par 41

*Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere*³ 22 Bertelsmann J stressed that s 28(2)

‘ . . . inderdaad die fundamentele reg van elke kind vestig om in die opweging van strydende partye se botsende belange - en dus ook die strydende partye se aansprake op fundamentele regte en die handhawing daarvan - in die eerste gelid te staan. ’

[15] In *J v J* 2008 (6) SA 30 (C) at par 20 it was held:

‘[20] As the upper guardian of minors, this court is empowered and 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: the best interests of the child.⁴ In Terblanche v Terblanche⁵ 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 recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.

In P and Another v P and Another⁶ Hurt J stated that the court does not look at sets of circumstances in isolation:

I am bound, in considering what is in the best interests of G, to take 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.

In AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)⁷ the Constitutional

² *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) (2000 (7) BCLR 713) para 18 at 428C-D. In *B v M* 2006 (9) BCLR 1034 (W) para 141 at 1067B it is said that the 'best interests' principle provides 'a framework for addressing the entire range of major issues affecting children'.

³ 2003 (4) SA 160 (T) ([2002] 4 All SA 745) at 178C-D.

⁴ *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA) para 32 at 200E; see also para 36 at 201B.

⁵ 1992 (1) SA 501 (W) at 504C.

⁶ 2002 (6) SA 105 (N) at 110C-D.

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'⁸ and held that in the case before it the best interests of the child 'should not be mechanically sacrificed on the altar of jurisdictional formalism'.⁹

[16] It is trite that, 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. Such a matter will be treated with the urgency it deserves, irrespective of any previous orders made in terms of rule 43.¹⁰

[17] Applicant's counsel referred to *Van der Linde v Van der Linde* 1996 (3) SA 509 (O). At 516B of this judgment, Hattingh J stated that the Court was not prepared to substitute certainty with uncertainty and to sacrifice the daughter as a guinea-pig on the proverbial experimental altar. I completely agree with this statement.

[18] The minor child in the application before me has not yet reached the age of three. Serious allegations of sexual misconduct were made. Ms. L[...] V[...] N[...] must conduct a proper investigation into the impact on the minor child.

[19] I am mindful that the applicant is entitled to approach this Court in terms of Rule 43(6) regarding his allegation that there has been a change in circumstances. What I found concerning is that the applicant has not elected to anticipate the interim order to dispel the serious allegations made in the respondent's complaint affidavit.

[20] The minor child's best interest far outweighs the applicant's right to have contact with the minor child. This Court will not expose the minor child

⁷ 2008 (3) SA 183 (CC) (2008 (4) BCLR 359) para 30 at 370A.

⁸ *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA) para 99 at 220I.

⁹ *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) (2008 (4) BCLR 359) para 30 at 370A.

¹⁰ *S v S and Another* 2019 (6) SA 1 (CC) at par 34

to any uncertainty, and she will not be placed on the proverbial experimental altar to protect the applicant's right of contact.

[21] In light hereof, and having regard to the best interest of the minor child, the applicant's insistence on contact in terms of the Rule 43 order cannot be permitted.

[22] I am further of the view that it would also not be in the best interest of the minor child if supervised contact is awarded to the applicant. A proper forensic investigation by Ms. L[...] V[...] N[...] should be conducted as to the allegations made in respect of the minor child and the impact thereof on the minor child. Upon receipt of the report from Ms. V[...] N[...], the applicant may then approach this Court again to reconsider his contact rights.

Costs of the application:

[23] The discretion in granting costs is a trite matter.¹¹ There is no reason to deviate from the established principle that costs should follow the outcome.

[24] The determination as to what scale of costs would be applicable under the party and party scale regime is dictated by the provisions of Rule 67A of the Uniform Rules of Court. Rule 67A(3) provides that a court "shall", when making a party and party costs order, "indicate the scale in terms of rule 69, under which costs have been granted". Those scales have been inserted into rule 69(7) under the amendment that created rule 67A. They are scales "A", "B", and "C". Rule 67A(4) provides for the right to apply for an order determining which parts of the proceedings, if any, were urgent, and whether the costs of more than one counsel may be recovered. The effect of that subrule is, notionally, that a different scale could be assigned to the services of each counsel whose fees are allowed under the rule.¹²

¹¹ *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO and Others* 1996 (2) SA 621 (CC) at par 3

¹² *Mashava v Enaex Africa (Pty) Ltd* (2022/1840) [2024] ZAGPJHC 387 (22 April 2024) at par 7 to 9

[25] The complex nature of a matter and how the case was presented to the court are among the factors to consider when setting a scale under the rule.¹³

[26] The application involves the best interest of the minor child and the applicant's contact rights. It is appropriate that costs be awarded on scale B.

Order:

[1] Consequently, I make the following order:

- a. In terms of Rule 43(6), prayer 1(b), (c), (d) and the aspect of the applicant's telephonic contact is varied to read:
'Pending finalisation of the forensic investigation by Ms. L[...] V[...] N[...], the applicant's contact rights with the minor child is suspended.'
- b. The applicant is to pay the costs of this application on Scale B.

Minnaar AJ
 Acting Judge of the High Court
 Gauteng Division, Pretoria

For the Applicant:	Adv A Koekemoer Instructed by Geyser & Coetzee Attorneys
For the Respondent:	Adv A Vosloo-De Witt Instructed by Vogel Malan Incorporated
Date of hearing:	8 July 2025
Date of judgment:	16 July 2025

¹³ *Mashava* at par 14