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

CASE NO : **2025-146896**

(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

In the matter between:

XJ Applicant

And

SP Respondent

JUDGMENT

FRANCK AJ:

[1] The Applicant launched an urgent application on the 26th of August 2025 for the following relief:

[1.1] Dispensing with the forms and service provided for in the Uniform Rules of Court and that the matter be regarded and dealt with as urgent in

terms of Uniform Rule 6(12)(a).

[1.2] That pending the finalisation of the disputes between the Applicant and Respondent in respect of the termination of their relationship, the Applicant shall be entitled to access and contact to the parties' minor son, currently aged 3 years old, as follows:

[1.2.1] Every alternative Saturday from 08:00 until Sunday 17:00.

[1.2.2] In the week following a weekend wherein the Applicant exercised contact per 1.2.1 supra, the Applicant will collect the minor son from the Respondent on Wednesday at 14:00 and return him to the Respondent by no later than 17:00.

[1.2.3] In the week preceding the weekend wherein the Applicant will exercise contact per 1.2.1 supra, the Applicant will collect the minor son on Mondays and Tuesdays at 14:00 and return him to the Respondent by no later than 17:00 on each of the respective afternoons.

[1.3] That pending the finalisation of the disputes between the Applicant and Respondent in respect of the termination of their relationship:

[1.3.1] the Applicant shall make available and provide unfettered occupation to the Respondent of the property situated at 3[...] G[...] H[...] E[...], G[...], E[...], alternatively the Applicant shall contribute towards the monthly rental expenses of the Respondent by making payment in the monthly amount of R15 000,00 payable on or before the last business day of each month;

[1.3.2] the Applicant to contribute towards the maintenance of the

parties' minor son by making payment to the Respondent in the monthly amount of R10 000,00 per month payable into a bank account to be nominated by the Respondent on or before the last business day of each month;

[1.3.3] the Applicant shall retain the Respondent and the parties' minor son on the current medical aid (or such other medical aid affording the same or substantially similar benefits) by making payment of the monthly contributions to the medical aid on behalf of the Respondent and the parties minor son; and

[1.3.4] the Applicant is to make available to the Respondent, for her unfettered and exclusive use, the Toyota Corolla motor vehicle owned by and registered in the name of the Applicant.

[1.4] That the Respondent be ordered to pay the costs of the application.

[2] At the outset of the proceedings, the court raised with the parties whether or not it had the requisite jurisdiction to deal with this dispute, as the Respondent and the minor child moved from the former matrimonial home in Sandton, to the Respondent's parents' home in East London during June 2025. Even though, the Respondent indicates a willingness to return to Johannesburg in her answering affidavit, she states that it is not financially possible and that the tender of maintenance as contained in the Applicant's notice of motion is not sufficient to allow her to do so.

[3] There is a dispute between the parties regarding whether or not a customary marriage was concluded. The Applicant claims that no customary marriage was concluded whilst the Respondent maintains that such a marriage was indeed properly concluded. No summons for a decree of divorce or other declaratory relief has been issued.

- [4] As such, the Applicant's application falls within the purview of Section 28 of the Children's Act 38 of 2005 ("**the Children's Act**"), in which event, the only court with jurisdiction to determine the dispute, in terms of Section 29 of the Children's Act would be the court where the child is ordinarily resident. The child has been ordinarily resident in East London since June 2025.
- [5] It was, however, pointed out to the court during argument, that the Respondent admitted that the court has the requisite jurisdiction to adjudicate the matter.¹ As such, the Respondent has consented to the jurisdiction of this court.
- [6] The provisions of Section 29 reinforces the requirement that orders affecting children must be made by courts that are best placed to assess and protect their interests.² This court will, however, consider the application launched by the Applicant in terms of Section 28 of the Children's Act through the prism of the child's best interests, as upper guardian of all minor children.
- [7] The place where the minor child is ordinarily resident is, however, still relevant to the issues of contact as will be dealt with hereinbelow, as there are geographical challenges with the minor child being ordinarily resident in East London and the Applicant residing in Gauteng.
- [8] The Respondent states in her answering affidavit that she was compelled to relocate to her parents' home during and has stayed there to date, as the Applicant paid no maintenance in respect of the minor child.³ The Respondent further alleges that, the Applicant confiscated her motor vehicle, discontinued her access to a credit card, stopped paying the salaries of the minor child's nanny and the Respondent's domestic employee and terminated all services to the former matrimonial home. The Respondent is currently living with her parents and receives financial assistance from them.
- [9] In terms of Section 1(2) of the Domicile Act 3 of 1992, a domicile of choice shall be acquired by a person when he/she is lawfully present at a particular place

and has the intention to settle there for an indefinite period. The Respondent's domicile is currently in East London where she resides with the minor child.

[10] The Respondent's answering affidavit was filed late and outside the time periods as prescribed in the Applicant's notice of motion. In the notice of motion, the Respondent was directed to file her answering affidavit by Friday, 12 September 2025. An unsigned copy of the answering affidavit was served on the 18th of September 2025 with the signed answering affidavit served on the 19th of September 2025. The Respondent seeks condonation for the late filing of the answering affidavit and comprehensively dealt with the reasons why the answering affidavit was filed late. The late filing is ascribed to the fact that her attorney of record had to undergo knee replacement surgery and was out of the office until 10 September 2025. The Respondent further states that due to the averments made by the Applicant and the denial of the validity of the customary marriage, it took the Respondent time to collate the relevant documentation and the logistical distance between her legal team also posed challenges.⁴

[11] The Applicant did not file a replying affidavit. An affidavit opposing the condonation was uploaded shortly before the hearing of the urgent application at 12:07 on 23 September 2025 with the Applicant's heads of argument (dealing with opposition to condonation) being uploaded shortly thereafter.

[12] The Applicant avers that, the Respondent is being dishonest as:

[12.1] a letter referred to and relied upon by the Respondent as a "*holding letter*" dated 15 August 2025 was in fact never sent to the Applicant's attorneys;⁵

[12.2] the signed answering affidavit did not contain pages 34 and 37.

[13] Nothing seems to turn on this, as the Respondent's attorney, when questioned regarding Annexure "AA17", readily admitted that the letter was mistakenly not

sent and informed the Applicant's attorneys *"We have conducted a thorough search of our records. Annex "AA17" which was writer's secretary, Hillary Brown, was mistakenly not sent to yourselves (which the writer only established upon receipt of your letter under reply). That said we apologise for the inconvenience occasioned. The writer's corroborating affidavit confirms the replacement surgery on 6 August 2025, the consequent pain and being out of office for recuperation purposes."* The Respondent requested the Applicant to disregard Annexure "AA17".

- [14] It was submitted that the Respondent's reliance on Annexure "AA17" amounted to dishonesty and destroyed the Respondent's credibility. I disagree. As soon as the error came to light, the Respondent's attorney advised the Applicant's attorney of same and requested them to disregard the correspondence. On the facts, I cannot attribute malice or dishonesty to either the Respondent or her attorney. Furthermore, the unsigned copy of the answering affidavit included pages 34 and 37. When the Applicant drew the omission of the pages in the signed version to the Respondent's attention, the Respondent immediately made the full signed affidavit available.

- [15] In circumstances where I was implored by the Applicant's counsel to consider the best interests of the minor child, I do not think it appropriate to rely on overly technical points or to consider legal niceties, over the best interests of the minor child. It is in the best interests of the minor child, for the Respondent's version to be before court and for the court to consider the submissions made by the minor child's mother.

- [16] The court has a wide discretion to grant condonation on good cause shown.⁶

- [17] Such discretion must be exercised with regard to the merits of the matter seen as a whole. On the facts of the matter, I find that the Respondent has show good cause and a sufficient explanation for the delay in filing the answering affidavit.⁷

- [18] The application was opposed on the grounds of urgency. The Respondent averred that the application is not urgent as the Applicant has not had contact to the minor child since 10 June 2025.
- [19] The Applicant alleges that his contact to the minor child was unilaterally terminated and alleges that contact must be restored urgently in order to safeguard the best interests of the minor child. The Respondent's relocation to East London, has no doubt contributed to the logistical difficulties in the exercise of regular contact between the Applicant and the minor child. From June 2025 to end of August 2025, there were some attempts to have contact to the minor child and communications were exchanged between the parties as well as their legal representatives. As this application deals with the best interests of a young boy and his contact to his father, I regard this matter as being urgent and in this regard, I was referred to the following cases by the Applicant's counsel : **B v B**⁸ and **DM v CHP**⁹.
- [20] If regard is had to the merits of the matter, the court is faced with the dilemma of the Applicant's claim for a restoration of contact which amounts to an order for the Respondent and the minor child to return to Gauteng. As the Respondent is domiciled in East London together with the minor child and has been so resident at her parents' home since June 2025, this court will not order the Respondent to return to Johannesburg especially in circumstances where the Respondent has been resident in East London for an extended period of time and is dependant upon her parents' financial assistance.
- [21] The Respondent states the tender for maintenance including accommodation in Johannesburg is not sufficient but indicates a willingness to return to Johannesburg at some point in the future.
- [22] The Applicant has not made any financial disclosure to this court and has not disclosed the basis upon which the quantum of the maintenance has been tendered. Neither has the Applicant indicated a timeframe within which he

intends to finalise *“the disputes between the Applicant and Respondent in respect of the termination of their relationship”* as stated in the notice of motion.

[23] The court is further faced with the difficulty that, it is not in a position to determine what type of contact and the duration thereof would be in the minor child’s best interests. This is so for the following reasons:

[23.1] the child is resident in East London and shuttling the child between East London and Johannesburg every second weekend, cannot be in the minor child’s best interests;

[23.2] the Respondent makes substantive averments relating to the Applicant’s lack of capacity to look after and care for the minor child;

[23.3] there is no social worker report or Family Advocate’s report to guide the court.

[24] In terms of Section 29(3), the court will only grant relief in terms of Section 28 of the Children’s Act, if it is in the child’s best interests. To determine whether or not the relief sought is in the child’s best interests, the court may request a Family Advocate or social worker to provide a report, in terms of Section 29(5) of the Children’s Act.

[25] I enquired from both counsel representing the Applicant and the Respondent whether or not they would have an objection to the appointment of a social worker and investigation by the Family Advocate. Neither party is opposed thereto and the Applicant’s counsel confirmed, after taking instructions, that the Applicant tenders payment for such expert to produce a report.

[26] Pending production of the report, the Respondent tenders contact as set out in her answering affidavit, being the following:

- [26.1] Whilst the Respondent still resides in East London, the Applicant is entitled to exercise contact with the minor child every alternate weekend on both a Saturday and Sunday for 2 hours in the presence of the minor child's nanny and daily telephonic/video call contact between 10:00 and 10:30 in the mornings and 16:30 and 17:00 on the days when the Applicant has no contact with the minor child.
- [26.2] In the event that the Respondent relocates to Johannesburg:
- [26.2.1] 2 hours during the week in the presence of the minor child's nanny;
- [26.2.2] 2 hours on alternate weekends, either a Saturday or Sunday, in the presence of the minor child's nanny;
- [26.2.3] Daily telephonic/WhatsApp video calls on the dates and times as set out above.
- [27] Due to the averments made by the Respondent relating to the Applicant's inability to look after and care for the minor child and because of the minor child's tender age, it is necessary, pending production of the report, for contact in the interim, to be exercised in the presence of the minor child's nanny. The time periods tendered by the Respondent are, however, extremely truncated and the Respondent has not advanced reasons why the periods of supervised contacts should only amount to a few hours at a time. The court will accordingly order more generous supervised contact pending the production of an expert report.
- [28] Regarding costs, the court has a wide discretion in family matters to make costs orders. In the present matter, there are various disputes of fact relating to the minor child on the papers and, in this specific matter, after a consideration of both affidavits, it would be just and equitable, for each party to bear their own

costs.

Wherefore an order is made in the following terms:

- [1] A social worker with no less than 10 years' experience shall be appointed as an independent expert, to investigate the best interests of the minor child, KAJ, and to provide a report to the court with recommendations relating to the minor child's care, contact of the minor child with the Respondent and primary residence.
- [2] The social worker shall be nominated by the Chairperson of the Gauteng Family Law Forum and shall be a social worker, that is willing to finalise a report, which includes possible travel to East London where the Respondent currently resides with the minor child.
- [3] The Applicant shall make payment of the reasonable costs associated with the production of the report by the social worker.
- [4] Pending production of the report of the social worker, the Respondent shall have the following contact with the minor child:
 - [4.1] Whilst the Respondent and minor child are resident in East London, the Respondent shall be entitled to exercise contact with the minor child as follows:
 - [4.1.1] Every alternate weekend on both a Saturday and a Sunday for a period of 5 hours on each day, in the presence of the minor child's nanny.
 - [4.1.2] Daily telephonic/WhatsApp video calls between 10:00 and 10:30 in the mornings and between 16:30 and 17:00 on the days that the Applicant does not have contact with the minor

child.

[4.2] In the event that the Respondent relocates to Johannesburg with the minor child prior to finalisation of the social worker's report:

[4.2.1] 2 hours every Tuesday and Thursday in the presence of the minor child's nanny.

[4.2.2] Every alternate weekend on both a Saturday and a Sunday for a period of 5 hours on each day, in the presence of the minor child's nanny.

[4.2.3] Daily telephonic/WhatsApp video calls between 10:00 and 10:30 in the mornings and between 16:30 and 17:00 on the days that the Applicant does not have contact with the minor child.

[29] Each party to pay their own costs.

FRANCK, A J

Date of hearing : 23 September 2025

Date of judgment : 25 September 2025

Legal representation :

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¹ Answering affidavit, paragraph 64, CaseLines 004-23

² **SH v MLH** 2025 JDR 4013 (ECGq) at [17]

³ Answering affidavit, paragraph 66, CaseLines 004-23

⁴ Answering affidavit, paragraph 4-6, CaseLines 004-4 to 004-5

⁵ A legible copy of Annexure "AA17" is found at CaseLines 004-228 to 004-229

⁶ **Smith NO v Brummer NO; Smith NO v Brummer** 1954 (3) SA 352 (O) at 358 A and **Du Plooy v Anwes Motors (Edms) Bpk** 1983 (4) SA 212 (O) at 216 H to 217 A

⁷ **Junkeeparsad v Solomon and Another** (37003/2019; 37456/2019) [2021] ZAGPJHC 48 (7 May 2021)

⁸ 2008 (4) SA 535 (W) at paragraph [23]

⁹ 2024 JDR 0448 (GP) at paragraph [12]