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

CASE NO: 1790/2023

(1) REPORTABLE: YES/NO

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

(3) REVISED.

DATE: 17 NOVEMBER 2025

SIGNATURE:

In the matter between:

H[...] C[...] C[...]

APPLICANT

And

N[...] E[...] M[...]

FIRST RESPONDENT

TEBOGO ASHLY MYENI

SECOND RESPONDENT

TIYANI THEODORE CHAUKE

THIRD RESPONDENT

EMELDAH NOMHLE NDLOVU

FOURTH RESPONDENT

JUDGMENT

BURNETT, AJ

INTRODUCTION

[1] This is an urgent application in terms of which the Applicant seeks the following relief: -

(a) That the non-compliance with the forms, service and time periods prescribed in the Uniform Rules of Court and/or directives if any be condoned, and that this matter be heard as urgent in terms of Rule 6 (12) of the Uniform Rules of Court.

(b) That the order granted by the Honourable Mushwana AJ on 17 October 2025 be declared operational and executable pending the finalisation of the leave to appeal filed by the First Respondent and or such further appeal processed which the First Respondent may in the future engage into arising from the aforesaid order of Honourable Mushwana AJ.

(c) That the provisions of section 18 (3) of the Superior Courts Act 10 of 2013 be invoked and applied, as the appeal noted by the First Respondent is against an interlocutory and non-appealable order, and or that exceptional circumstances exist warranting the operation of the said order granted on 17 October 2025 by the Honourable Mushwana AJ.

(d) That the order of the Honourable Justice Tshidada J dated 19 December 2023 for the spousal maintenance and child maintenance of the Respondent and her minor child namely M[...] J[...] M[...] be suspended pending: -

(i) The full compliance by the First Respondent with the orders of Mushwana AJ dated 17 October 2025, and/or alternatively.

(ii) The determination of the paternity of the minor child, M[...] J[...] M[...]; and

(iii) The determination of the marital status of the Applicant and the First Respondent.

(e) That it be declared that there is no prejudice whatsoever that will be suffered by the First Respondent should the order of Mushwana AJ dated 17 October 2025 be allowed to operate and be executed pending the finalisation of the appeal proceedings or processes.

(f) That it be declared further that, should the order of Mushwana AJ not be operational, the Applicant (First Respondent in the leave to appeal) will

suffer serious prejudice and irreparable harm, including the frustration of the court's directive for determination of paternity and marital status, and the continued effect of an order granted but the Honourable Tshidada J, 19 December 2023 obtained through fraudulent misrepresentations and or direction and or concealment of the material facts by the First Respondent.

(g) That the operation of the order granted by the Honourable Tshidada J dated 19 December 2023 be suspended pending compliance with the orders of the Honourable Mushwana AJ dated 17 December 2025 for the determination of the marital status of the Applicant and the First Respondent and paternity of the minor child, namely M[...] J[...] M[...].

(i) That the costs of this application be payable by any opposing First Respondent on a party and party scale.

(ii) That the Applicant be granted such further and/or alternative relief as this Honourable Court may deem just and equitable.

[2] The order that was handed down by his Honourable Justice Mushwana AJ on 17 October 2025, and that forms the subject of this urgent application, was handed down through the case management process. The order held that: -

(a) That the Applicant/Plaintiff and the First Respondent together with the minor child herein concerned submit themselves for a paternity test ("DNA test") to be conducted by a Laboratory registered with the South African National Accreditation System (SANAS).

(b) That the First Respondent/Defendant is ordered to immediately secure an appointment with a laboratory so stated above and immediately communicate the date, place and time where such test shall be conducted to the application through her legal representative of record.

(c) That the First Respondent/Defendant shall be responsible and liable for the payments of the costs occasioned by the conducting of such tests and all reasonable costs incurred for the travelling of the Applicant and the minor child in attendance of such testing to be conducted.

(d) That the First Respondent/Defendant shall, once the appointment has been so secured and all payment has been made, file this court with proof thereof.

(e) That the results of such tests shall be sent to the parties directly, that means the parties shall appoint their own addresses for accepting the test results for the purposes of confidentiality and make them available to this court by causing same to be filed with the Registrar of the Court.

(f) Both the Applicant/Plaintiff and the First Respondent/Defendant are ordered to file with this court, proofs of their marital status at the time of entering the customary marriage, alternatively an affidavit stating their marital status quo at the time of entering such a marriage.

(g) That this matter is postponed on the 20th day of November 2025 for the parties to comply with the orders at paragraph 1, 2, 3, 4 and 6 supra and for the further hearing of the interlocutory applications should same become necessary.

(h) Costs of the interlocutory applications are reserved until the finalisation of the applications.

[3] The application is opposed by the First Respondent who seeks a dismissal of the application together with a cost order on an attorney and client scale in accordance with scale C.

[4] The Second, Third and Fourth Respondents did not oppose the urgent application, however no relief was sought against them. Accordingly, their roles in this matter are not addressed herein.

BACKGROUND FACTS

[5] The following facts are pertinent to understanding the litigation history between the parties: -

[5.1] The Applicant and the First Respondent were involved in a sexual relationship. The First Respondent contends that she and the Applicant are married in accordance with customary law and that their marriage complies with section 3 (1) of the Customary Marriage Act, Act 120 of 1998. The Applicant disputes that the relationship between him and the First Respondent constitutes a valid and binding customary marriage. Their different versions as

to the nature of the relationship will be dealt with in due course by the divorce trial court.

[5.2] A child was born during the sexual relationship between the Applicant and the First Respondent, namely M[...] J[...] M[...], a girl born on 17 August 2023. Paternity of the child is also in dispute. The First Respondent contends that the Applicant is the biological father of the child, however the Applicant disputes this and alleges that it is impossible for him to have fathered the child.

NON-COMPLIANCE WITH PRACTICE DIRECTIVE

[6] There was non-compliance with the practice directive to some extent, and more in particular, the court file had not been indexed and paginated. Despite the court file not having been indexed and paginated, the court read all the papers filed by the parties.

[7] The matter is accepted as urgent and accordingly the court condoned non-compliance with the Practice Directive. Whilst the court is certainly displeased that the Applicant did not index and paginate the court file, it was in the interests of the minor child to hear the matter.

[8] The reasons that the matter is accepted as urgent will be addressed later in this judgment.

LITIGATION HISTORY

[9] The papers placed before this court were somewhat chaotic. The Applicant's papers contain a very poor chronological explanation of what has transpired in the legal process thus far. There has been an inordinate amount of litigation between the parties, with various applications being heard across various divisions. The court finds it perplexing that the Applicant did not take sufficient care to provide this Honourable Court with a detailed chronological explanation of what has transpired through the protracted legal history. This court had to spend a great deal of time navigating through the papers to properly understand what has happened from beginning to end. Judicial officers should not have to fish for relevant information;

legal representatives have a duty to be diligent in the drafting of their papers to ensure that they make sense and are easy to read.

[10] A copy of the court order granted by his Honourable Mushwana AJ on 17 October 2025, the very court order to which this application relates, was not even attached to the Founding Affidavit and the Applicant was granted leave to file a Supplementary Affidavit affixing the relevant court order thereto.

[11] It was not clear from the papers as to whether a divorce summons was issued, and if so, what the status of the action was. The Applicant has not made any reference to a divorce action. The First Respondent refers to a divorce in her Answering Affidavit wherein she stated that: -

“...which aforesaid conduct renders our customary marriage putative and resultant in me launching the Rule 43 application proceedings pending divorce or dissolution of the foregoing putative marriage in the Limpopo Division of the High Court Thohoyandou.”

[12] The court had to clarify with the legal representatives what the position with the divorce was. According to the legal representatives, the divorce action is pending in the Thohoyandou High Court, and the matter is at discovery stage with notices in terms of Rule 35 having been served and filed. The action is not trial ready.

[13] During the course of 2023, the First Respondent issued an application in terms of Rule 43 in the Thohoyandou High Court, which matter was ventilated in that court and an order granted by the Honourable Justice Tshidada on 19 December 2023 granted *inter alia*, that: -

“(a) The First Respondent is ordered to contribute twelve thousand rand (R 12 000.00) towards the Applicant for spousal maintenance.

(b) The First Respondent is further ordered to contribute an amount of nine thousand rand (R9 000.00) towards the minor child in casu for maintenance or upbringing pendente lite.

(c) *The First Respondent is ordered to reimburse the Applicant on any medical expenses incurred by the Applicant on behalf of the minor child herein upon the Applicant providing him with proof of the medical expenses incurred in respect of the minor child.*

(d) *The First Respondent is ordered to contribute an amount of one hundred and fifty thousand rand (R150 000.00) towards the Applicant's legal costs in the impending divorce proceedings between the Applicant and the First Respondent,*

(e) *The First Respondent is therefore ordered to pay both the spousal maintenance and the minor child's maintenance amounts from the 1st day of January 2024 and all the consecutive months thereafter pendete lite.*

(f) *The First Respondent is therefore ordered to pay the contribution towards legal costs of the Applicant in the amount of one hundred and fifty-thousand rands (R150 000.00) in four equal instalments which first instalment shall commence on the last day of January 2024 and thereafter on the succeeding day of each last day of the month.*

(g) *The First Respondent is ordered to pay the costs of this application, including the reserved costs on the 28th day of November 2023."*

[14] The Rule 43 order relates to spousal maintenance for the marriage that has been disputed and child maintenance for the child whose paternity is disputed.

[15] Some two to three months after the Rule 43 application order was granted, the Applicant launched an application in the Malamulele Children's Court for an order for confirmation of paternity. The application for paternity was never finalised. From a reading of the papers, it seems that the First Respondent was dissatisfied with a directive at the pre-hearing process and noted an appeal against it. The matter has not moved forward, and the status of the appeal is unknown.

[16] In between all of this, a male third party by the name of Tebogo Ashly Myeni, launched an application in the Malamulele Children's Court to obtain visitation to the minor child, which he contends is his child. From a reading of the papers, it seems that, as with the Applicant's application for confirmation of paternity, the First Respondent was dissatisfied with a directive at the pre-hearing process and noted

an appeal against it. The matter has not moved forward, and the status of the appeal is unknown.

[17] The Applicant complied with the Rule 43 order for six months and then stopped. As a result of this, the First Respondent launched a Contempt of Court application against the Applicant for his failure to adhere to the Rule 43 order. The Contempt of Court Application was heard by the Honourable Justice Tshidada on 13 August 2024, who found the Applicant to be in contempt of court. A warrant of arrest was authorized, however suspended pending the full payment of the maintenance arrears within a specified period.

[18] Two days later, on 15 August 2024, Honourable Justice Tshidada varied his order in terms of Rule 42 (1) (b) in respect of the number of days that the Applicant had to comply with the order of 13 August 2024 for the warrant to remain suspended.

[19] The Applicant launched an application for leave to appeal against the orders handed down on 13 and 15 August 2024, which application was dismissed on 4 September 2024. The Applicant then filed a petition with the Supreme Court of Appeal against the 13 August 2024 order by his Honourable Justice Tshidada. The petition was dismissed.

[20] The First Respondent launched an urgent application against the Applicant whereby she sought to uplift the suspension of the warrant of arrest for the Applicant's continued failure to comply with the court order and on 6 September 2024 his Honourable Justice Matumba AJ uplifted the suspension.

[21] The Applicant then launched an application for leave to appeal the decision of 6 September 2024 order by the Honourable Justice Matumba AJ, together with a request for reasons. The Honourable Justice Matumba then varied the order and replaced it with a new order dismissing the First Respondent's urgent application.

[22] The First Respondent then launched an application for leave to appeal against dismissal of her application to uplift the suspension of the warrant. The application for leave to appeal was dismissed on 11 December 2024. The First

Respondent then filed a petition to the Supreme Court of Appeal and was granted leave to appeal to the Full Court of the Limpopo Local Division of the High Court. The appeal process to the Full Court is underway, however, has not been finalised.

[23] Proceedings were instituted by the First Respondent in terms of Section 31 of the Maintenance Act, Act 99 of 1998. On 15 January 2025, the Applicant was convicted and sentenced to three months' imprisonment or a fine of R 50 000.00 which sentence was suspended.

[24] The Applicant commenced maintenance payments however stopped again after a few months. This led to a second maintenance complaint in terms of Section 31 of the Maintenance Act, Act 99 of 1998. Save for the fact that a warrant of arrest has been authorized against the Applicant for his failure to attend court, the exact status of the proceedings is unknown.

[25] The Applicant launched an urgent application in this Division of the High Court for the setting aside of the warrant of arrest issued in the Section 31 proceedings. The urgent application was heard by the Honourable Justice Besler AJ and was struck from the roll for a lack of urgency.

[26] On 26 June 2025 the Honourable Justice Du Plessis AJ granted an interdict against the sale of the Applicant's assets for his failure to comply with the Rule 43 order. The First Respondent has noted an appeal against the order; however, it is unclear what the status of that appeal is.

[27] On 14 July 2025 the Honourable Justice Khan AJ from the Gauteng Division also granted an interdict against the sale of the Applicant's assets. The First Respondent has noted an appeal against the order; however, it is unclear what the status of that appeal is.

[28] There is also an application in terms of Rule 43 (6) pending, which was launched by the Applicant. All that can be gathered from the papers is that sometime after the Rule 43 (6) application was launched, the First Respondent sought an order interdicting the High Court from hearing it, which application was dismissed. The

First Respondent went as far as petitioning the Constitutional Court with an application for leave to appeal, of which application was dismissed.

[29] Following this, the Honourable Judge President of this Division referred the matter to case management.

[30] In the midst of this, four interlocutory applications were launched. No detail is provided in the papers as to what these interlocutory applications were about. It appears that these applications were to be dealt with during a case management hearing. His Honourable Justice Mushwana AJ convened a case management meeting and made the 17 October 2025 order (the order to which this application relates). The interlocutory applications were not heard during this case management hearing, and no order was made in regard thereto. His Honourable Justice Mushwana AJ directed the parties, *inter alia*, to submit the minor child for a paternity test ("DNA Test"). The First Respondent has filed an application for leave to appeal against this order, and the Applicant seeks to enforce the order pending the outcome of the appeal.

SUBMISSIONS BY THE APPLICANT

[31] The Applicant submits that he underwent a vasectomy in 2010 and that it was impossible for him to have fathered a child thereafter. As the child to which this application relates was born in 2023, the child cannot be his. The Applicant further submits that he suffers from a medical condition called Azoospermia, which means that he has complete absence of sperm. In support hereof the Applicant attaches medical evidence to his papers.

[32] The Applicant believes that the First Respondent is purposefully attempting to block the DNA because she knows that child is not his biological child. He suggests that this application is merely another attempt to frustrate the discovery of the truth. The Applicant thinks that the First Respondent is doing this so that she can extract an unlawful financial benefit from him in the form of maintenance.

[33] The Applicant states that he has spent approximately nine hundred thousand rand (R 900 000.00) on maintenance and legal fees flowing from the Rule 43 order. He submits that the maintenance that he has paid so far has been because of fraudulent misrepresentations made by the First Respondent in the initial Rule 43 application. The continuous maintenance payments and the enforcement thereof has caused him financial hardship.

[34] The Applicant says that he has suffered humiliation from the various encounters with the South African Police Services and the criminal justice system.

[35] The Applicant relies on the following authorities in support of his arguments:

[35.1] ***University of the Free State v AfriForum***¹ wherein it held that the purpose of an application in terms of section 18 (3) was not to re-ligate the issues that gave rise to the order in question. The point of an application in terms of section 18 (3) is to determine whether the requirements of exceptional circumstances, irreparable harm and the balance of convenience have been satisfied to justify the order remaining operational pending appeal.

[35.2] ***Centre for Child Law v NN***² wherein it found that children have a constitutional right to know their own origins.

[35.3] ***LB v YD***³ wherein the court held that it may draw a negative inference against a parent refusing to submit a child to a paternity test.

[35.4] ***M v M***⁴ wherein the court held that the best interests of a child are served by the truth being established when paternity is uncertain.

SUBMISSIONS BY THE FIRST RESPONDENT

[36] The First Respondent contends that the minor child is the biological son of the Applicant and that the paternity test is unnecessary for the following reasons: -

¹ 2018 (3) SA 428 (SCA).

² 2019 (2) SA 442 (CC).

³ 2009 (5) SA 463 (T).

⁴ 2012 (2) SA 526 (GSJ).

[36.1] The minor child was born “*stante matrimonio*” and the common law presumption of “*Pater est Quem nuptiae demonstrant*” finds reference.

[36.2] The Applicant has acknowledged that the minor child is his own child and thus on a balance of probabilities the child is his biological child.

[37] The court should not entertain the Applicant because he is not a litigant with clean hands. The Applicant has violated the Rule 43 order continuously over the last two years and accordingly has no respect for the court and the orders that it makes. The First Respondent refers to the Applicant as a fugitive from justice because he has evaded the authorities, court appearances in the criminal court and warrants of arrest issued against him.

[38] The First Respondent relied on the judgment of **YM v LB**⁵, which found that scientific tests should not be ordered where paternity has been shown on a balance of probabilities.

[39] The First Respondent further relied upon the following authorities: -

[39.1] **Deputy Sheriff, Harare v Mahlaza & Anor**⁶, wherein it was held that: -
“*People are not allowed to come to court seeking the court’s assistance if they are guilty of probity of dishonesty in respect of the circumstances which case them to seek relief from the court.*”

[39.2] **Underhay v Underhay**⁷ wherein it was held that: -
“*It is a fundamental to court procedures in this country and all civilized countries that standards of truthfulness and honesty be observed by parties who seek relief.*”

[39.3] **Botes v Goslin**⁸ wherein it held that: -
“*The basic morality in denying a fugitive from justice the assistance of the very system he refuses to submit to is elementary, a man cannot say that he is prepared to abide by the rules of society, and seek society’s assistance in*

⁵ (469/09) [2010] ZASCA.

⁶ 1997 (2) ZLR 425 (H).

⁷ 1977 (A) SA 23 (W).

⁸ 1987 (2) SA 716 (C).

enforcing them, only when they favour him and when he chooses, but not when he decides that it does not suit him to do so.”

[39.4] **Mulligan v Mulligan**⁹ wherein it held that: -

“In the passage it appears that a fugitive may be accepted as being one who is willfully avoiding the execution of the processes by the court of the land, or as one who is avoiding the processes of the law through flight out of country or is hiding within the jurisdiction of the court.”

[39.5] The United States of American decision of **Togan v Casaus**¹⁰ wherein it held that: -

“Such flagrant disobedience and contempt effectually bar him from receiving the assistance of the appellate tribunal. A party to the action cannot with right or reason, ask the aid or assistance of a court in hearing of the demands, while he stand, in attitude of contempt of legal orders and process of the courts of the State.”

LEGAL QUESTIONS

[40] This is an application in terms of Section 18 (3) of the Superior Courts Act 10 of 2013 and accordingly the legal questions to be answered will flow therefrom.

[41] Section 18 (1), (2) and (3) read as follows: -

“(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

⁹ 1925 WLD 165.

¹⁰ American Law Reports 29 ALR 2d page 1423.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.”

[42] Having regard to the above, once an application for leave to appeal is launched against an order in a Superior Court, the operation and execution of that order is automatically suspended unless, the order is interlocutory in nature and does not have the effect of being final. If the order is not interlocutory or final in nature, a court may, on application, declare the order operational and executable if: -

[42.1] Exceptional circumstances exist for such declaration.

[42.2] The Applicant will suffer irreparable harm if it is not so declared.

[42.3] The Respondent will not suffer irreparable harm.

[43] If the court order is interlocutory and not final in nature, an application for leave to appeal will not suspend the operation of the order, however a party may bring an application in terms of Section 18 (2) to suspend the operation and execution of that order. In this case, the First Respondent has not brought a counterapplication in terms of Section 18 (2).

[44] Having regard to the above, the first question that needs to be ascertained is whether the order handed down by Honourable Justice Mushwana AJ is interlocutory and does not have the effect of being final in nature. If order is interlocutory and not final, the application must be granted without further enquiry. If the application is a final order (and not interlocutory in nature), then the following three further questions must be answered: -

[44.1] Are there exceptional circumstances to deem the order operational pending the appeal?

[44.2] Will the Applicant suffer irreparable harm if the order is not declared operational?

[44.3] Will the First Respondent suffer irreparable harm if the order is declared operational?

[45] This is an urgent application and accordingly it is not possible to deal with all the relevant issues in a lengthy fashion.

THE LAW

International Law

[45] Article 7 (1) of the Convention on the Rights of the Child states that: -

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.”

[46] Article 8 (1) of the Convention on the Rights of the Child states that: -

“State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”

[47] Section 19 (1) of the African Charter on the Rights and Welfare of the Child states that: -

“No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interests of the child.”

[48] Article 19 (2) of the African Charter on the Rights of the Child states that: -

“Every child who is separated from one or both of his parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.”

The Constitution

[49] Section 28 (1) (b) of the Constitution states that: -

“Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.”

[50] Section 28 (2) of the Constitution of the Republic of South Africa states that: -

“A child’s best interests are of paramount importance in every matter concerning the child.”

[51] Section 34 of the Constitution of the Republic of South Africa states that: -

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[52] Section 36 of the Constitution of the Republic of South Africa states that: -

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

[53] Section 39 (1) (b) states that: -

“When interpreting the Bill of Rights, a court, tribunal or forum – (b) must consider international law.”

The Children’s Act 38 of 2005

[54] Section 6 (4) of the Children’s Act states that: -

“In any matter concerning a child, a delay in any action or decision to be taken must be avoided as far as possible.”

[55] Section 7 (1) (n) of the Children’s Act states that: -

“Whenever a provision of this act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely - which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.”

[56] Section 9 of the Children’s Act states that: -

“In all matters concerning care, protection and well-being of a child the standard that the best interest is of paramount importance.”

[57] Section 36 of the Children’s Act states that: -

“If in any legal proceedings in which it is necessary to prove that any particular person is the father of a child born out of wedlock it is proved that the person had sexual intercourse with the mother of the child at any time that the child could have been conceived, in the absence of evidence to the contrary which raises a reasonable doubt, presumed to be the biological father of the child.”

[58] Section 37 of the Children’s Act states that: -

“If a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the

taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn the party of the effect which such refusal might have on the credibility of that party.”

Case Law

[59] The Constitutional Court stated in **S v S and Another**¹¹ that: -

“Any injustices, real or perceived, can be ameliorated in a number of ways. Rule 43 was not designed to resolve issues between divorce litigants for an extended period, but rather as an interim measure until all issues are properly ventilated at trial. The fact that rule 43 orders may be enforceable for longer periods than was initially anticipated, is the fault of the way divorces are handled, often by litigants and practitioners, rather than a deficiency in the rule itself.... Rule 43(6) provides litigants with an avenue to approach a court for a variation of its decision, on the same procedure, when there is “material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate”.

ANALYSIS

[60] The First Respondent conceded during argument that the order that was granted by the Honourable Justice Mushwana AJ was interlocutory in nature, however contended that despite this, the effect thereof is final. I cannot agree that the order directing the First Respondent to submit the minor child for a DNA test is final, because it does not bring an end to the main action between the parties. The same applies to the part of the order that directs the parties to submit proof of their marital status at the time of entering the alleged customary marriage. The effect of the order is like the effect of an application to compel in terms of Rule 35 of the Uniform Rules of Court; the fulfilment of such an order places the parties in a position to properly prepare for trial. The litigation will continue after the interlocutory

¹¹ [2019] ZACC 22.

order is complied with. The court order emanating from the divorce order will be a final order.

[61] The above should bring the application before the court to an end, with no further discussion required. The First Respondent has not brought a counterapplication in terms of Section 18 (2) of the Superior Courts Act before this court; however, it seems that she had intended to do so through her defence. The First Respondent suggests that the court can suspend the operation and execution of the order of 17 October 2025, if exceptional circumstances exist. The First Respondent contends that because the Applicant is a fugitive from justice, the court should not come to his aid. It is suggested that the Applicant cannot seek enforcement of the court order, because he has persistently obstructed the enforcement of other court orders.

[62] Section 34 of the Constitution guarantees everyone the right to access justice. Section 34 does not attach conditions or exceptions thereto. Even people that have been convicted in a criminal court have the right to access justice in terms of section 34. Whilst the Applicant's behaviour throughout the entire legal process might be questionable or frowned upon, it does not justify an infringement of his right to access justice in terms of section 34. For the First Respondent to limit the Applicant's right in terms of section 34, she would have to meet the high threshold of what is required under section 36 of the Constitution insofar as the limitation of the Applicant's right to access justice is concerned. The Respondent has not done this. The First Respondent did present this court with some authority to support her contention, however two of those authorities emanate from foreign jurisdictions and the other two are pre-Constitution and accordingly hold no weight to her argument.

[63] If the First Respondent had brought a counterapplication in terms of section 18 (2) and pleaded her fugitive from justice argument as the special circumstances envisaged by the section, the argument was unlikely to have succeeded.

[64] Hypothetically, if the court found that the order of 17 October 2025 was not interlocutory and that it was final in nature, and thus being compelled to go into the second leg of the inquiry, I am satisfied that there are exceptional circumstances to

declare the order operational and executable. I am also satisfied that, on a balance of probabilities, the Applicant will suffer irreparable harm if the order is refused, whilst the First Respondent will not.

[65] The minor child is the exceptional circumstance.

[66] The High Court is the upper guardian of all minor children, and the court has a duty to make orders in accordance with their best interests. Section 28 (2) of the Constitution and Section 9 of the Children's Act dictate that a child's best interests must be considered in all matters in which a child or children are involved. The First Respondent argued that the Rule 43 court already took the best interests of the child into account, and thus it was not necessary to do so in this application. This argument cannot be accepted because the relief sought from this court is completely different from the relief that sought in the Rule 43 court. The matters, whilst linked to one another, are separate and entail different legal arguments. The rights of the minor child remain relevant to the matter at hand and must be considered by this court.

[67] It is glaringly obvious that this level of litigation is not healthy for two people that are purportedly supposed to co-parent. It doesn't seem possible that these parties' relationship will ever be able to recover from the extravagant litigation. The parties have dug their heels into the ground and there is no indication from either of them that they intend to back off from each other in the legal sense. The parties' thirst for litigation has caused them to lose sight of what is important, specifically the minor child. The parties probably could have paid for the minor child's entire tertiary education with what they have spent on litigation thus far.

[68] It goes without saying that both the Applicant and the First Respondent have legal rights, however one must not allow the rights of the minor child to be lost in this legal warfare between the parties. The minor child is her own person with her own rights, which includes a right to know her genetic origins.

[69] The Applicant has a right to know whether the minor child is his biological daughter, however the minor child has a right to know her who her father is and where she comes from.

[70] As is clear from the international law, and more specifically the United Nations on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. A child has a right to know and be cared for by his or her parents. A child has a right to family relations. A child has a right not to be separated from his or her parents against his or her will. If a child is separated from one or both of his or her parents, he or she has a right to maintain personal relations with that parent he or she is separated from. The Constitution dictates that children have a right to parental care.

[71] What if the Applicant is not the minor child's father? If the Applicant is not the minor child's biological father, she is being prevented from knowing the identity of her real biological father, she is being separated from her biological father, she is being prevented from maintaining a relationship with that biological father, she is being denied the right to receiving parental care from that biological father.

[72] Section 36 read with Section 37 of the Children's Act implies that if there is reasonable doubt about the paternity of a child, a court may call for a DNA test to be conducted. The Applicant has produced scientific medical tests that suggest he was incapable of fathering the minor child. This does create reasonable doubt that he could have fathered the child. This reasonable doubt is enhanced by the fact that another man has brought proceedings in the Children's Court for contact with this child. One cannot accept the First Respondent's argument that because the child was during the marriage and that the First Respondent accepted the child means that there is a balance of probabilities that he is the biological father. The scientific evidence that the First Respondent is and was sterile at the time that the child was conceived tips the scales in his favour.

[73] The First Respondent suggests that Section 36 of the Children's Act should not be considered because it only relates to children being born out of wedlock, and this child was born of the marriage between the parties. The marriage between the

parties is in dispute and, depending on the findings of the divorce trial court, it could be that the child was born out of wedlock.

[74] Paternity is in dispute and will remain in dispute until a scientific based medical test ("DNA Test") has been conducted. The test will either confirm the Applicant's paternity, or it will prove that he is not the biological father. If the paternity test confirms that the Applicant is the biological father of the minor child, he will have to accept his duty to pay maintenance to his daughter. If the paternity test shows that the Applicant is not the minor child's biological father, the First Respondent will have to consider her rights and possibly amend her pleadings in the main action. One way or another, the results of the litigation will aid the parties in moving forward.

[75] The minor child is two years and two months old. She is at an age where she will not understand what a DNA test is. A DNA test is conducted, not by a blood test, but by obtaining a swab of sylvia from inside the child's mouth. The child will suffer no pain or discomfort. The child will not be traumatised and will not know that paternity is being disputed. If the paternity test shows that the Applicant is not the child's biological father, the child is young enough to still develop an actual and meaningful bond with her real father.

[76] The situation will be different in a few years' time. In a few years' time the minor child will be able to ask questions and may be able to understand what it means to dispute paternity. It is better that the DNA test is conducted at an age where the minor child cannot understand the process, before she can ask questions and receive answers that will cause her severe psychological damage. If the DNA test is delayed, it may possibly deprive the minor child of a relationship with her real father; it may be too late to develop an actual and meaningful bond with him.

[77] Whatever the result, the parties have a duty to handle the outcome responsibly insofar as the minor child is concerned. They must carefully consider what they will tell the minor child and handle it with absolute care, and with professional help if necessary.

[78] The Respondent has not given this court proper reasons as to why she refuses to submit the minor child to a DNA test and in terms of section 37 of the Children's Act, this brings into question her credibility. There is no logical reason to refuse to submit the minor child to the DNA test. The First Respondent is warned, in accordance with Section 37, that her continued refusal to submit the minor child for the DNA test is going to further bring her credibility into question.

[79] There is no evidence of any kind that the First Respondent will suffer any harm. It will not even cost her any money as the Applicant was directed in the order of the 17 October 2025 to cover the cost in relation thereto.

[80] The First Respondent will suffer irreparable harm if the order is not granted because: -

[80.1] The main action cannot move forward until the marriage status of the parties and paternity is confirmed. The Applicant's life will just hang in limbo, and he will not be able to move on with his life.

[80.2] The Applicant will continue to be liable to maintain the minor child and the First Respondent which may lead to financial hardship.

[80.3] The First Respondent remains at risk of being prosecuted criminally for his failure to maintain the minor child and the First Respondent. This would in turn affect his suitability to continue practising as a legal practitioner and could have dire consequences for his professional future.

[81] There is no legal basis on which this court can suspend the operation of the Rule 43 order. The only way the order can be varied or terminated is through Rule 43 (6) or by conclusion of the divorce. Depending on the results of the paternity test and discovery of the parties' marriage status, the Applicant will have to launch a Rule 43 (6) or take the necessary steps to bring the divorce to finality.

[82] Section 6 (4) read with section 7 (1) (n) of the Children's Act implies that all matters relating to children are urgent. This is especially so in this case because the longer the DNA is delayed, the greater the potential damage to the minor child. The

order by this court will minimise further legal and administrative proceedings in relation to the child, thereby acting in her best interests.

[83] It is in the interest of justice to bring this dispute to an end. The outcome of the paternity of the child and marital dispute will potentially lead to the settlement of all the other outstanding pending matters.

[84] I accordingly make the following order: -

1. That non-compliance with the forms, service and time periods prescribed in the Uniform Rules of Court and/or Directives are hereby condoned and the matter is accordingly accepted as urgent in terms of Rule 6 (12) of the Uniform Rules of Court.
2. That the provisions of section 18 (3) of the Superior Courts Act 10 of 2013 are hereby invoked and applied in respect of the order granted on 17 October 2025 by the Honourable Mushwana AJ.
3. That the order granted by the Honourable Mushwana AJ on 17 October 2025 is hereby declared operational and executable pending finalisation of the leave to appeal filed by the First Respondent and such further appeals processed which the First Respondent may in the future engage in arising from the aforesaid order of the Honourable Mushwana AJ.
4. That the First Respondent pays the Applicant's party and party costs in accordance with scale B.

**MADAM JUSTICE BURNETT
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION**

APPEARANCES

FOR THE APPLICANT: -

ADVOCATE TSHIGIDIMISA

INSTRUCTED BY: -

TALENI GODI KUPISO INC.

FOR THE FIRST RESPONDENT: -

ADV. NP MBHIZA

INSTRUCTED BY:-

NTSAKO PHYLLIS MBHIZA ATTORNEYS

DATE OF HEARING: - 11 NOVEMBER 2025

DATE OF JUDGMENT: - 17 NOVEMBER 2025