

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

Case Number: 220773/2025

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

B[...] N[...]

APPLICANT

AND

K[...] N[...]

RESPONDENT

JUDGMENT

This Judgment was handed down electronically and by circulation to the parties' legal representative by way of email and shall be uploaded on CaseLines. The date of the hand down is deemed to be on the **04 FEBRUARY 2026**.

MAKUME J:

INTRODUCTION

1. In this matter, the Applicant seeks an order on an urgent basis that the Respondent be directed to return the minor child of the parties' marriage S N[...] to the parties' matrimonial home.

BACKGROUND FACTS

2. The Applicant is employed as a Software Engineer at MultiChoice and lives at 2[...] P[...] Road, T[...] G [...], Johannesburg, which is the matrimonial home.
3. The Respondent is a self-employed beautician and currently lives at 1[...] S[...] Street, S [...], Johannesburg.
4. The parties married each other in community of property at Midrand on 27 August 2016. The minor child Sann was born out of the marriage relationship on 27 November 2020.
5. The marriage relationship has broken down and as a result on 14 July 2025, the respondent's attorney, Ms Shirish Kalian addressed a letter to the Applicant's attorney in which they indicated that their client, the Respondent has instructed them to proceed and file for a divorce. In the letter, the Applicant's attorneys were invited to engage in settlement discussions to, amongst others, deal with parental rights and responsibilities in respect of the minor child.
6. What follows thereafter was a series of correspondence exchanged between the attorneys which did not achieve any meaningful agreement, save for an agreement on the appointment of an expert who will do a comprehensive forensic investigation and recommendation regarding the best of the minor child.
7. On 10 November 2025, the Respondent was granted an interim protection order against the applicant, in terms of section 5(2) of the Domestic Violence Act 116 of 1998. In the order the applicant was prohibited from entering 1[...] S[...] Street, S [...], Johannesburg. The Applicant was also allowed to contact with the minor child, pending the outcome of the proceedings on the return date been 2 December 2025.
8. In the interim protection order the Respondent was granted the right to remove from the matrimonial home certain movable items. On 11 November 2025, the Respondent's attorneys

sent a letter to the Applicant's attorneys in which they informed them that the Respondent intends vacating the matrimonial home with the minor child.

9. On the morning of 12 November 2025, the Respondent arrived at the matrimonial home, accompanied by the police and had the Applicant served with the interim protection order. The Respondent thereafter left the common home with the minor child and took with her some movable assets.
10. The Respondent has since 12 November 2025 been living at 1[...] S[...] Street, S[...] with the minor child and has been joined by her parents who are both retired.
11. On 17 November 2025, the Applicant's attorneys served by email an unissued urgent application seeking the return of the minor child. The matter became opposed when the respondent filed her answering affidavit, whereafter the Applicant filed his reply.
12. This matter served before me on 20 November 2025, whereafter I granted an order and reserved reasons for the order. What follows hereunder are the reasons for my judgment and order.

ISSUES TO BE DECIDED

13. The following issues are in dispute and call for a decision and ruling from this Court they are:
 - 13.1 Is the application urgent?
 - 13.2 Has the applicant provided sufficient evidence in his founding affidavit, justifying the return of the minor child to him at this stage.
 - 13.3 What are the best interest of the minor child?
 - 13.4 What form of contact and access is suitable in the interim pending an expert report?

URGENCY

14. On a strict application of Rule 6(12) and taking into consideration that the Applicant was told as far as July 2025 that the Respondent intends vacating the matrimonial home with the minor child. I should have struck the matter from the urgent roll. However, it is common cause that issues involving the best interest of a minor child always remain urgent. It is on that basis that I exercised my discretion to allow the parties to deal with the merits of the application.

HAS THE APPLICANT PROVIDED SUFFICIENT EVIDENCE IN HIS
FOUNDING AFFIDAVIT TO JUSTIFY THE RETURN OF THE
MINOR CHILD TO THE MATRIMONIAL HOME

15. It is common cause that the parties have been living together since their marriage and the minor child was born during their stay together as a family. The marriage relationship has broken down, though none of them has commenced divorce proceedings at the time when the application was launched, otherwise this would have been an application for interim custody in terms of Rule 43 of the Uniform Rules of Court. Accordingly, what is key in this matter is not at this stage who is the best suited parent, rather, it is what is in the best interest of the minor child.

16. Section 7 of the Children's Act 38 of 2005 sets out in broad outline the factors to be taken into consideration when determining what is in the best interest of the minor child. It includes, amongst others the following:

- (a) The nature of the personal relationship between the child and the parents, or any specific parent.
- (b) The nature of the personal relationship between the child and any other caregiver.
- (c) The likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from both or either of the

parents.

- (d) The child's age, maturity, stage of development, gender and background.

17. The above list is not exhaustive, but gives a general guideline as to what should a Court take into consideration when dealing with the concept best interest of a child.
18. In paragraph 7 of the founding affidavit, the applicant says that if the minor child is not returned to him, then the child will, or is at risk of suffering irreparable emotion and/or psychological harm, as more fully set out hereunder. I have read through the lengthy founding affidavit and I have not been able to find any evidence supporting the applicant's fear.
19. There is evidence that the Respondent is leasing a three-bedroom house which she shares with the minor child and her now retired parents. There is no evidence to suggest that the Respondent and her parents are not able to look after the best interest of the child.
20. The Applicant is employed at MultiChoice and does not always work from home. On the other hand, the Respondent has always conducted her business as a beautician from the common home. This means that she is always at home with the child before and after school.
21. The Applicant on the other hand places reliance on domestic servants to look after the minor child. This is not the case with the Respondent. The Applicant at paragraph 17 alludes that:

"I employed a night nanny who works from 4PM until 9AM. Her role is complete care of the minor child. During this time, both the nanny and domestic helper are still in my employ and refuse to move with the Respondent."

22. What is strange is that the Applicant does not say what could be the reason for the domestic servants refusing to move to the place with the Respondent. The answer is not far, it is because he is the one who pays their salary, they owe allegiance to him. He does as he likes, even making them work right through the night, over 16 hours a day. It would also seem that both helpers are foreign immigrants who always live under the threat of been deported.
23. The Applicant has failed to demonstrate that the Respondent is not a suitable parent to look after the minor child. In his own words at paragraph 18 he says that they both work and take turns to take the minor child to school and collect him after school and they both spend time with him during the afternoon.
24. The Respondent in dealing with the relationship between the Applicant and the minor child says that prior to that notifying the Applicant about her intention to divorce, the Applicant had little to no regard for the minor child and left everything to the helpers.
25. The Applicant has failed to provide a realistic insight into the daily routine and needs of the minor child. This, in my view, demonstrates that it is the nanny and the domestic worker who carry out parental responsibilities over the minor child. It is therefore, not surprising that the two domestic workers have signed affidavits in which they make damning statements about the Respondent. For instance, Ms Clara Mwanosiko in her evidence attached to the Applicant's replying affidavit tells how the Respondent used to sneak out of the house at night and returned in the morning. This version which should have been known to the Applicant was never set out in the founding affidavit. It is new matter which cannot be allowed in reply without reasons. It is clear that the nanny is biased against the Respondent.
26. The helper, Ms Biyona Nkomazana is equally biased in her

affidavit, which is also a supporting affidavit to the Applicant's replying affidavit. She says that the Respondent has used abusive language calling the Applicant (pee brain). This information appears nowhere in the Applicant's founding affidavit. I find it difficult to believe that the Applicant would have chosen not to mention such statements. The domestic workers have clearly been schooled what to say. I do not believe what they say.

27. The applicant has made a bold statement to the effect that the minor child will suffer emotional and psychological harm if not returned to him. He has failed to set out what would cause this harm and why it will amount to psychological and emotional harm.

WHAT ARE THE BEST INTERESTS OF THE MINOR CHILD

28. The Applicant on his own version is not totally involved in the minor child's daily routine and relies on domestic servants.
29. The minor child is only five years old and has clearly bonded with the mother. One of the teachers confirmed in a letter that since July 2025, the minor child has displayed signs of separation anxiety during the morning school drop-off as the minor child battle to separate from the Respondent.
30. The Respondent's parents live with her and the minor child, thus building a close relationship with extended family members. This is in compliance with section 7(1)(f)(i) of the Children's Act which reads as follows:

“The need for the child to remain in the care of his or her parent family and extended family, and

(ii) to maintain a connection with his or her extended family, culture and tradition.”

31. De Vos AJ in the matter of *DM v CHP*, case number B6773/2023, Gauteng Division of the High Court Pretoria held on 4 January 2024, at paragraph 22 to 23 thereof writes as follows:

“22. Our courts have expressed itself on the need for stability in children’s lives. Our case law has recognised the importance of consistency in children’s lives, particularly those as young as the parties’ daughter. Children’s existing environment should not readily be disturbed and any unnecessary move should be discouraged and avoided on the ground of security and stability. A stable routine is universally determined to be in the interest of children, especially those of a young age.

23. Of course, the *status quo* is not allowed around and a court can interfere on an urgent basis to change the *status quo* on proper grounds. The court does not assume automatically that the return to the *status quo* sought by the Applicant is appropriate, purely because it was a *status quo*. Each case falls to be decided on its own particular facts.”

32. In the matter of *MK v MC* (15986/2016) (2018) ZAGPJHC 9 (29 January 2018) at paragraph 37, the court said the following:

“It would likewise be incorrect to categorically hold that because it is generally in the best interest of a child to

form a physical bond with and experience the love affection and care of both parents, that a parent that intends to relocate with the children to a different town or country is precluded from relocating.”

33. I am satisfied that the Respondent has taken the right decision to vacate the matrimonial home and remove the minor child from an environment where there was no longer love, instead, abuse and insults. The Respondent had to obtain a protection order, in order to protect the best interest of the minor child.

34. The Applicant has failed to make out a case for the return of the minor child. It is also commendable to note that in the Respondent’s draft order, the Applicant is afforded reasonable contact and access rights to the minor child, which this Court hopes the Applicant will exercise, well understanding that an expert report is still being awaited, which will finally make recommendations about the permanent primary care of the child.

35. In the result, the order that I granted on 25 November 2025 is attached hereto marked **Annexure A**.

MAKUME J

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant:

Adv Olwagen Meyer

Instructed by:

Joseph Sizzler Attorneys

For the Respondent:

Adv Andrew

Instructed by:

Shirish Kalian Attorneys.