

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

Case 2025-232707

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☒ / No ☐

Date: 27 February 2026

In the matter between:

P[...] **H[...]** **R[...]** **D[...]** **P[...]**

Applicant /
Respondent in reconvention

And

L[...] **D[...]** **P[...]**

Respondent /
Applicant in reconvention

JUDGMENT

DU PLESSIS J

Introduction

[1] The applicant, Mr d[...] P[...], launched a Rule 43 application at the end of November 2025 seeking, amongst other things, the primary residence of the youngest minor child, Z[...]. To this, the respondent, Ms d[...] P[...], launched an urgent counterapplication¹ based on events that occurred on 1 February 2026, seeking the immediate return of Z[...] to her care, a structured contact regime, interim maintenance, and a contribution towards her legal costs. The parties will be referred to as “the father” and “the mother”, for ease of reference.

¹ By utilizing the Rule 43 mechanism, in line with *Leppan v Leppan* 1988 (4) SA 455 (W).

[2] The parties were married in 2018, out of community of property with the exclusion of the accrual regime. There is one child born from the marriage, Z[...], now four years old. The mother has two other children born from a previous relationship, namely C[...] and P[...]. Both the children were adopted by Mr d[...] P[...] during the marriage. Since the parties' separation around January 2025, the two older children have remained primarily in their mother's care in the matrimonial home.

[3] Before me in the urgent family court, I was asked to decide whether the counterapplication ought to be entertained as urgent, and, pending the finalisation of the divorce action and the Rule 43 application, with which parent Z[...] should primarily reside and on what terms the parties should exercise care and contact. In my view, while piecemeal adjudication is not desirable, the maintenance claims and the contribution towards legal costs cannot be properly determined on the limited material placed before the court on an urgent basis, and those prayers will be postponed sine die for determination in the ordinary course.

Urgency

[4] The mother's case on urgency is that on 1 February 2026, the father, without any prior court order authorising such a change and with the Rule 43 pending to determine residency and contact, failed to return four-year-old Z[...] to her after a contact weekend. He thereafter retained him in his care. Being unrepresented at the time, she pursued various avenues, including approaching the South African Police Service for assistance and the Children's Court. When her employer learned of her predicament, they offered assistance in securing legal representation, and on 6 February 2026, her attorneys immediately sent letters demanding that the father return the child. When no undertaking was forthcoming, she launched the urgent application.

[5] The father disputes the urgency. He submits that the parties have been separated for approximately 13 months and that the mother's financial difficulties, on which she relies in support of urgency for maintenance, have existed for some time,

and there was also an implicit acknowledgement that these matters can be postponed sine die. He submits that there is thus a contradiction, which obviates urgency. He also states that he is not denying the mother contact with the child, his attorneys tendered contact on condition that the child be returned pending the Rule 43 hearing, and avers that the mother chose not to exercise the contact.

[6] It is so that matters concerning minor children are not automatically urgent and that urgency still needs to be established in terms of Rule 6(12). However, high conflict and uncertainty about a young child's primary residence and contact, which may have a long-lasting effect on a child's well-being, and the fact that one parent unilaterally altered the status quo,² caution a court to insist that the other parent wait for the ordinary motion roll.

[7] After the father refused to return the child to the mother, who had been caring for him for the past 13 months, the mother did what she could to secure his return. One should add that this is a father who took it upon himself not to return a four-year-old child to the parent who had always been his primary caregiver, despite correspondence from his attorneys indicating that he cannot keep the child on such a basis absent a court order.

[8] It is thus the combination of the unilateral self-help affecting a young child's residence and the ensuing uncertainty about care and contact that justifies this counterapplication to be entertained in the urgent court.

[9] As will be shown later, the financial issues, the child's care, and the father's refusal to return the child are interwoven. Insofar as those issues are relevant to this application, they will be addressed below.

Merits

Factual background

[10] The parties married in 2018, and Z[...] was born on 19 January 2022. C[...] (now 16) and P[...] (now 12) were born from the mother's earlier relationship and

² *B v B* 2008 4 SA 535 (W).

were adopted by the father in August 2022. The parties separated at the end of January 2025. Since the separation, the mother has remained in the former matrimonial home with the two older children, while the father moved approximately 5km away. There was an agreement that he would have Z[...] and C[...] every other weekend, and Z[...] for sleepover contact on Wednesdays.

[11] In November 2025, the father instituted divorce proceedings, accompanied by a Rule 43 application in which he initially proposed a shared residence regime under which all three children would alternate weekly between the parties, pending an investigation by the Office of the Family Advocate. He indicated that it is important for the siblings to grow up together.

[12] During December 2025, the father spent a substantial amount of time at the mother's home when exercising contact with the children. He then filed a supplementary affidavit with an amended Rule 43 notice on 4 February 2026, in which he avers that during this period he formed the view that the house was dirty and neglected, that the children were not properly cared for, and that there was insufficient food. He annexed photographs depicting, amongst other things, the overflowing refuse bin in the bathroom.

[13] The mother disputes that her home or her children were neglected. She acknowledges severe financial hardship, noting that her cupboards and fridge are empty and that she and her family survive on maize meal and handouts from family and neighbours. Sometimes the father brings groceries. She also admits that various accounts are overdue. She attributes this to the father's conduct in "working her out" of their joint business, stopping payment of a previously normal R25 000 per month, and the fact that the business no longer covers certain household expenses. She insists that despite their circumstances, the children have never gone to bed hungry. She does what she can to manage the situation.

[14] The parties do not agree about the events of the weekend of 30 January 2026 and 1 February 2026. On the father's version, Z[...] was distressed at the prospect of returning to the mother on Sunday evening and refused to go back. Because of these concerns, he retained the child in his care. On the mother's version, she

denies that Z[...] refused to return, and states that she is closely bonded with him in that he still sleeps with her, and alleges that when the teenage son tried to take Z[...] home with him, the father refused and even shoved him.

[15] The photographs annexed to the father's supplementary papers show rooms with toys lying around and, as mentioned before, an overflowing bathroom bin. At best, the house is cluttered, but on their own, they do not demonstrate that the children were being subjected to conditions of neglect or that the home was in a state so unsafe as to justify the unilateral removal pending a Rule 43 application of a four-year-old from what was his primary caregiver for the past year. Much of what is depicted in those photos is consistent with a modest household with three children, rather than the kind of squalor that might justify immediate intervention without recourse to court.

[16] The father acknowledges that he continues to pay certain expenses, including school fees and some household accounts, and says that when the mother asked for money for food, he would take her shopping. He earns approximately R30 000 per month and conducts business through a new entity after closing down the previous business, which had been registered in the mother's name. On his own version, he is financially more secure than the mother, who now works only one day a week for a modest amount.

Best interest of the child and the interim arrangement

[17] Section 7 of the Children's Act³ requires the court, when determining a child's best interest, to have regard to a range of factors, including the nature of the personal relationship between the child and each parent, the attitude of each parent towards the child, the capacity of each parent to provide for the child's needs, the likely effect on the child of any change in his circumstances, and the need for stability. In interim proceedings of this nature, the court does not make a final determination of residence and care but seeks to preserve or restore an arrangement that best serves the child's immediate welfare pending investigation.

³ 38 of 2005.

[18] It is clear from the papers that both parties love their children and that the father has been an involved parent to all three, including the adopted older children. It is also common cause that until 1 February 2026, Z[...]’s primary caregiver was the mother: she cared for him daily, he did not yet attend school, and he was used to co-sleeping with her.

[19] Against that backdrop, the father’s unilateral retention of Z[...] pending the Rule 43, in other words, without first seeking the appropriate relief from this court and without prior report from the Family Advocate or another professional, is concerning. Whatever concerns he had about the home environment and the mother’s difficulties could and should have been addressed through lawful channels already in place, including ensuring adequate financial support. On a human level, he could assist them.

[20] A further difficulty in the father’s position is that he raises concerns about conditions in the home. Yet, he does not attempt to remove or urgently protect the older children, who remained with the mother. If the home was as unfit as he suggests, the inconsistency of leaving the other two children in the same environment while only retaining the youngest child undermines his claim that the retention of Z[...] was motivated purely by welfare considerations.

[21] The father was already using Rule 43 as the proper mechanism to regulate interim care, contact, and maintenance pendente lite during the divorce. Despite that, he chose to bypass that process and resort to self-help by unilaterally retaining a four-year-old child. This weighs against the bona fides of his conduct and reinforces the need to restore the status quo ante.

[22] The mother’s financial situation is fragile, mainly due to the breakdown of the parties’ financial arrangements during the marriage and the father’s control and dissolution of the former joint business and its successor – issues that should be properly examined in the Rule 43 maintenance proceedings and ultimately at trial. Based on the material before me, I am not convinced that the mother is currently unable, in principle, to meet Z[...]’s daily needs. Financial hardship alone, when the

other parent has the means to assist without a court order, should not be lightly used as a reason to strip a primary caregiver of her role.

[23] The mother also raises some worrisome questions about the father's conduct towards the daughter. The father denies this and points out that the parties continued to socialise after separation on a relatively civil footing. I cannot make definite findings in this regard from the papers. I merely mention these concerns to indicate a well-founded need for a thorough, independent assessment of the family dynamics and each parent's functioning, and to ensure that all three children's voices are heard appropriately.

[24] Having regard to all the factors listed above, I am satisfied that it is in Z[...]s best interest that the status quo ante be restored as it was before the institution of these proceedings: he shall be returned to the primary care of the mother, with the father enjoying defined contact rights. This will limit the disruptive effect of unilateral change and allow the Family Advocate and a suitable expert to properly assess the family in circumstances that are not the product of self-help.

[25] At the same time, it is important that the order recognises the father's role in the relationship with all three children, and not to marginalise him. A generous contact regime can and should be fashioned that enables him to remain actively involved, while the expert assessment proceeds, and that allows the older children, in particular, some say in how their contact is structured, given their ages.

Expert assessment

[26] Both parties have, in principle, accepted the utility of an assessment by the Office of the Family Advocate. There are serious allegations on both sides that need not be spelt out in this judgment. For the benefit of the decision maker, a Family Advocate must meet and interview both parents and all three children to provide an informed, evidence-based evaluation of the family dynamics and recommendations regarding residence, care and contact, as well as any therapeutic interventions that may be indicated.

[27] As to the costs of the assessment, if any, on the papers before me, there is a stark disparity in income. The mother already bears the day-to-day expenses of the two older children, while the father has an income. Fairness, the need to ensure that the assessment proceeds without delay, and should there be costs involved, justify that the father bear the greater portion of the costs at this stage.

Maintenance and contribution

[28] The complex, fact-intensive and interwoven maintenance disputes cannot be fairly and properly adjudicated on the urgent roll based on the truncated affidavits presently before me. I considered it appropriate to confine this judgment and the order to the issues of care and contact and the appointment of an expert only. The maintenance and contribution aspects of Rule 43 must be postponed for determination on the ordinary family roll, where full papers can be filed and the parties' financial positions thoroughly explored.

Costs

[29] Both parties sought costs. Given that the maintenance aspects remain to be determined, it is appropriate that the costs of this urgent hearing be reserved for determination by the court that finally adjudicates the Rule 43 application or the divorce action.

Order

[30] The following order is made:

1. The issue of care and contact of the minor child Z[...] C[...] D[...] P[...] (born on 19 January 2022), is determined as a matter of urgency in terms of Rule 6(12).
2. Pending the final determination of the Rule 43 application and the divorce action between the parties, and subject to any further order of this court:
 - 2.1. Both parties shall retain their full parental rights and responsibilities towards the minor children, Z[...] C[...] D[...] P[...] (born on 19 January 2022), C[...] A[...] D[...] P[...] (born on 16 May 2009) and P[...] M[...] D[...] P[...] (born on 9 July 2013) (hereafter "the minor children") in terms of sections 18, 19 and 20 of the Children's Act 38 of 2005.

- 2.2. The minor children shall be in the respondent's primary care.
- 2.3. Z[...] C[...] d[...] P[...] shall immediately be returned to the respondent's care.
- 2.4. The applicant shall exercise reasonable rights of contact with Z[...], including, at minimum:
- 2.4.1. every alternate weekend from Friday at 16h00 to Sunday at 18h00 (starting the first weekend in March 2026). This will continue through school holidays, unless the respondent takes him away on holiday for a reasonable time;
 - 2.4.2. one mid-week contact visit per week, to be exercised on a day and at times to be agreed between the parties, failing agreement, on Wednesdays from 16h00 to Thursday 07h00;
 - 2.4.3. every alternative public holiday from 16h00 on the day prior to the holiday until 18h00 on the public holiday and every alternative long weekend from 16h00 on the first day of the long weekend until 18h00 on the last day of the long weekend;
 - 2.4.4. on Father's Day from 09h00 to 18h00, with the understanding that he will be with the applicant on Mother's day;
 - 2.4.5. on each child's birthday for at least three hours;
 - 2.4.6. on the applicant's birthday for at least three hours;
 - 2.4.7. reasonable telephonic and electronic contact.
- 2.5. C[...] A[...] D[...] P[...] is to accompany his brother on the weekends, but can elect whether he wants to join on the other days.
- 2.6. The applicant can exercise contact with P[...] M[...] D[...] P[...] when she agrees, including reasonable telephonic and electronic contact.
3. The parties shall exercise their respective contact rights in a manner that promotes the children's stability and emotional well-being and shall refrain from denigrating the other parent in the presence or hearing of the children.
4. The issues of interim maintenance and contribution towards the respondent's legal costs, as set out in the Rule 43 application, are postponed sine die for enrolment on the ordinary family court roll.
5. The Office of the Family Advocate is requested to investigate the circumstances of the minor children, namely C[...] A[...] D[...] P[...], P[...] M[...] D[...] P[...] and Z[...] C[...] D[...] P[...], and to file a report and

recommendations in this court regarding their primary residence, care and contact, including any concerns arising from the allegations relating to domestic violence and the daughter, and any therapeutic interventions that may be in the children's best interests:

5.1.interview both parents and all three children, namely C[...] A[...] D[...] P[...], P[...] M[...] D[...] P[...] and Z[...] C[...] D[...] P[...];

5.2.conduct such further collateral interviews and assessments as the Family Advocate deems necessary; and

5.3.prepare a report and recommendations to this court regarding the children's primary residence, care and contact, including any concerns arising from the allegations relating to domestic violence and the daughter, and any therapeutic interventions that may be in the children's best interests.

5.4.If there are any costs involved, they shall be borne 70% by the applicant (the father) and 30% by the respondent (the mother).

6. The costs of the urgent hearing on 24 February 2026 are reserved for determination by the court that finally adjudicates the Rule 43 application or the divorce action.

WJ du Plessis

Judge of the High Court Gauteng Division,
Johannesburg

Date of hearing: 24 February 2026

Date of judgment: 27 February 2026

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