

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 072294-2025

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

DATE

SIGNATURE

In the matter between:

MM

Applicant

and

T

Respondent

JUDGMENT

WENTZEL -THOMPSON J

Introduction

- [1] The applicant is M. The respondent is his estranged wife, T. They married in community of property on 6 January 2011. There are three children born of the marriage, namely a teenage boy, M, a teenage girl, K and a toddler, O, who is now approximately 13 months old.

- [2] The marriage deteriorated seriously during 2025 culminating in the applicant moving out of the matrimonial home and into rented accommodation, leaving the minor children at the matrimonial home with the applicant.
- [3] This application has as its genesis an application brought by the applicant for the primary care of the three minor children, including the youngest minor child, that was granted by du Plessis AJ on 23 February 2026. At the time that this Order was made, the respondent had not filed any opposing papers, she says because she could not afford legal representation.
- [4] Less than a month later, the applicant filed a supplementary affidavit and amended notice of motion dated 20 March 2026 in which he sought, *inter alia*, an Order that he and the children be permitted to return to the matrimonial home together with the long-time caregiver to the minor children, and simultaneously sought the ejectment of the applicant from the matrimonial home, who he says is self-supporting and well able to afford to obtain alternative accommodation for herself. This the applicant states is in the best interests of the minor children and invokes section 28(2) of the Constitution that makes the children's best interest paramount and is the rubric under which the application now before is brought.
- [5] The matter came before me after a number postponements granted by prior judges seized of the matter to afford the respondent an opportunity to obtain legal representation. When the matter came before me, the applicant again sought a postponement for the same reason. This was strenuously opposed by the applicant, who stated that these were simply delaying tactics and impressed upon me that it was now becoming urgent that he and the children be permitted to return to the matrimonial home. Of course, this was all prefaced on the basis that the Order making him the primary care giver of the minor children was now cast in stone, at least until the parties' divorce was finalised.
- [6] This notwithstanding, I granted the respondent an opportunity to finalise the steps that she satisfied me that she had already taken to secure legal representation; the only aspect being outstanding being the payment of the deposit to the attorney whose services she had already secured. This, the applicant stated she would pay the following day, which so happened to be the date she was due to

receive her salary. I thus stood the matter down to allow the respondent to demonstrate her *bona fide* intention to oppose the matter and instructed her to request her attorney to confirm payment of the deposit, which she did. I then granted a short postponement to afford her attorney an opportunity to prepare an opposing affidavit and heard the matter myself at the postponed hearing.

- [7] The parties paint a markedly different picture of the breakdown of the marriage. In his founding papers, the applicant alleges physical, emotional, psychological and economic abuse and reports that both parties obtained interim protection orders against the other following a violent argument that was the catalyst for him leaving the matrimonial home. These, the respondent says, were withdrawn by both parties on the suggestion of the applicant.
- [8] The respondent, on the other hand, paints a substantially happier picture of their marriage prior to the alleged infidelity that she accuses applicant of while she was pregnant with their youngest child. She stresses that the divorce summons was served on her when she was due to give birth to their youngest child and points out that the applicant did not attend the birth of this child. Indeed, it is correct that the summons was served on her the day that this child was born.
- [9] The respondent's case is that the applicant has historically been the financially dominant spouse who has traditionally paid most of the children's expenses and those relating to the household. She maintains that she has always been the primary caregiver of the minor children and ceased working for a period to enable her to look after the minor children. During this period, the respondent states that she became financially dependent upon the applicant, but has now returned to work as after the leaving the matrimonial home the applicant ceased supporting her. However, she stresses that she earns substantially less than the respondent and is thus unable to afford to obtain commensurate, alternative accommodation for herself, should she be required to leave the matrimonial home..
- [10] The respondent's stated intention is to obtain a variation of the Order made by du Plessis AJ and to seek primary residence of the minor children herself, including maintenance for the minor children by way of substantive application or counter-application. This application is, however, not presently before me as the

respondent's attorney indicated that in the limited time provided to the respondent to file an answering affidavit, she was only able to deal with the relief sought by the applicant in his amended notice of motion and supplementary affidavit.

Chronology

- [11] The parties separated in March 2025 and at the time of their separation, no longer shared the same bedroom.
- [12] The applicant left the matrimonial home on 3 May 2025 following violent confrontation between the parties during which the respondent, who accused the applicant of infidelity and wanted to engage with him regarding the state of their marriage (which he refused to do), grabbed a bedside lamp and hit the applicant over the head with it. The respondent states that the applicant voluntarily left the matrimonial home. She also states that this was a once off incident, borne out by extreme frustration caused by the respondent's persistent failure to engage with her regarding the status of their marriage.
- [13] Following the incident referred to above, both parties obtained protection orders against one another. The respondent points out that the counter-protection orders have subsequently been withdrawn by agreement between the parties. However, the applicant nevertheless relied extensively upon this history in the main Rule 43 papers before du Plessis AJ.
- [14] On 20 May 2025, the applicant instituted divorce proceedings. The respondent says this occurred during the final stages of her pregnancy the youngest child and that in fact the summons was served upon her on the day that she gave birth to her youngest child.
- [15] In June 2025 O was born. The applicant did not attend the birth and the respondent omitted his name from O's birth certificate. The respondent's explanation is that the omission occurred against the background of a dispute about the child's name and the applicant having questioned the child's paternity. The applicant explains that he had requested that the child be named after his late brother, which the respondent refused to do, taunting him by asking him why

he wished to name a child he did not even know he was the father of. DNA testing subsequently established that the applicant is indeed the father of the minor child.

- [16] On 23 January 2026, the applicant instituted the main Rule 43 application. Its ambit was considerably broader than the relief now sought. He sought a Family Advocate investigation, a division of responsibility for maintenance of the children, allocation of residential expenses, as well as primary residence of all three children with him pending the Family Advocate's recommendations. In addition, the applicant sought a defined contact regime for the respondent, and restrictions upon O leaving South Africa until his name appeared as her father on her birth certificate. The applicant also sought an order that the respondent retain the children on her comprehensive medical aid.
- [17] Under the proposed financial arrangement, the respondent was to provide food, lunchboxes, toiletries and groceries when the children were with her, while the applicant would meet the remaining children's expenses. Each spouse was ordinarily to bear the costs of the residence occupied by that spouse, although alternative relief was sought making the respondent liable for various expenses associated with the matrimonial home should she be permitted to remain in the matrimonial home.
- [18] The respondent did not deliver answering papers within the period stipulated in the original Rule 43 notice. Her explanation is that she could not afford effective legal representation at the time. In support of this contention, the respondent states that she had only recently returned to employment, had received no income during maternity leave and had incurred approximately R81,608 in debt to her employer for the continuation of certain employment benefits during her maternity leave. This amount she says is being deducted from her salary in equal monthly instalments in the amount of approximately R3000, which deductions will continue until December 2027.
- [19] On 23 February 2026, the matter came before Du Plessis AJ who did not finally dispose of the Rule 43 application but made an interim order awarding primary residence of all three children to the applicant, while fashioning and Order

affording the respondent structured alternate-weekend, weekday, holiday and electronic contact with the minor children.

[20] This order was made on an unopposed basis in the absence of any opposing affidavit having been filed by the respondent.

[21] However, it appears that despite no leave to defend having been entered and no answering affidavit filed on behalf of the respondent, on the day of the hearing before Plessis AJ, an advocate who had only recently been briefed and had not had an opportunity to read the papers appeared for the respondent. This advocate had apparently been secured at the last minute by the respondent's attorney who had represented her in the divorce action, but had withdrawn.

[22] The applicant's counsel informed me that on the instruction of du Plessis AJ, who wished to sort out the care arrangements for the minor children, he and the respondent's counsel drafted an Order to be granted by consent, affording the applicant primary care of the minor children, including the youngest child, on the basis that the respondent be afforded the opportunity to file opposing papers and that the applicant could file supplementary papers. The draft Order framed was recrafted by Du Plessis AJ, which Order was then handed down. The draft order originally prepared is not uploaded on Caselines and I am not able to compare it to the Order ultimately made by du Plessis AJ.

[23] It is significant to note that at the time that the matter came before du Plessis AJ, all three of the minor children were residing with the applicant and as such, the Order made awarding primary care of the children to the applicant represented an Order preserving the *status quo*. But it is important to note that this state of affairs had been extremely short-lived; and only existed following the arrest of the respondent at the instance of the applicant for breach of the protection order granted by the applicant against the respondent granted in September 2025. This Order, in the broadest of terms, precluded the respondent from denying the respondent access to the minor children. This is the protection order that the applicant obtained several months after the alleged assault by the respondent on the night that the applicant left the matrimonial home in May 2025; it is also the protection order that the respondent insists the applicant was supposed to have

withdrawn, following her agreement that they both withdraw the protection orders against each other at the applicant's instance.

- [24] Equally troubling is that the applicant involved the police which, despite his professed understanding that the best interests of the minor children is paramount; arresting their mother can never be in the minor children's best interests. This is particularly so as by this time, the parties had engaged the services of a private social worker to determine which parent ought to be afforded the primary care of the minor children who could have been approached as a parental co-ordinator to resolve the access dispute, as she had indeed done at the instance of the applicant when the elder children did not wish to spend Christmas with the applicant and preferred to spend Christmas with their mother.
- [25] This was not the first time that the applicant had involved the police in contact disputes. The applicant admits that he had resorted to police intervention to secure access to the minor children on several occasions; indeed he says that most of the applicant's visitation with the children was preceded by police intervention.
- [26] It also seems that this was also a course adopted by the respondent in seeking to enforce the protection order against the applicant in her favour that she obtained on 29 September 2025 based on the same incident that occurred on 3 May 2025, the date that the applicant left the matrimonial home. This, as I have said, is inimicable to with the best interests of the minor children.
- [27] The recommendations made by this private social worker are highly relevant, not only due to the circumstances under which she came to make her recommendations regarding the primary care and contact of the minor children, but the date upon which these recommendations were made: She was appointed in November 2025 at the instance of the applicant through his attorney to consider whether primary care of the children should be awarded to him, subject, of course to the best interests of the minor children. Pursuant to this instruction, the social worker interviewed the applicant and the two elder children and on 18 December 2026, delivered her report in which she recommended that shared residency of the two elder minor children was in their best interests. However, in view of the

tender age of the youngest child, the social worker recommended that her primary residency should be with the respondent, with the applicant being afforded increased contact to the youngest child over time.

[28] This shared residency arrangement had in fact been in place since December 2025, and it was pursuant to this shared residency arrangement that at the time that the applicant secured the arrest of the respondent, that two elder children were in the care of the applicant, but the youngest child was in the care of the respondent. Following the respondent's arrest, the minor child was also placed in the care of the applicant, and it was when this state of affairs existed that the applicant presented the *status quo* in the proceedings before du Plessis AJ as his *de facto* having the primary care of all three the minor children, even the youngest child, contrary to the express recommendations of the social worker that had been engaged by him. This, to me, is extremely concerning.

[29] It is now necessary to examine the circumstances under which the applicant secured the arrest of the respondent. The applicant states that following his vacation of the matrimonial home, the respondent persistently frustrated his access to the minor children. This cannot be disputed. From the social worker's report, it appears that the elder daughter admitted that the respondent would make up excuses for the applicant not having access to them, which were sometimes not true.

[30] This pattern of behaviour caused the applicant's attorney to propose that a private social worker be engaged to determine what care and contact arrangements would be in the best interests of the minor children, who was ultimately engaged by the applicant's attorney on 7 November 2025; however, the respondent did not co-operate with the investigation and was not interviewed by the social worker.

[31] On 18 December 2025, the social worker delivered her report recommending shared parenting of the two elder children, with primary residence of the youngest child being provided to the respondent as aforementioned. The applicant claims this was merely an interim report but there is no indication of this in the report or in the recommendations made. The word "*interim*" simply does not appear in the

report; nor is there any indication that she intended to conduct further interviews during January 2026, as claimed by the applicant in his founding affidavit. What the applicant states is that the social worker delivered an interim report on 13 December 2026. However, the difficulty he faces is that this is not the report that he, himself attached to his founding affidavit; this was a report dated 18 December 2026 that was patently a final report. The so-called “*interim report*” was not attached.

[32] The applicant admits that during December 2025, this access arrangement was implemented, yet the applicant states that the respondent persisted in frustrating his access.

[33] On 17 January 2026, the respondent was taken into police custody as a result of her alleged violation of the applicant’s protection order that had been granted on 7 August 2025. This had followed a dispute between the parties as to whether or not the applicant could have access to the youngest child on his birthday (round 13 or 14 January 2026) that was refused by the respondent, purportedly due to short notice. As it turns out, and unbeknown to the applicant at the time, the respondent was in Cape Town for work on the day of the applicant’s birthday, and the minor child was staying with her mother or other relative.

[34] Following the arrest of the respondent for repeatedly breaching his protection order, the youngest child was placed in the care of the applicant. As I have said, he already had the elder children staying with him at this time pursuant to the shared contact arrangement.

[35] Less than one week later, on 23 January 2026, the applicant brought the main Rule 43 application seeking an Order that the primary residence of the minor children be awarded to him. In the applicant’s counsel’s practice note he admits that “*the set down of the Rule 43 hearing was done fairly urgently and the hearing is expected to bring clarity and legal certainty with respect to the care, contact, access and maintenance of the minor children.*”

[36] There was absolutely no basis for such urgency. The parties already had a shared residency arrangement in place with regard to the older children, with it being recommended that the primary care of the youngest child being given to the

respondent. It is evident from the sequence of events that the applicant seized the opportunity to seek primary care of the minor children once he had secured that all three of them be placed in his care following the arrest of the respondent. In so doing, he went against the recommendations of the social worker he had requested be appointed and who had expressly been requested to consider whether the primary care of the three minor children should be awarded to him. There was thus no need” *to bring clarity and legal certainty with respect to the care, contact, access and maintenance of the minor children.*”

[37] In the applicant’s practice note, it was expressly pointed out that the respondent was not represented. It was recorded that the applicant had issued summons on 20 May 2025, and that on 14 August 2025, the respondent had filed her plea, to which the respondent had replicated. After the applicant had obtained a protection order against the respondent, the respondent appointed new attorneys of record. Whether this was because the protection order had been granted is not clear. However, on 7 November 2025, these new attorneys withdrew as the respondent’s attorneys of record. Thus at the time that the main Rule 43 proceedings were brought, the respondent was self-represented. The respondent thus did not have legal representation at hand to assist her in filing an answering affidavit to respond to the Rule 43 proceedings prior to the hearing.

[38] Following the appearance of counsel on her behalf (who was not familiar with the matter), the respondent was afforded 10 days to answer the applicant’s application, but was order to pay the costs.

The social worker’s report

[39] It is reported in the social worker’s report that the applicant sought primary residence of the minor children on the basis of ongoing difficulties he stated he experienced in exercising contact with the children. He complained that he was only permitted to have contact with their youngest child at the matrimonial home as the respondent refused to express her breast milk.

[40] The elder boy reported that his father, a maxilla facial and dental surgeon, worked long hours and was not available to care for them. He thus expressed the preference to reside with his mother. He indicated that his mother worked flexible

hours and was able to work virtually. He further indicated that when their carer was off duty, he was required to assist in looking after his baby sister.

[41] After it was explained to him by the social worker that she wished the children to maintain contact with both of their parents, he then indicated that his parents had cared for him equally and wanted to see both parents equally; he revealingly added that then *“his parents will not feel like he loves one parent less.”* This is a red flag as children should never have to feel that they need to choose between their parents. It was with this in mind that his stated preference thus became that of shared residence.

[42] The elder daughter did not express a preference to stay with either parent and felt that they both cared for her equally. She also did not want her parents to feel like she loved the one more than the other. Sadly, she also believed that her parents wanted her to choose between them, which she did not want to do. She admitted that her mother was resisting them seeing their father and made up excuses for their not being able to see their father.

[43] What concerns me about the social worker’s report is that that she reports that K *“was asked of her feelings should the Court decide, she and her brother and baby sister should remain with her father and visit her mother, she informed it will be fine because her father takes her to school. She voiced that she will be sad because she will miss her mother..... She was asked if the arrangement could be changed and she be placed in her mother’s care. She informed that she will still miss her father and she would be worried who will take them to school.”* These questions were asked by the social worker in the order she did, knowing that the applicant sought to have the primary care of the children awarded to him and she had not interviewed the respondent.

[44] But it must be said in the social worker’s defence, K’s responses promoted her to ask K about what she thought of shared residency and it is reported that she said *“she would be comfortable with one week with each parent.”*

[45] It is also significant that the social worker went to visit the applicant’s rental accommodation that she found to have three bedrooms, one for each of the

children and a main bedroom with its own bathroom. She recorded that there is another bathroom that could be shared by the children.

[46] Ultimately the social worker concluded from her interaction with the two elder children that, *“it was very apparent that the minor children have a remarkable relationship with their father”*, but did not comment at all about their relationship with their mother, despite what she reported from her interviews with the older children referred to by me above.

[47] In the end, she suggested that shared residence would be the best viable option for the elder children, but recommended that the primary care of the youngest child be given to the respondent, with phased in contact between the applicant and the then infant child, with eventual sleepovers once a week with the caregiver’s support. She recommended that the parties share the carer during the week that they had the elder children and that the carer assist when the applicant had access to the younger child.

[48] She concluded:

“It is recommended that the Court endorse shared residence for M and K, phased in contact for O, and co holding of parental rights by both parties. These arrangements will safeguard the children’s physical, emotional, and developmental needs, ensuring meaningful relationships with both parents despite marital conflict.”

[49] Despite this, Du Plessis AJ did not implement the shared residency arrangement that had been recommended and awarded primary residence of all three children to the applicant, stipulating in some detail the contact to which the respondent would be entitled with the children.

The case presented to du Plessis AJ

[50] It is necessary to fully consider the case on behalf of the applicant presented to Du Plessis J that persuaded him to grant the applicant primary residence of the children, including the infant, on an interim basis. This order was made by Du Plessis AJ knowing that the respondent had been granted the opportunity to file

an answering affidavit that may change the landscape. It was also not made subject to an investigation by the Family Advocate, although this had been an Order expressly sought by the applicant.

The terms of the notice of motion of the initial Rule 43 application

[51] In terms of the notice of motion, the applicant originally sought that:

- “1. The Office of the Family Advocate, Johannesburg (OFA), is ordered to institute an enquiry and compile a report, with recommendations, into the issue of parental responsibilities and rights in respect of contact and primary residence for the respondent and the minor children;
2. Pendent lite; the respondent to maintain the minor children by providing all of the minor children’s food, lunch boxes, toiletries and groceries and related household needs when the minor children are with the Respondent;
3. The Applicant to take care of all the remaining maintenance needs and requirements of the minor children except what is listed in Prayer (2) above.
4. Each party to pay the costs in respect of the maintenance of the residence they occupy, including any rental expenses or bond costs, rates and taxes, water and electricity as well as levies as may be applicable. ALTERNATIVELY, that the Respondent is ordered to pay the following expenses incurred in respect of the erstwhile matrimonial home: gardening service, water, electricity and gas, swimming pool, plumbing, roof repairs, removal of beehive from chimney, waterproofing and general maintenance of the infrastructure of the matrimonial home.
5. The respondent to continue to pay the costs to retain the minor children on a comprehensive medical aid scheme and the Applicant to be responsible for any excess medical expenses not covered and paid for by the aforesaid medical aid;
6. Pendente lite, and further pending the recommendations of the Office of the Family Advocate, Johannesburg (“OFA”), the primary residence of all three minor children to be awarded to the Applicant.
7. Pending the recommendation of the OFA, the respondent to contact with the minor children, being;
 - 7.1. Daily telephonic contact including WhatsApp video calls between 18h00 and 20h00;
 - 7.2. Weekend sleepover contact, every alternative weekend, the respondent to collect the minor children from school on Fridays and drop the minor children off at school on Monday morning. The

respondent will collect O from the applicant's residence and return O to the Applicant's residence;

7.3 *All school holidays to be equally shared between the Applicant and the Respondent, and Public Holiday to be alternated between the parties with the first of each of these holidays [after the granting of the Order] to be with the Respondent.*

8. *Pending the inclusion of the applicant's name on O's birth certificate, the respondent shall not be permitted to enter and exit the Republic of South Africa with O.*

9. *Further and/or alternative relief as the Court may deem fit."*

[52] For the purposes of the issues now under consideration, it is the underlined portion of the relief sought that is important: The relief claimed in the notice of motion was unequivocal. It was framed such that pending the Family Advocate's recommendation, primary residence of all three children was to vest in the applicant, with the respondent receiving alternate-weekend contact, limited weekday/electronic contact and shared holiday contact.

[53] O, despite her tender age was expressly included, it being suggested that the respondent would collect the infant from, and return her to, the applicant's residence for alternate-weekend contact.

The applicant's counsel's practice note

[54] Practice notes perform an important function in assisting judges to get to grips with the material facts and the essential issues before them. There can be no doubt that they colour the way in which the matter before them is approached, particularly when faced with a lengthy roll with extensive papers to read. Although Rule 43 proceedings are supposed to be expeditious, the applicant's founding affidavit was 47 pages, contained 55 annexures, and in total comprised 421 pages.

[55] It is of fundamental concern to me that in the applicant's counsel's practice note prior to the hearing before Du Plessis AJ, he disclosed that the social worker had recommended that the parties "*have a shared residency regime for purposes of contact to the minor children*", although this did not apply to the youngest child. It was further recorded that "[t]he applicant has been exercising equal alternating

contact with the children, despite the respondent's unwillingness." Again, no distinction was made with regard to the primary care of the youngest child, that it had been recommended be awarded to the respondent. Had the court's attention been directed to this, du Plessis AJ, who was seized of the matter, may well not have awarded primary residence to the applicant of the minor child.

[56] What the Court was further told in the practice note was that:

"On 17 January 2026, the respondent was taken into police custody as a result of her violation of the applicant's protection order in so far as her refusing the applicant contact with the children. Since her arrest the children have remained in the applicant's care."

[57] It was in these circumstances that it was presented to du Plessis AJ that the *status quo* was one in which all three children now primarily resided with the applicant.

[58] During the hearing before me, when asked on what basis du Plessis AJ had granted primary care to the applicant, I was told by counsel for the applicant that this had been on the basis of the social worker's report attached to the Rule 43 application and her interviews with the children. Neither the report nor the interviews with the children suggested that primary care should be with the applicant.

[59] I have perused the protection order granted in favour of the applicant. It precluded, *inter alia*, that the respondent commit "*any of the following acts, to wit Refuse Applicant to have access to the children.*" This Order was granted on 12 May 2026, before the youngest child was even born. It is also framed in overly broad terms, making no grounds at all for reasonably refusing access to the minor children, not the least of which that it would have applied to the minor child who would have been only 3 months old when the protection order was confirmed on 7 August 2026. Its effect would have been to grant the applicant to the then infant who was being breast fed by the respondent. It was also made when, as far as I am aware, there was no formal or agreed contact arrangement in place against which the respondent's breach was to be measured and none was attached to the order made.

The case made out in the founding affidavit before du Plessis AJ

- [60] The applicant says that the parties' attorneys had agreed upon the appointment of a private social worker because there was no agreed parenting regime after he left the matrimonial home. He says efforts were made to secure the respondent's cooperation with the assessment process, to no avail. Nevertheless he alleges that on 11 December 2025, the social worker delivered a preliminary report in which she "*recommended that all the minor children be in a shared residence between the respondent and I*" on a weekly rotational basis.
- [61] As I have said, the report annexed to his founding affidavit, is dated 18 December 2025, and must thus be the final report, in which the same recommendation was made. However, the applicant still stated that further interviews were arranged for January 2026 and that a further report was contemplated but was not available when his affidavit was prepared. To this day, no such further report has been prepared.
- [62] Accordingly, there can be no suggestion that the applicant's prayer for primary-residence in his notice of motion simply sought to regulate the contact and care arrangements that implemented the professional recommendation of the social worker that the parties had appointed; on the contrary, it did the opposite. Indeed, the applicant jettisoned the expertise of the social worker engaged by the parties in favour of a family advocate investigation, which it is assumed he hopes will render the current state of affairs permanent.
- [63] What is readily apparent that by the stage that the Family Advocate's investigation by the social worker is completed, the children will all have been residing with the applicant for a period in excess of six months and the *status quo* that the applicant achieved following the arrest of the respondent will be all but cemented. This is at considerable prejudice to the respondent.
- [64] In his founding affidavit, the applicant's central theme was that, notwithstanding the shared-residence recommendation, the respondent was not capable or willing to implement genuine shared parenting. He alleged that the respondent repeatedly "*gatekept*" the children, frustrated his access and he required police intervention before he could exercise contact to the children. He described failed

attempts to collect the children for the social-worker assessment, the respondent driving away with them when he arrived at the matrimonial home, and his subsequent resort to police intervention. Thus his case was essentially that the shared-residence recommendation presupposed a level of parental cooperation which, on his version, did not exist.

[65] However, the applicant admits that during the December holiday, he nevertheless managed to exercise substantially equal shared contact with the children, but that this was achieved despite obstruction by the respondent and, on occasion, with police intervention. His specific complaint was that his contact with O remained curtailed, even while the older children moved between the parents. The curtailment of his contact with O was not intended to mirror that of the elder children and was curtailed in accordance with the social worker's recommendation; it was not recommended that she also move weekly between her parents. This was only contemplated in phase 3 when she was between 12 and 24 months. In December 2026 she would only have been six months old.

[66] I have already expressed the view that the solution was not to abandon the shared residence and make the applicant the parent the primary caregiver of the children, it was rather to seek the assistance of the social worker already engaged by the parties or to appoint a parental co-ordinator to deal with contact disputes between the parties. Indeed, the applicant claims that the respondent repeatedly involved the police in parenting disputes (as he did), indicating all the more keenly the need for a parental coordinator to regulate disputes regarding contact and care arrangements.

[67] Added to his complaint that the respondent persistently obstructed his access to the minor children, the applicant sought to paint the respondent in a particularly serious light, alluding to her assault of him, including pictures of his injuries and insisting that he required a protection order against her, that she persistently disregarded.

[68] The applicant also painted the respondent as a flight risk and stated that he feared that so long as his name did not appear on the youngest child's birth certificate, she may take her outside of the jurisdiction of the court, as she had done when

taking the children to visit her family in Lesotho on 20 December 2025 without his knowledge and consent. There is no dispute that the applicant returned to South Africa with all three children after this visit.

[69] It was, however, on this basis that the applicant coupled his original Rule 43 primary-residence prayer with an order prohibiting the respondent from taking O out of South Africa pending inclusion of his name on her birth certificate.

[70] The applicant also averred that the factual position concerning the infant had changed dramatically shortly before the application. He did not even seek to argue that a then approximately seven-month-old child should primarily reside with her father; instead, his case was that this was a *fait accompli* which had arisen shortly before the Rule 43 application following the arrest of the respondent on 17 January 2026.

[71] The applicant says that since then:

"I have since been living with all the three minor children and [the carer] at my residence."

[72] I have already said that this in my view was opportunistic as this had been a *status quo* engineered by the applicant that had existed for less than one week at the time that he launched his application for primary residence. Nevertheless, this became an important component of the applicant's argument before Du Plessis AJ for preserving the *status quo pendente lite*.

[73] The applicant, however, appreciated that primary residence of an infant with a father instead of the mother called for specific justification. Thus, immediately after saying that all three children had been living with him following the respondent's arrest, he stated that there had been "*no difficulties with the baby*" because he had a relationship with her and because she was very fond of the "*nanny*". He added that O had been on solid food from approximately four months and described the foods she ate, obviously to deal with the fact that admittedly at this stage, the baby was still being breast fed by the respondent.

[74] The applicant relied heavily on the fact that the carer, who had worked for him (in reality the parties) for approximately 18 years and had helped raise all three

children, had been fired by the respondent on 13 January 2026 (he says contrary to the best interests of the children) and now worked for him. He thus leveraged this fact to stress that the carer was thus available to look after the children while they resided with him. He did not deal with the fact that the social worker had proposed that the carer move together with the children to facilitate the shared residency arrangement and the applicant's contact with the infant.

[75] This, however, does not refute the implicit proposition that the infant was still at the time that she was placed in the primary care of the applicant, necessarily dependent upon her mother for her day-to-day care. There is also an unwritten rule that ordinarily a child of such young age should not be separated from her mother, unless there are exceptional circumstances.

[76] There is, however, no evidence before the Court that following her arrest the respondent had been placed in custody, denied bail or had been sentenced to a prison term, preventing her from being able to continue the shared residency arrangement with the older children that had already been implemented, or preventing her exercising primary care over the infant.

[77] The applicant also sought to portray the respondent as unable to provide stable care for O. The applicant first alleged that the respondent had indicated an intention to take O to Lesotho. He contended that sending the child there would remove her from both parents and from her carer. He also, without any basis, suggested that the respondent may be intent on abducting O, pointing out that international child-abduction proceedings would be expensive and emotionally draining and that it was better to prevent the risk than litigate afterwards.

[78] The applicant then sought to further leverage the Lesotho trip to bolster his case by then claiming that the respondent had expressed a desire to send O to Lesotho because she was unable to care for her without assistance. This was stated notwithstanding that the Lesotho trip took place in December 2025, and on his own version, the respondent only terminated their care's services on 13 January 2026; she had throughout the marriage and both in the case of the elder children and the infant, had domestic assistance to help her with caring for the children.

[79] And if this was not enough, the applicant coupled this claim that the respondent had admitted her inability to care for the infant without assistance with a wider allegation that the respondent was unable adequately to meet the children's emotional needs. He concluded that stability required that the court award primary residence of the children to him. This was said in the face of the clear indication in the social workers report attached to his papers that the children had a good relationship with both parents and at no stage had expressed a view that the respondent was unavailable to them as a mother.

[80] This was all advanced by the applicant to provide justification for his claim that it was in the children's best interests that the social worker's shared residence recommendation not be followed and that the primary residence of the children be granted to him.

[81] However, while relying upon the practical functioning of shared contact with the older children during the December 2025 holiday, and upon their established relationships with both parents, the applicant nevertheless concedes that the older children wished to spend Christmas with their mother. He says that it was only following the social-worker's intervention, that they both exercised approximately equal alternating contact to the older children during this period. This was but a month before he maintained that it would be in in their best interests that the elder children and the infant reside primarily with him.

[82] But the fact that the applicant sought the social worker's intervention serves only to bolster my view that the respondent's obstruction of his rights of access to the minor children could readily have been resolved through the social worker's intervention. Indeed this had already proved a fruitful avenue of dispute when the children themselves had not wanted to follow the prescribed shared residency arrangements. This establishes that there was absolutely no need for the applicant to seek primary residence.

[83] The principal issues that occurred after the submission of the social worker's report relied upon by the applicant justifying the award of primary residence to him were the Lesotho trip, further conflict over access, the dismissal of the children's carer by the respondent, certain incidents at the school, the

respondent's arrest on 17 January 2026, and the fact that the three children thereafter came to live with him. This notwithstanding, nowhere does the applicant state that he presented these additional facts to the social worker and that in light of them, she had reconsidered her recommendation and now supported primary residence with him. Nor does he identify any professional opinion specifically recommending that a then seven-month-old infant should reside primarily with him rather than respondent, apart from the fact that the children's carer now worked for him.

[84] The applicant fails entirely to explain how relegating the children's care to their carer while he works long hours and, apart from driving the children some seven kilometres to school, is in the children's best interests, particularly where the respondent's job enables her to work online from home as reported to the social worker by the eldest child as a reason to reside with his mother.

[85] It is against this background that it is necessary to consider the Order made by du Plessis AJ.

The terms of the Order made by du Plessis AJ:

[86] Du Plessis AJ's Order was also framed in interim terms. The material terms of his Order for present purposes are as follows:

- "1. *The Rule 43 application is postponed sine die.*
2. *Pending the postponed hearing, and until varied by this court, the following shall operate as an interim order:*
 - 2.1 *All three minor children shall reside primarily with the applicant.*
 - 2.2 *The respondent shall be entitled to weekend contact with the three children on every alternate weekend, from after school on Friday (or 14h00 if it is not a school day) until the commencement of school on Monday, or 08h00 if it is not a school day. This arrangement will commence on the weekend of 27 February 2026, with the respondent having weekend contact that weekend.*
 - 2.3 *In addition the respondent shall be entitled every week, on Wednesdays and Tuesdays to collect the school going children from school and O from the applicant's residence after the other children's school, and exercise contact to them until 18h00 on*

each of those days, when she shall return them to the applicant's residence.

2.4. ...

2.5. ...

2.6. *During school holidays, the following shall apply, unless the parties agree otherwise in writing:*

2.6.1. *For each school holiday except the December holidays, the respondent shall be entitled to contact with the children for one half of the holiday period, to be exercised in a continuous block. This arrangement shall commence from the March/April 2026 school holidays, with the respondent being entitled to the first half of those holidays; thereafter, the parties shall alternate, so that the applicant will be entitled to the first half of the next school holiday (i.e. the June 2026 holidays), and so on.*

2.6.2 *For the December/January school holiday, the holiday shall be divided into two reasonably equal periods, one of which include Christmas and the other New Year; the parties shall alternate these periods annually, with the applicant having the Christmas period in even- numbered years and the respondent in odd-numbered years.*

2.6.3 ...

2.6.4. ...

2.6.5. ...

2.7. ...

2.8 *The respondent shall be entitled to reasonable electronic contact (voice and video calls, WhatsApp messages) with the children daily between 15h00 and 20h00, provided this does not unreasonably interfere with homework, extramural activities or bedtime.*

2.9. ...

2.10. ...

2.11 *Pending the postponed hearing, neither party shall remove the minor children from the Republic of South Africa, unless the other party agrees to the removal in writing.*

2.12. *The respondent is to pay the wasted costs for today's postponement."*

[87] The underlined portion also indicates that du Plessis AJ contemplated that his Order would only operate on an interim basis and until varied by the Court. However, despite it being expressly requested by the applicant, du Plessis AJ did not render his Order granting primary residence to the applicant operable pending an investigation by the Family Advocate. I can only assume that this must have been an omission. At no time during argument before me did the applicant's counsel suggest that an investigation should not be conducted by the family advocate.

[88] The respondent's midweek access to the minor children is rendered utterly nugatory as she now works full time, albeit mainly from home, and is required to work until 17h00. The access afforded to her by du Plessis AJ required her to return the children to the applicant's residence by 18h00. This has made it completely impracticable for her to fetch the elder children from school, fetch the youngest child afterwards from the applicant's residence, take them back to her house and then return to the applicant. Yet, in supplementary affidavit, the applicant paints her as a disinterested mother who does not even bother to exercise her midweek access to the minor children.

[89] I think the critical question for assessing the order subsequently made by Du Plessis AJ is not simply whether the applicant alleged enough concerning the respondent's conduct to justify his granting primary residence to the him; it is whether, in the absence of opposition and only six days after the respondent's arrest and the placement of all three children into the applicant's care, there was a sufficient basis to depart from an existing professional recommendation of shared residence of the older children and primary residence of the infant to the respondent, without first obtaining the contemplated further professional assessment by the Family Advocate, that the applicant had, himself, requested.

[90] And even this should have been called into question, as the social worker engaged by the applicant's attorneys had little more than a month prior to the application, recommended shared residence and had been called in to ensure this happened, notwithstanding the elder children's resistance.

[91] Had du Plessis AJ had the respondent's views and version of events before him that is now before me, I cannot accept that he would have made the Order that he did.

[92] Although du Plessis JA's order may not be appealed, it may be varied by the Court; a fact made part of the Order itself. Such an application, however, is not before me.

[93] But what need not be before me is whether or not I should properly require that the Family Advocate's Office fully investigate the question of care and contact to the minor children having regard to the best interests of the minor children. This is relief that the applicant himself sought and he has no objection to my ordering.

[94] As the Upper Guardian of the minor children it is also incumbent upon me to Order that such an investigation take place as a matter of urgency and I have the independent discretion to do so should I believe that it is in the best interests of the minor children, which I do. In my view, the court needs to consider whether or not the Order made by du Plessis AJ, without the benefit of the respondent's answering affidavit and a full investigation by the Office of the Family Advocate should be varied. Such an investigation needs to be conducted urgently as now six months have elapsed since du Plessis AJ made his Order and the longer the delays, the more entrenched the current care and contact arrangement becomes to the prejudice of the respondent, who is entitled to be heard before the current arrangement is rendered permanent.

[95] It is against this backdrop that the applicant's supplementary relief set out in his amended notice of motion to return to the matrimonial home should be evaluated.

The supplementary relief sought in the application before me

[96] Less than a month after securing du Plessis JA's Order in his favour, the applicant sought to amend his notice of motion and filed a supplementary affidavit now seeking to return to the matrimonial home with the children and their carer and ejecting the respondent from the matrimonial home. He did not seek that the Family Advocate investigate prior to this drastic step being taken, but rather that their investigation now merely precede the final divorce of the parties, it being

taken as a *fait accompli* that until this time, the primary residency Order made by du Plessis AJ would continue to apply and was, for all intents and purposes now “cast in stone.”

[97] This is contrary to the relief the applicant himself sought in his original notice of motion. There he had made plain that, pending the recommendations of the Family Advocate, the primary residency of all three minor children be awarded to him. He is yet to refer the matter to the Family Advocate for investigation. And the longer he delays, the more entrenched the *status quo* becomes to the detriment of the respondent.

The amended notice of motion and supplementary affidavit deposed to by the applicant

[98] On 20 March 2026, the applicant filed his amended notice of motion and supplementary affidavit. In his supplementary affidavit the applicant seeks an Order that the respondent vacate the matrimonial home and that he be permitted to return to the matrimonial home together with the children and their carer. This is all premised on the basis of the best interests of the children, and without any regard at all to the respondent’s *sui generis* rights to remain in the matrimonial home while their marriage still subsists, and without any Family Advocate investigation confirming that it is indeed in the children’s best interests that the children primarily reside with him.

[99] The supplementary relief sought in terms of the amended notice of motion comprises four substantive components, all of which are prefaced on the basis that *pendente lite* (that is pending the finalisation of the divorce proceedings) the minor children will continue to reside with the applicant and that this should continue after the divorce, subject to the recommendations of the Family Advocate.

[100] Having regard to this degree of permanence that it is now envisaged by the applicant that his primary residence will now be afforded, the applicant now maintains that it is now appropriate that the respondent be ordered to:

- a. deliver to the applicant all of the children’s original documents, including their immunisation cards and the like;

- b. provide the requisite authority concerning the amendment/standardisation of official documents, particularly to secure the insertion of the applicant as O's father on her birth certificate; and
- c. obtain alternative accommodation at her own expense to allow the reoccupation of the matrimonial home by the applicant, the three children and their carer, alternatively, an order making the respondent solely liable for all costs associated with the matrimonial home.

[101] The applicant's alternative relief is telling: Whereas he maintains that the return of the children to the matrimonial home is in their best interests, if this is not to be granted, he has made it plain that he will no longer continue to pay the costs associated with the matrimonial home. The financial disclosure of the respondent demonstrates that the respondent will not, on her salary, be able to afford to pay the bond and the associated expenses related to the matrimonial home, a fact that the applicant well appreciates.

[102] In his supplementary affidavit the applicant states that between 10-16 March 2026, a series of difficulties in implementing Du Plessis AJ's order were experienced. These include alleged interference with contact/co-parenting, failures by the respondent to exercise or comply punctually with contact arrangements, difficulties concerning return of the children, and withholding of documents relating particularly to O.

[103] The applicant tends to portray the incidents cumulatively as demonstrating deliberate obstruction of co-parenting, whereas the respondent gives incident-specific explanations. It is thus necessary for me to be cautious about treating the applicant's description of "*wilful disobedience*" as established merely because particular handovers did not occur exactly as contemplated.

[104] The respondent disputes this characterisation. For example, she says weekday contact was practically difficult because she finished work at 17h00, while the order required return of the children by 18h00. She also explains one delayed return of O by reference to a scheduled clinic/immunisation appointment and relies upon contemporaneous WhatsApp exchanges.

[105] I will deal with the supplementary relief sought by the applicant in the matter before me in turn.

The relief sought to restore the applicant, the children and the helper to the matrimonial home

[106] The applicant's counsel's argument was prefaced by reference to section 28(2) of the Constitution which stressed the paramountcy of the best interests of a minor child. He stressed the importance of this provision and argued that courts too often pay lip service to the best interests of minor children.

[107] The applicant's counsel impressed upon me that the matter had already been postponed by Motha J on 4 June 2026 to afford the respondent an opportunity to obtain legal representation, and again by Mahomed J on 6 July 2026, for the same reason. He said that this had substantially delayed the applicant's right to have his application to return to the matrimonial home heard, which he said had now become urgent. Indeed, since the hearing of the matter, correspondence has been addressed to me emphasising the urgency and stressing that his lease expires in October 2026, and if it is to be renewed, this needs to be done two months prior to the expiry of his lease.

[108] The applicant's counsel sought to persuade me that it was completely unjust, and patently absurd that the respondent should be permitted to remain living alone in a mansion with five bedrooms and five bathrooms, a large garden and a pool, while he, the minor children and the carer are required to squash up in a three bedroom apartment, where the children are required to share a bathroom and have to do their homework on their beds.

[109] Added to this was the fact that the applicant had been paying all the expenses relating to the matrimonial home, that the respondent was not able to afford to upkeep, in respect of which references were made to a number of instances demonstrating that the matrimonial home had become derelict, including that the pool was green and a ceiling had collapsed and had not been repaired.

[110] The applicant's counsel argued that the applicant had been forced to incur the costs of two homes, and submitted that it was not fair that the respondent should

be permitted to live alone in the matrimonial home, while he bore all of the expenses. Although couched as an argument that this was in the best interests of the minor children, it was equally couched as a matter that was the fairest to the parties, including the applicant, who himself clearly feels affronted by the fact that he pays for everything, yet has been squashed up in a rented apartment with the minor children and their carer, while the respondent lives in luxury alone in the matrimonial home.

[111] Nevertheless, the applicant does stress that it was clearly in the minor children's interests that they be permitted to return to the matrimonial home and their own bedrooms because this is the home that they have grown up in and are familiar with; indeed it is said that this is the only home that they have ever known.

[112] What the applicant forgets is that when the social worker recommended shared residence, she attended at his residence and was satisfied that it was suitable for him to exercise weekly access to the elder children. What she contemplated was that the elder children (to whom the familiarity would really count) would spend every alternate week with their mother in the matrimonial home. It was also contemplated that the carer would move with the children and thus also occupy the matrimonial home during the week that the applicant had shared residence of the elder children. The proposed arrangement thus meant that at least half of every month, the elder children, to whom this would have counted, would have been able to return to live with the respondent in the matrimonial home and would be able to stay in their own bedrooms.

[113] That arrangement was in place until the applicant hijacked the process by having the respondent arrested for precluding his access to the youngest child on his birthday. This he did on the back of a restraining Order in which the access to the children was not defined, was made when the youngest child had not yet been born and in the face of the respondent's contention that the parties agreed to withdraw both of their respective restraining orders against each other.

[114] Having temporarily secured that he be afforded primary residence of all three children, including the youngest child, the applicant now seeks by way of

amended relief to render this permanent by permitting him and the children to move back to the family home, thereby effectively evicting the respondent.

[115] To my mind, the applicant's application to move back into the matrimonial home is premature: He, himself, requested that the Family Advocate be directed to investigate the matter and in particular, the question of primary care of the minor children.

[116] Should the family advocate agree with the shared residency arrangement proposed by the social worker engaged by the parties themselves, then it is fitting that he and the respondent remain where they are presently and the children spend alternate weeks with them. They will then spend alternative weeks with the respondent in the matrimonial home, which the respondent, himself says is the home that is most familiar to them, and can only be in their best interests. They will also spend alternate weeks with the respondent in the rented accommodation that he has now lived in with the children for six months and is also familiar to them and has been found to be suitable by the social worker when she investigated the question of shared residency of the older children.

[117] Should, however, it be found that the primary care of all three children should be with the respondent, it would be in the minor children's best interests that they reside in the matrimonial home with the respondent. If, on the other hand, it is found that primary residence should be granted to the applicant, then the issue as to who should be able to remain in the matrimonial home may be revisited. All of these scenarios of course being subject to the approval of the Court.

[118] It thus makes no sense at all now to evict the respondent from the matrimonial home until the question of primary residence and/or shared residence is investigated and determined. I have already demonstrated at great length in this judgment that it cannot be regarded as a *fait accompli* that primary residence will be finally granted to the applicant.

[119] But, I must stress that there appears to be cogent evidence of the respondent having restricted the respondent's access to the minor children. It is in the best interests of children that they have access to and form a loving and caring relationship with both parents. Adult parents should put their matrimonial

differences aside in the interests of their children and should not, under any circumstances, create an impression that their children should choose between them; they should not and all this does is cause them guilt for loving the other parent, fracture their hearts and destroy them.

[120] Shared residency will not work if the respondent obstructs the process. This requires complying strictly to contact arrangements and if needs be, engaging the services of the already appointed social worker or a parental co-ordinator to resolve disputes instead of the Police Services, which is highly confrontational and serves only to escalate an already volatile relationship between the parties. This should be avoided as it is plainly not in the best interests of the children that their mother or father be arrested.

[121] This applies equally should one of the parents be granted primary residence of the children. It is also not in the children's interests that the respondent restrict the applicant's access to the children on grounds of short notice or by fabricating that she has already made alternative arrangements; it is in their best interests that they are afforded proper and appropriate access to both parents. This is a principle that should apply now that the applicant has primary residence of the children and should he permanently be granted primary residence.

The alternative arrangements proposed by the applicant should the respondent be required to leave the matrimonial home

[122] Although not strictly necessary, as I have already determined that the applicant's application to evict the respondent and be permitted to return to the matrimonial home with the children and their carer is premature, there is another basis upon which I believe that the applicant's application to evict the respondent must fail.

[123] The matrimonial home is registered in the name of a company. The applicant points out that the parties jointly own another property that the respondent could reside in; but he does not say that it would be suitable for her to reside in this property with the children. This property is, in any event, plainly unsuitable as it is in the Pretoria area, whereas the matrimonial home, the respondent's apartment and the elder children's school is in the Johannesburg region and all are within 7km of the elder children's school. Should the respondent be required

to live in Pretoria, this would make the respondents weekly visits with the children even more illusory than they are now.

[124] The applicant maintains that he cannot afford to run two households and stresses that the respondent herself earns well. Despite insisting in his supplementary papers that the respondent should be required to obtain and pay for alternative accommodation, during the hearing, the applicant tendered to pay the respondent R12 000 per month for rental for a period of two months, after which he insists that she pay her own rental.

[125] *The applicant's counsel referred me to Hall v Hall,¹ relied upon in the respondent's heads of argument where it was stated that:*

"But I would like to say that an order to exclude one spouse or the other from the matrimonial home is a drastic order. It ought not to be made unless it is proved to be impossible for them to live together in the same house ... "

[126] He points out that the marriage relationship between the parties is now so acrimonious that it would be impossible for them to reside together in the matrimonial home pending their divorce.

[127] Reference was also made to *Du Plessis v Du Plessis*,² that referred to *Hall*, and dealt with the right of a spouse, who is the owner of the matrimonial home, to evict the other from the matrimonial home. It was found that the fact that the one spouse was the owner of the home may be relevant, particularly where that spouse wished to return to the matrimonial home.

[128] However, both of these cases are distinguishable because the one dealt with a situation where the parties were still co-habiting and the other where the owner of the property wished to return to the matrimonial home, but not evict the other spouse. In that case, issues of abuse and other like factors were found to be relevant.

[129] However, what is relevant is the ability of the other spouse to pay for alternative accommodation, and if she or he is not able to, what arrangements have been

¹ 1971 (1) All ER 762 (CA)

² 1976 (1) SA 284 (W)

made to provide that spouse with alternative accommodation. I point out that in *SGB v SLB*,³ the court treated the accommodation of the spouse who was to be ejected as important. The Court only granted ejectment against the applicant's tender of provide the respondent with rental accommodation of up to R30 000 per month pending the divorce; it was emphasised that the respondent was thus being relocated and was not being deprived of adequate alternative accommodation.

[130] The respondent set out her expenses on the basis that the applicant was successful in his claim for her ejectment. Although some of these expenses may have been exaggerated, the applicant has only offered to pay for two month's rental for the respondent, whereafter he expects her to pay all her own expenses. In *Mboneleli v Londa*,⁴ the court dismissed an ejectment application where no alternative accommodation or the means to acquire it had been tendered.

[131] *HM v LM*⁵ required that the court carefully consider the motives of the spouses, their existing accommodation, alternative accommodation and relative hardship in deciding an application for the ejectment of a spouse from the matrimonial home.

[132] In *Buck*⁶, cited with approval in *Oosthuizen v Oosthuizen*⁷ and *Silverstone*⁸ it was held, *inter alia*, as follows:

"In my view she [the wife] has a right to be in the matrimonial home while a petition is pending before this court and this court is entitled to protect that right and ensure that pressure is not put on a wife to abandon her petition by evicting her from the home. In the present case I am satisfied that if I let the husband return to the house I am really driving the wife out."

[133] In *McWhirter*⁹ it was held:

"In my opinion, therefore, the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable authority which the husband is presumed in law to have conferred on her. This accounts for the fact that the husband

³ *supra*

⁴ (2020/29437) [2021] ZAGPJHC 823 (15 December 2021).

⁵ 19881/2019) [2020] ZAWCHC 24 (26 March 2020)

⁶ 1974 (1) SA 609 (R)

⁷ 1986 (4) SA 984 (T) at 992 I

⁸ (1953) 1 All ER 556

⁹ (1952) 1 All ER 1311

cannot turn the wife out.....the authority which is thus conferred on her is an authority to stay in the house until the court orders her to go out.”

[134] These cases are cited to establish that it is not a straightforward matter to eject a wife from the matrimonial home, even subject to the overall consideration of the best interests of the minor children. Unless she can afford alternative equivalent accommodation, this must be provided to her. And, she should not be ejected while an application is pending. In this instance, a Family Advocate investigation is pending.

[135] Irrespective of whether or not the applicant is allowed to return to the matrimonial home, the applicant also wishes me to resolve the financial issues between the parties as he no longer wishes to pay for the expenses related to the matrimonial home.

[136] In answer to this, the respondent has raised in her recently filed answering affidavit, that she is neither in a position to pay the bond and expenses related to her continued occupation of the matrimonial home, nor is she able to afford alternative rental accommodation, sufficient to accommodate herself and the minor children without the financial assistance of the respondent.

[137] As it is my view that as the applicant's supplementary relief is premature, without a thorough investigation by the Family Advocate as to the best interests of the minor children regarding their primary care and contact, an exercise by me as to what alternative accommodation the respondent could afford or the applicant would be able to subsidise may well prove to be academic.

[138] That being said, on my cursory analysis of the respondent's financial circumstances, and that of the applicant, I am satisfied that without the applicant's assistance, the respondent will not be able to afford alternative comparable accommodation for her and the children, be this on a weekly basis or only every alternate weekend, which to my mind, is hopelessly inadequate.

[139] But, whatever my views, this is an inquiry to be embarked upon by the court after the Family Advocate has made its recommendations.

The birth certificate relief

[140]The applicant counsel explained that the applicant wished his name to be reflected on the youngest child's birth certificate as she was in his primary care and he wished to add her as a beneficiary on his policies.

[141]His previous justification had been to prevent the respondent leaving the country with the youngest child without his consent, but this had already been dealt with in the Order granted by du Plessis AJ preventing her leaving the country with the minor children without the applicant's consent.

[142]In view of the paternity tests, I cannot see why this relief should not be granted, but remain to be convinced that this relief should be sought under Rule 43.

[143]Despite this, I cannot see the point in the applicant incurring the costs of a separate application to obtain this relief. I am thus inclined to exercise my discretion to determine my own court processes and to grant this relief.

Costs

[144]This is not a matter in which I think it would be appropriate that either party bear the costs. It is essentially an issue about the best interests of the minor children of the parties. It is not the sort of case where I feel that it would be appropriate that the general rule should apply that the successfully party be awarded the costs.

[145]This is said that on previous occasions the respondent has been mulcted with costs and that in the application before me, the respondent has been substantially successful. Costs were awarded against the respondent on the prior occasions as she had sought indulgences. She also sought an indulgence before me. Accordingly the appropriate order is that each party pay their own costs.

[146]I thus propose to make an order in the following terms:

Order

(1). The Office of the Family Advocate, Johannesburg (OFA), is ordered to institute an urgent enquiry and compile a report with recommendations regarding the parental

rights and responsibilities regarding primary residence and contact in respect of the minor children.

- (2). In conducting this inquiry, the Family Advocate is directed to appoint a social worker to carry out an independent investigation into the minor children's best interests and to liaise with and consider the report compiled by the independent social worker, attached to the founding affidavit marked DMM 27.
- (3). In particular, the Family Advocate and the social worker in the Office of the Family Advocate shall consider the best interests of the minor children and determine and make recommendations concerning:
 - (a) which parent, if any, is more suitable to exercise primary care over the two elder children;
 - (b) which parent, if any, is more suitable to exercise primary care over the youngest child;
 - (c) whether shared residency would be in the best interests of the two elder children;
 - (d). whether shared residency would be in the best interests of the youngest minor child.
- (4). In considering each of the issues outlined in paragraph (3) above, the Family Advocate and the social worker in the Office of the Family Advocate must consider, but are not bound by, this judgment.
- (5). In the event that the Family Advocate and the social worker conclude that it is not appropriate that the parties exercise shared residency in respect any of the minor children, they shall consider the contact and access arrangements of the parent who it is not recommended should have primary residence of the elder minor children and/or the youngest minor child, having regard to the parental rights of such parent and the best interests of such child or children.
- (5). In the event of the Family Advocate and the social workers concluding that it would be in the best interests that primary care of the elder children and/or the

elder children and the youngest child be afforded to the applicant, whether it would be in the best interests of the minor children that the applicant and the elder children and/or the elder children and the youngest child, be permitted to reside in the matrimonial home and if so, to examine fully what suitable alternative accommodation is being offered to the respondent, and whether it properly accommodates the respondent's weekend, holiday and other contact with or access to the minor children.

- (6). Directing the respondent to take all steps necessary to include the applicant's name as the father of the youngest child on her birth certificate within 60 days of this Order.
- (7). Postponing the remaining relief sine die.
- (8). Directing that each party bear their own costs.


WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of the hearing: 30 July 2026
Date of the judgment: 22 August 2026

For the applicant: Adv Nomakwezi Nomvete instructed by T Mahapa Inc.
Attorneys

For the respondent: Salem Sekome of Sekome Attorneys Inc.

