

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

CASE NO: 69408/2019

DATE: 26/02/2020

In the matter between:

J[....] J[....] S[....]

Applicant

and

M[....] B[....] W[....]

Respondent

JUDGMENT

MALUNGANA AJ

Introduction:

- [1] The applicant brought an application *pendente lite* in terms of Rule 43 of the Uniform Rules of Court, in which he seeks the award of certain parental responsibilities and rights with regard to access, contact of their minor child, B[....], a female born on 3 March 2014. The application is opposed by the respondent.
- [2] It is common cause that the applicant and the respondent were married to each other out of community of property on 2 March 2012, and there is a divorce action pending involving the parties. After the parties became separated in September 2018, Bridget (the minor) has been residing with her

mother (the respondent).

- [3] Due to the acrimonious nature of their relationship since the split, the parties are unable to reach an amicable agreement regarding the manner in which the applicant has to exercise his parental right of access and contact in respect of the minor child, Bridget.

The Facts

- [4] The applicant in his founding affidavit filed in support of the Rule 43 applicants contends that the respondent has made allegations about his emotional functioning which resulted in him obtaining the report of a clinical psychologist, Dr. Elisa Mecco dated 14 October 2014. Dr Elisa Mecco's report could not reveal any evidence of aggressive or violent behaviour on the part of the applicant. She further recommended that the applicant be given full liberal access to the minor child.
- [5] In October 2016 the parties reconciled and moved in together. During this period the applicant participated in the minor child's daily care such as feeding, bathing, changing nappies and clothes, and putting her to bed. When the dispute broke out in October 2018, the parties attempted a formal mediation before a private social worker, Mrs Irma Schutte, but when they were almost ready to agree on the parental agreement the respondent terminated the mandate of the mediator, and withdrew from the process.
- [6] In the counterclaim filed in response to the divorce action, the respondent tendered to the applicant contact in respect of the minor child with a right to remove her every alternate weekend on both Saturday and Sunday. However, he was not allowed to see Bridget despite the tender.
- [7] The above situation led to the Family Advocate's intervention. Due to lack of cooperation from the respondent, the applicant has been totally cut off from Bridget. He was informed that the respondent has since been diagnosed with breast cancer, and he contends the current situation requires him to be more closer to the minor child, in the likely event that the respondent's becomes too ill.
- [8] The applicant further avers that he engaged the services of a private social worker, Ms Jackie Griessel. Her report is attached to the founding affidavit

Both the family advocate and Ms Griessel found that there is no reason why the applicant could not have contact with the Bridget.

- [9] The applicant's counsel submits that the respondent often refuses the applicant contact with the minor child, and only allows him contact after threats have been made from his attorneys. The parties attended a meeting with the Family Advocate on 13 August 2019. The Respondent refused to attend further meetings with the Family Advocate who pinned down certain visits on particular dates and for particular time spans. This is also acknowledged by the respondent
- [10] The respondent answered to the allegations made in the applicant's founding affidavit. She contends that there have been numerous disputes between her and the applicant, with the applicant refusing to provide adequate maintenance for Bridget. She has spent a substantial amount of money on parenting plans but the applicant was the one who was obstructive. She raises concern over the applicant's lack of concern regarding the sexual abuse incident which involved his family member. She states that it is the applicant's constant refusal to acknowledge what had happened to the minor child and failure to take further steps to protect her which had led to the ultimate breakdown of their marriage.
- [11] The respondent admits that she terminated the mediation process after she became aware of the fact that the mediator was counselling the applicant privately and without her knowledge. She felt that the mediator was compromised as she was no longer independent.
- [12] According to the respondent, Bridget is fearful of the applicant because of his temper. She often encourages her to spend time with the applicant, but the minor reacts negatively towards the news of seeing the applicant.

"She becomes very clingy and tearful. She often will not let me go."

- [13] Under paragraph 16.2 the respondent asserts as follows:

"16.2. I have not terminated the Applicant's rights to contact Bridget. The Applicant's contact has remained the same as when we separated. This contact, until recently, included contact every alternate Saturday and Sunday from 10h00 until 16h00 and on Wednesday for an hour. It is also included daily telephonic contact. However, since the Family Advocate's

interim report. I have been following the contact recommendation e set out by Family Advocate."

Legal frame work and principles

[14] It is trite that Rule 43 is designed to give fast and affordable relief in terms of interim disputes regarding maintenance, and access to the minor children.

[15] Section 18(2) of the Children's Act, Act 38 of 2005 provides that:

"The parental responsibilities and rights that a person may have in respect of the child, include the responsibility and the right:-

- (a) to care for the child;
- (b) to maintain contact with the child;
- (c) to act as guardian of the child; and
- (d) to contribute to the maintenance of the child."

[16] Section 7 of the Children's Act provides that:

"(1) Wherever a provision of this Act requires the best interests of the child standard to be applied. the following factors must be taken into consideration where relevant namely-

- (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii)
- (b) The attitude of the parents; or any specific parent, towards-
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect the child.
- (c) the capacity of the parents, or any specific parent, or of any other care- giver or a person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances,

including the likely effect of any change in the child's circumstances, including the likely effect on the child of any separation from-

- (i) both or either of the parent;
- (ii) ...
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent. and whether that difficulty or expense will substantially affect the child's right to maintain personal relationship and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for a child -
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, or extended family. culture or tradition;
- (g) the child's-
 - (i) age, maturity and stage of development
 - (ii) gender;
 - (iii) background
 - (iv) any other relevant characteristics of the child;

[17] Section 28(2) of the Constitution enshrines this principle

"A child's best interests are of paramount importance in every matter concerning the child."

Evaluation

[18] A good starting point, in my view, is to give due consideration to the best interests of the minor child. Having said that, the Constitutional Court in *Fraser v Naude*,¹ demonstrated that it could play a decisive role even in the face of an apparently strong case by one of the parties to the dispute. Clearly the case

¹ 1999 1 SA 1 (CC)

before me is the one where such approach is necessary.

- [19] It is the respondent's contention in the Instant matter that she did not terminate the applicant's contact with the minor child, Bridget. She also maintains that since the Family advocate's report she had been following the contact recommendation set out in her Interim report. I have also had sight of the email from the respondent of the 28 May 2019, in which she wrote:

"Thank you very much I received the summons today.

Please take note of the following with immediate effect:

- *Phone Calls during the week to Bridget will stop till further notice*
- *Wednesday visitation with Bridget will stop till further notice*
- *Every 2nd Weekend for an Hour under supervision - Place and time will be communicated a day in advance."*

- [20] From the reading of the two draft orders handed in by counsels, there appears to be consensus with regard to both parties having joint parental rights and responsibilities envisaged by the Children's Act. There is also consensus with regard to the primary residency of the minor child being awarded to the respondent. Furthermore the applicant has indicated during the hearing, correctly so in my view, that he will not persist with his claim for a *curator ad litem* to be appointed for the respondent. However, in lieu of the curator, he suggests in his draft order that a social worker be appointed to investigate all and any issues relating to the minor child and guide the parties as to the proper parenting and shared responsibilities, as well as other matters relating to the minor child. I am mindful that this might prolong the dispute between the parties and places unnecessary financial burden upon the parties. The respondent on the other hand contends that the applicant ought to have a supervised visit for the first half hour of the contact session between the applicant and the minor child. I have difficulty with this contention as it has not been established that the applicant poses a threat or any danger to the minor child on the evidence placed before me. On the contrary, the social worker, Mrs Jackie Griessel, whose report has been placed before me observed that the applicant is a stable and loving parent. He went as far as getting himself

assessed by a professional in order to improve his relationship with Bridget. I have no reason to reject her findings in this regard.

[21] The email from the respondent dated 28 May 2019 clearly indicate, in my view, that there were some sort of arrangements with the applicant regarding contact, and the arrangements were cancelled upon receipt of the summons. These arrangements somewhat included Wednesday visits by the applicant. I have taken into consideration the submissions made by both parties during the hearing, and in particular what the parties consider to be an appropriate order in the given circumstances. That said, I find that there is a general agreement between them insofar as the issue of contact is concerned. It further seems to me, if I am correct that the only dispute between the parties is how that right of access and contact of the minor child will have to be exercised. I am particularly influenced by the fact that both parties recognize the need for the minor child to have contact with both parents. In these circumstances it is my view that it will be in the best interest of the Bridget if both parties are granted unfettered parental responsibilities and rights in the manner that I will set forth in the order.

[22] In the result the order I make is as follows:

1. Primary care and residency of the minor child, Bridget shall be with the Respondent, subject to the Applicant's rights of reasonable contact.
2. Both parties shall enjoy joint parental rights and responsibilities, as envisaged in the Children's Act, and any decisions regarding the minor child's education, medical treatments, extra mural activities, religious matters and upbringing in general shall be discussed and agreed to between the parties.
3. The applicant shall exercise his right of contact as follows:
 - 3.1 Every alternate Saturday from 10:00 until 16:00, and Sunday from 9:00 to 13H00.
 - 3.2 Midweek visit shall be every Wednesday from 17h30 to 18h30;
 - 3.3 Short school holidays to rotate between the parties, with the April 2020 school holiday to start with the applicant;
 - 3.4 Public holidays to rotate between the parties;

- 3.5 The applicant will be entitled to spend 4 hours with the minor child's on her birthdays.
- 3.6 The applicant will spend 4 hours with the minor child on the father's day;
- 3.7 The respondent will be entitled to spend mother's day with the minor child;
- 3.8 Daily telephonic contact with the minor child, shall be between 17h00 and 18h00;
- 3.9 The applicant will continue to maintain the minor child In accordance with the minor child, currently at the rate of R1700,00 per month.
- 3.10 The applicant will continue to pay the full school fees of the minor child directly at the school concerned. Costs of all extra mural activities will be shared equally between the parties.
- 3.11 The applicant will place and add the minor child as a dependent on his medical aid. The parties will share equally all other costs nm covered by such medical aid.
- 3.12 Costs of the application shall be costs in the divorce action.

P H MALUNGANA

Acting Judge, Gauteng Division, Pretoria

Appearances:-

For the Applicant: Adv. Emile Van der Merwe

Instructed by: Thereza Hitge Attorneys

For the Respondent:

Instructed by: S Muskat Attorneys