

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

CASE NO: 2019/34212

**REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES
REVISED.
14/8/2020**

In the matter between:

R[....], M[....] C[....]

APPLICANT

And

R[....], R[....]¹ S[....]

RESPONDENT

JUDGMENT

ROSE AJ

1. The applicant, M[....] C[....] R[....], launched an application in terms of the provisions of uniform rule 43 on or about 10 March 2020, wherein she sought an order in respect of maintenance of the minor child born of the marriage between the parties, H[....] B[....] R[....], who is turning 2 years old next week on 18 August 2020 ("the child"), and a contribution towards legal costs. The answering affidavit in this application was delivered on 2 June 2020.

2. On or about 11 June 2020, R[....]1 S[....] R[....], as applicant, launched a separate application in terms of the provisions of uniform rule 43, wherein he sought an order in respect of contact with the child. The answering affidavit to this application was delivered on 29 June 2020. This application was dealt with as a counter application to that instituted by M[....] C[....] R[....] on or about 10 March 2020.

3. Both these applications served before me and albeit that R[....]1 S[....] R[....] is the applicant in his own application, for ease of reference, I shall refer to M[....] C[....] R[....] as the applicant and R[....]1 S[....] R[....] as the respondent throughout this judgment.

4. It is evident from the papers filed of record that since the applicant left the former matrimonial home and since or about August 2019, the applicant has not allowed the respondent regular and/or unfettered contact with the child. deal with the applicant's reasons for this hereunder.

5. It is common cause that in January 2020, the applicant relocated to Durban, KwaZulu Natal with the minor child. The relocation has further impacted on the respondent's contact with the child. Consequently, the respondent has himself relocated to Durban, Kwa-Zulu Natal, which temporary residence, he intends making permanent as recorded during argument of the matter.

6. It is further common cause that the respondent has not had any physical contact with the child for a period of approximately 4 months at the instance of the applicant. This appears to be consequent upon, *inter alia*, concerns raised in regard to the respondent's medical condition and/or the respondent failing and/or refusing to return the child to the applicant shortly prior to the national Covid-19 lockdown, in an alleged unilateral and underhanded attempt at retaining the child contrary to the arrangements unilaterally imposed by the applicant.

7. From the papers filed of record and argument by counsel, it is evident that the basis upon which the applicant relies and justifies withholding contact with the child from the respondent, can be summarized as three considerations:

7.1. the respondent alleged abusive nature and further alleged inappropriate and/or concerning conduct in endeavouring to retain the child during Covid-19 and pursue various proceedings in, *inter alia*, the domestic violence court, which conduct was described as "not *bona fide*" during argument ("the respondent's alleged *mala fide* conduct");

7.2. the respondents alleged inability to care for the child in light of, *inter alia*, the age of the child; and

7.3. the respondent's medical condition being of such a nature that this may pose a danger to the child.

8. In the circumstances, the question arising is - was it in the best interests of the child for the applicant to withhold the respondent's contact with the child, based on the factors summarized in paragraphs 7.1 to 7.3 above? I have considered the contents of the papers filed of record and the argument of counsel and have come to the conclusion that it was not in the best interests of the child.

9. From the papers filed of record, it is apparent that the respondent's alleged abusive conduct was never in respect of the child, but the applicant only. This was not challenged during argument before me. In the circumstances I cannot find that the child would be in any danger and/or that there would be any prejudice to the child on this basis, whilst in the care of the respondent. I also cannot find that it would not be in the best interests of the child to have reasonable contact with the respondent because of the respondent's alleged *mala fide* conduct, which once again, never related to the child save for the isolated incident where the respondent endeavoured to retain the child in his care on the eve of the Covid-19 lockdown, in circumstances where, it is evident from the papers, his contact had been unduly frustrated by the applicant where she would not accept written confirmation from a medical practitioner that the respondent is able to care for the child and instead insisted on being present in joint consultations with the respondent's medical practitioner/s.

10. In respect of the second consideration, the age of the child and the respondent's ability to care for him, as was held in P v P 2007 (5) SA 94 (SCA), the value systems and social beliefs underpinning the "*maternal preference*" or "*tender years*", principle have been challenged in our Courts, which have held that parenting is a gender-neutral function. The assumption that a mother is necessarily in a better position to care for a child than a father, belongs in a past era.

11. The child is no longer a small baby. The child will be 2 years old next week. In addition, the applicant did not advance any cogent basis upon which I can find that the respondent would not be able to properly care for the child. In addition, the respondent is currently residing with his parents in Durban, Kwa-Zulu Natal, and will do so until at least the end of the year. Accordingly, assistance should the respondent require same, will be available to him if need be. During this time, the best interests of the child, which would include the respondent's ability to care for the child, will be fully investigated by a duly qualified expert which I intend appointing.

12. The last factor which I need to consider is the allegation that the respondent's medical condition, encephalopathic secondary epilepsy syndrome with complex partial seizures, renders him unfit to care for the child.

13. The respondent, in his papers filed of record, alleges that his doctor has declared that he is fit to care for himself and the child. The medical certificate confirming this, was however not part of the papers. This evidence is crucial in considering the best interests of the child and I, as upper guardian of the child, called for this certificate to be placed before me in terms of the provisions of uniform rule 43(5). The applicant was afforded the opportunity to reply thereto, if necessary.

14. A medical certificate from a certain Dr Cheyip dated 27 February 2020 was placed before me by the respondent, which indeed confirms that the respondent is able to care for himself and the child. Dr Cheyip however further stated that the respondent should avoid stressful situations and that it is not advisable for the respondent to drive.

15. Instead of a formal reply on behalf of the applicant, I have been provided with numerous letters by the applicant's attorneys, some of which I have been requested to disregard by the respondent's attorneys, in circumstances where the letters do not constitute a formal reply and certain letters, in addition to those uploaded to case lines, were emailed to my registrar directly without copying the respondent's legal representatives in the emails. Albeit that the letters are not in the form of a formal reply, I have had regard to the letters that were uploaded to case lines, as it is prudent that all evidence impacting on the best interest of the child be considered and I am entitled to do so by virtue of the provisions of rule 43(5). From these letters, it is evident that the respondent previously endeavoured to engage with the applicant to provide the applicant with medical confirmation in regard to his ability to care for the child, despite his medical condition. This is in fact also apparent from the covering email of the medical certificate of Dr Cheyip provided to me by the respondent, which email is dated 3 March 2020 and directed at the applicant. The letters take this issue no further, save that it is apparent therefrom that the applicant wishes to have joint consultations with the respondent's medical practitioner/s in the spirit of mistrust that has pervaded the matter, which has now even extended to medical professionals, contrary to the best interests of the child.

16. I have not been requested to grant an order entitling the applicant to have joint consultations with the respondent's medical practitioner/s. Even if there was an order sought to this effect, I would not be inclined to grant such an order.

17. Any fears or concerns that the applicant may have in regard to the respondent's medical condition and the impact thereof on his ability to care for the child, will be alleviated by the fact that I intend appointing a duly qualified clinical psychologist to investigate the best interests of the child, particularly the issue of his residence and what contact each of the parties is to have with the child, and to request the said psychologist to render a report to court in this regard. This psychologist will be empowered by this court to, *inter alia*, interview the respondent's medical practitioners, make interim recommendations in regard to the respondent's contact with the child, which recommendations the parties can

either adhere to or approach a court of competent jurisdiction to seek adherence to if need be.

18. I pause to point out that it is poignantly evident from the papers, that a high handed and in some instances a tit-for-tat approach to the issue of residence and contact has been adopted in this matter. This is not in the best interests of the child and I implore the parties to refrain from this and to place the bestinterest of the child above their own.

19. Two wrongs do not make a right and withholding contact and attempting to then steal a march by retaining the child prior to the national Covid-19 lockdown contrary to arrangements that were in place, irrespective of the arrangements being imposed unilaterally and/or how unreasonable the arrangements may appear to be to a party, are not actions in the best interests of the child and only serve to fuel the fires of litigation.

20. I am of the view that it is in the child's best interests that the respondent's contact with him be re-established in the circumstances with sufficient safeguards insofar as may be necessary. He is the child's father, and the fact that he suffers from a medical condition is no reason to withhold contact from him as has been done in this matter, particularly where there is confirmation from a medical practitioner that his ability to care for the child is not impeded. Accordingly, I intend granting an order reinstating the respondent's reasonable contact with the child forthwith.

21. I have further considered the issues of maintenance payable by the respondent to the applicant in respect of the child and the contribution towards legal costs sought by the applicant, an Order in respect of which I grant hereunder.

22. Before I do so however, I must address the applicant's claim for arrear maintenance for the period August 2019 to date.

23. The applicant could have, and should have, launched rule 43 proceedings

in respect of maintenance at an earlier stage, instead of now claiming arrear maintenance retrospectively for a period of a year without explaining the delay in bringing the application. In matters concerning maintenance, parties must approach the court when the need arises, and not at some later stage, as this would indicate that there is in fact no need for maintenance. If it were not for the allegations contained in the founding papers that the applicant obtained personal loans to make ends meet, this court would have questioned the applicant's need and particularly how the applicant managed to survive for a year without receiving alleged adequate maintenance from the respondent.

24. To grant an order retrospectively at this stage requiring the respondent to pay a substantial lump sum, will place undue strain on the respondent in the circumstances. Furthermore, the applicant makes provision for the re-payment of the personal loans in her schedule of monthly expenses as being an expense for herself only and not for the child for who maintenance is sought in this application. This court cannot lose sight of the purpose of maintenance, being to enable a party to maintain him/herself and/or a child, as the case may be. It is not to reimburse a party for expenses previously incurred, which a party managed to finance through other means, particularly if this was done over a lengthy period of time prior to approaching this court for assistance.

25. It would be undesirable to set a precedent where a party can claim arrear maintenance, as in this case, a year after the need allegedly arose and where the applicant managed to maintain the child, in the absence of the payment of the sum now sought as maintenance. This could lead to an abuse of the process of this court, particularly rule 43 proceedings, which are intended to provide for maintenance *pendente lite* and be expeditious.

26. I am however of the view that a case has been made out for an order in respect of arrear maintenance for the period of June 2020 to July 2020, in circumstances where the applicant did eventually launch rule 43 proceedings on 10 March 2020. Bearing in mind that rule 43 proceedings are designed to be expeditious in nature, the applicant's rule 43 application should reasonably have been brought to finality in or about June 2020, even considering the diminished

functioning of the courts during the Covid-19 lockdown period. Had it not been for the separate rule 43 application instituted by the respondent on 11 June 2020, the late delivery of the answering affidavit in the applicant's rule 43 application on 2 June 2020 and the rule 30 proceedings launched by the respondent on 31 July 2020, all of which resulted in an undue delay in the finalization of the matter which should have been dealt with expeditiously, this matter would have been brought to finalization much earlier.

27. Accordingly, I grant an order the following terms *pendente lite*:

27.1. The parties shall both retain full parental responsibilities and rights in respect of the child.

27.2. The child shall reside with the applicant and the respondent shall be entitled to exercise reasonable contact with the child.

27.3. When the respondent is in Durban, Kwa-Zulu Natal, he shall be entitled to exercise reasonable contact with the child as follows:

27.3.1. Every Tuesday and Thursday for a period of 2 hours;

27.3.2. Every alternate weekend on the Saturday and the Sunday from 08:00 to 17:30;

27.3.3. Father's Day from 08:00 to 17:00;

27.3.4. On the respondent's birthday for a period of 3 hours should this be on a weekday or from 08:00 to 17:30 should this be on a weekend;

27.3.5. Half the available time on the child's birthday.

27.4. The respondent shall not drive the child in a motor vehicle, be it to collect and drop off the child for purposes of contact or otherwise, until

such time as the psychologist appointed to investigate this matter as provided for in paragraph 27.8 hereunder, recommends that he is safely capable of doing so after consultation with the respondent's specialist neurologist.

27.5. Should the respondent not be able to drive to collect and/or drop off the child for purposes of contact, the applicant or a person nominated by the applicant, shall drop the child off at a venue designated for purposes of contact by the respondent and shall collect the child when the contact period comes to an end.

27.6. The respondent shall immediately inform the said psychologist if his neurologist withdraws and/or amends such authorization to drive a motor vehicle in any way whatsoever and obtain an alternate recommendation from the psychologist in this regard.

27.7. In addition to the physical contact set out in paragraphs 27.3.1 and 27.3.5 above and irrespective of whether the respondent is in Durban, Kwa-Zulu Natal, the respondent shall be entitled to daily video call contact for 5 minutes between 08:30 and 09:00 and 5 minutes between 15:30 and 16:00, through such suitable video platform as elected by the respondent, for which contact the applicant shall ensure that the child is available, has a device, is not distracted by her and provided with an electronic device.

27.8. Within 5 court days of the granting of this order, the parties shall agree the identity of a duly qualified clinical psychologist, who is directed to investigate the best interests of the child, particularly the issue of his residence and what contact each of the parties is to have with the child, and to render a report to court in this regard as a matter of urgency. Should the parties be unable to agree the identity of such psychologist, the parties shall forthwith approach the Health Professions Council of South Africa to make an appointment as a matter of urgency.

27.9. The appointed psychologist shall further be entitled to make interim recommendations in regard to all aspects of the respondent's contact with the child and interview all persons necessary to enable this to be done, including but not limited to the respondent's medical practitioners.

27.10. The costs of the psychologist and all costs incidental to the investigation shall be paid by the parties in equal shares.

27.11. The applicant and the respondent are directed to fully co-operate with the investigations by the psychologist.

27.12. The respondent shall make payment of the amount of R7,500.00 per month to the applicant in respect of maintenance for the minor child, the first payment shall be made within 7 days of the granting of this order and all subsequent payments shall be made on or before the P¹ day of every month.

27.13. In addition to the cash sum in paragraph 27.12 above, the respondent shall:

27.13.1. Retain the child as a dependent on medical aid scheme and make timeous payment of the monthly premiums in respect thereof;

27.13.2. Make timeous monthly payment of:

27.13.2.1. 50% of the child's creche fees directly to the service provider concerned;

27.13.2.2. 50% of the child's extra mural activities, limited to 1 activity per month, in respect of which the respondent's prior consent is to be obtained, which consent shall not be unreasonably withheld, directly to the service provider concerned;

27.13.2.3. 50% of all reasonable and necessary excess medical expenses not covered by the medical aid scheme. Insofar as the applicant has to make payment of the full expense, the respondent shall reimburse the applicant within 7 days of being presented with an invoice in relation thereto.

27.14. All payments to the applicant by the respondent shall be made by way of eft into an account nominated by the applicant in writing.

27.15. The respondent shall make payment to the applicant of the sum of R15,000.00 in respect of arrear maintenance for the child for the months of June 2020 and July 2020, which sum shall be paid in 5 equal installments in the sum of R3,000.00 each, the first installment of which shall be payable on or before 1 September 2020 and all installments thereafter on or before the 1st day of the following months.

27.16. The respondent shall pay a contribution towards the applicant's legal costs in the sum of R15,000.00, which shall be paid in 6 equal installments in the sum of R2,500.00 each, the first installment of which shall be payable on or before 1 September 2020 and all installments thereafter on or before the 1st day of the following months.

27.17. The costs of both the applicant's and respondent's rule 43 application shall be costs in the cause of the divorce action.

ROSE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION

DATE OF HEARING:	12 AUGUST 2020
JUDGMENT DELIVERED:	14 AUGUST 2020 (electronically)

FOR APPLICANT/RESPONDENT: ADVOCATEA.SALDUKER

INSTRUCTED BY: CUTHBERTSON & PALMERIA
ATTORNEYS INC

FOR RESPONDENT/APPLICANT: ADVOCATE N. RILEY

INSTRUCTED BY: ULRICH ROUX & ASSOCIATES