

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

CASE NO: 38184/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED

In the matter between:

JB

(Id Number [...])

Applicant

And

DHB

(Id Number [...])

Respondent

JUDGMENT

MAKUME, J:

[1] This matter is about access and contact rights concerning two minor children T[...] and B[...].

[2] The Applicant is the step-father to T[...] and a biological father to B[...] who is aged 3 years. T[...] is older than B[...]. The Respondent is the biological mother to

both the minor children. She lives with them in Alberton, Gauteng since the year 2017.

[3] The Applicant is a business consultant who lives and works in Cape Town since the year 2014. The Applicant and the Respondent are in the process of a divorce and had been living apart since 2017 when the Respondent left the common matrimonial house in Cape Town and took up residence with her parents in Alberton.

[4] It is common cause that since the separation the Applicant has visited the minor children on a quarterly basis during the year 2018 to 2020 and only visited the children in January and June in 2021.

[5] After the last visit that happened in and around June 2021 the minor child B[...] reported to the Respondent on the 7th June 2021 that the Applicant had “touched her fanny” and that it was sore.

[6] On the 18th June 2021 Dr Pat Dorman who had conducted a medical examination on the minor child B[...] reported to the Respondent that she believes that B[...] was raped though she did not say who the perpetrator was.

[7] The incident was reported to the South African Police and a case of rape or child abuse is presently being investigated. A social worker Mrs Jooste was enlisted and she has had sessions with the minor child B[...].

[8] The Applicant says he has also made a statement to the Police and denies having ever sexually abused his child B[...].

[9] Applicant says that since that incident the Respondent is refusing him telephone, skype or physical access and contact with B[...] and told him that until the Police investigations are finalised she is not prepared to allow B[...] to be seen or have contact with the Applicant.

[10] A letter was addressed by the Respondent's attorneys to the Applicant's attorneys on the 22nd June 2021 the content of that letter read as follows:

“Subsequent to your client’s previous visit/ contact session with the minor child B[....] she complained that her vagina was sore.

Our client was concerned and requested B[....] to explain what has occurred where after B[....] replied “daddy touched my fanny” and that Mr B[....] has done this before.

During the week that followed B[....] continually complained that her vagina was sore.

Our client was alarmed and booked an appointment with Dr Pat Dorman who specialises in child abuse and sexual assault for the last 26 years. Dr Dorman’s medical examination revealed evidence of sexual assault.

Our client has recently noted that upon your client’s visitation/contact sessions with B[....] that she becomes increasingly clingy, wets her pants and doesn’t sleep when B[....] becomes aware that your client will be visiting, B[....] screams and doesn’t want to go to your client.”

[11] On the 16th August 2021 the Applicant launched this application in the urgent court in Part A, the Applicant seeks the following order:

- i) That pending receipt of a forensic as well as a Social Worker’s report he be allowed to exercise contact to both the minor children under supervision once a month over a weekend commencing on Friday.
- ii) That he be allowed daily telephone contact with both minor children between 17h00 and 18h00.

[12] The Respondent opposed this and says that it is not in the best interest of the minor child especially B[....] that she makes contact in whatever form with the Applicant whilst the Police are still investigating a serious case of sexual assault against the Applicant.

[13] The Applicant contends that the Police investigation should not be a bar to him being allowed access to the minor children as it is taking long. The Police have already taken a statement from him and not effected any arrest.

[14] This matter is not about the Applicant and the Respondent it is about the best interest of a 3-year-old child. Matters involving access and custody will always remain urgent depending on the circumstances of each matter. In this matter it is urgent hence I allow the parties to proceed and address the merits of the matter.

[15] The Respondent makes the point and correctly so in her answering affidavit that she believes that she as the Primary Care Giver of B[....] need to listen to her and protect her. The assessment by the SAP and Mrs Jooste have commenced and are under way and should not be tempered with. Allowing contact between the minor children and the Applicant at this sensitive stage of the investigation may not be in the interest of not only the minor child but also the interest of justice.

[16] I have been referred to various case law on the best interest of the minor child amongst them is the Constitutional Court decision by Sach J in the matter of **S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 CC at para 17** where the following is said:

“What unites these principles and lies at the heart of Section 28 I believe is the right of a child to be a child and enjoy special care.”

[17] The Respondent in refusing the Applicant access to the minor child is not being vindictive because of the impending divorce. It is because she is concerned and wants to afford B[....] and T[....] to enjoy special care as children. I have no doubt that when the investigation shall have been completed and the forensic and social worker reports been made available including that the Applicant is not to blame appropriate steps will be taken to regularise the situation and resume contact.

[18] At this stage it is my view that as a court it would be foolhardy and too quick to allow contact.

[19] In the result I make the following order:

ORDER:

1. The application is dismissed.
2. The Applicant is ordered to pay the Respondents taxed party and party costs.

Dated at Johannesburg on this 14 day of September 2021

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	:	31 August 2021
DATE OF JUDGMENT	:	14 September 2021
FOR APPLICANT	:	Adv L Norman
FOR RESPONDENT	:	Adv Engelbrecht