

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

CASE NO.: 20/40030

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED: YES / NO

DATE: 26 November 2021

In the matter between:

R[....] A[....]2 C[....]

Applicant

and

D[....]2 C[....]

Respondent

JUDGMENT

SEGAL AJ

1. Central to the dispute in this Rule 43 application are the interests of a young child, D[....] A[....] C[....], born on 23 January 2020. At the time that this matter was argued, D[....] had not yet turned 2 years old.

2. The parties are involved in a high conflict, acrimonious divorce during the course of which they have both approached the domestic violence court for interim

protection orders against one another and other family members, recordings of the various altercations have been made and the police have been called out to the parties' respective residences on account of the hostilities between them. There are multiple criminal charges that have been laid with the SAPS, in relation to neglect of D[....], which have served to further fuel the animosity. The papers are littered with allegations and counter-allegations of abuse and violence in the presence of D[....]. Neither party alleges that D[....] has come to harm whilst in the care of the other party and both parties love him dearly. What is manifest however, is the complete lack of insight displayed by both parents in relation to the needs, interests and welfare of a child who is still a toddler. This is completely contrary to D[....]'s best interests and must cease forthwith.

CONTACT REFUSAL

3. The Applicant vacated the former matrimonial home together with D[....] during September 2020 and agreed to the Respondent exercising contact to him. In fact, on 27 September 2020, the Respondent collected D[....] from the Applicant and exercised contact to him. The parties agreed that the Respondent would exercise contact to D[....] again on 29 September 2020.

4. On 28 September 2020, the Applicant attended at the former matrimonial home together with police officers, who served an interim protection order on the Respondent, which included an order preventing him from exercising contact with D[....]. Armed with this order, the Applicant, to all intents and purposes excised the Respondent from D[....]'s daily life, affording him contact with D[....] on 12 occasions in 6 months, under supervision at her parents' home. It was only on 20 May 2021 that the court, finalising the parties' respective protection orders, determined that there were no valid reasons for the Applicant's restriction of the Respondent's contact to D[....]. At this point, regularised and unsupervised contact was ordered by that court. By all accounts, that contact is going well.

5. The Applicant has not given any cogent justification to this court as to why the Respondent's contact should be supervised or limited, and no basis was established for the Respondent to be precluded from contributing meaningfully to D[....]'s life.

6. The conflict is limited purely to the parties and the Applicant has wielded her position as primary caregiver of D[....] over the Respondent, unilaterally dictating when, where and in what manner the Respondent would be permitted to exercise contact to a child in respect of whom he co-holds full parental responsibilities and rights.

7. I consider the unjustified contact refusal on the part of a primary caregiver to be egregious conduct, particularly in circumstances where a child is of such a tender age, that he is unable to express his views and wishes and where frequent contact for children of this age, is generally indicated.

8. This is compounded, where the parent being denied contact lives with the sword of Damocles over his head in the form of an interim protection order (together with the suspended warrant of arrest), which includes an order in respect of the child and which, could result in his arrest, lest he presses for contact, and this is perceived to be a breach of the order.

9. Arising out of the inability of the Family Advocate to make a recommendation in relation to D[....]'s best interests, the parties have agreed that a clinical psychologist, Dr Peche will conduct a forensic assessment into the allocation of parental responsibilities and rights.

10. Pending the finalisation of Dr Peche's report, the Respondent should be entitled to more extensive contact to D[....], which I have made provision for in my order below. Had the problematic conduct of the parties ended at this point, I would have been inclined to grant a costs order against the Applicant on account of her unreasonable contact refusal.

11. Regrettably, the Respondent has also displayed a serious lack of judgment, but on a different score.

REMOVAL OF A SPOUSE FROM MEDICAL AID SCHEME

12. It is common cause that the Applicant is at present unemployed and suffers a

30% hearing loss in both ears. Notwithstanding the fact that this Rule 43 application was pending, the Respondent unilaterally removed the Applicant from his medical aid scheme on 31 August 2021. He did so allegedly due to his “financial position” and the Applicant’s purported abuse of the medical aid scheme.

13. This is not the first Rule 43 application this week in which this practice has manifested. There appears to be a tendency amongst litigants in divorce matters, who are the Main Members on a medical aid scheme, to unilaterally and without notice, remove their spouse from the medical aid scheme. This conduct is egregious and places the removed spouse in the invidious position of being without medical cover and having to rely on the public health sector for medical care. This is highly prejudicial to the removed spouse in that the level of medical care in public health facilities is frequently found wanting.

14. It is well known and publicly recognised that public health facilities are under severe pressure and as a result the level of treatment may be of an inferior standard to that available privately. Private medical care provides an important supplementary role in the healthcare system in our country. The removal of a dependant from a medical aid scheme could have far reaching, significantly prejudicial and devastating consequences. This is exacerbated whilst we find ourselves in the midst of the COVID-19 Pandemic.

15. In circumstances where a spouse who is the Main Member on a medical aid scheme wishes to remove a dependant spouse, in the midst of divorce proceedings, I would think that no less than 3 months written notice should be given of the intention to remove the dependant spouse, so as to enable the dependant spouse to elect to approach the Rule 43 court in the ordinary course to obtain a court order in respect of their retention on the Main Member’s medical aid scheme or to procure his/her own medical aid cover if he/she is able to afford to make payment of the premiums.

16. In many cases, the dependant spouse has been a dependant for a significant period of time and the medical aid premium is a deduction off the Main Member’s gross salary or paid by the employer. In all events, this practice is one to be frowned

upon and discouraged. For this reason, I have included in my order below, provision for the immediate reinstatement of the Applicant on the Respondent's medical aid scheme *pendente lite*.

17. Insofar as the Respondent alleges that due to his "financial position", he could no longer afford to retain her as a dependant, I am not persuaded. The Respondent earns a gross monthly income of R124 485.00, from which the medical aid premium is deducted. That premium, (which includes the Applicant and D[....]) amounts to R8810.00. It is noteworthy that the Respondent contributes the sum of R21 930.00 towards his retirement fund on a monthly basis, which is also a deduction off his gross income.

18. In the circumstances, the retention of the Applicant on his medical aid scheme can hardly be attributed to a lack of affordability. I am similarly not persuaded that the Applicant's purported abuse of the medical aid scheme, which was baldly asserted, but not substantiated or particularised, justified her removal therefrom.

19. Had the Applicant not behaved in the manner referred to above, I would have been inclined to grant a costs order against the Respondent for having removed her from his medical aid scheme.

20. It is unfortunate that both parties have behaved in a manner deserving of censure and that neither one has managed to maintain the moral high ground.

THE APPLICANT'S CLAIM FOR MAINTENANCE

21. The Applicant is 36 years old and was gainfully employed prior to the parties' marriage and thereafter until D[....]'s birth. She is a business analyst and has worked in the banking and financial services industry as a data / business analyst and digital products specialist for a period of more than 15 years. In her Founding Affidavit, she states *inter alia* that she is currently unemployed and "unable alternatively unwilling to engage in fulltime employment". She goes on to state that she is unable to afford a fulltime caregiver for D[....].

22. The parties' marriage is one of very short duration and it is doubtful whether the Applicant will succeed in securing an order for maintenance post the parties' divorce. There is no reason why she should not return to the work force and again become gainfully employed. She is young, qualified and experienced. Her professed unwillingness to work on account of her inability to afford a fulltime caregiver for D[....], rings hollow.

23. In the first instance, the Respondent's mother has offered to care for D[....] at no cost whilst the Applicant is at work. There is no evidence to suggest that this is not in his best interests. In the second instance, D[....] will soon be 2 years old and well able to attend play school or crèche to which the Respondent will be obliged to contribute or pay for in full, depending on the parties' financial circumstances at the time.

24. I believe that a maintenance order in favour of the Applicant *pendente lite* will dis-incentivise her from seeking and obtaining employment without delay. For this reason, I am minded to grant her maintenance for a period of 5 months, irrespective of whether or not the divorce action is finalised.

In the circumstances, I grant an order in the following terms:-

1. From 30 November 2021 and for a period of 5 months thereafter, on or before the 30th day of each successive month, the Respondent shall pay maintenance for the Applicant in the amount of R10 000.00 per month.

Pendente lite:-

2. The Respondent is ordered to:-

2.1 immediately reinstate the Applicant as a dependant on his current medical aid scheme and make payment of the monthly medical aid premiums in regard thereto directly to the service provider;

2.2 make payment of maintenance for the minor child in an amount of

R6500.00 per month, the first payment to be made on 30 November 2021 and thereafter or before the 30th day of each successive month following the grant of this order.

3. Dr Peche is appointed as the expert to conduct a full forensic investigation into the best interests of the minor child and to render a report with recommendations in relation to the allocation of parental responsibilities and rights. Both parties shall take all such steps and do all such things as are necessary to enable the expert, to conduct her investigation.

4. The Applicant and Respondent shall continue to co-hold full parental responsibilities and rights in respect of the minor child as provided for in Section 18 (2) (a) – (d) and 18 (3) of the Children's Act 38 of 2005.

5. The minor child's primary place of residence shall be with the Applicant subject to the Respondent's reasonable rights of contact, which contact shall, with effect from the date of the grant of this Order, include:

5.1 having the minor child with him every Monday, Thursday and Friday from 08:00 until 17:00, when the Respondent will collect and drop the minor child at the Applicant's place of residence;

5.2 having the minor child with him every alternate weekend on a Saturday and on a Sunday from 08:00 until 17:00 when the Respondent will collect and drop the minor child at the Applicant's place of residence;

5.3 Father's Day, provided that the Applicant shall have the minor child with her on Mother's Day;

5.4 the Respondent shall spend Christmas day 2021 with the minor child from 08:00 until 18:00. The Respondent will collect and drop the minor child at the Applicant's residence;

5.5 half of the Boxing Day so as to ensure that the public holiday is shared

by the Applicant and the Respondent, where the Respondent will have the minor child from 08:00 until 14:00. The Respondent will collect and drop the minor child at the Applicant's residence;

5.6 half of the New Year's Day, so as to ensure that New Year's Day is shared between the parties, where the Respondent will have the minor child from 08:00 until 14:00. The Respondent will collect and drop the minor child at the Applicant's residence;

5.7 half of the minor child's birthday so as to ensure that the birthday is shared by the Applicant and the Respondent, where the Respondent will have the minor child from 08:00 until 14:00. The Respondent will collect and drop the minor child at the Applicant's residence;

5.8 on Good Friday 2022 from 09:00 until 17:00 when he will collect and drop the minor child at the Applicant's residence, provided that the Applicant shall have the minor child with her on Easter Sunday 2022.

6. Once the expert's report is to hand, either party shall be entitled to apply on the same papers, duly supplemented, to the extent necessary, for a variation of this order.

7. The costs of this application are costs in the cause of the main action.

L SEGAL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

This judgment was prepared and authored by Acting Judge Segal. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.

DATE OF HEARING: 09 NOVEMBER 2021

DATE OF JUDGMENT: 26 NOVEMBER 2021

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