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

CASE NO: 2022/26992

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

31/10/2022

In the matter between:

L [...], C [...] D [...] F [...]

Applicant

And

L [...], J [...] 1

Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Rule 43 application – shared residence pendente lite – interest of minor children – application and affidavits not complying with Rule 43 – each party to pay his or her own costs

Order

[1] In this matter I made the following order on 28 October 2022:

1. *Dr Ronel Duchen, alternatively, Irma Schutte, alternatively a qualified third party agreed to and nominated by both parties, shall conduct a Voice of the Children Assessment in respect of the children, T [...] L [...] and J [...] 2 L [...] (“the children”), to establish the children’s views and wishes in determining their place of residence and contact.*
2. *The costs of the expert conducting the Voice of the Children Assessment shall be shared equally between the parties.*
3. *Pending the (a) final outcome of the Voice of the Children Assessment, and (b) the Family Advocate’s investigation into the issue of the children’s residence, and (c) the final determination of the Rule 43 proceedings between the parties under case number: 22/13389:*
4. *The primary residence of the children shall be shared equally and between Applicant and Respondent;*
5. *The primary residence of the children shall alternate every week as from Friday, 4 November 2022, commencing on Fridays at 12h00 until the following Friday at 12h00, with the children residing with the applicant for the week commencing on 4 November 2022 and then residing with the respondent for the week commencing on 11 April 2022;*
6. *Each party is entitled to reasonable telephonic, alternatively virtual remote contact through a suitable communication platform with the children at all reasonable times, including at least once per day during the hours of 17h00 – 19h00, which shall be exercised subject to the children’s reasonable scholastic, extra mural, cultural, religious and social activities.*
7. *Each party shall pay his or her own costs.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application in terms of Rule 43 of the Uniform Rules of Court for an order *pendente lite* regulating firstly the primary residence of the minor children, a nine year old girl and a seven year old boy, and secondly the need for a Voice of the Children assessment.

[4] In short,

4.1 the applicant (“Mr L [....]”) seeks an order that primary residence be shared and alternate on weekly basis whereas the respondent (“Ms L [....]”) argues that primary residence should be with her, with ample rights of access by Mr L [....], and

4.2 Mr L [....] wants a Voice of the Children assessment to be conducted and Ms L [....] is of the view that such an assessment is not necessary, it being common cause that the Family Advocate will commence investigations in November 2022.

[5] Both parties seek a punitive cost order against the other.

[6] The *status quo* is that the parties live with the minor children in the matrimonial home. Ms L [....] intends to relocate to alternative accommodation in the immediate future and for this reason the matter was enrolled in the urgent court. With the benefit of hindsight one can say that Mr L [....] could have brought the application late in September 2022 already but by the time that the application was in fact launched, an approach to the Urgent Family Court was justified. I therefore condone non-compliance with the Rules in respect of urgency.

[7] Because of Ms L [....]’s decision to move to alternative accommodation, this is not a case that can be dealt with by an order maintaining the *status quo*. The *status quo* is about to end.

[8] Ms L [....] objects to shared residence on the basis of aspects of Mr L [....]’s behaviour that she does not approve of, but these objections are not of such a nature that she opposes access to the children by him. These are issues that the parents should be able to discuss in an adult way, going forward.

[9] Both parties will reside close to the children’s school and the two residences are not far apart. Both parents are involved with their children and both have the interests of the children in mind. There are no practical problems with alternating

residence on a weekly basis.

[10] Ms L [...] in objecting to a Voice of the Children investigation rely on two factors, firstly the pending investigation by the Family Advocate and second the hearsay evidence of what a play therapist, who is neither an expert nor willing to sign an affidavit, allegedly said. No reliance can be placed on this aspect and the hearsay is inadmissible. It should never have been presented.

[11] The parties and the children may benefit from a Voice of the Children assessment. Mr L [...] suggested an assessment by Dr Duchon or Ms Schutte. I requested counsel to take instructions with a view to identifying a third person acceptable to both parties who could be appointed for the purposes of the assessment but this turned out not to be possible. It was however confirmed that the two individuals mentioned were indeed available and the order I make provides for an assessment by either of them or by a third person if the two parties managed to come to an agreement in this regards.

[12] There is a second application in terms of Rule 43 already pending before the courts. The first Rule 43 application was brought under case number 2022/13389 and in that application Ms L [...] seeks a maintenance order as well as an order evicting Mr L [...] from the matrimonial home.

[13] The divorce action was instituted under case number 2022/12776. This unnecessary complexity of using three case numbers in one action is bound to cause confusion.

[14] In this application Mr L [...] filed a replying affidavit that is not permissible in terms of Rule 43 and he did so without an application for its admitting it into evidence in terms of Rule 43(5). In the interest of the children I read through the replying affidavit but in the absence of an application to admit it, I took no account of it.

[15] Neither of the parties complied with Rule 43(2)(a) and Rule 43(3)(a) that require affidavits *'in the form of a pleading.'* Such conduct may in appropriate cases lead to attorneys' fees being disallowed.

[16] Under these circumstances I am of the view that each party must pay his or her own costs.

[17] For these reasons I made the order in paragraph 1.

**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **31 October 2022**

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DATE OF THE HEARING: 19 October 2022

DATE OF ORDER: 28 October 2022

DATE OF JUDGMENT: 31 October 2022