REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **2023/093002**

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

[redacted]

Date: 3 October 2023

In the matter between:

CVZ Applicant

and

BF Respondent

JUDGMENT

DE VOS AJ

[1] The applicant seeks urgent relief from the Court. The case concerns the primary care of two minors, aged 4 and 7. On 11 August 2023, Her Ladyship Justice Basson ordered that the primary care of the children rests with the respondent. The applicant asks this Court to reconsider the 11 August 2023 order and change the primary care to vest with the applicant.

[2] The applicant before this Court was the respondent before Basson J. For ease of reading, the parties will be referred to as they appear before this Court now.

[3] The applicant contends that at the time the 11 August 2023 order was granted, the applicant and respondent were living together in the respondent's home. Subsequent to the order, the applicant left the respondent's home. The details of the applicant's departure need not engage the Court save to say it was not voluntary. The applicant's position is that the "regrettable consequence" of the court order granted on 11 August 2023 is that it removes the minor children from their primary caregiver of the past three years – being the applicant - and provides no proper contract rights to the applicant.

[4] The crux of the applicant's case is that if the Court [Basson J] was "aware of the applicant's version, the relief sought in the respondent's urgent application would not have been granted". The applicant's case is that this Court would not have made the 11 August 2023 order if it was aware that the parties may not live together.

[5] The respondent opposes the relief sought and contends that Basson J was made fully aware of the fact that the applicant would leave the shared home when it granted the 11 August 2023 order. The applicant's subsequent departure from the shared home was an issue which served before the Court when it granted the 11 August 2023 order.

[6] The central controversy, in this case, is whether the circumstances have changed subsequent to the order of Basson J to permit a reconsideration of the primary care order.

[7] I have to consider the facts which served before Basson J. The founding affidavit before Basson J contains the following allegation –

> "the [applicant] undeniably stated that she will move out where she is currently living [in our house]."[1]

[8] The Court was made aware of the applicant's intention to leave the shared home. The applicant's request that the order be reconsidered on the basis of subsequent events should fail, as these events were foreshadowed and properly placed before the Court when it granted the 11 August 2023 order. The factual basis for the applicant's request for this Court to intervene with the 11 August 2023 order is at odds with the pleaded facts.

[9] It also weighs with this Court that the respondent (as applicant before Basson J) highlighted this fact – the certainty that the applicant will move out of the shared home - in its practice note. The respondent's counsel submitted in the practice note before Basson J that it seeks urgent relief to bring consistency to the children's lives as the applicant has stated she will move out of the home which they all currently share and that this will result in further "disarray for the children".[2]

[10] The applicant's departure from the home is not an unexpected event. It may have occurred subsequent to the 11 August 2023 order, but it was expected, anticipated and disclosed to the Court. The Court was made aware of this fact, not only in the affidavit which served before it and then pointed out specifically in the practice note. This Court cannot conclude that the order of 11 August 2023 must be interfered with based on subsequent events – as these did serve before Basson J.

[11] It also weighs with this Court that the children have now lived with the respondent as the primary caregiver for more than six weeks. The Court would have to uproot the children again were it to interfere with the order of Basson J. I have no reports or evidence of what the impact of another move will have on the children. They have moved from New Zealand to South Africa and from Hermanus to Gauteng. They have been in three different schools already this year. It is not a criticism – there appears to be good reasons for all these moves – and it appears that these decisions were taken with the interests of the children in mind. The Court must, however, consider that our case law has recognised the importance of consistency in children's lives –

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[1] FA 13-48 para I (urgent application under case number 078774/2023)

[2] CL 13-217

particularly those as young as the parties' second daughter.[3] Children's existing environment should not readily be disturbed, and any unnecessary moves should be discouraged and avoided on the grounds of security and stability.[4] A stable routine is universally determined to be in the interests of children, especially those of a young age.[5] Were I to grant the relief sought by the applicant, they would be uprooted, again, in dissonance with our caw law. This is particularly concerning as I have not been told what the impact of such a move would be on the children. I hesitate to do so without knowing what the impact on the children would be.

[12] I also spent some thought on the temporary nature of the 11 August 2023 order. The order was granted on an interim basis pending the outcome of Part B, which would be a final resolution of the issue. The order also operates pending an investigation by the Family Advocate, which has been ordered to be provided on an urgent basis. The current situation is, therefore, interim and will be resolved with the report from the family advocate when Part B is considered. The parties can seek case management or agree to an expedited hearing in one of this Division's specialist courts. I asked the parties whether they would agree to a case management order with the hope of expediting the issue, but no such agreement could be reached. Regardless, there are avenues available to see relief on a more immediate basis, but also with all relevant facts from the Family Advocate before the Court.

[13] The Court also considers that it is being asked, essentially, to suspend the operation of the order of 11 August 2023. The applicant has not expressly relied on Rule 45A, but the impact of the relief being sought is that provided for in Rule 45A. The Court must exercise the powers in Rule 45A sparingly.[6] The applicant's premise for seeking such interference is for reasons set out above, not borne out by the evidence. The applicant leaving the shared house is a fact that Basson J was made aware of on the

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[3] ***AS v CHPS 2022 JDR 0623 (GJ)***).

[4] Mekgwe v Letlatsa 2018 JDR 1959 (FB) at page 30

[5] JO v AO 2017 JDR 1691 (GJ)

[6] The power to suspend execution will not be exercised as a matter of course and should be used sparingly to come to the assistance of an applicant outside of the provisions of the rules of the Court when the Court is satisfied that the interests of justice require it to do so, and that justice cannot be properly done unless relief is granted to the applicant. (***Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W)*** at 462H – 463B; and ***Whitfield v Van Aarde 1993 (1) SA 332 (E)*** at 337E – G).

papers and in argument. The Court cannot conclude it is in the interest of justice to interfere with an order in circumstances where the basis of the interference alleged by the applicant is not supported by the evidence.

[14] There is a history of protracted litigation between the parties, which spans back to December 2021, when the respondent launched an urgent application and sought investigations into the well-being of the children and the question of primary care. These legal proceedings in the Western Cape were never finalised, despite reports being filed by the Family Advocate. These proceedings provide another basis for the Court to be slow to interfere with the existing order.

[15] The Court also gains comfort from the fact that there is nothing on the papers before me, which indicates that the respondent lacks a caregiver. On the contrary, the Court has reports indicating both parents are suitable to be primary caregivers.

[16] For all these reasons, the Court is not persuaded that the applicant has made a case for the relief sought.

[17] The Court's duty to the children, however, does not end there. The reality is that I am confronted with two girls who have lived with the applicant most of their lives and permanently for the past four years and now see them for limited periods – sometimes as little as a couple of minutes before school. I must immediately state the respondent has offered a contact regime – a matter to which I will return. However, practically, the children's contact with their mother is a matter of concern to the Court.

[18] The Court's concern with contact emanates not just from the facts of this case but the case law concerning the best interests of the children. In *ND v PT*[7] this Court held -

> "The absence of contact and the resultant failure to establish a relationship between a young child and one of the parents is not in the best interests of a child. Additionally, the longer a young child is denied such contact the more difficult it becomes to establish a relationship between the relevant parent and the child."

[19] At present, the children see their mother for limited periods – when before, they lived with her full time. The change was concerning to the Court, and it turned to the parties for assistance. The Court is grateful for the full submissions it received from the

[7] 25792/2020) [2022] ZAGPJHC 13 (18 January 2022)

parties' representatives during the Court hearing as well as their endeavours to approach the Court with solutions to this concern: being the issue of contact pending the outcome of Part B. The parties were helpful and offered to engage each other to see what they could achieve through negotiation. At the end of an urgent week and the best endeavours by both parties, they remained far apart.

[20] The positions were, essentially, that the applicant sought shared residency, and the respondent tendered contact on Wednesdays and alternate weekends (including sleepovers).

[21] The applicant's position (if not primary care, then a shared residency) places the Court in the difficult position that it has no facts on which it can consider this relief. The Court has no information on what the impact on the children will be if they move homes between the applicant and the respondent. I have been provided with no basis to conclude a shared residency will be in the best interest of the children. In these circumstances, the Court is hesitant to interfere with the children's residence. To be clear, the Court does not conclude that shared residency is inappropriate, but only that at this stage, it does not have facts on which to make this finding.

[22] The respondent's tender of contact will, however, immediately improve the amount of contact between the applicant and the children. I have been informed that the parties have been unable to agree to a contact order pending the outcome of Part B of the urgent application, which was served before Basson J. As this contact has been tendered by the respondent, I see no harm in making this an interim order of the Court to ensure the children have contact with the applicant.

[23] The respondent's counsel has referred to a judgment of this Division by Van der Schyff J, who confronted with a request to intervene with an existing order made an interim contact order. In *LKM and Another v NFM and Others*[8] where the Court held –

> "This is, however not the end of the matter before me. The practical reality is even if the applicants are compelled to issue an application in the children's Court for the suspension of the order granted on 25 April 2022, the immediate question is whether the order as it relates to the first respondent's contact with her child for 29 and 30 April 2022 should proceed as ordered by the children's Court. Although the applicants' did not make out a case that the first respondent poses any threat to the minor, I have to consider that, be it because of the first respondent's voluntary absence or the applicants denying

[8] (16859/22) [2022] ZAGPPHC 269 (29 April 2022) para 13

her contact, the last contact that the first respondent had with her child was during November 2021. It would, however, be in the minor child's best interest to resume having contact with her biological mother as soon as possible. This being said, it would be in the best interest of the child to ensure that the first contact is not overwhelming but gradually phased in."

[24] I am persuaded, based on the tender offered by the respondent, the case law's recognition of the importance of contact with parents and the reasoning of Van der Schyff J set out above, that an interim contact order be granted. This type of order is appropriate in the circumstances as neither party says the other is unfit or that the girls are not loved and well looked after by the other. The order will, of course operate on an interim basis, solely to increase the applicant's current contact until part B of the application launched under case number 078774/2023 has been resolved.

Order

[25] As a result, the following order is granted:

a) The application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court any non-compliance with form, service and time periods in terms of the Uniform Rules of Court is condoned;

b) Pending the outcome of Part B of case number 078774/2023 the Court provides for contact by supplementing 11 of the court order dated 11 August 2023 under case number 078774/2023 as follows:

i) The applicant will have contact with the minor children every alternative weekend from after-school returning them to the respondent's residence on a Sunday afternoon at 17:00. Where there is a public holiday attached to a weekend, such public holiday will attach to the applicant's weekend;

ii) The applicant will exercise contact with the children every Wednesday from after school until 18:00, whereafter the applicant will return the children to the respondent's home. This contact will be subject to extra classes, school and sporting activities.

iii) The applicant must disclose the residence where the children will be housed.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	**A RAYMOND**
Instructed by:	Schindlers Attorneys
Counsel for the Respondent:	**L KEIJSER**
Instructed by:	AH Stander and Achenbach Inc
Date of the hearing:	27 September and 28 September 2023
Date of judgment:	4 October 2023