

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 11396/21

Before: The Hon. Mr Acting Justice Montzinger

Hearing: 5 October 2021

Reasons: 8 October 2021

In the matter between:

J G[....]

Applicant

and

G G[....]

Respondent

REASONS REFUSING POSTPONEMENT

MONTZINGER AJ:

[1] This matter started as an urgent application on 7 May 2021. It concerns the interests of a minor child who is presently 13 years old. The application initially consisted of two parts.

[2] Under Part A urgent relief was sought to appoint a curator *ad litem* to the child so that his voice can be heard, and that a neutral party would advance his position in respect of care, contact and care by his parents. Part B of the application sought relief that this Court considers to be in the best interest pertaining to the minor child's care, contact and welfare, including any potential orders in accordance with the recommendations of the minor child's curator *ad litem* and with the recommendations, if any, of the Family Advocate.

[3] Both parts of the application were initially opposed by the respondent, who was legally represented and delivered a notice of opposition. Notwithstanding the opposition the parties on 7 May 2021 reached an agreement in respect of the further conduct of the application, and ancillary matters. This agreement was embodied in a Court order granted by Henney J. In terms of this order Janet McCurdie SC was appointed as the curator *ad litem* to the minor child, as per part A of the notice of motion. As curator she was granted investigative powers with the direction to deliver a report with her recommendations to the Court.

[4] The relief sought in part B was postponed, by agreement, to 2 August 2021 for hearing on the semi-urgent Court roll. On that day the matter did not proceed to argument and the parties concluded a further agreement embodied in a Court order granted by Judge President Hlophe. The August 2021 order postponed the relief in Part B for hearing on 6 October 2021, and the curator was required to deliver her report on 23 August 2021.

[5] Both orders by Henney J and Judge President Hlophe made provision for the respondent to file an answering affidavit. The record also reflects that the respondent was represented by an attorney since May 2021 when the agreements regarding the further conduct of the matter concluded.

[6] The curator's report was delivered on 8 September 2021. On 5 October 2021 at approximately 14:30 this Court was informed that the respondent's previous attorney of record has been substituted with new attorneys. Potgieter & Associates came on record while the respondent was until the morning of 5 October 2021 represented by Haydn Elmes & Elmes Attorneys. No explanation was tendered why the previous attorneys was substituted at this late stage.

[7] The matter was called for hearing on 6 October 2021 and Ms Danell Wallace appeared on behalf of the respondent. She indicated that she had not had an opportunity to consider the proposed parenting plan. By this time the curator has filed a supplementary report to her September 2021 report and in consideration of her findings and proposals a draft parenting plan was presented for consideration by both parties. Ms Wallace indicated that her client was not aware of the hearing date. This could off course not be, as the orders, postponing the matter, was granted by agreement. Ms Wallace then requested the matter to stand down to take instructions and consider the parenting plan. This request was granted.

[8] Court resumed at 14:15. This time the respondent was represented by counsel, who was briefed during the course of the morning. Counsel requested a further stand down of the matter to discuss the applicant's proposed parenting plan alternatively draft order. The request was again granted. Court reconvened at 15:15

as the parties could not agree on the terms of the proposed parenting plan or draft order.

[9] This time respondent's counsel addressed the Court seeking a postponement of the matter. After submissions were made from the bar in support of a postponement application, the Court refused the postponement and allowed the parties to address the merits of the matter. Applicant's counsel moved for a draft order pending the finalisation of the divorce proceedings. Considering the status and nature of the proceedings and the Court's approach to the matter the respondent was informed that the Court is inclined to grant an order in the terms proposed by the applicant. Respondent's counsel was invited to address the Court on the terms of the proposed draft order. Some objections were raised. These related to paragraphs 1.3, 1.6, 1.7, 1.9 and 1.26 of the proposed order. Some of the concerns were addressed in an updated draft.

[10] In granting the order this Court approached the matter as a Rule 43 application. What follows are the reasons for refusing a further postponement of the matter.

The nature of the proceedings

[11] Although the matter started as an urgent application in part to appoint a curator *ad litem* for the minor child, two obvious issues were alive that required the Court's intervention. Firstly, it was to obtain an opinion whether the minor child's views should be considered regarding his care, contact and welfare. Secondly, that the need to obtain the minor child's view was necessary since the applicant and

respondent was still at loggerheads in the divorce proceedings, and the issue of the minor child's care, contact and welfare had to be resolved.

[12] The 7 May 2021 order provided for interim contact with the minor child pending the resolution of part B of the application. In terms of paragraph 7 of that order the contact had to take place as directed by the parenting co-ordinator / social worker, Esna Bruwer in consultation with the curator *ad litem* and clinical psychologist, Bernard Altman and only with the consent of the minor child and in the presence of certain professionals. Paragraph 8 of the order also gave the curator the power to recommend interim contact arrangements pending the hearing of Part B.

[13] Although the relief in Part B of the notice of motion does not expressly mention for how long the Court should grant an order pertaining to the care, contact and welfare of the minor child, it cannot conceivably be a final order. To view such relief as final would usurp the divorce Court's powers to issue an appropriate order on the same issues. Furthermore, if the allegations in the founding affidavit are considered it is apparent that the need for the relief arose in the context of the pending divorce proceedings. So, any order issued by this Court can only be effective until such time that a final decree of divorce is issued.

[14] The Court's view is justified when the ambit of Rule 43 is considered as well as the legal principles that has developed around it. The procedure applies *whenever* a spouse seeks relief in respect of one or more of the listed matters. It applies solely to matrimonial actions that are pending or are about to be instituted¹.

¹ See: *Spangenberg v De Waal* [2008] 1 All SA 162 (T) and for the interpretation of rule 43: *E v E and related matters* [2019] 3 All SA 519 (GJ).

Procedurally a rule 43 application does not have to meet the same stringent formal requirements of an application on motion in the ordinary course.

[15] Properly contextualised the applicant seeks relief in respect of contact and care of the minor child, pending the finalisation of the divorce. The relief falls squarely within the listed matter in Uniform rule 43(1). So although no mention is made in the founding affidavit referencing a reliance on Uniform rule 43 it is apparent from a reading of the affidavit that the divorce proceedings are still pending and that it is within that context that the applicant approached this Court on 7 May 2021.

[16] The Court's approach in this matter is that substance should count over form² as the facts of the matter clearly demonstrates a need for relief in the context of a pending divorce. This matter has all the characteristics of a Rule 43 application and should thus be treated as such.

[17] Treating the matter as a rule 43 application and issuing an appropriate order creates a safeguard for the respondent as she can still approach the Court later in terms of Uniform rule 43(6), should a material change occurs in the circumstances of either party or the child. This approach favours the respondent as she has not expressed her position and response to the relief on affidavit. So the circumstances that underlies the order issued by this Court is as presented by the curator *ad litem* and the applicant, keeping in mind that the curator *ad litem* did consult with the respondent in compiling her report.

² See *Kwazulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu Natal and Others* 2013 (40 SA 262 (CC))

The postponement application

[18] The legal confines in which a Court must consider a postponement application is well established. Suffice it to point out that the legal position and the requirements an applicant must comply with to succeed with a postponement application has been consistently endorsed by our Courts including the Constitutional Court. In this regard the Constitutional Court's summary of the principles underlying a postponement application in *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC) at 1112 C – F³, guides the Court's consideration in this matter.

[19] Having regard to these principles, an applicant is at the mercy of the Court as an indulgence is sought and the party must provide a reasonable explanation for the need to postpone⁴ and must thus show a '*good and strong reason*'⁵ for the grant of the postponement.

[20] In this matter, the primary reason for the postponement is premised on the respondent's legal team's need to consider the papers and to advise the respondent. Unfortunately, the request for a postponement falls far short of the parameters laid down by the Constitutional Court. The application for a postponement was made from the bar without any factual support for it under oath. The Court was not provided with an explanation why the respondent, while previously represented, did nothing to file answering papers. Also, an explanation was absent why the respondent's erstwhile attorney was substituted the day before the hearing.

³ Also *Lekolwane and another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) para [17]

⁴ *Carephone (Pty) Ltd v Marcus NO and others* 1999 (3) SA 304 (LAC) para [54]

⁵ *Gentiruco A G v Firestone SA (Pty) Ltd* 1969 (3) 318 (T) at 320 C - 321 B

[21] While the Court has sympathy for the position of the respondent's legal team having been briefed at short notice, what would have sufficed is at least a short affidavit simply explaining the reasons for the respondent's failure to file papers since the May 2021 order, also the sudden failure by her previous attorney of record to continue to represent her.

[22] This Court is of the view that by refusing the respondent a further postponement would not result in an injustice. The respondent has had an attorney for a significant period (i.e. 5 months) and could have had the opportunity to place her defence before the court any time during this period.

[23] As the Appellate court has said⁶ that the interest of other litigants, like the applicant, the minor child and even the Court is also important. Therefore, in the absence of any substantive application for a postponement this Court's ability to exercise its discretion in favour of the respondent is restricted.

[24] Finally, any prejudice that the respondent could conceivably complain off is trumped by the situation the minor child finds itself in. The curator has carefully considered the best manner in which to reinstate contact between the respondent and the minor child, with a well-constructed support system of professionals who will ensure that the child's interests are not subordinated to the wishes and impulses of the applicant and respondent where these are inappropriate and counter to his interests. Further the curator's recommendations operate to the advantage not only of the minor, but also of the respondent, as a program is designed to afford her contact with the minor, which she does not presently enjoy.

⁶ In *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] 3 All SA 236 (A)

[25] It was also the Court's impression that the respondent in effect does not take serious issue with most of the findings by the curator in her report. This is apparent from the fact that even though the matter stood down for almost an entire day and the curator's report, as supplemented, as well as the proposed draft order was discussed by the respondent's new legal team with her, when the matter resumed at 15:15 counsel on behalf of the respondent simply pointed out concerns in the proposed draft order that was limited to semantics or for which safeguards were sufficiently catered for in the order.

[26] For all these reasons the application for a postponement was refused and the order marked 'X' was made an order of Court.

A MONTZINGER
Acting Judge of the High Court

Appearances:

Applicant's counsel:	Adv Fiona Gordon-Turner
Applicant's attorney:	Andrew Miller & Associates
Respondent's counsel:	Adv Samkange
Respondent's Attorney:	Potgieter & Associates