

Reportable



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

Case No: 9685/2022

In the matter between:

C T

Applicant

and

T E T

Respondent

Coram: De Wet AJ

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time of handing down judgment is deemed to be 13 October 2023.

JUDGMENT

DE WET AJ:

Introduction:

1. The applicant launched an urgent application seeking interim contact with the parties' two minor children and for the appointment of Ms Pettigrew, an educational psychologist, to conduct an assessment pertaining to care and contact in respect of the minor children, at the respondent's cost. She further claimed, *pendente lite*,

maintenance in respect of herself and the minor children, a contribution to her legal costs in the divorce action and costs.

2. The respondent was afforded two days to file a notice of intention to defend and a further four days to file his opposing affidavit. To the applicant's knowledge, the respondent was abroad when the application was served, only to return on the day the notice of intention to defend had to be filed. The respondent did not file a notice of intention to defend or an opposing affidavit, but instead, served a notice in terms of Rule 30(2)(b) of the Uniform Rules of Court ("the notice"). In terms of the notice, the applicant was afforded ten days to remove the irregular step.

3. Despite the notice, and in the absence of the respondent, the applicant proceeded with the urgent application and obtained an order on 17 June 2022 ("the order").

4. In terms of the order a rule *nisi* was issued calling upon the respondent to show cause why certain extended interim contact arrangements pertaining to the parties' minor children should not be made final and Ms Pettigrew was appointed at the respondent's cost, to conduct a care and contact assessment. The Court further ordered the respondent to maintain the applicant and the parties' minor children *pendente lite*, by paying the applicant an amount of R 2 500 per month per child, by retaining the minor children on his medical aid, by paying all their medical expenses not covered by the medical aid, by paying the children's school fees and related expenses and by paying the applicant an amount of R 2 200.00 per month as a contribution to her medical aid. The respondent was also ordered to pay a contribution towards the applicant's legal costs in the divorce action up to and including the first

day of trial in an amount of R 75 000.00¹, to be paid in instalments and to pay the costs of the application. I shall refer to this application as the urgent application.

5. The respondent, who became aware of the order on 17 June 2022, filed an urgent application on 30 June 2022 to anticipate the return date and requested a reconsideration of the order in terms of Rule 6(12)(c) of the Uniform Rules of Court. He further filed a counter application requesting an order that the applicant should only have very limited interim contact with the children, which does not include overnight contact, and that Ms Raphael, a clinical psychologist, be appointed to conduct a care and contact assessment, with the costs of such assessment to be shared equally by the parties. On the issue of maintenance, the respondent makes no tender in respect of the applicant's maintenance claim, no tender in respect of a contribution to her legal expenses and no tender in respect of the minor children's expenses whilst in her care. He further requests that the applicant pay half of all medical expenses the children may have whilst in her care but tenders to retain the children on his medical aid and to continue paying their school and related expenses. He requests that the applicant be ordered to pay the costs of the reconsideration application and the counter application, on a punitive scale. The applicant opposed the urgent reconsideration application and the counter application. I shall refer to the respondent's applications as the reconsideration and counter application.

6. The reconsideration and counter applications were postponed for a number of reasons on many occasions and both parties filed extensive further affidavits prior to the matter finally being allocated, with the leave of the Judge President, on the fourth division roll.²

¹ The order contained a patent error that the amount of R 75 000 be paid in instalments of R 75 000 per month.

² At the time the matter was placed on the Fourth Division roll the papers amounted to 248 pages.

Brief relevant background facts:

7. The parties were married to each other on 7 July 2007, out of community of property and in terms of the accrual system. Two boys were born from their marriage, who are currently 11 and 14 years old.

8. The respondent works in the salvage industry and spends approximately 6 months (though not consecutively) a year abroad. The applicant is a teacher. Until February 2022 the applicant mainly cared for the parties' minor children, when the respondent was abroad.

9. The respondent instituted divorce proceedings in July 2021 claiming *inter alia*, that primary care and sole guardianship of the minor children be awarded to him, that the applicant forfeit all her patrimonial benefits and tenders no maintenance to the applicant post-divorce.

10. The reasons for the breakdown of the marriage are in dispute. The applicant alleges that the respondent was and still is involved in an extra-marital affair whilst the respondent allege that the applicant was involved in an extra-marital affair and abused alcohol. He further alleges that because of her addiction, she did not attend to the children with the required care during the marriage.

11. The applicant left the former common home, which is jointly owned by the parties, during March 2022 and the children have been in the care of the respondent since. According to the applicant, the respondent made it intolerable for her to remain in the common home, which allegation he denies. Be that as it may, after the applicant left, the respondent's new partner moved in and she, with the assistance of the respondent's family, takes care of the children when the respondent is abroad. The

applicant has enjoyed and been afforded very limited contact with the minor children since at least May 2022. The reasons for her limited contact are in dispute.

12. The applicant alleges that the respondent is frustrating her contact with the minor children and further that he is actively alienating them from her. The respondent alleges that the children do not wish to see her, that they are not comfortable with where she lives and that they do not like her new partner, whom he had not met. He offers, as he did in correspondence before the application, that the applicant can have contact with the children at their former common home or in a public place and that further contact could be phased in subject to the children's wishes and social schedules. This offer was understandably not acceptable to the applicant.

13. The applicant earns approximately R 23 000 a month whilst the respondent earns approximately R110 000 a month. The respondent, his new partner and her daughter, and the children reside in the parties' jointly owned property. It does not appear from the respondent's schedule of expenses that his partner contributes to the household expenses, whilst the applicant's partner shares, at least, their monthly rental and he has registered the applicant as a dependant on his medical aid at a cost of R 2 200 per month after the respondent had removed her from his medical aid during May 2022.

14. Despite requests as far back as May 2022, the respondent has not contributed any amount in respect of the applicant's maintenance, legal fees or medical expenses.

The reconsideration application:

15. The mechanism provided for in terms of Rule 6(12)(c), is to redress imbalances, injustices or oppression which may flow from an order granted in an urgent matter in a party's absence.

16. In the matter of *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA 484 (W) at 486I-487B the court held regarding Rule 6(12)(c) that:

“... the dominant purpose of the Rule seems relatively plain. It affords an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In the circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto.

The framers of the rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended.”

17. In the matter of *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) Howie JA held at 455B that:

“It is trite that an ex parte applicant must disclose all material facts that might influence the Court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion, the later Court will have regard to the extent of the non-disclosure; the question whether the first Court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside.”

18. As to what information may be taken into account by the court upon a reconsideration, it was held in the matter of *The Reclamation Group (Pty) Ltd v Smit and Others* 2004 (1) SA 215 (SECLD), that as a full set of affidavits had been filed at the date of the hearing, it resulted in a new set of circumstances and both sides' story was now before Court.³

19. On receipt of the urgent application⁴, the respondent served the notice, by way of email, on 13 June 2022 on the applicant's attorney of record. The notice was filed at court on 14 June 2022 and stated that the relief claimed by the applicant constituted an irregular and improper step as the relief should have been sought by way of Rule 43. The notice states that the application amounted to an abuse of process and should be set aside.

20. Although the respondent's attorney states under oath that the notice was placed in the court file by his correspondent, it is unclear whether the notice found its way into the court file prior to the hearing of the urgent application. What is however undisputed is that the index and court bundle which was prepared on behalf of the applicant and placed before the presiding Judge on 17 June 2022, did not include the notice, counsel who appeared for the applicant did not alert the court to the existence of the notice and the practice note which was filed on 14 June 2022, by the applicant, incorrectly stated that the respondent had not reacted to the application.

21. As the notice was already served on the respondent's attorney of record on 13 June 2022, I can think of no reason why the practice note (and index) was not

³ See also *Oosthuizen v Mijns* 2009 (6) SA 266 (W) at 2691; *Industrial Development Corporation of South Africa v Sooliman* 2013(5) SA 603 (GJ) at para [9] and *Faraday Taxi Association v Director Registration and monitoring: MEC for Roads and Transport and Others* (58879/2021) [2022 ZAGPJHC 213 (5 April 2022).

⁴ The applicant in reply and in the Heads of Argument filed on her behalf, concedes that the application was a Rule 43 application and stated that the presiding Judge had condoned it being brought on an urgent basis.

corrected and updated timeously to alert the presiding Judge to the respondent's attitude to the application. There is a duty on legal practitioners to ensure that all relevant information is placed before court, especially in circumstances where an application is heard in the absence of another party and even more so if it involves the best interests of minor children. In the matter of *Toto v Special Investigation Unit and Others* 2001 (1) SA 673 (E) at 683 A to F, Leach J reiterated the trite duty of litigating parties' legal representatives to inform the court of any matter which is material to the issues before court and of which they are aware. He stated in this regard that:

"...This Court should always be able to accept and act on the assurance of a legal representative in any matter it hears and, in order to deserve this trust legal representatives must act with the utmost good faith towards the Court" and "...A legal representative who appears in court is not a mere agent for his client, but has a duty toward the Judiciary to ensure the efficient and fair administration of justice – see the remarks of De Villiers JP in Cape Law Society v Vorster 1949 (3) SA 421 (C) at 425."

22. I have no doubt that the order would not have been granted, had the presiding Judge been informed of the notice. The misleading statement in the practice note is simply unacceptable. The argument advanced by the applicant in the opposing papers to the reconsideration application that there was no duty on the applicant's legal representatives to bring the notice to the attention of the Court, as it was filed on the respondent's attorney's version, is simply against trite legal principles and ethical practice. The applicant's instructing attorney should have ensured that the practice note and index reflected the correct position and counsel should have brought such fact to the attention of the Court. It was a material non-disclosure in my view.

23. It was further contended by the applicant, that the notice is not indicative of the respondent's intention to oppose the urgent application and that the respondent should have filed a notice of intention to defend and an opposing affidavit as directed in the notice of motion. This argument is illogical and contemptuous of ethical practices.

24. Even more astounding in this matter, is the fact that neither the applicant's nor the respondent's legal representatives, in the aforesaid circumstances, approached the presiding Judge after the order was granted to have it set aside and arrange a time-table for the further hearing of the matter. Instead, what unfolded, was a situation where the applicant clung to an order that should never have been granted which in turn necessitated the respondent to launch the reconsideration and counter application at huge costs to both parties. It is expected, especially of family law practitioners, to be pragmatic and solution driven when faced with litigation which impacts families and more particularly the well-being and functioning of minor children.

25. On the issue of whether the urgent application amounted to an irregular step and constituted an abuse of process, it is trite that although Rule 43 applications may be brought on an urgent basis, it does not take it outside the scope and limitations of the Rule. A party cannot choose whether to proceed by way of Rule 6 or Rule 43 if the relief claimed falls squarely, as in this matter, within the ambit of Rule 43.

26. In this regard and in the matter of *Leppan v Leppan* 1988 (4) SA 455 (WLD), Fleming, J held at 457 F-G thus:

"Rule 43 is clearly a special Rule governing certain applications in contrast with the general directions created by Rule 6 which normally govern applications. Rule 6 can therefore find application only on aspects which are not governed by Rule 43. Rule 6 would therefore have continued application insofar as rule 6(12)(a) is concerned – and,

*if practitioners would take note, also the requirement that urgency must be set forth 'explicitly' as is required by Rule 6(12)(b). The wording, the function of and the reasons for the existence of Rule 43 all militate against an applicant having a choice which enables him to cause Rule 43 to be inapplicable. In the circumstances enumerated in Rule 43(1) neither party nor a Court can cause Rule 43 not to apply. Nor can any 'practice' do so."*⁵

27. In the founding papers, the applicant stated that the application is urgent and justified deviation from the normal time frames, be it in terms of Rule 6 or Rule 43, as the respondent is frustrating her contact with the minor children and is alienating them from her. She further stated that she required a contribution to her maintenance requirements and a contribution to her costs. On her own version her contact with the minor children had been frustrated prior to her moving out of the former common home and since February 2022. On her own version the respondent had already removed her from his medical aid during May 2022 and refused to make any contribution to her maintenance requirements. In the circumstances there was no basis upon which the application should have been launched as one of urgency nor is any acceptable reason advanced why an adaptation of the limitations imposed by Rule 43 was justified. The fact that the application also concerned the well-being of minor children, does not *per se* render the application urgent nor does it justify non-compliance with Rule 43, particularly in respect of the maintenance claims.

28. Despite the aforesaid, I do not believe that it would be correct to dismiss the urgent application in the circumstances of this case but, in the exercise of my discretion, and to show this court's displeasure of the manner in which the application

⁵ See also *Henning v Henning* 1975 (2) SA 787(O).

was launched and the order obtained, the applicant's attorneys shall not be entitled to recover any costs from the applicant in respect of the urgent application up to and including 17 June 2022.

The voice of the minor children:

29. On the issue of care and contact, it was common cause at the hearing of the applications, that the minor children did not, despite the order, enjoy any mentionable contact with the applicant before and since the order was granted and that no investigation had been conducted. The applications, even though it concerned minor children, were also not served on the Office of the Family Advocate as required in terms of the practice directives.

30. There was no reason apparent from the papers why the minor children did not enjoy reasonable contact with the applicant. I was advised from the bar that the respondent was not in the country and that the children were left in the care of his partner. Based on these facts, the court was at a loss as to why the minor children were not in the care of the applicant, their mother, at least until the respondent returned and why the respondent was alleging that they did not want to have meaningful contact with her.

31. Section 10 of the Children's Act, 38 of 2005 ("the Children's Act") states that: *"Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration,"* whilst section 31(1) (a) states: *"Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give*

due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development".⁶ These clauses dictate that children should not only be listened to but also given an opportunity to participate in proceedings which affect them. The question from time immemorial is of course what weight is to be attached to the elusive concept of the voice of the child and how to incorporate a child's stated preferences when deciding issues pertaining to such child.⁷ A further issue to be considered is the manner wherein a child's voice should be ascertained and placed before the court to enable it to make decisions as upper guardian.

32. What was before Court in this matter, was the applicant's contention that the respondent is influencing and alienating the children, whilst the respondent denied the allegation and stated that the children did not want to have contact with the applicant for the reasons already stated. There were no allegations that the children would be in any danger should they be placed in the applicant's care or have reasonable contact with her.

33. In disputes concerning minor children, their voices are usually placed before the Court by their parents, third parties such as social workers or therapists appointed by one or both of their parents, by way of the appointment of legal practitioners in terms of section 29 (6) of the Children's Act or by the appointment of a curator *ad litem* in the High Court. Some judicial officers also interview children themselves. There are

⁶ In terms of section 31 (1) decisions in subsection (a) refers to any matter listed in section 18(3)(c), affecting contact between the child and a co-holder of parental responsibilities and rights, the assignment of guardianship or care to another person in terms of section 27 and which is likely to significantly change or have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

⁷ Voet 22.5.2 held the view that "*Natural reason also debars those below the age of puberty from giving evidence. Persons of that age are easily led astray, they suffer from instability of judgment, and they are considered as rather open to suspicion of being capable of lying; nay they are not understood as committing perjury*", and the Appellate Division in 1945, without any criticism, quoted Blackwell J in the matter of Peterson v Cuthbert & Co., Ltd 1945 AD 420 at 429 who stated thus: "*The respondent is presumably a gentleman possessed of all his sense, he is neither a child, a lunatic nor a woman and he must have known what he was saying and what he did when he signed this letter...*" This archaic position has been developed in keeping with the Bill of Rights.

differing views in this regard. If judicial officers decide to speak to a child or children, they should, in my respectful view, be cautious and mindful of the fact that the choice of a child is not necessarily the authentic voice of the child and that to interpret the voice of a child, it is imperative to have at least a basic understanding of the child's developmental stage. Consideration should also be given to issues of confidentiality, whether, if there is more than one child involved, they should be seen separately or together, the environment wherein such discussion takes place, obtaining the assistance and presence of a trained mental health professional and what impact such consultation may have on the child(ren).

34. The factual matrix of every matter concerning the well-being of children is different and unique. Children's voices, choices and wishes are shaped, and influence be various complex factors. That is why the High Court has been afforded with very wide and far-reaching powers to call for and obtain all relevant information to enable it to exercise its discretion, without being tied down to stringent rules in matters concerning the best interest of minor children.⁸

35. Generally accepted factors to consider when measuring the weight to be attached to the expressed views and wishes of a child include the age and maturity of the child, the capacity of the child to make reasoned decisions, the level of intellectual and emotional functioning of the child, the nature of the child's relationship with each parent and whether the child is vulnerable to parental pressures, to name but a few.

36. In deciding urgent matters, it may be essential for the Court to at least hear and consider the view of the child, before making an order. In this regard judicial officers

⁸ In *Terblanche v Terblanche* 1992(1) SA 501 (W) at 504C it was stated that a court, when sitting as upper guardian in a custody matter "... has extremely wide powers in establishing what is in the best interest of minor or dependent children. It was not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes." Also see *J v J* 2008 (6) SA 37 (CPD).

have access to the Office of the Family Advocate who employs social workers and family counsellors who can assist them to interview children to ascertain, at least to some extent, the true voice and wishes of a child which forms the subject matter of litigation.⁹ Private organisations such as the Family Mediators Association of the Cape (“FAMAC”) can also be extremely helpful and are encouraged to assist the court by making available independent social workers or psychologist within their organisations to assist the Court.¹⁰

37. In this matter, given the lack of substantiating factors for the children’s alleged refusal to spend time at the applicant’s new home, the Court, with the assistance of FAMAC and by agreement between the parties, proceeded to obtain and hear the voice of the children, by way of the following order:

“1. Ms Zeeman, a social worker, is appointed by agreement between the parties and the court, to:

- 1.1 Attend at the home of the applicant, Ms [T], on 26 August 2022, at a time to be arranged, and provide feedback to the court as to whether her place of residence is suitable to accommodate the minor children;*
- 1.2 Should the applicant’s accommodation be suitable, meet with and explain to the minor children, in the presence of the applicant, on 26 August 2022, that they shall be in the in the care of the applicant until*

⁹ In *Soller N.O. v G and Another* 2003 (5) SA 430 (W) 437B the purpose and role of the Office of the Family Advocate was described as follows: “..the Family Advocate, as required by legislation, reports to the court on the facts which are found to exist and makes recommendations based on professional experience. In so doing the Family Advocate acts as an advisor to the court and perhaps as a mediator between the family who has been investigated and the court.”

¹⁰ In the United Kingdom organizations such as Cafcass (Children and Family Court Advisory and Support Services) are regularly requested by the courts to assist judicial officers to interview and ascertain the voice of the child in family courts. Cafcass was formed in 2001 as part of a government incentive to combine the services previously provided by the Family Court Welfare Service, the Guardian ad Litem Services and the Children’s divisions of the Official Solicitor’s Office. It is sponsored by the Ministry of Justice and is a non-departmental public body.

the respondent's return to South Africa, whereafter contact shall be revisited by way of a further order by this court;

1.3 Assist the minor children and the applicant to make the necessary arrangements for their stay at the applicant's home;

1.4 Report to the court and the parties' legal representatives which arrangements have been agreed on and whether further assistance is required..."

38. The court received feedback from Ms Zeeman that the applicant's residence was suitable for contact, albeit much smaller than the residence of the respondent with fewer luxuries and no play station. She further reported that the minor children did not want to live with the applicant, at her new home, when the respondent is working abroad. The older child did not even want to be at the applicant's home for daily contact. They mentioned that they had concerns with sleepovers as they would have to share a room which would result in less privacy, they would have to leave their pets at the respondent's home, and they had uncertainty how they would be able to proceed with their social schedules. These complaints, in my view, were not convincing. However, of great concern was that fact that Ms Zeeman noted that the youngest child presented with high stress and anxiety levels at the thought of sleeping over at the applicant's home and that the older child presented with emotional distress to the extent of avoidance and despondence. She reported that the minor children were only willing to agree to daily contact with the applicant two days a week, which did not include sleepovers.

39. Due to Ms Zeeman's limited mandate and her observations of the children, she advised that an urgent investigation should take place to understand the children's functioning and the impacting factors, and further that the children be provided with a predictable and structured opportunity to have a relationship with the applicant at a pace favourable to their emotional well-being. Her feedback greatly assisted the Court and militated against the order that was initially sought.

40. On receipt of the feedback, the applicant did not insist on overnight contact or that the children be placed in her care whilst the respondent was abroad but indicated that she believes that the children were being influenced by the respondent as stated in her founding papers. The parties, considering the aforesaid recommendations, agreed and requested that the applications be postponed, on the basis that the applicant would only enjoy day visits with the children in the interim, and that an expert would urgently be appointed to conduct a care and contact assessment.

41. I was subsequently advised that Dr Bredekamp, a counselling psychologist, was jointly appointed by the parties to conduct a care and contact assessment. Despite an order that her report be filed on or before 25 November 2022, it was only filed in March 2023 and consisted of a brief report and a proposed parenting plan. Due to the long delay, the parties were both afforded an opportunity to file further affidavits pertaining to the report and parenting plan and the respondent was further directed to make a comprehensive financial disclosure as the content of his opposing affidavit was, in my view, insufficient and lacking in particularity.

42. The report of Dr Bredenkamp noted that:

“T and J are aware of the conflict between their parents, particularly the financial conflict. They believe their father is working hard to meet his financial obligations, that their mother is making financial demands, and that the communal home may have to be sold to reach a financial settlement. This information was passed on to the children by Mr [T]. They now blame Mrs [T] for delaying the finalisation of the divorce and perceive her to be more interested in the money than in them. The financial conflict confuses the children because the parents do not have corresponding versions of the financial matters, and as a result, they do not know whose account to believe.”

43. She further reported that the respondent and the children had concerns regarding Mrs [T's] alcohol abuse and that she had admitted to being guilty of alcohol abuse in the past and that she was receiving professional help to deal with the divorce and associated losses.¹¹

44. Ms Bredekamp further reported that the older child has adopted a negative view of his mother, which prevents him from maintaining a warm and loving relationship with her, which he reportedly had before the separation. He avoids telephone and personal contact with her out of anger and distrust, and having contact with her elicits anxiety. In respect of the younger child, she recorded that Mr [T] reported that the child is stressed and overconsumed by his situation. She reported that he may be avoiding his mother as a way of coping with his emotional overload but warns that it may put him at risk of becoming an alienated child as he refuses contact with Mrs [T].

¹¹ From the further affidavits filed it appears that Ms [T] was admitted to hospital during February 2023.

45. It was noted that Mr [T] allowed the children to dictate and decide where, how and when they wanted to have contact with the applicant and further that he adopted an attitude that he was not going to “force” the children to have contact with the applicant. The applicant on the other hand indicated that she did not want to force the children to spend time with her but needed to maintain a bond with them by way of structured contact. I was left with the very uncomfortable feeling that these minor children had been influenced, and as pointed out by Dr Bredekamp, they are not mature enough to realise that their withdrawal from the applicant may harm their emotional well-being in the long run. A full care and contact assessment and interventions as recommended by Dr Bredekamp is in my view essential.

46. The respondent admits that the parties had discussed and agreed on interim contact and treatment options for the children as reflected in the proposed parenting plan and further stated that he is still willing to agree and attempt to implement such arrangements.

47. In the circumstances I intend making an order incorporating the care and contact arrangements agreed upon between the parties as set out in the parenting plan attached to the report of Dr Bredenkamp, subject to the Office of the Family Advocate overseeing and conducting a full care and contact assessment.

Maintenance *pendente lite* and a contribution to costs:

48. It is trite that a reciprocal duty of support exists between spouses. The Constitutional Court in the matter of Dawood¹² observed that “(t)he celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses.... These legal obligations perform an important social function....

¹² See Dawood and Another v Minister of Home Affairs and Others; Shalabi and another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) 2000 (8) BCLR 837 - referred to in ST v CT 2018 (5) SA 479 at 533 A – B

Importantly, the community of life establishes a reciprocal and enforceable duty of financial support between the spouses....”.

49. By the time the final affidavits were filed herein, the respondent’s ability to pay maintenance was, rightly so, no longer seriously disputed.

50. It was however argued that the applicant could no longer claim maintenance *pendente lite* from the respondent as she is living with another man as husband and wife and that for this court to order the respondent to do so, would be against public policy. This contention is simply wrong. In the matter of *EH v SH* 2012 (4) SA 164 (SCA) at 167E-G, it was held that: “*Relying upon judgments such as Dodo v Dodo 1990 (2) SA 77 (W) at 89G; Carstens v Carstens 1985 (2) SA 351 (SE) at 353F; and SP v HP 2009 (5) SA 223 (O) para 10, it was argued, both in the high court and in the appellant’s heads of argument, that it would be against public policy for a woman to be supported by two men at the same time. While there are no doubt members of society who would endorse that view, it rather speaks of values from times past and I do not think in this modern, more liberal (some may say more “enlightened”) age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from claiming maintenance from his or her spouse. Each case must be determined by its own facts...*”

51. The mere fact the applicant is living with her new partner and that he is contributing to their joint living expenses, is not a bar to her claiming maintenance from the respondent *pendente lite*.

52. There is a clear disparity between the parties’ respective incomes and expenditure, and it evidences the applicant’s entitlement to a contribution to her maintenance expenses *pendente lite* and a contribution to her costs. The fact that her parents had to assist her with rental deposits and loans, supports her claims.

53. There is nothing contained in the applicant's list of expenses which is exorbitant, in my view.

54. The respondent's listed expenses, shows a different picture. He is able to pay more than R 21 000 a month to make provision for pension and has recently purchased another motor vehicle for his partner which brings the total of his vehicle expenses to over R 8 000 a month. There is further no indication on his list of income and expenditure that his partner contributes in any way in respect of herself and her daughter. The respondent has further been able to pay his legal expenses (the amount is not indicated) and has the benefit of residing in the parties' jointly owned property. Despite being so directed, the respondent has still not made full financial disclosure.¹³

55. The applicant was previously registered on the respondent's medical aid as a dependent. According to him she was removed as she exhausted the savings plan. Instead of simply removing her and leaving her without any medical cover, he could have reached agreement with her regarding the allocation of savings. I see no reason why the respondent should not pay the applicant an amount of R2 200 retrospectively and from 1 July 2022 in order to pay for her basic medical cover.

56. As to the applicant's other maintenance requirements, I have considered the applicant's income and expenditure, the fact that the respondent is paying the bond and all other related expenses in respect of the jointly owned property, has accepted full liability for all the children's school and medical expenses and the respondent's income and expenditure, and I do not intend making any further maintenance orders in her favour.

¹³ The respondent did not attach the policy schedule to his counter application and in his further affidavit refers to an Allan Gray policy which he did not attach nor did he advise what the value thereof is.

57. Whilst agreeing with the contact and interventions proposed by Dr Bredenkamp and agreed to between the parties, the respondent is not willing to pay the various psychotherapists to be appointed and requests in this regard that such costs be shared equally by the parties, with the same to apply in respect of the appointment of a facilitator. The applicant simply does not have the funds to pay for these expenses whilst the respondent does.

58. It is well accepted that a husband's duty to pay a contribution towards his wife's legal costs rests upon the duty of support which a husband ordinarily owes to a wife.¹⁴ The contribution may include costs already incurred and costs relating to interlocutory applications.

59. The amount to be contributed is to be determined by the Court's view of the amount necessary for an applicant to adequately put her case before Court.¹⁵ The quantum of the contribution is to be determined with reference to the scale on which respondent intends litigating, having regard to what is reasonable, and with due regard to the respondent's true financial position.¹⁶

60. A wife is further entitled to a contribution towards her costs which would ensure the equality of arms in the divorce action against her husband.¹⁷

61. As care and contact is contentious and as the respondent is claiming forfeiture, whilst not tendering any maintenance to the applicant post-divorce, it would appear that this divorce is not going to be resolved amicably or sensibly. In order to place her case before Court the applicant is entitled to an initial contribution to her costs and

¹⁴ Glazer v Glazer 1959 (3) SA 928 (W) at 931 G-H

¹⁵ Van Rippen v Van Rippen 1949 (4) SA 634 (C) at 639-640

¹⁶ Nicholson v Nicholson 1998 (1) SA 48 (W) at 50D

¹⁷ Cary v Cary 1999 (3) SA 615 (C) at 621C

there is no obligation on her parents to fund the litigation. In the circumstances and in order to further the matter, an amount of R 80 000 appears reasonable.

62. In the circumstances, the following order is made:

1. The reconsideration application is granted and the order dated 17 June 2022 is set aside.
2. The counter application is dismissed.
3. *Pendente lite*, the minor children shall remain in the respondent's care and the applicant shall have contact with the minor children, but not limited thereto, with due regard to the children's educational, sporting and religious activities, as follows:
 - 3.1 Every alternate Tuesday from 17h00 until 19h30;
 - 3.2 Every second weekend, either on Saturday or Sunday, from 12h00 until 18h00 on a Saturday or from 12h00 until 17h00 on a Sunday.
 - 3.3 Once sleepover contact is in place, every alternative weekend from Friday after school until Sunday at 17h00;
 - 3.4 Half of the school holidays on the basis that until the children are comfortable with sleeping over, it shall only be day visits.
 - 3.5 Should the parties be unable to agree regarding the times and duration of contact and or whether the children are ready to sleep over, such dispute shall be referred to the facilitator referred to below;

- 3.6 Public holidays and long weekends shall be shared equally;
 - 3.7 Telephonic contact at all reasonable times;
 - 3.8 For a period of at least 3 hours on their respective birthdays should the children be in the respondent's care;
 - 3.9 For a period of at least 3 hours on the applicant's birthday should it not be her contact period or day.
4. Should a dispute arise pertaining the contact set out above, the parties shall jointly appoint a facilitator on the basis set out in paragraphs 11.1 to 11.7 of the parenting plan attached to the report of Dr Bredekamp subject to the proviso that the parties shall be liable to pay for the costs of facilitator on the basis that the applicant shall be liable for 20% of the costs whilst the respondent shall be responsible for 80 % of the costs, unless otherwise directed by the facilitator.
5. The parties shall immediately jointly agree on the appointment of a psychotherapists and ensure the attendance of the parties' children for them to assist the minor children and the applicant to restore the mother-son relationship. The reasonable costs of the psychotherapist and attendant therapy shall be paid by the respondent insofar as it is not covered by the respondent's medical aid;
6. *Pendente lite*, the respondent shall maintain the applicant and the minor children as follows:
- 6.1 By paying the amount of R 2 200.00 as a contribution to the applicant's medical expenses from 1 July 2022 on or before the last

day of every month directly into an account nominated by the applicant;

6.2 By payment of the arrear amount due in terms of paragraph 6.1 above on or before 1 November 2023 into a bank account nominated by the applicant;

6.3 By paying the entire costs of the children's medical expenses including but not limited to the monthly subscription fee and all expenses not covered by the medical aid;

6.4 By paying the entire costs of the children's schooling, including but not limited to expenses relating to school uniforms, books and stationery as prescribed, extra-curricular school and sporting activities and all compulsory school outings, compulsory school camps and compulsory school sport tours in which they may participate, as well as agreed holiday activities and sporting attire and sports equipment relating to the sporting and/or extra-mural activities engaged in by them;

7. The respondent shall make an initial contribution to the applicant's legal fees in the divorce action in the amount of R 80 000 to be paid into a bank account nominated by the applicant as follows:

7.1 The amount of R 30 000 on or before 31 October 2023;

7.2 The amount of R 30 000 on or before 30 November 2023;

7.3 The amount of R 20 000 on or before 31 December 2023.

8. The parties are directed to take all necessary step in terms of the Rules of Court and approach the Registrar of this Court to obtain an expedited date in respect of the divorce action on the pre-trial roll.
9. Save that the applicant's attorneys shall not be entitled to recover any costs from the applicant in respect of the urgent application up to and including 17 June 2022, each party is to pay their own costs in respect of the urgent application and the reconsideration and counter application.
10. The Office of the Family Advocate is requested and directed to urgently conduct a care and contact assessment and file a report by no later than 31 January 2024 with reference to the issue of alienation and compliance with this order. The Office of the Family Advocate is further directed and requested to assist the parties and the minor children to implement the interim contact arrangements and interventions contained in this order.

A De Wet
Acting Judge of the High Court

On behalf of the applicant:

Adv. A Heunis
Instructed by HJ Ehrich of Laubscher
& Hattingh Inc.
Email: hans@lhattorneys.co.za

On behalf of the respondent:

Adv L Theron
Instructed by Du Toit Attorneys
Email: pieter@dutoitprokureurs.com