THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case 021850/2023

(1) REPORTABLE: Yes☐/ No ☒

(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒

(3) REVISED: Yes ☐ / No ☒

Date: 02 September 2024

WJ du Plessis

In the matter between:

S[...] H[...] Applicant

and

T[...] N[...] H[...] Respondent

Coram: Du Plessis AJ

Heard on: 27 August 2024

Decided on: 2 September 2024

This judgment has been delivered by uploading it to the CaseLines digital data base of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date and time of the delivery is 10H00 on 2 September 2024.

JUDGMENT

DU PLESSIS AJ

[1] The applicant launched this Rule 43 application requesting extended contact with the minor children wherein the children shall spend every alternate weekend with him, from Friday afternoon after school until Monday morning, when the applicant will drop the minor children off at school and fetch them from school or extra-mural activities, whichever the case may be, on each and every Wednesday afternoon for a sleepover visit, dropping them off at school on the Thursday morning. The applicant also asks for an order that neither party be allowed to remove the minor children from the Gauteng province without the other party's prior written consent.

[2] The respondent opposes this and seeks an order in terms of which an investigation is to be conducted by the office of the family advocate into the applicant's contact with the minor children.

[3] The applicant tenders to continue paying expenses towards the minor children that he is currently paying, including 50% of the school fees. The respondent seeks maintenance for the minor children in the form that the applicant shall make payment of all educational expenses for the children, as well as R12 500 per month per child, to the respondent on or before the first day of every month.

Should the further affidavit be allowed?

[4] The applicant filed a further affidavit after the respondent filed their affidavit. The applicant submits that the respondent has included new information and allegations in her affidavit, raising a dispute of fact. The respondent further raises a counter application in reply. All these matters need to be addressed, which is the reason for the further affidavit.

[5] Rule 43(5) provides that the court's discretion should be exercised where the respondent's affidavit raises a dispute of fact. In line with this rule and reasoning in other judgments of this division,[1] I will allow the filing of a further affidavit.

Background

The parties are currently separated and involved in divorce litigation, having attempted to settle the divorce litigation in November 2022. Two minor children, aged 8 and 9, were born from the marriage. Before their separation, the applicant was an involved father. He wishes to remain involved. However, after the separation, the respondent decided what contact the applicant could have with the children. The applicant states that his contact was unreasonably restricted by the respondent, with limited sleepover and holiday contact.

[6] Matters were further complicated when the applicant began his relationship with his new partner at the end of May 2023, with the partner falling pregnant and a baby being born from that relationship. The children know the partner, who has been introduced in a phased-in approach.

[7] Understandably, the respondent is hurt by this new development. Seemingly to justify limited sleepover contact, she emphasises an incident in September 2023 when the applicant had his partner over for the evening during the weekend contact with the children and where a child walked into the applicant's bedroom while the respondent was sitting on his bed watching television. The respondent claims it was more than just watching television. While the applicant admits that it could have been managed more sensitively, he denies that what the children witnessed was sexual intimacy.

[8] The applicant had to launch an urgent application in December against the respondent for holiday contact with the children, despite contact already having been agreed between the parties. The respondent avers it was the news of his partner's pregnancy that triggered the respondent into refusing meaningful contact between the applicant and the minor children. Further, the respondent broke the news to the

[1] *E v E* 2019 (5) SA 566 (GJ) at 575B – 577A.

children of this new development despite the applicant telling her that he would tell the children the news. An order by agreement was made in the urgent application, and the applicant spent a few days with the children.

[9] After that, the respondent continued restricting the applicant's contact with the children. For instance, when she travelled outside the country for work, she asked her mother, rather than the applicant, to take care of the children.

[10] After the birth of the new baby, the respondent indicated that she wished to relocate to Gqeberha with the minor children due to financial considerations. She just informed the applicant, she did not discuss it or request consent. The applicant does not think this will be in the children's best interest, as the applicant resides in Gauteng and their support structure is in Gauteng.

[11] It is common cause that special care is required for both children and that they have learning difficulties. The respondent is concerned that the applicant is not taking this seriously enough and that he does not support them in their homework. This is also why she suggests they spend Saturday mornings with her and see their father in the afternoon to play.

Maintenance

[12] As for the maintenance, the respondent states that the applicant is not contributing his share of the expenses. The applicant denies this, saying he contributes above his means.

[13] The applicant states that the respondent is in a better financial position and contributed more to the joint household before the separation. Since the separation, the applicant's costs have drastically increased. He attaches a bank account statement, including his personal and business expenses. The income is sporadic and depends on the onboarding of clients and their horses. It is an unpredictable industry in the current economic climate. His monthly expenses far exceed his income, which he seeks to cover through his business income.

[14] The applicant states that during or about 23 August 2023, they agreed that it would be reasonable if the parties paid 50% of the child's expenses. That is why the applicant pays the school fees for one child. The applicant states that the counter claim of the respondent asking for him to pay all the educational expenses for the children as well as R12 500 per month is simply unaffordable. He also notes that she moved in with her mother, drastically reducing her costs.

[15] The respondent disputes the applicant's contention that he can only afford what he is contributing. She points out that the ABSA current account shows that the applicant has a substantial amount of cash. There are also payments going to Discovery that are not explained.

[16] It is somewhat difficult for the court to assess the applicant's financial position. He probably makes more than what his IRP5 indicates, but in all probability, a lot less than his bank accounts show. The fact that his income fluctuates also complicates matters further.

[17] The respondent has her own consulting firm where she is a director consulting in the engineering and building environment as an arbitrator. She is highly qualified and earns a decent income. I noted that the respondent included maintenance (to the rental property) of about R11 000 per month on the table and towels and linen of R2 500 per month. It also includes both children's school fees, although she is only responsible for one child.[2]

[18] The applicant states that the respondent lives far beyond her means. The children are also enrolled in a vast amount of extra murals, mostly without the consent or the applicant's knowledge. Considering the financial position of both parties, this cannot be in the children's best interest.

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[2] The respondent made much of the fact that the applicant stopped paying for the school fees of both children. However, an email attached to the further affidavit indicates that in July 2023 she sent her bank confirmation letter to the school, and the school confirmed that she will start payments from end June for Ewan. This supports the applicant's contention that each party would pay a child's school fees.

[19] In addition to her income, she also has immovable property in France. As indicated above, her monthly expenses are probably lower (at least R25,000, which covers one child's school fees and the maintenance of the rental property), and since she moved in with her mother, they might be even lower.

[20] In a "without prejudice" letter that the applicant wishes to make available to the court, he sets out the children's expenses, namely:

Description	**Amount**
School fees	R29 000
Drama classes	R 900
Violin	R2 600
Piano	R1 400
Speech therapy	R 4000
Boxing	R2 000
Medical aid	R3 343
Soccer	R750
Total	**R43 993**

[21] The applicant finds the expenses excessive, especially because he has not agreed to many of the activities or expenses. Still, in the "without prejudice" letter, he offered to cover 50% of the children's expenses, which amounts to R21 996.50. He offered to pay the service providers directly. He also offers to contribute 50% of any costs not covered by the medical aid, all special counselling costs, extra lessons, and extramural activities provided that he agreed, in writing, before the expenses are incurred.

[22] I have noted from the correspondence with Mr Doods that the respondent attached to her affidavit, that Mr Doods cautions the respondent on being more prudent with her spending, to put it lightly. He empathetically points out that "[e]ven today, rather than taking advice from those who care for you to stop the constant drain of funds to attorneys, schools, excessive rentals etc, you still are making no effort to curtail your spending".

[23] Having regard to both parties' income and expenses, with all the possible fluctuations, it seems that the respondent earns more than the applicant, although not to the degree the Financial Disclosure Forms indicate. Her expenses are also higher, although she has tried to curb the rental expenses by moving in with her mother. She also spends more on the children due to having more contact time with them. This, however, seems to be proportionate to the applicant's income. Therefore, I do not think the R12 500 per child is warranted.

[24] I consider the applicant's offer to pay 50% of the children's expenses to be fair to both parties.

Contact

[25] The principle of the child's best interest is always paramount in the mind of a judge who has to decide on contact. In this, I am guided by s 7 of the Children's Act[3] that states that a child has the need to remain in care of his parent or extended family, and to maintain a connection with the family. It requires a balancing act, and in exercising my discretion and inherent jurisdiction as upper guardian of minor children, I have to make a value judgment based on the facts.[4] The respondent's counsel, in her heads of argument, extensively referenced the wide considerations that a court can take into account when making decisions in the best interest of a child.

[26] It should also be noted from the beginning that contact is child-centred. In terms of s 18(3) of the Children's Act, *both* parents share guardianship of the children. Both biological parents also acquire parental rights and responsibilities automatically according to ss 18 to 21 of the Children's Act. Both parents are still co-parents and co-guardians of the children until a court decides otherwise. They have the same parental rights and responsibilities regarding the minor children.

[27] I have noted Dr Riberio, the children's educational psychologist's email to the parents on 23 September 2023. As to the older child, she states that "the present custody arrangements may […] be interpreted as a rejection". As to the youngest,

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[3] 38 of 2005.
[4] *JKRS v DS* [2023] ZAMPMHC 28.

she noted significant sensitivity to separations and that he expends his resources, making the most of this time with each parent, sometimes at a cost to himself. This might be reflected in his behaviour. It is suggested that the parties have one-on-one time with him. Connection should be prioritised. She concludes that structure is important to the boys and that a clear parenting plan should be prioritised to give them a sense of predictability and stability. Visual reference is important to guide them.

[28] The respondent also copied an email from Dr Riberio in her affidavit, dated 5 March 2024. This indicates that the youngest child is reluctant to go to the applicant's house. Dr Riberio emphasises open and honest communication between the parties, with *both* parents and that *both* must assist in regulating the boys' nervous system by taking time to sit with them and calm their bodies down and then find ways that each feels comfortable communicating their anxieties. She also refers to finding solutions to help the boys transition from one parent to the other. The report does not advise that the applicant's contact be restricted but rather that strategies should be developed to support the children in dealing with their new reality.

[29] This court regards a parent who deprives a child of opportunities to experience the affection of their other parent as not being in the children's best interest. It might be that the children are struggling to make sense of their world now and are scared that the new child in the father's life might replace them. This, however, rather warrants more contact with the father to displace that fear than further contact restriction, which might be interpreted as rejection.

[30] Both parents should try to gently introduce the children to their new reality and ensure that the children's fears of taking second place in their father's life are dispelled. From the small glimpse that the court had into the children's behaviour, it seems like they have difficulty processing their feelings and need guidance in regulating their emotions. Children often learn this by looking at how their parents regulate theirs. Both parents sit with their own emotions. The parents should reflect on their reaction to the divorce and the subsequent developments, as how they react and process it impacts the children's behaviour and views. To assist the children with

strategies to adjust to their new reality, I also deem it advisable that the children continue their play therapy with the psychologist they are familiar with. It would be wise of both parents to support this.

[31] The respondent urged the court that due to the children's special needs, the normal and bare minimum contact with the children is not feasible and that instead, the office of the family advocate must investigate the best interests of the children, presumably in terms of s 4 of the *Mediation in Certain Divorce Matters Act*.[5] In such an instance, the family advocate would assist the court in presenting facts and a balanced recommendation before the court.

[32] I do not think getting a family advocate involved in this stage is warranted. Apart from the father's alleged failure to support the children in their homework activities, there is nothing to suggest that the applicant cannot care for the children as he proposed. I have considered the applicant's draft order, but I thought it would be better to order the contact in a phased manner.

[33] Nothing prevents the parties from employing the family advocate to draft a report while the contact, as ordered in this judgment, is exercised. The parties might want to consider employing the help of a parenting coordinator to assist in drafting a final parenting plan.

[34] The contact set out below will ensure that there is structure, routine, and predictability in the children's lives. Structured contact should be visually indicated, indicating the days and times that the children will be with the applicant. This will assist the children in predictability and stability and, possibly, the transition from one household to the other.

[35] The respondent should remember that the applicant has the same rights and responsibilities and that if she wishes to relocate outside the province, it is not a decision she can unilaterally make.

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[5] 24 of 1987.

[36] As for costs, I do not see a reason to deviate from the default order that costs of this application be costs in the cause.

Order

[28] The following order is made:

1. The Court hereby exercises its discretion in permitting the filing of the Applicant's Further Affidavit, as served and filed on 19 July 2024.

2. The Applicant is hereby granted extended contact with the minor children wherein, during the first month (September):

    2.1. The minor children shall spend every alternate weekend with the Applicant from Saturday morning 9:00 until Sunday 18:00. The Applicant must fetch and drop the minor children at the Respondent's house; and

    2.2. The applicant will fetch the minor children from school or extra-mural activities, whichever the case may be, each Wednesday afternoon for a sleepover visit and will drop them off at school on Thursday morning.

3. During the second month (October)

    3.1. The minor children shall spend every alternate weekend with the Applicant from Friday afternoon after school until Sunday evening at 18:00. The Applicant must fetch and drop the minor children at the Respondent's house; and

    3.2. The applicant will fetch the minor children from school or extra-mural activities, whichever the case may be, each Wednesday afternoon for a sleepover visit and will drop them off at school on Thursday morning.

4. From the third month (November)

    4.1. The minor children shall spend every alternate weekend with the Applicant from the Friday afternoon after school until Monday morning when the Applicant will drop the minor children off at school; and

4.2. The applicant will fetch the minor children from school or extra-mural activities, whichever the case, each Wednesday afternoon for a sleepover visit and drop them off at school on Thursday morning.

5. Holidays will be shared equally between the parties. The Applicant will have the children for the first half of the December holidays, including Christmas. This will alternate every year until the divorce is finalised. The Respondent will have the children for the first half of the following holidays. Mid-term breaks, if any, will alternate between the parties.

6. Neither party is allowed to remove the minor children from the Gauteng Province without the other party's prior written consent.

7. The Applicant shall pay 50% of the children's school fees and school expenses (uniforms and outings), extra murals, therapy and excess medical expenses. The Applicant will pay his share to the service providers directly.

8. The therapy shall include the educational psychologists and the play therapist.

9. Both parties must agree to the extra murals.

10. Costs of this application is to be costs in the trial.

WJ du Plessis
Acting Judge of the High Court

For the Applicants:	K Blair instructed by Karla Strydom Attorneys
For the Respondents:	F Bezuidenthout instructed by Marston & Taljaard Attorneys