IN THE HIGH COURT OF SWAZILAND

CRAIG GARREL Applicant

V

KERRY ANN GARREL Respondent

Civ. Case No. 1128/99

Coram S.B. MAPHALALA - J

For the Applicant MR. D. SMITH S.C.

(Instructed by Howe and Company)

For the Respondent MR. P. FLYNN

(Instructed by Robinson Bertram)

JUDGEMENT (27/08/99)

Maphalala J:

The applicant launched an urgent application in terms of the provisions of Rule 43 of the rules of this court on the 14th May, 1999. In the notice of motion, the applicant requested the following relief:

1. The applicant be awarded custody of the minor child Tristan Garrel, pendente lite,
2. The respondent be interdicted from removing the minor child from the Kingdom of Swaziland pendente lite;

3. That such rights of access that may be awarded to the respondent to the minor child be exercised in the presence of the applicant and/or his parents, Mr. and Mrs. Taylor and under their direct supervision.
4. That costs of this application be paid for by the respondent, alternatively, that costs hereof be costs in the main divorce action.

The urgent application of the applicant duly served before this court on the 14th May, 1999 and in consequence thereof, a draft order by agreement was concluded between the parties, which draft order provided as follows:

1. That custody of the minor child, Tristan, be awarded to the applicant pendente lite;
2. That respondent be awarded certain rights of access to the said minor child, subject to certain restructuring;
3. The respondent be allowed to occupy the previous matrimonial home situated at number 56, Ncoboza Road, Mbabane.
4. The costs of the application shall be costs in the main action.

The matter was then again enrolled for finalization on the 23rd July, 1999 and at the said hearing, a preliminary point had to be argued, namely the admissibility of the additional affidavit filed and served by the applicant, on the 24th June, 1999. The preliminary point was duly argued and judgement reserved thereon and the matter re-enrolled for finalization on the 30th July, 1999. On the said date the court delivered its ruling on the preliminary point in favour of the admission of the additional affidavit. However, the proceedings at that stage took another twist counsel for the respondent made an application to have the respondent give viva voce evidence under oath to rebut certain issues raised in the additional affidavit. The applicant opposed this application and the court heard argument for and against this application and gave an ex tempore ruling in favour of the respondent thus

allowing that viva voce evidence be entertained. At that stage counsel for applicant applied to take further instructions

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from his client on this new development. After conferring with his client Mr. Smith announced to the court that for the sake of finality they were abandoning the additional affidavit and would proceed on the basis of the papers before court.

Both parties to this application are domiciled within the area of jurisdiction of this court. They were both married to each other on the 20th April, 1996 at Ezulwini, Kingdom of Swaziland, in community of property and the marriage still subsist. As a result of this union the child which is the subject of this dispute was born. The child is a boy born on the 29th July, 1996. He is accordingly at present approximately two and a half years old. The respondent has a six year old daughter, Che Wardell, born of her previous marriage to one Wayne Wardell. This child has been residing with the couple since the date of their marriage. The applicant is employed as a Manager by a company called Maxi Prest. The respondent is presently not employed and living with her mother in Cape Town. The step-parents are described as people of means occupying a spacious house in the Water Front in Cape Town.

The major bone of contention at this point is which parent is suitable to have custody of the minor child of the marriage pendente lite. The court is called upon to decide this rather contentious issue which is normally the case in such cases where parties are in the throes of divorce.

Both counsel filed Heads of Arguments which were not only helpful but also illuminating in a number of respects as I shall show in the course of this judgement. I am grateful to them both.
Mr. Smith for the applicant submitted that the minor child Tristan has been under the custody and control of the applicant since the 27th April, 1999. The applicant exercised such custody and control over the minor child from the 27th April, 1999 up and until the 8th May 1999, with the consent of the respondent. From the 8th May 1999, up and until the 14th May 1999, the applicant exercised custody and control over the minor child, contrary to the consent of the respondent. As from the 14th May 1999, custody over the minor child has been exercised by the applicant with the express consent of the respondent and in accordance with the provisions of the court order which reads ipsissima verba as follows:

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"2. The respondent shall in the interim enjoy the following rights of access to the minor child subject to the provisions of paragraph 3 infra, namely:

2.1. The right to remove the child for alternative weekends and for purposes of definition a weekend shall commence at 14h00 on Friday to 17h00 on Sunday. The first weekend of access shall commence on Friday 21st May, 1999;

2.2 The right to remove the child on each weekday afternoon from Monday to Friday from 14h00 to 17h00".

It is submitted on behalf of the applicant that despite the liberal rights of access afforded to the respondent, the respondent contends in paragraph 27.3 of her answering affidavit as follows:

"27.3 The child is of such tender age that he can only be traumatized when kept away from his mother for as long as if already has unfortunately happened".

Despite the respondent's allegation aforesaid, the respondent left Swaziland on the 28th May 1999, and has since then up and until the 23rd July 1999, had no physical contact with the said minor child. Access has been exercised by way of weekly telephonic conversations with the said minor child. The respondent has not attempted to place any information before the court as to why she left Swaziland on the 28th May 1999, despite having liberal access to the minor child as set out in the court order of the 14th May 1999, and despite, enjoying adequate accommodation, namely accommodation in the erstwhile common home. Mr. Smith urged the court that in view of this, the sentiments expressed in

paragraph 27.3 of the respondent's answering affidavit, should be looked upon with great suspicion to the extent that the court would be justified in rejecting same.

It is contended on behalf of the applicant that the respondent has approached the application as evidenced on the basis that she is the biological mother of the child and that the child is of tender age, namely three years old. It follows that by virtue of these reasons, she is entitled to custody of the said minor child.

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The applicant contends that the approach adopted by the respondent is, with respect, archaic. The court was referred to an array of South African cases. The first case cited is that of Van Der Linde vs Van Der Linde 1996 (3) S.A. 509 (OPA) where it was held that in the past mothering was a component of a woman's being, however these days mothering is also part of a man's being. To paraphrase the words of Hattingh J in that case the concept of "mothering" is indicative of a function rather than a person and this function is not necessarily situated in the biological mother. This seem to be the current trend in such matters. The learned judge in that case opined thus;

"Today the man has the freedom to reveal and to live out his mothering feeling. A father can be just as good a "mother" as the biological mother and naturally a mother can be just as good as a "father" as the biological father. The quality of a parental role is not simply determined by gender"

Further in the case of Van Pletsen vs Van Pletsen 1998 (4) S.A. 95 (OPA) Ancke J expresses himself in more or less the same way as Hattingh J in Van Der Linde (supra) where he had this to say:

"To decide which is the most suitable parent to exercise custody over a minor child it is an important consideration which parent can not only offer the most security, but also which parent would be in the best position to attend to the child's physical care and also ensure that the child develops properly on a moral, cultural and religious level. The assumption that a mother is of necessity in a better position to care for a child than the father belongs to an era from the past. It is not accepted that "mothering"' is not just a component of a woman, but is part of a man's being, and that a father, depending on the circumstances, possesses the capacity and capability to exercise custody over a child as well as the mother".

In the matter of Ex Parte Critchfield and another 1999 (3) S.A. 132 Willis A J had this to say:

'It would not amount to unfair discrimination for a court to have regard to maternity as a fact in making a determination as to the custody of young children. On the other hand it would amount to unfair discrimination if a court were to place undue weight upon this factor when balancing it against other relevant factors. The only significant

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consequence of the constitution of the Republic of South Africa, Act 108 of 1996. when it comes to custody disputes, it that the court must be astute to remind itself that maternity can never be the only consideration of any importance in determining the custody of young children. With regard to the award of custody, the interests of the child must prevail" |at 143 B -C/D and 142 B/C and the authorities therein cited".

In the book Custody and Visitation Dispute - A Practical Guide -Bosman/Swanepoel/Fick/Strydom — Buttenvorths at page 105 the learned authors expressed themselves as follows.

'Role stereotypes have changed drastically from traditional gender role expectations to greater equality between the sexes. "Mothering" no longer refers to the functions only performed by a mother - it rather describes the function which may be performed by a parent of any gender and refers to care-giving and nurturing".

Further in the same work at page 78 the authors had this to say:

"One further change is also relevant, that is, the steeply rising divorce rate and the increasing number

of disputed custody cases. It is the latter which perhaps gives the most point to the issues which we are examining here. Despite fathers greater participation in child care, there remains a deepseated conviction that the mother is invariably the "natural" parent and should therefore be given priority in custody decisions. This applies especially to those cases where a comparative judgement about a mother and a father is required, such as in custody disputes. The assumption that the mother is almost invariably the fitter person to assume sole parental responsibility has dominated judgements in the past; Fathers were considered unfit unless proven otherwise. The changes in family lifestyle that have occurred in recent times have shown that this is not necessarily so; Fathers can also be adequate care-givers. It follows that the father with the appropriate inclination and personality ought to be considered for sole parenthood as seriously as his ex wife. The same general principle applies here as in custody cases; The individual's sex ought not to debar him or her from consideration. Motivation and personality are of greater importance and an application from a single man ought to be treated in the same was as from a single woman"

Mr. Smith argued that in the absence of any facts being placed before the court, disqualifying the applicant to act as custodial parent, no reason exist as to why custody of the minor boy, Tristan should be awarded to the applicant. The applicant

on the other hand has placed facts before the court which tend to disqualify the respondent as the custodian parent on a pendente lite basis, which, should tilt the scales in favour of the applicant's application. These facts are summarized as follows: The respondent left the minor child under the care and custody of the applicant on the 27th April 1999 and at best for her up and until the 8th May 1999. The respondent left Swaziland once again on the 28th May 1999, leaving the child under the care and custody of the applicant, notwithstanding the fact the she had liberal right of access to him. The possibility exists that if the respondent is permitted to remove the minor child from Swaziland, the applicant will be denied access to him. The respondent is not employed and therefore is not personally in a position to care for his financial and material needs, The applicant is emotionally unstable and it is also alleged by the applicant that the respondent is of low moral standing. The minor child was born in Swaziland and has lived his entire life in Swaziland and is presently residing with the applicant, together with his parents at Plot No. 4 Panarama Drive, Dalriach, Mbabane. The child therefore finds itself in a familiar and known environment. The father has a permanent employment with a good income. The applicant resides with his parents who provide spacious and adequate accommodation. It is submitted further that the applicant quite clearly has a good support system and the child is presently well cared for.

Mr. Smith submitted on behalf of the applicant that the applicant qualifies in all the qualities of a custodian parent and in weighing up the factors in determining what is the best interest of the minor child. In this regard the court was referred to the matter of McCall vs McCall 1994 (3) S.A. 201 (CPD) where King J expressed himself as follows:

"In determining what is in the best interests of the child, the court must decide which of the parents is better able to promote and ensure its physical, moral emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria, namely:

a) The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;

b) The capabilities, character and temperament of the parent and the impel thereof on the child's needs and desires:
c) The ability of the parent to communicate with the child and parent's insight into, understanding of and sensitivity to the child's feelings:
d) The capacity and disposition of the parent to give the child the guidance which he requires:
e) The ability of the parent to provide for the basic physical needs of the child, the so-called "creature comforts" such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;

f) The ability of the parent to provide for the educational well-being and security of the child, both religious and secular,
g) The ability of the parent for the child's emotional, psychological, cultural and environmental development;
h) The mental and physical health and moral fitness of the parent;
i) The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
j) The desirability or otherwise of keeping siblings together;
k) The child's preference, if the court is satisfied that in the particular circumstances, the child's preference should be taken into considerations;
l) The desirability or otherwise of applying the doctrine of same sex matching;
m) Any other factor which is relevant to the particular case with which the court is concerned".

On the question of costs the respondent has asked for a further contribution towards costs in the amount of E2, 500 - 00. The parties agreed on the 14th May 1999, that an amount of E1, 500 - 00 would be paid as contribution towards the legal costs of the respondent. Payment of this contribution is not provided for in the court order of the

14th May 1999, but it can be acknowledged that the amount so agreed upon has already been paid to the respondent. Applicant submits that the respondent is not entitled to a further contribution on her legal costs at this stage of the proceedings, bearing in mind that this is an application in terms of Rule 43 and not in terms of the provisions of Rule 43 (6). That in the particulars of claim, filed by the respondent in the main action and of note is the fact that no cost order is sought by the respondent therein against the applicant.

Per contra Mr. Flynn before delving into his submissions threw a word of caution to the court in treating the South African decisions after 1994 when South Africa adopted a new constitutional dispensation with an extensive Bill of Rights which is regarded as one of the most liberal in the world. Mr. Flynn's point is that the South African decisions after - 1994 are delivered in this background such that it would be folly for this court to follow such decisions blindly when Swaziland has no such Constitutional framework. The court has to be guided by the principles of Roman -Dutch Law without any constitutional flavouring of another country. I agree with Mr. Flynn in this regard that the court in treating these judgements is to tread carefully lest it unwittingly depart from the law of the land. He submitted that the courts in South Africa are permitted by the Constitution to have regard to cases of other foreign countries where their constitutions are similar to that of South Africa. That the cases cited by Mr. Smith on behalf of the applicant do not affect the respondent's case but they do so on the spirit of the South African Constitution. Mr. Flynn went further to distinguish the case of Ex Parte Critchfield and another (supra) in that the learned judge in that case states at pages 142 - 143 of his judgement that he is not departing from the general principles but is mindful of their effect. On the Van Der Linde (supra) case Mr. Flynn holds the view that this case does not take the matter any further. The judgement does not undermine the legal authority in Ex Parte Critchfield (supra). All in all Mr. Flynn's view is that the new cases cited by Mr. Smith do not fundamentally change the law.

Mr. Flynn submitted that in determining the question of custody, including custody pendente lite, the best interests of the child are paramount and prevail over all other considerations. To this effect he directed my attention to the case of Fletcher vs Fletcher 1948 (1) S.A. 130 (AD). He further argued that the young child's need for a

sense of security is the basis of the principle that the custody of such children is normally awarded to the mother (see French vs French 1971 (4) S.A. 298 (W). Steyn J, considered this to be the primary consideration in French vs French (supra) where he stated as follows:

"In respect of a young child its sense of security should be preserved and protected above all. The child must feel that it is welcome, wanted and loved".

It is only after applying this "primary test" that the suitability of the proposed custodian parent is to be tested and other factors are considered. This rule is justified on psychological ground as it was enunciated by Broome J in the case of Dunsterville vs Dunsterville 1946 N. P. D. 594 at page 597 in the following terms:

"'It is often said that the best person to look after young children is their mother.....experience goes to show that a child needs a father and a mother, and that, if he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child's life that the paternal, and if not forged early may never be forged at all. The psychological need of a father on the other hand only arises later. It seems to me that if the father is awarded custody of these young children they will in all probability not withstanding the loving care which they will undoubtedly receive from their paternal grandmother, grow up as motherless children, with all the attendant psychological disadvantages. If, on the other hand, the mother is awarded their custody, at any rate during their years of infancy they will not necessarily grow up as fatherless children, for the relationship between a father and his young children is never one of continuous intimacy, it is necessarily intermittent".

Further in Myers vs Leviton 1949 (1) S.A. 203 (T) at 214 Price J, said:

"There is no one who quite takes the place of a child's mother. There is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his own mother - an important factor in the normal psychological development of a healthy child".

Holmes J in Bashford vs Bashford 1957 (1) S.A. 21 at 24 said the following:

"In my view it is equally clear, on the papers before us. that the mother's home is more in (he interests of this very young child, not yet two years old. as it will have the tender surveillance of the mother. It is not necessary to cite authority for the proposition that. in a case like this, other things being equal, a child of tender years should be with the mother: the decisions arc legion".

Bresler J in Madden vs Madden 1962 (4) S.A. 654 at 657 © stated that:

"Normally young children - the age of ten has sometimes been fixed - should go to the mother".

It was submitted that a further consideration in a case of custody pendente lite is probability, with reference to the authorities, that the custody of a young child be awarded to the mother in the divorce action. On this approach, as custody will in all probability be awarded to the mother, it has been held that it is in such a child's best interest that the child be placed in the mother's custody pendente lite. To this effect I was referred to the following decided cases:

• du Plooy vs du Plooy 1953 (3) S.A. T 848 at 854

• Madden vs Madden op cit 629 (A)

After laying the legal background of his argument Mr. Flynn then took the court through a close examination of the conduct of the applicant prior to the application. In this matter the parties had agreed that the respondent would bring the child to visit the applicant for some two weeks after which the child would be returned to the respondent. It was agreed that after this period the applicant was to bring the child to Johannesburg where the respondent would be temporarily staying with her aunt. The child was to be returned to respondent by the 8th May 1999. Notwithstanding this agreement the applicant refused to return the child and his parents frustrated the respondent seeing and talking to the child telephonically. The applicant instituted these proceedings on the 11th May 1999, having deprived the respondent of custody by refusing to return the child pursuant to the agreement. Mr. Flynn submitted that applicant merely alleges that the child was left with him and his parents on the 27th April 1999. He fails to disclose the background to this or the agreement between the parties. It is significant that he does not seek to deny the contents of paragraph 13 of

the respondent's answering affidavit. The respondent submits that this conduct by the applicant indicates that it is the respondent who has good reason to fear that her access to the child will be frustrated by the applicant and his parents. In view of legal authorities cited on behalf of the respondent such conduct would exacerbate that psychological damage which a young child suffers when deprived of the constant presence and affection of its mother.

Further that respondent's willingness to bring the child to Swaziland so as that he could spend time with his father demonstrates her bona fides.

Mr. Flynn went further to determine the best interest of the child. The best interest of the child in this matter would be served if the custody of his mother for the following reasons:

1. The child is only three years of age and is still bottle fed and uses diapers
2. The respondent is able to offer, secure, tranquil, comfortable accommodation with her mother, which accommodation is conveniently situated near schools, hospital, shops and recreation.
3. The evidence is that the applicant, however, must rely in his mother to look after the child during the day when the child is not at nursery school. His mother is, in any event, employed in a family business. Respondent submits that this arrangement is entirely unsatisfactory compared to what the respondent can offer. It is therefore clear that the child is effectively in the care of a third party most of the time and this is a situation which is undesirable and definitely not in the best interests of the child. The applicant allegation that he is available to take care of the child in the evening and over weekends is unsatisfactory, particularly in the light of the respondent's allegation (which he

has not sought to challenge) that he is often away at night "at rugby training sessions and/drinking sprees with friends".

Mr. Flynn went on to address the court on the applicant's allegations with regard to the suitability of the respondent as custodian parent. The respondent submits that the applicant's allegations with regard to the respondent's suitability as a custodian parent are unsubstantiated, untrue and scandalous. Certain allegations simply do not stand up to logical scrutiny. Applicant alleges that the respondent is emotionally unstable and suffers from depression and serious mood swings and in addition suffers from anorexia. He provides no detail to substantiate these allegations nor does he indicate how this is alleged to have manifested itself during the course of the marriage he is in any event not qualified to make such assessments. In addition the applicant merely states that he "verily believes" that she was admitted to hospital for emotional instability. Respondent submits in her answering affidavit that she has never suffered from depression or mood swings while she has always been weight conscious (like many women) she has never suffered from anorexia, she is a fitness and aerobic instructor and is fully aware of matters relating to a healthy diet.

Respondent has denied the adulterous relationship alleged in paragraph 8.5 of the founding affidavit. Respondent's view is that this is an issue for the trial which cannot be decided in the context of a Rule 43 application. In any event the standard of proof of adultery is a high one. The court accordingly should not place any reliance on this aspect of the matter. To this end I was referred to the following cases:

• Churchman vs Churchman 1945 (2) All England Reports 190

• Madden vs Madden op at 656 (B).

It is further submitted that adultery does not per se establish unsuitability of the particular parent for custody (per Dunsterville vs Dusterville (supra) at 596)

Applicant contends that the respondent's morals are questionable and basis this scandalous allegation on the statement that "her first marriage and our marriage was a forced marriage" it is submitted that the unwarranted assumption in this allegation

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is that her husband was guitless participants in these events. It is, of course, equally possible to contend that her husband was guilty of the very irresponsibility of which the applicant accuses the respondent, (see Marques vs Marques (supra) at page 204 -205).

Applicant alleges that the respondent's mother and her fiancee are in the process of emigrating to Australia. He states that he "verily believes" that respondent intends to move with her mother. It is submitted on behalf of the respondent that the applicant's repeated use of the term "verily believes" clearly evinces an absence of actual evidence, and is indicative of the vague and unsubstantiated allegations made by the applicant.

Furthermore, in his founding affidavit the applicant makes the positive statement that respondent "forged her husband's signature to obtain passport (sic) for the minor daughter Che". This statement is not supported in the founding papers and no source for the information is indicated therein. This allegation is dealt with in the Wayne Wardel who is the respondent's first husband. However, argued Mr. Flynn it falls short in convincing the court.

Lastly applicant contends that respondent's previous husband has had "innumerable problems" obtaining access to his daughter. Respondent states that she has invited him to see his daughters on numerous occassions and that he may see her at any time in Cape Town. Respondent submits that the facts regarding to access to Che are irrelevant to this matter and paragraphs in the founding papers to that effect constitutes inadmissible similar fact evidence (per Hoffman and Zeffert, the South African Law of Evidence, (4th ED),pages 52 - 54).

These are the issues before court. 1 have read the papers before me very carefully and also considered the interesting submissions made by both counsel in this case. I agree in toto with the opening submission by Mr, Flynn which I have already alluded to earlier in the course of this judgement that courts in Swaziland should tread with caution in considering South African decisions after 1994, especially in areas such as this one. As these judgements have been coloured by the constitution in South Africa

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which is regarded by many as one of the most liberal constitution in the world with an extensive Bill of Rights. Our jurisprudence is still rooted on Roman-Dutch principles.

The position in this country was clearly enunciated by Nathan CJ (as he then was) in the case of De Sousa vs De Sousa 1979 - 1981 S. I. R. 315 at page 318 (D - E) where the learned Chief Justice has this to say:

"It is trite law that in custody cases the prime consideration (my emphasis) is the well-being and interest the child or children. See, eg, Shawzin vs Laufer 1968 (4) S.A. 657 (A), Fortune v Fortune 1955 (3) S.A. 348 (A), Fletcher vs Fletcher 1948 (1) S.A. 130 (A). One of the factors to be taken into account, however, is that there is a lot of authority for the proposition that, all things being equal, young children should be placed in the custody of their mother. See the cases referred to in French vs French 1971 (4) S.A. 298 (W). But this consideration should not be elevated into a rule (my emphasis) carrying greater weight than the cardinal principle stated above, that one must have regard primarily to the best interest of the child (my emphasis)".

I find that this view although expressed more than 20 years ago is similar to the view expressed by Willis A J in a case of recent vintage that of Ex Parte Critchfield and another 1999 (3) S.A. 132 at page 142 cited by Mr. Smith for the applicant. The learned judge had this to say:

"Even if Myers vs Levition 1949 (1) S.A. 203 (T) is taken as the high-water mark of judicial conservatism with regard to custody matters in South Africa, it is clear that the so-called "meternal

preference" rule has never been a rule of law. (see also Kennedy vs Kennedy 1929 EDL 257; Steyn vs Steyn 1948 (3) S.A. 127 (T) at 135; Tromp vs Tromp 1956 (4) S.A. 738 N at 746; Bashford vs Bashford 1957 (1) S.A. 21 (N) at 24).

It has rather been a statement of judicial preference or, if you will, a statement of the prevailing practice and, perhaps, prevailing policy. For decades, the law in South Africa with regard to the award of custody is the best interest of the child must prevail...".

In my understanding of the two cases I have cited above this is the premise within which I should decide the matter to have as a primary consideration the best interest

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of the child and the other considerations "inter alia" the martenaly preference and others should be considered in view of what is to the best interest of the child. It is because of the following background that 1 come to the considered conclusion that the interest of the child will best be served if the custody of the child was given to the respondent (the mother):

1. The parties entered into an agreement that respondent would bring the child to visit the applicant for some two weeks after which the child would be returned to the respondent. It was agreed that after this period the applicant was to bring the child to Johannesburg where the respondent would be staying with her aunt. The child was to be returned to the respondent by the 8th May 1999, notwithstanding this agreement the applicant refused to return the child and his parents frustrated the respondent seeing the child and talking to the child telephonically. The applicant instituted these proceedings on the 11th May 1999 having deprived the respondent of custody by refusing to return the child pursuant to the agreement between the parties. The applicant does not seek to deny the contents of paragraph 13 of the respondent's answering affidavit. I must say applicant was not candid to the court. He failed to take the court to his confidence as he has not disclosed this background or the agreement between parties. It is the applicant who disturbed the status quo and he cannot be heard to cry foul that this has been done by the respondent.

2. The child in question is 3 years old and has been with the respondent since birth except for the interlude I have mentioned above. He is still bottle fed and uses diapers.
3. Respondent has shown that she is able to provide secure, tranquil comfortable and convenient accommodation with her mother which was graphically described by the mother Jill Warn in her affidavit.

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4. The evidence is that applicant must rely on his mother to look after the child during the day when the child is not at nursery school. The court was informed that the mother is employed in a family business. This 1 agree with the respondent is an entirely unsatisfactory arrangement compared to what the respondent can offer. This means effectively the child is in the care of a third party much of the time. The allegation by the applicant that he is available to care for the child in the evening and over weekends is not satisfactory.
5. I found that the allegations that respondent is emotionally unstable and suffers from depression and serious mood swings and in addition suffers from anorexia to be unsubstantiated, untrue and scandalous. The applicant fails to indicate how the alleged instability to have manifested itself during the course of the marriage. The mere stating

by the applicant that he verily believes that she was admitted to hospital for emotional instability is not enough. It is trite law that in interlocutory matters where urgent or other special circumstances appear to justify its doing so, the court has allowed the deponent to state that "he is informed and verily believes" certain facts on which he relies for relief. In such cases however, he is required to set out in full the facts upon which he bases the grounds for his belief and how he obtained the information. The source of information must be disclosed with a degree of particularity sufficient to enable the opposing party to make independent investigating of his own, including, if necessary, verification of the statement from the source itself (see Herbstein at al the Civil Practice of the Supreme Court of South Africa (4th ED) at page 369 and the cases cited thereat).

6. The issue of adultery cannot be decided in the context of a Rule 43 (see Churchman vs Churchman (supra); Madden vs

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Madden (supra) and Dunsterville vs Dunsterville (supra) the latter case it was held that adultery does not per se establish unsuitability of the particular parent for custody. Further the allegation that respondent's morals are questionable as "her first marriage and our marriage was a forced marriage" is without merit. The blame for this can go either way after all "it take two to tango" (see Marques vs Marques (supra) at page 204-205).

7. On the question of the feared emigration to Australia of respondent's mother and fiancee there is no actual evidence indicating this fact except that applicant "verily believe", my comment in 5 above equally apply in this instance.

8. The fact that respondent is unemployed should not be taken against her as her explanation is simply that she has been unemployed to raise her 6 year old daughter and son. The respondent is entitled to receive adequate maintenance from applicant and her present unemployment is if anything, an advantage in that she is able to devote adequate time to care of her young child in the secure environment provided by her mother.
9. The son, Tristan has always known his half sister Che and it is one of the recognized consideration that of desirability or otherwise of keeping siblings together (see McCall vs McCall (supra).
10. Lastly, it is my considered view that the respondent satisfies all the factors or criteria in McCall (supra) save factor (e) which is covered by my view expressed in 8 above and (k) and (1) which are not of relevancy in this case.

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The cumulative effect of the points I have outlined above together with those mentioned by Mr. Flynn which I may have unwittingly omitted tilt the scales in favour of the respondent as a suitable custodian parent, pendente lite.

On the question of the contribution to her legal costs in the sum of E2, 500 - 00. According to established principle the sum to be contributed is determined by the court in view of the amount necessary for applicant adequately to put her case before the court (see Erasmus Superior Court Practice at page 315 and the cases cited thereat). However, I agree with Mr. Smith that respondent has already been given the sum of El, 500 - 00 towards her legal costs. Respondent can only be granted such costs in terms of the provisions of Rule 43 (6).

On the question of the contribution for her support in an amount of E1, 000 -00 per month until the divorce proceedings are finalized. It appears to me that Mr. Smith is correct that applicant has not been furnished with a claim supported by reasonable and moderate detail as contemplated by the rule. It is difficult for me to determine this issue as the papers stand. The case of Taute vs Taute 1974 (1) S.A. 675 is instructive in this regard. I am not going to award the amount sought at this point until respondent furnishes the court with such details as envisaged by the relevant rule of court. However, for the time being in exercise of my discretion I award respondent a sum of E500 - 00 towards the maintenance of the child pending a full determination in terms of the rules.

In the result, I rule as follows:

a) Custody of the minor child, Trisan is awarded to the respondent pendente lite with reasonable visitation rights to be determined by the parties.
b) Applicant is to pay a sum of E500 - 00 as maintenance pending the full determination in terms of Rule 43 (7).
c) That the costs of this application be costs in the cause of the main divorce action

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d) Counsel fees to be exempt from the rigours of Rule 68 as to taxation.

S. B. MAPHALALA

JUDGE