IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 1548/2020

In the matter between:

M B Applicant

and

R B Respondent

JUDGMENT BY: MHLAMBI J,

HEARD ON: 07 MAY 2020

DELIEVERED ON: 12 MAY 2020

MHLAMBI, J

[1] The applicant, and adult female residing at […], Pentagon Park, Bloemfontein, Free State Province, applied to this court on an urgent basis for relief against the respondent who is resident at […] Klerksdrop, North-West Province for an order on the following terms:

"1.1 That the applicant's non-compliance with the form process and prescribed periods pertaining to service be condoned and that the application be heard on an urgent basis in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court.

1.2 That the respondent be ordered and directed to immediately return C B (hereinafter referred to as "the minor child") to the applicant's primary care and primary place of residence.

1.3 The respondent be ordered and directed to travel to Bloemfontein and to hand the minor child over to the applicant at her place of residence.

1.4 Alternatively and should the respondent refuse to return the minor child to applicant, as stated in paragraph two (2) and three (3) supra, that the South African Police Services be authorized and directed to

accompany the applicant to the residence of the respondent at […] Klerksdrop for the purpose of removing the minor child from the respondent and for placing the minor child in the primary care of the applicant.

1.5 The respondent be ordered and directed to pay the costs of this application only in the event of his opposition.

1.6 Further and or alternative relief."

[2] The essence of the applicant's case is contained in the following paragraphs of the founding affidavit:

"8. The respondent and I were married on 04 November 200 at Bloemfontein, Free State Province and three (3) children were born from our marriage relationship, namely:

8.1 A girl, name I B, was born on […] 2002 and she is seventeen (17) years old.

8.2 A boy, named R B, was born on […] 2004 and he is fifteen (15) years old.

8.3 A boy, named C B, was born on […] 2012 and he is eight (8) years old. Hereinafter referred to as "the minor child"."

9. Unfortunately the marriage relationship between the respondent and I have broken down irretrievably. On 05 September 2018 I have moved out of the communal home.

11. On 12 June 2018 I have issued a summons against the respondent out the Regional Court for the Regional Division of the North West Province held at Klerksdrop under civil case number NW/KLD/RC-417/18 claiming a decree of divorce and ancillary relief.

18. On 14 August 2018 I have filed an application in accordance with the provisions of Rule 58 of the Magistrates Court Rules of court I append a copy of the notice of motion hereto and I mark it annexure "FA2". The respondent opposed the same and filled a counter application. I append a copy of the notice of motion of the counter application hereto and I mark it annexure "FA3".

19. The majority of the issues raised in the Rule 58 proceedings were resolved by ourselves and we reached an agreement in as far as the primary place of the two elder children is concerned. The outstanding issue were argued and I append hereto copies of the judgment and

the order granted by the learned Regional Magistrate and I mark it annexures "FA4" and annexure "FA5" respectively.

20. *The parental and responsibilities in respect of care of the minor child was hotly disputed and the same was postponed sine die, with leave to re-enrol the Rule 58 applications once we have received a report and recommendation from the family advocate, as is evident from the abovementioned.*

22. *Shortly before the announcement of the COVID-19 National State of Emergency, the minor child visited the respondent for a period of seven (7) days during 19 March 2020 to 26 March 2020 and in this regard I confirm that the respondent informed me in WhatApp messages dated 25 February 2020 and 04 March 2020 that he would return the minor child on 26 March 2020. I append a copy of the above-mentioned message hereto and I mark it annexure "FA6.1" and annexure "FA6.2".*

23. *On 25 March 2020, and in contravention of the abovementioned agreement/undertaking, the respondent refused to return the minor child because, according to him, the lockdown would commence on 26 March 2020. My attorney of record informed the respondent that I will drive to Klerksdrop to collect our minor child. The National Lockdown only commenced at 00:00 on 26 March 2020 and there*

was sufficient time for the respondent to return our minor child to me. On my arrival in Klerksdorp at 11:00 on 26 March 2020 the respondent refused to let me even have contact with the minor child. I obtained the assistance of the South African Police Services, to no avail. The respondent still refused to let me take our minor child into my primary care, which was the status quo since 5 September 2018. In doing so, the respondent unilaterally changed the minor child's primary place of residence in the midst of a national lockdown to the detriment of the minor child.

26. *This particular regulation was amended on 8 April 2020 empowering parents the right to move children between themselves and on 16 April 2020, my attorney of record addressed a letter to the respondent's attorney of record informing the latter that the regulations were amended and sought an undertaking that the respondent would cooperate in turning the minor child to me. Prior to my attorney's letter I requested respondent on 10 April 2020 to return our minor child to me, and on 13 April 2020 he again refused my request, where after I had no choice but to obtain legal assistance.*

27. *The respondent refused to provide this undertaking and I had no other option than issue an urgent application in the High Court of South Africa, North-West Division, Mahikeng under civil case number UM67/2020 and I append a copy of the notice of motion, which was*

filed in the above-mention application, hereto and I mark it annexure "FA7".

28. *The respondent opposed the same and on 21 April 2020, his Honourable Lordship Djaje removed the application from the roll after it concluded that Mahikeng High Court does not have the necessary geographical jurisdiction to hear the matter because the ordinary place of residence of the minor child is situated in Bloemfontein.*

29. *I have since received further legal advice and after having considered the same, I have decided to approach the Honourable Court for assistance, seeing that the Mahikeng High Court effectively concluded that I must approach the Free State High Court alternatively the Regional Court in Klerkdorp".*

[3] The application is opposed by the respondent. Besides dealing with the merits, the following preliminary points were raised:

"1. Res judicata:

2. Lack of territorial jurisdiction:

3. Lack of jurisdiction in respect of the subject matter:

4. Lis pendens

5. Lack of urgency.

The respondent gave notice that in the event that all the points in *limine* were dismissed, and only in that event, the respondent would apply at the hearing of the matter for an order in the following terms:

"1. That pending judgment in the application in terms of Rule 58 of the Magistrates' Court Rules pending between the above parties in the Regional Court of Klerksdrop under case number NW/KLD/RC-417/2019:

1.1 The primary care and residence of the minor child C B shall vest with the respondent;

1.2. The applicant may take the minor child with her on alternative weekend from 14h00 on Friday until 18h00 on Sunday;

1.3 The applicant may take the minor child with her for alternative school holidays;

1.4 The applicant shall enjoy reasonable telephonic contact with the minor child.

2. The applicant shall be liable for all the costs of this application."

[4] In the replying affidavit, the applicant denied each and every allegation contained in the opposing affidavit in as far as it was contradictory to the general gist of the averments contained in her founding affidavit. In paragraph 6 of the replying affidavit she stated the following:

"I reiterate, once again, that the disputes raised by the respondent are not material to the relief sought in these proceedings. The purpose of the relief sought herein is not aimed at circumventing the Rule 58 proceedings and the Honourable Court is, with respect, not called upon to resolve these disputes in these proceedings. I merely request the Honourable Court to restore the status quo until the Rule 58 application is finalised.

[5] A confirmatory affidavit of one Nicoleen Neethling, an adult female attorney practising as such at Smit Stanton Incorporated, Mahikeng, North West Province, was attached. She confirmed

that she was the local correspondent for the applicant in the urgent application brought on 21 April 2020 in the North West High Court and attended the court proceedings on that day with Advocate Danielle Smit. She confirmed that the application was dismissed with costs due to a lack of jurisdiction. As far as her recollection went, the application was dismissed on the basis of jurisdiction in that the child was ordinarily resident in Bloemfontein and the merits were not argued.

[6] It was argued on behalf of the applicant that the crux of the relief sought is the restoration of the *status quo* and nothing else. In this regard I was referred to *Van Tonder vs. Van Tonder*[1] where it was stated that:

> *"when one spouse deserts the other and leaves the child born of the marriage in the custody of the latter ('the custodian as spouse'), but later unilaterally removes the child from care of the custodian spouse, the court in whose area of jurisdiction the child was when violation occurred has jurisdiction to adjudicate the application by the custodian parent and to grant orders concerning the return of the child and ancillary relief. That is the case regardless of whether a divorce action is pending in the court in whose area of jurisdiction the custodian parent resides. Nor is it necessary for the*

[1] 2000 (1) SA 529 (O)

custodian parent to approach the division of the high court to whose area jurisdiction the child was removed."

[7] The counsel, in support of the submission that the court had jurisdiction, referred to *inter alia* to section 23 of The Children's Act[2] *which provides that:*

"(1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary-

(a) contact with the child; or

(b) care of the child.

(2) When considering an application contemplated in subsection (1), the court must take into account-

(a) the best interests of the child;

(b) the relationship between the applicant and the child, and any other relevant person and the child;

(c) the degree of commitment that the applicant has shown towards the child;

(d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and

(e) any other fact that should, in the opinion of the court, be taken into account.

[2] 38 of 2005

(3) If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court-

(a) must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interests of the child; and

(b) may suspend the first-mentioned application on any conditions it may determine.

(4) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child."

[8] The court, it was submitted, had jurisdiction to entertain the application as the respondent had taken the law into his own hands by his refusal to return C to the applicant as agreed.

[9] The *res judicata* preliminary point referred to the North West High Court application in which the applicant sought an order for the return of the minor child. The order would serve as an interim interdict pending the final adjudication of the divorce action between the parties already instituted in the Regional Court of Kerksdorp under case number NW/KLD/RC-417/2019. The application was dismissed with costs on 21 April 2020. It would

appear that the two preliminary points of lack of territorial jurisdiction and lack of jurisdiction in respect of the subject matter were upheld[3].

[10] The respondent was of the view that this decision constituted *"a final judgment between the parties in respect of the powers of a different court than the one in which the main proceedings and the proceedings pertaining to the parental responsibilities and rights regarding C are pending, and that M is required to apply for leave to appeal in the North West High Court Mahikeng and is not permitted to bring a fresh application between the same parties regarding the same dispute."*[4]

[11] A final judgment disposes completely of a case, ends the litigation on the merits leaving no further issues to be decided by the court.[5] In *PT Operational Services (Pty) Ltd vs. Raw on OBO Mngwetsana*[6] the court stated the following:

"Although I agree that the appropriate order in a matter where urgency has not be shown should be striking the matter from the roll, it seems to me that even where the word "dismissed" is used it does not necessarily mean that the dismissal amounts to a final order. One will have to enquire, where there

[3] Paragraph 29 on page 15 of the founding affidavit and the affidavit of Ms Neetlhing attached to the replying affidavit

[4] Paragraph 7.6 on page 73 of the opposing affidavit.

[5] Molala vs. Mestimaholo Local Municipality and others (5464/2018) [2019] ZAFSHC 267 20 August 2019 at para 13; Commissioner for South African Revenue Service (Pty) Ltd: Commissioner for South African Revenue Services vs. Hawker Aviation Services partnership and others 2006 (4) SA 292 (SCA) on pages 299-300

[6] (2013) 34ILJ 1138 (LAC)

is doubt, whether the matter was dismissed on the merits or not. If it was dismissed on the merits then the order is final. A finding that a matter is not urgent does not mean that there are no merits in the applicant's case. Even if a matter is dismissed for lack of urgency it can and should be enrolled. To reason otherwise would be to allow form to triumph over substance."

[12] It is also evident from both parties' papers and submissions that the matter was not finally resolved but referred by the North West High Court to other courts with the necessary jurisdiction. The applicant was entitled in these circumstance to proceed with the matter in the appropriate court.

[13] The pleas of *res judicata* and *lis pendens* are related and the elements are the same[7]. The party wishing to raise a *lis pendens* bears the onus of alleging and proving the following[8]:

(a) Pending litigation;

(b) Between the same parties all their privies;

(c) Based on the same cause of action;

(d) In respect of the same subject matter

A court has an overriding discretion to order a stay even if all the elements are not present[9]. On consideration of the applicant's

[7] Amler's Precedence of pleadings 9th Ed by LTC Harms on page 250

[8] Amler's Precedence of pleadings 9th Ed by LTC Harms on page 251

claim or cause of action it is clear that the pleas both *res judicata and lis alibi pendens* are appropriate in the give circumstances. Its uncertain whether the order granted in the North West High Court constituted a final judgment and as regards the latter preliminary point, the *lis* does not relate to the same subject matter. Similarly, and in the light of Van Tonder, *supra,* the decision of the North West High Court and the provisions of the Children's Act, the preliminary points relating to the lack of jurisdiction in respect of territory and subject matter are without merit and should be dismissed.

[14] On urgency the respondent maintained that the applicant failed to advance cogent grounds or circumstance which rendered the matter so urgent that the applicant would be unable to obtain substantial redress in the normal cause. She also failed to acquit herself of the onus of ensuring that the alleged urgency had not been self-created and that the respondent had not been unduly prejudiced in adequately presenting his case in the amount of time permitted between the service of the application on him and the actual hearing thereof.

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[9] Ceasarstone Sdot-Yam Ltd vs. The world of Marble and Granite 2000 CC and other (2013) 4 ALL SA 509 (SCA), 2013 (6) SA 499 (SCA)

[15] The preliminary point of urgency should also fail. It is clear from the papers that the applicant endeavoured from the onset to have the child returned to her care, but without success. The lockdown period interfered with her efforts to regain the child. She continued in her endeavour on the relaxation of the lockdown regulations. The assertion that some days went by without her perusing the litigation process for the recovery of the child is without substance and but splitting hairs. Consequently, I find that all preliminary points are without foundation and are dismissed.

[16] Section 23 (2) of the Children's Act enjoins the court, when considering an application contemplated in subsection (1), to take into account the circumstances set out in sub-section (2)(a) to (e). The answering affidavit was quite voluminous and detailed. Attached to it were the Family Advocate's report dated 23 September 2019, in which it is recommended that it would be in minor child's (C) best interest to have his primary care vested with the respondent and for him to reside with his two siblings in Klerksdorp; the assessment report by the clinical social work professional, Dr Karin Luck, dated 22 August 2019. The report assessed the relationship between the respondent and the three minor children in order to determine:

(a) What would be in the best interest of the minor children with regards to residency pending the parents' divorce and;

(b) giving the minor children a voice to be heard in determining their happiness with their current residency and schooling choices.

[17] Also attached were brochures of the Best Independent Primary School, Klerksdorp; a report relating to C from the social worker in private practice, Nuansa Vogel dated 28 April 2020; a report dated 19 April 2020 by the paediatrician, Dr OL Tshenkeng relating to C's state of medical health and a confirmatory affidavit by the couple's 17 year old daughter, I B, dated 6 May 2020. The challenging contents of the above reports and affidavit went unanswered and were hardly addressed in the replying affidavit. The respondent in his answering affidavit went to some lengths to address the circumstances as set out in section 23 (2)(a) to (e) of the Children's Act.

[18] In her affidavit[10], the applicant stated that it is not in the minor child's best interest to be uprooted from his known environment, be relocated to a new environment and enrolled in a new school which did not cater for his needs after he only spent one term at […] Primary School. Despite these statements the applicant failed to contradict the respondent's allegations in the replying affidavit that since September 2018, the applicant had moved the minor child to three different schools in Bloemfontein.

[19] Regional Court, Klerksdorp, ordered that the adjudication of the parental rights, responsibilities and guardianship including the respondent's counter claim were postponed indefinitely pending the Family Advocate's recommendations. The Family Advocate's report was completed on 23 September 2019. As at the time the urgent application was filed with the North West High Court, a period of six months had elapsed since the report was made available. It is in my view strange that before the hearing of 21 April 2020 the applicant manage to secure a report of Ms Campel in support of her application in that court.

[20] The applicant stated that she "

[10] Paragraph 40 of the founding affidavit

"46. …cannot enrol the Rule 58 application because she required a report to prepared by an expert witness in order to prove her case, to convince the Honourable Court that it is not in the best interests of the minor child to reside with the respondent and that the Family Advocate's recommendation is unreliable, inaccurate, not persuasive, is not in the best interests of the minor child and should not be followed by the Regional Court.

47. As such I have no other option that to approach the Honourable Court and to request the Honourable Court to intervene and to assist us in this regard. My attempts to resolve the matter outside the courts had fallen on death (sic) ears."

[21] It is noteworthy that before the hear of 21 April 2020, the applicant managed to secure a report of an occupational therapist, Ms F Campbell, dated 14 April 2020, which was used in support of her North West High Court application within a matter of days after the relaxation of the lockdown regulations and before her attorneys could address a letter to the respondent on 16 April 2020. Ms Campbell stated that she knew C since 2018. It goes without saying that there was no reason why she could not have furnished a report for purposes of the Regional Court proceedings in the same manner as she did in the two application before the High Court.

[22] It is indeed so that the applicant's cause of action is simply the return of the child to her care. However, her reliance on the provisions of section 23 of the Children's Act made it imperative for the court to consider, *inter alia,* the best interest of the child and the other factors pertinent thereto. In *F v F*[11], a case which dealt with the relocation of a custodian parent, the court stated the following:

> *"The criterion consistently applied by the Courts in deciding matters of this nature is now entrenched in s 28(2) of the Constitution which provides that '(a) child's best interests are of paramount importance in every matter concerning the child'. The 'best interests of the child' standard is, however, of necessity an indeterminate and relative one as the circumstances of each child within each family unit will vary across a wide spectrum of factors"*. I find this principle applicable to the matter at hand.

[23] It is unwarranted and implausible for the applicant to suggest that the court should grant an order as prayed for without the consideration of the circumstances contained in the Act. It behoved of the applicant to address the serious allegations contained in the respondent's opposing affidavit in her replying affidavit, which she failed to do. It was therefore not enough for

[11] 2006 (3) SA 42 (SCA)

the applicant to content herself with bare denials of such allegations. It would be unwise in my view, and contrary to the best interests of the minor child if he were to be removed from Klerksdorp to Bloemfontein before the finalization of the matter currently pending in Regional Court at Klerksdorp. Taking into account that C is in the presence of his siblings in the house he grew in, attending a private school and apparently being medically looked after, it would therefore not be in his best interests that he should be removed from such an environment until the pending dispute between the parents has been finalised.

[24] Having considered the papers and the applicant's conduct I get the impression that she was dissatisfied with the process before the Regional Court, and tried to circumvent the Rule 58 proceedings, thereby delaying the finalisation thereof. The earlier the parties realise that they must have the minor child's best interests at heart, the sooner will they ensure the finalisation and resolution of the matter pending between them.

[25] In conclusion, I find that this application should be dismissed on the basis that the applicant failed to show that it would be in the best interests of the minor child should an order be granted as

prayed for. In the light of the above she should pay the respondent's costs.

[26] In the result, I make the following order:

Order:

The application is dismissed with costs.

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JJ MHLAMBI, J

Counsel for Applicant:	Adv. J Coetzer
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Counsel for Respondent:	Adv. M.G Hitge
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