

SOUTH AFRICA / JUDGMENT

C.M.B v F.J.B (525/20) [2020] ZANCHC 52 (7 August 2020) [2020] ZANCHC 52

COURT

Northern Cape High Court, Kimberley

BEFORE

Nxumalo

CASE / FILE NUMBER

525/20

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION, KIMBERLEY)

CASE

NUMBER: 525/20

In

the matter between:

B[...],
C[...] M[...]
Applicant
and
B[...],
F[...] J[...]
Respondent

JUDGMENT

PER NXUMALO AJ:

INTRODUCTION

- [1] It behoves stating at the onset that section 11 of the Divorce Act, expressly and peremptorily stipulates that the procedure applicable with reference to a divorce action shall be the procedure prescribed from time to time by rules of court. Rule 43 (1) of the Uniform Rules of Court, expressly stipulates that it shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters; to wit: (a) maintenance pendente lite;
- (b) a contribution towards the costs of a matrimonial action, pending or about to be instituted;
- (c) interim care of any child;
- (d) interim contact with any child. Before this court is an application in terms of the said rule, which was lodged on or about 04 March 2020. The respondent delivered his sworn reply (answering affidavit) on or about 19 March 2020.
- [2] The applicant, who is the plaintiff in the divorce action pending before this court,[1] prays pendente lite (i.e. “during or pending litigation” or “awaiting litigation”), the following orders.[2] That the parental rights and responsibilities in respect of the primary care and residency of Brigitte (the parties’ minor girl child),[3] be awarded to her.[4] That the parental rights and responsibilities in respect of contact with the minor child be awarded to the respondent, as per paragraph 9.3 on pages 47-48 of the family advocate’s report.[5] That the respondent be ordered to pay maintenance of R3 000.00, per month in respect of the minor child. That the respondent be ordered to pay 50% of all the minor child’s reasonable medical and scholastic expenses. Penultimately, that the respondent be ordered to pay an amount of R20 000.00, as contribution towards the applicant’s legal expenses incurred in the divorce action. Ultimately, that the costs of this application be costs in the pending divorce action.
- [3] The respondent, for his own part, is opposed to the relief sought being granted and wishes same to be dismissed with costs on an attorney and own client scale, including costs of counsel and that of her travelling from Cape Town to Kimberley.[6] Preliminarily, the respondent contends that this application is fraud with irregularities and that this court lacks jurisdiction over the minor child.
- [4] On 19 June, the date this matter was set down for virtual hearing, after brief argument, this court ordered the parties’ counsel to prepare and submit heads of argument with regard to the foregoing preliminary points for this court consider during recess. Counsel complied with the said order and delivered their heads - the respondent on 26 June and the applicant on 03 July. This judgment is thus limited to the abovementioned preliminary points, which I will proceed to adjudicate seriatim, as soon as I have briefly stated the relevant law.

BRIEF STATEMENT OF THE LAW

The Constitution

[5] Section 28 (1) (b) of the Constitution, expressly arrogates every child the right to family or parental care or to appropriate alternative care when removed from the family environment. Section 28 (2), for its own part, expressly stipulates that a child's best interests are of paramount importance in every matter concerning the child. Section 34, on the other hand, arrogates everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum. Section 9 of the Constitution, contemporaneously grants everyone equal standing before the law and the right to equal protection and benefit of the law. Thus when interpreting the Bill of Rights, our courts, tribunals or forums are enjoined to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Our courts are also enjoined to consider international law and permitted to consider foreign law. When interpreting any legislation and when developing the common law or

customary law, every court, tribunal or forum is also enjoined to promote the spirit, purport and objects of the Bill of Rights. The Bill of Rights, however does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that same is consistent with the Bill of Rights.[7] It should however be pointed out that all courts function in terms of national legislation and their rules and procedures are provided for in terms of legislation, regard being had to section 171 of the Constitution.

[6] Section 36 (1) of the Constitution, for its own part, expressly permits the rights in the Bill of Rights to be limited only in terms of law of a general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant

factors, including those expressly catalogued in the said section. Of significance in this regard is to point out that except sections 28

(1) (d) and (e); (g) (i) and (ii); and (i); all the rights embedded in section 28 are derogable.

The Divorce Act

[7] Section 2 (1) of the Divorce Act 70 of 1979, expressly grants our courts jurisdiction in divorce actions, if the parties are or either of the parties is domiciled in the area of jurisdiction of the court on the date on which the action was instituted. Or the parties are or either of the parties is ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one

(1) year immediately prior to that date. It is trite that a court which has jurisdiction in terms of section 2 (1) of the Divorce Act in a divorce action, also has jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned, regard being had to section 2 (2) of the Divorce Act. It is however significant to point out that the provisions of the Divorce Act, do not derogate from the jurisdiction which a court has in terms of any other law or the common law, regard being had to section 2 (4) of the Divorce Act.

[9] Of significance is that a court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the

exclusion of the surviving parent. For the purposes of this section, the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.[9]

[10] Section 8 (1), for its own part, expressly stipulates that a maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor. Provided that if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (b) or 2 (b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in section 4 (1), have been considered by the court.

[11] Of significance also, is the fact that section 8 (2) of the Act, expressly empowers a court other than the court which made an order referred to in section 8 (1) of the Divorce Act, to rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court. Section 10 of the Divorce, for its own part expressly stipulates that in a divorce action, the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in, so

far as it may be relevant, make such order as it considers just and the court may order that the costs of the proceedings be apportioned

between the parties.

The Children Act 38 of 2005

[12] Section 29 (1) of the Children Act, for its own part, contemporaneously permits applications in terms of sections 22 (4) (b);[10] 23;[11] 24;[12] 26 (1) (b);[13] or 28;[14] to be brought before certain courts within whose areas of jurisdiction the child concerned is ordinarily resident. Section 44 (1) of the Children Act, on the other hand, expressly grant children's courts of the areas in which the children involved in any matter are ordinarily resident, jurisdiction in such matters. Section 9, in turn expressly stipulates that in all matters concerning the care, protection and well-being of children, the standard that the best interest of children is of paramount importance must be applied. Sections 45, 46 and 48, respectively only catalogues matters children's courts may adjudicate; orders they may make; as well as their additional powers in that regard.

Rule 43

[13] As alluded above, rule 43, which is aptly headed "matrimonial matters" expressly and peremptorily stipulates that this rule applies whenever a spouse seeks relief in respect of one or more of the following ancillary interim reliefs from the court where the main lis of divorce between the parties is pending; to wit:

- (a) maintenance pendente lite; (b) a contribution towards the costs of a pending matrimonial action; (c) interim custody of any child; and (d) interim access to any child.

PRELIMINARY POINTS

[14] In his answering affidavit, the respondent preliminarily raised what he describes as "manifest irregularities" in this application and contemporaneously contends that this court's lacks jurisdiction over the minor child.[15] The respondent argues that the application ought to be dismissed with costs because the applicant is abusing this application to obtain a final order. With regard to the alleged manifest irregularities, the respondent's argument seems three-fold; to wit: that the applicant has set down the matter prematurely; contra rule 43 (4); that the applicant has not made out a prima facie case for the relief sought in her founding affidavit; and that the application is not accompanied by a notice of motion. The latter is contended for, notwithstanding the fact that the respondent concedes that applicant's affidavit indeed contains the relief sought at the end thereof and as such is in line with Form 17.[16] With regard to the alleged lack of jurisdiction of this court, the respondent's mainstay contention seems to be contained in paragraph 6 of his answering affidavit; to wit:

"6. Jurisdiction has changed manifestly in the advent of Children's Rights and with the dawn of the Children's Act 38 of 2005. The minor child does not automatically follow the domicile of the mother anymore. As such the minor child is not automatically domiciled with Applicant and therefore follow her jurisdiction. In terms of the Children's Act as aforementioned the jurisdiction of the minor child is where the minor child is ordinarily

resident.”[17]

ISSUES

FOR DETERMINATION

[15] Regard being had to the respondent’s preliminary contentions; the following issues fall for determination; to wit: (a) whether this court indeed lacks jurisdiction in these proceedings;

(b) whether the application is indeed manifestly irregular; (c) whether the order sought is indeed final; and (d) whether the applicant has made out a prima facie case for the relief sought. I now turn to adjudicate these issues seriatim.

(a) Whether this court indeed lacks jurisdiction in these proceedings

[16] Regarding the point in limine of the alleged lack of jurisdiction of this court to adjudicate this interlocutory application, pendente lite, the respondent maintains that this court does not have jurisdiction over the minor child or the divorce proceedings. As far as he is concerned, both disputes ought to be adjudicated by the Western Cape Division of the High Court. According to him, to the extent that this court lacked jurisdiction ab initio, neither did the Kimberley office of the family advocate have any jurisdiction to investigate this matter.[18]

[17] The respondent maintains that it is so since the applicant instituted action in this division requesting primary care and ancillary relief only during November 2017, when the minor child was no more residing in this court’s jurisdiction. He alleges that despite this fact being known by the Kimberley office of the family advocate, the said office nevertheless sought leave from this court to institute an inquiry into the welfare of the minor child, in terms of section 4

(2) (a) of the Mediation in Certain Divorce Matters Act 24 of 1987 (Act 24 of 1987), which leave was allegedly erroneously granted by this court. The respondent also alleges that the said office proceeded with the

impugned inquiry despite having had sight only of the summons sans the benefit of his special plea of lack of jurisdiction, plea and counter-claim. [19] In the premise, it is submitted on behalf of the respondent that he has already raised the lack of this court’s jurisdiction in the divorce action in his special plea delivered on 25 June, this year.[20]

[18] The following is also submitted on behalf of the respondent regarding this court’s alleged lack of jurisdiction in these proceedings. That to the extent that the primary care, residence and guardianship of the minor child is the only and main lis in this matter, it is not in the best interest of the minor child that this court be seized with jurisdiction of determining

same, pendete lite.[21] It is further submitted on his behalf, without any authority, that it is so that in instances where termination is sought and in general, where a minor child has not been ordinarily resident in the jurisdiction of the court at the time of institution of the divorce action, this court cannot have jurisdiction.

[19] It is argued also on behalf of the respondent that the principle that the Divorce Act simply overrides the common law and the Children's Act, cannot pass muster in an era of constitutionalism and the advent of the Children's Act. That the aspect of our courts' jurisdiction with regard to non-resident children falls to be developed because the Children's Act and the best interest of the child trumps the Divorce Act. It is also argued further on his behalf that parental rights and responsibilities now obtained in section 18 of the Children's Act, are predicated against sections 19 and 20 of the same Act. And that in *Minister of Welfare and Population Development v Fitzpatrick* (2000) 3 SA (CC), it was held that section 28 (2) of the Constitution extends beyond and creates a right independent of the other rights of a minor child as listed in section 28 (1) of the Constitution.

[20] Furthermore, it is argued in this regard that through the development of international law and South African law, it has become accepted, even before the advent of the Children's Act, that the best interest of the child being of paramount importance in any matter pertaining to the child, is not just a standard and a rule of procedure, but an independent right, regard being had to section 9 of the Children's Act. Furthermore, over also it is argued for the respondent that the paramountcy of the best interest of the child is not served where the Divorce Act overrides the common law as well as the Children's Act to found a court's jurisdiction over a minor child who has not been ordinarily resident in its jurisdiction at the time of the institution of the divorce proceedings.

[21] It is maintained for the respondent that the Divorce Act directly clashes with the rights of the minor child. And that the jurisdiction of our courts over minor children ought to be developed and extended such that where the minor child has not been ordinarily resident in the area of the jurisdiction of a particular court at the time of the institution of proceedings, the Divorce Act should not automatically found jurisdiction of such a court on the minor child. It is also argued on behalf of the respondent that it is so because the Divorce Act is the only act that flouts the fact that the jurisdiction of a court is predicated against the residence of a child and completely

ignores same, by granting the divorce court inherent jurisdiction in circumstances where the minor child is not ordinarily resident in its area of jurisdiction at the time of the institution of the divorce proceedings. In the premise, it is concluded for the respondent that the Children's Act must trump the Divorce Act such that the court with jurisdiction should be where the child is ordinarily resident. It is also argued for him that it should be so since even where there is a dispute as to the custody of a minor child, the development of jurisprudence under The Hague Convention on Civil Aspects of Child Abduction, demands that same is adjudicated in the country of the minor child's habitual residence.

- [22] Contra wise, it is contended for the applicant, in the main that it is trite that divorce courts have jurisdiction to hear divorce actions between parties domiciled within their areas of jurisdiction as well as inter-alia; matters such as interim custody of children; contribution towards costs and maintenance pendente lite, where such matters are ancillary to the main divorce action. It is thus contended for her that this court has jurisdiction over the minor child by virtue of the fact that the divorce proceedings pending between the parties have been instituted in this court. The consequence of the foregoing, according to the applicant, is that this court retains the required jurisdiction to deal with the divorce action and the interim custody of the minor child pendente lite at least until the finalisation of the divorce proceedings. This argument is predicated against the fact that it has long been held that Rule 43 applications should be instituted where the divorce action has been instituted- see *Venter v Venter* 1970 (1) SA 11 (T) at 13.
- [23] It is maintained for the applicant that the respondent's reliance on section 29 and 44 of the Children's Act, is misplaced simply because the former section only refers to specific proceedings/applications instituted in terms of the specific sections of the Children's Act and does not apply to rule 43 applications. It is also maintained for her that it is so since if the legislature wanted to make the provisions of section 29 applicable to rule 43 applications, the legislature would have expressly mentioned the said applications in section 29. The applicant also maintains that section 44 of the Children's Act, specifically refers to proceeding in a children's court and not a normal civil court.
- [24] It is trite that a court must have jurisdiction for its judgment or order to be valid. Jurisdiction in this context means "the power invested in a court by law to adjudicate upon, determine and dispose of a matter." It is also trite that the crucial time for determining whether a court has the necessary jurisdiction is when proceedings commence- that is, when the initiating papers are served on the defendant or respondent. Once jurisdiction is established, it persists to the end of the proceedings even though the ground upon which it was established might cease to exist- see *CWU v Telkom* 1999 (2) SA 586 (T). Jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case. In the event of the court's jurisdiction being challenged at the outset (i.e. in limine) as in casu, the plaintiff's pleadings are the determining factor. It is so since the pleadings alone contain the legal basis of the claim under which the applicant or plaintiff chose to invoke the court's competence- see *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC) at para 75.
- [25] It is common cause that the applicant has instituted divorce proceedings in this court on the basis that she was domiciled in the area of its jurisdiction on the date on which the divorce action was instituted, vide section 2 (1) (a) of the Divorce Act 70 of 1979.[22] These proceedings are still pending before this court and constitute the main lis between the parties. This court's attention was drawn to the fact that in the counterclaim delivered on 25 June 2020, by the respondent, where he seeks termination of the guardianship of the minor child in terms of section 28 (1) of the Children's Act. It must be pointed out that a court granting a decree of divorce may, in regard to the maintenance of a dependent child of the

marriage or the custody or guardianship

of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent. For the purposes of this section, the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.[23] This court therefore takes the view that this issue is irrelevant and not before this court in this application. It is so simply because the custody of the minor child is ancillary and not the main *lis* as contented for the respondent. It is also so because this court's findings, which it is entitled to make, are not binding on the trial court- see *Levin v Levin* 1962 (3) SA 330 (W).

- [26] It is trite in our law that where a statutory provision expressly mentions something of a class, with which the statute deals, the provision should be construed impliedly as excluding other members of the same class- *expressio unius est exclusio alterius*. In applying this maxim, our courts have held that it must be absolutely clear that the legislative intention, in not expressly mentioning the other members of the same class, was to exclude the other thing, person or remedy or mode of procedure, or a person's rights, as the case may be- see *Mhlongo v MacDonald* 1940 AD 299. It follows from the foregoing that where new rights are given or duties imposed, with particular legal remedies to maintain them or enforce them, other legal remedies are excluded, unless other circumstances show that that was not the legislative intention- see *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 722.
- [27] It also follows from the foregoing that the jurisdiction of the courts in matters expressly mentioned in sections 29 and 44 of the Children's Act; and the jurisdiction of the courts, where the main *lis* between the parties is pending, to grant interim relief in matrimonial matters are therefore not mutually exclusive. Nor is the Divorce Act overriding or clashing with the rights of the minor children in similar circumstances or the Children's Act. It is so since section 2 (4) of the Divorce Act, expressly stipulates that the provisions of the Divorce Act, does not derogate from the jurisdiction which any other court has in terms of any other law or the common law.
- [28] It is so that section 29 of the Children's Act, expressly arrogates courts in whose area of jurisdiction the child concerned is ordinarily resident the jurisdiction to grant orders regarding only "parental responsibilities and rights agreements" [s22 (4) (b)]; "assignment of contact and care to interested persons" (s23); "assignment of guardian" (s24); "persons claiming paternity" (s26); or "termination, extension, suspension or restriction of parental responsibility rights" (s28). It is also so that all the aforementioned orders are final and not interim or matrimonial in nature, as contemplated in rule 43. Section 44 of the Children's

Act, for its own part, expressly and unambiguously only regulates the geographical areas of jurisdiction of the children's court and nothing more pretentious. It can therefore be deduced from the foregoing that neither section 29 nor 44 grant any of these courts any jurisdiction to grant any interim orders pendente lite. That seems to be the exclusive jurisdiction of the high court whence from the divorce proceedings have been instituted. It can also be deduced from the foregoing that rule 43 governs procedure and does not affect the substantive law, which may be regulated by other statutes including the Children's Act- see PT v LT 2012 (2) SA 623 (WCC) at 634E.

- [29] Whilst a court may be entitled to grant ancillary relief pendente lite under this rule, if the respondent is resident within the jurisdiction, even where the jurisdiction of the court to issue a decree of divorce in the main action is in dispute.[24] It has been held that, in the absence of urgency, applications for ancillary reliefs pendente lite under rule 43, should be brought in the court where the main lis between the parties is pending and not in another court which may have jurisdiction to hear the divorce action between the parties.[25] To the extent that rule 43 regulates procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters. And to the extent that the Divorce Act contemporaneously confers jurisdiction on the court in divorce proceedings, it follows that this court has jurisdiction in matters incidental to divorce proceedings- *Rousalis v Rousalis* 1980 (3) SA 446 (C).
- [30] Section 29 only seems to permit applications expressly mentioned therein to be brought before the mentioned courts within whose area of jurisdiction the minor child concerned is ordinarily resident. It does not for a moment derogate from the jurisdiction which this court has in terms of section 2 (1) and (2) of the Divorce Act or rule 43. The Divorce Act therefore cannot be said to flout the jurisdiction of the relevant courts over matters expressly mentioned in section 29. Neither does the Divorce Act seem to clash in any way with the rights of minor children who are not ordinarily resident within the jurisdiction of the court seized with the divorce action. In sum, the Children's Act does trump the Divorce Act. In the premise, this court finds that it has jurisdiction over both the divorce action and this interlocutory ancillary application pendente lite, until the end of these proceedings.[26] This point must therefore be dismissed accordingly.
- (b) Whether the application is indeed manifestly irregular
- [31] As alluded above, rule 43 (1) expressly peremptorily stipulates that this rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters; to wit:
- (a) maintenance pendente lite;
- (b) a contribution towards costs of a matrimonial action, pending or about to be instituted; (c) interim care of any child; and (d) interim contact with any child. This rule peremptorily regulates the procedure to be followed in applications for ancillary

relief of an interim nature in matrimonial matters. Of significance, in this regard is the fact that the jurisprudential basis of the rule is that applications of the kind contemplated therein should be dealt with as inexpensively and expeditiously as possible. Prolivity in averments and the unnecessary proliferation of papers and affidavits therefore ought to be avoided.[27] It is on these bases that rule 43 (2), expressly and peremptorily requires an applicant to deliver a sworn statement, in the nature of a declaration, setting out the relief claimed and the grounds therefore, together with a notice to the respondent, as near as it may be in accordance with Form 17 of the First Schedule. The statement and notice are required to be signed by the applicant or its attorney and is also required to give an address for service within eight (8) kilometres of the office of the registrar.

[32] Rule 43 (3), for its own part, requires the respondent, within ten

(10) days after receiving the said statement, to deliver a sworn reply, in the nature of a plea, signed and giving an address as aforesaid, in default of which it shall be ipso facto barred. Rule 22 expressly requires a plea either to admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent and shall clearly and concisely state all the material facts upon which reliance is placed. In terms of rule 22 (3), every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or admitted, shall be deemed to be admitted. The rule also requires, if any explanation or qualification of any denial is necessary, for same to be stated in the plea. Rule 43 (4), on the other hand, expressly enjoins the registrar to bring the matter before the court for summary hearing, on ten (10) days' notice to the parties, unless the respondent is in default. At the hearing of the matter, the court is vested with the power to hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit, to ensure a just and expeditious decision.[28] Of significance, is the fact that the court may also, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child or the contribution towards costs proving inadequate.[29] Of significance also, are the provisions of rule 43 (7) and (8), which expressly and respectively provide as follows; that: (a) no attorney or advocate appearing in a case under this rule is allowed to charge a fee of more than R426.00, if the claim is undefended or R1 066.00, if it is defended, unless the court in an exceptional case otherwise directs; (b) no instructing attorney in cases under this rule is allowed to charge a fee of more than R1 491.00, if the claim is undefended or R2 130.00, if it is defended, unless the court in an exceptional case otherwise directs.

[33] It is common cause that the applicant, instituted divorce proceedings against the defendant (the respondent herein) on 20 November 2017, whilst the former was domiciled within the jurisdiction of this court. These proceedings are still pending before this very court. It is also common cause, that at all material times hereto, the respondent and the minor child were domiciled in the Western Cape, outside the jurisdiction of this court and within the jurisdiction of the Western Cape Provincial Division. It is further common cause that this

application was lodged on 04 March 2020, pendente lite, the divorce action. The respondent was invited to deliver his sworn reply within ten (10) days of receipt of the former, within the contemplation of rule 43 (3). The respondent deposed to his sworn reply on 18 March and delivered same on 19 March 2020, regard being had to the filing notice at pages 72 to 73 of the papers.

- [34] He alleges that on 18 March, a day before the expiration of the 10 days within which he was entitled to deliver his reply, the applicant irregularly served a notice of set-down on him setting down the matter for hearing on 24 April. The applicant, for her own part, submits that the argument in this regard is misplaced as the said date is clearly 10 days after the date upon which the respondent's reply should have been delivered. That whilst the matter was originally set down to be heard on 24 April,[30] same was nevertheless subsequently postponed to and heard virtually by this court only on 19 June 2020, due to the advent of the novel covert 19 pandemic. The applicant contends that this postponement has afforded the respondent ample time to prepare for argument in the matter.[31] In the premise, it is submitted on behalf of the applicant that to the extent that there is no prejudice suffered on the part of the to the respondent due to the applicant's alleged irregular step, this point should be dismissed. Proof of prejudice is a prerequisite to success in irregular proceedings. [32] This court therefore agrees with the applicant and dismisses this point accordingly.
- [35] In paragraph 38 of the respondent's heads of argument, it is submitted that the applicant's "... Sworn statement is not commissioned and therefore not before this Honourable Court." A "sworn statement" otherwise known as "an affidavit" is by its very nature a statement in writing sworn to before someone who has authority to administer an oath. It is a solemn assurance of fact known to the person who states it and sworn to as his statement before some person in authority such as a magistrate, justice of the peace, commissioner of the court or commissioner of oaths- see *Swissborough v Government of RSA* 1999 (2) 279 (T) at 336A-B. A "sworn statement" can therefore not be so sans being commissioned. The applicant's sworn statement was clearly signed by her and commissioned on 18 February 2020, regard being had to page 19 of the papers. The notice also gives an address as contemplated in rule 43 (2). This court also finds that the applicant has substantially complied with rule 43. That much is conceded on behalf of the respondent in paragraph 35 of the respondent's heads of argument. This contention is therefore erroneous and must be rejected as such.
- [36] In any event, rule 30 (1) applies to all procedural irregularities. The rule expressly empowers that a party to a cause in which an irregular step has been taken by any other party, as alleged in these proceedings, to apply to court to set it aside. Rule 30 (2), for its own part, expressly requires an application in terms of sub-rule (1), to be on notice specifying particulars of the impropriety alleged and may be made inter-alia if the innocent party has not himself taken any further step in the cause with knowledge of the irregularity and the innocent party has, within ten (10) days of becoming aware of the impugned step, by written notice, afforded his opponent an opportunity of removing the cause of complaint within ten

(10) days. In *SA Metropolitan v Louw* (1981) 4 329 (O) at 333G-H, it was clearly stated that rule 30 was intended as a procedure whereby a hindrance to the future conduct of the litigation, whether it is created by non-observance of what the rules intended or otherwise is removed. It was also held elsewhere that a party should not self-righteously remain silent when he knows the other party is in default, especially where such default has continued over a lengthy period.[33] The respondent clearly has not sought to invoke or availed him selves of any the provisions in rule 30. Nor has he alluded to any prejudice he might have suffered as a result of the alleged irregularity, especially regard being had to the fact that the application was not heard on the date on which it was originally set down, to wit: 24 April 2020. He instead took a further step in the cause with knowledge of the irregularity by delivering his sworn answering

statement a day after the alleged irregular step was taken, on 19 March 2020.

[37] Deviation from the strict requirements of the rule is permissible, if required by the circumstances.[34] A replying affidavit or supplementary papers may also be permitted under special circumstances in the exercise of the court's

inherent jurisdiction to regulate its proceedings, taking into account the interests of justice.[35] Rule 27 (3), for its own part, laconically and expressly empowers this court, on good cause shown, to condone any non-compliance with the rules. The foregoing notwithstanding, it is submitted on behalf of the respondent that to the extent that rule 43 does not give any party the right to supplement its papers, filing a notice of an irregular step would not have sufficed.[36] This court disagrees. This court does because the respondent's objection to the applicant's alleged irregularities is of it selves not only irregular, but the respondent has already acquiesced to the alleged irregularity. This issue thus falls to be dismissed too.

(c) Whether the order sought is indeed final

[38] The respondent contends that the applicant is abusing this application to obtain final relief by merely annexing the family advocate's impugned report, without the relevant family counsellors' reports from Cape Town and Upington. He says this is part of the applicant's stratagem to inveigle this court to "rubberstamp" the impugned report without scrutiny. Contra-wise, it is submitted for the applicant that, given the contents of paragraph 39 of her affidavit, she is in no way expecting this court to grant her any sort of final relief. This court is constrained to agree with the applicant's submission. It does simply because it is clear from a cursory glance at paragraph 39.1 of the applicant's sworn statement that she only seeks to be awarded interim parental rights and responsibilities in respect of the primary care and residency of the minor child, pendente lite.[37] In any event, the reliefs embedded in rule 43 are by their very nature pendente lite and interim. None is final. Rule 43 simply regulates the procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters and nothing more pretentious. It must be repeated that the rule clearly only governs procedure and does not affect the substantive law.[38] The procedure together with the stipulated time limits has also clearly been designed to enable

the court deal expeditiously with

these interlocutory applications- see De Villiers (10 1965 (2) SA 882 (C)). In the premise, this court finds that the order sought by the applicant is not final and consequently dismisses the respondent's

argument regarding this point accordingly.

(d) Whether the applicant has made out a prima facie case for the relief sought

[39] The respondent quarrels with the fact that, the grounds upon which the applicant relies for the relief sought is based on a final recommendation by the office of the Kimberley family advocate, which report is only referred to but not expressly traversed as if specifically repeated and which contents is not requested to be incorporated into the sworn statement. It may be so that the respondent is entitled to raise an objection in limine that a founding affidavit does not make out a prima facie case for the relief claimed. It may also be so that it is not open to any party to merely annex to its affidavit documentation and to request the court to have regard thereto. But what is required is merely the identification of portions of the relevant document on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof and nothing more.[39]

[40] It so since the procedure embodied in rule 43 is both hybrid and sui generis, being largely in the nature of an application, but also resembling an action since the affidavits have to be in the nature of a declaration and plea- see Willies 1973 (3) SA 257 (D). It is against this backdrop that it has been suggested that in the use of the expression: "A sworn statement in the nature of a declaration" the drafter of the rule presumably had in contemplation the requirements of a declaration as set out in rule 20 (2).[40] Rule 20 (2), expressly and peremptorily provides that a declaration must set forth the nature of the claim, the conclusions of law which

the plaintiff shall be entitled to deduce from the facts stated therein; and a prayer for the relief claimed. Lengthy affidavits may frustrate the object of the rule to decide the application thereunder as inexpensively and expeditiously as possible; and may for that reason amount to an abuse of the process of the court resulting in no order being granted.[41]

[41] The respondent out rightly rejects the recommendations of the impugned report in its entirety, especially the alleged incorrect inference drawn that there are markers of PAS (Parental Alienation Syndrome) on the minor child.[42] He alleges that there seems to be a severe bias on the part of the impugned family advocate, without any more. He does not state which of the aspects of the said report that led to the family advocate's conclusion that there are traces of PAS detected on the minor child are not admitted and to what extent. Nor does he state any fact upon which he relies for disputing the impugned report. He has also not put up any expert evidence to contradict the impugned findings. It is simply submitted on behalf of the respondent that evidence still ought to be adduced as mere referral to the impugned report is not sufficient.[43] In this regard, the respondent in paragraph 15 of his

answering affidavit, avers that he has been advised that he has the right to cross-examine the impugned family counsellors.[44]

- [42] This argument is careless of the provisions of rule 22 (2) and the fact that rule 43 (5), expressly empowers the court to only hear such evidence as it considers necessary and may dismiss the application or make such order as it sees fit to ensure a just and expeditious decision. Evidence can therefore only be received because of the deliberate decision of the court and not by a party, as of right.[45] It follows from the foregoing that whether it is necessary to hear any evidence with regard to the impugned report falls within the discretion of the court that will hearing the substantive part of this application. In paragraphs 11-17 and 21 of the founding affidavit, the applicant adequately identifies the portions on which reliance is placed and indicates the case which she seeks to make out on the strength thereof.[46] In the premise, this court finds that the applicant has made out a prima facie case for the relief sought and therefore dismisses this point accordingly.

CONCLUDING REMARKS

- [43] The nub of the respondent's qualms seems to be the fact that the provisions of the rule 43, applies whenever a spouse seeks interim relief from the court in respect of inter-alia custody of or access to any child pendent lite. It has been well said per O' Regan J in *Giddy v Barnard* [2006] ZACC 13; 2007 (2) BCLR 125 (CC) at para 16, that for our courts to function fairly, they must have rules that regulate their proceedings and of course, all these rules must be compliant with the Constitution. [47] This court is of the view that if it is so that the impugned rule constitutes a limitation on the rights of children and that that limitation is justifiable in terms of section 36 of the Constitution. It follows that a challenge to the legitimacy of the repercussions of the application of the rule requires a challenge of the rule itself. In the absence of such a challenge, the respondent's complaint can only be that the rule was not properly applied by this court. By parity of reason, as long as the rule is properly applied, it follows that there can be no cause for constitutional complaint. It is so since, as pointed out by O' Regan, very often the interpretation and application of the rules will require a consideration of the provisions of the Constitution, as section 39
- (2) of the Constitution instructs. It is also so because, a court that fails to adequately consider the relevant constitutional provisions when applying a rule will not have applied the rule at all. It is not the respondent's case that the impugned rule is being misapplied. Nor has the respondent launched a frontal constitutional attack on the impugned rule. In the premise, the respond's preliminary points all fall to be dismissed with costs.

COSTS OF THIS APPLICATION

[44] The applicant originally sought costs of this application to be costs in the divorce action. The applicant however in argument decried the conduct of the respondent in raising the foregoing points in limine which the applicant maintains are not only baseless but also frivolous and vexatious such that same should be frowned upon by this court. In the premise, the applicant submits that the respondent should be ordered to pay the costs of this in limine part of the proceedings. This court agrees.

ORDER

[45] In the result, the following order is made:

- (a) All the points in limine raised by the respondent are hereby dismissed; and
- (b) The costs of these proceedings as far as arguing of the matter on 19 June 2020, including the preparation of the heads of argument on the points in limine, shall be borne by the respondent, forthwith.

APS NXUMALO

Acting Judge of the High Court

Northern Cape Division, Kimberley

APPEARANCES

For Applicant: Advocate AD Olivier, instructed by Eliot Maris Wilmans & Hay, Ground Floor, Cheapside, Kimberley.

For Respondent: Advocate MH Steyn, instructed by Lucas Dysel Crouse Inc, 06 Van der Byl Avenue, Durbanville, c/o Hugo Mathewson & Oosthuizen inc, 31 Bean Street, Kimberley.

Date of Hearing

19 June 2020

Date of Judgment

07 August 2020

[1] These divorce proceedings were instituted on 20 November 2017.

[2] See paragraph 39, pp18-19, Founding Affidavit.

[3] Hereinafter referred to as “the minor child.”

[4] The minor child is approximately 8 years five (5) months old, having been born out of the marriage between the parties on 23 February

2012.

[5] It will be noted that this impugned Report is dated 24 January 2020, regard being had to p68 of the papers.

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- [6] See para 47, p 85, AA. It should be noted that travelling costs have become unneeded since this matter was adjudicated virtually.
- [6] See para 47, p 85, AA. It should be noted that travelling costs have become unneeded since this matter was adjudicated virtually.
- [7] See section 39 of the Constitution.
- [8] See section 6 (2), Divorce Act.
- [11] Assignment of contact and care to interested persons by order of court.
- [12] Assignment of guardianship by order of court.
- [13] Persons claiming paternity.
- [14] Termination, extension, suspension or restriction of parental responsibilities and rights.
- [15] See para 5, thereof.
- [16] See paras 11-12, pp76-77, AA.
- [17] This Court's emphasis.
- [18] See paras 9-10, p76, AA.
- [19] See para8, p76, AA.
- [20] See paragraph 3, p2, Respondent's Heads of Argument.
- [21] See paragraphs 9 and 28, pp3 and 8, *ibid*.
- [22] See paragraph 3, Particulars of Claim, 20/11/2017; see also paragraphs 4-5, p6 founding affidavit.
- [23] See section 6 (3) and (4), Divorce Act.
- [25] *Green v Green* 1987 3 131 (SE) at 132F-134D.
- [26] See *Communications Workers Union v Telkom* 1999 (2) SA 586 (T).
- [27] See *Du Preez v Du Preez* 2009 (6) SA 28 (T) at 30(C).
- [28] See Rule 43 (5).
- [29] See Rule 43 (6).
- [30] See para 47, p 14 Applicants' Heads of Argument.
- [31] See p 1 of the Papers.
- [32] See *Metropolitan v Louw* 1981 (4) SA 329 (O) at 333G.
- [33] *Webster v Webster* 1992 (3) SA 729 (E) at 734G.

[34] See Dodo 1990 (2) SA 77 (W).

25 See section 173 of the Constitution, which expressly inheres our superior courts with the inherent powers to protect and regulate their own processes and to develop the common law, taking into account the interests of justice.

[36] See paragraph 36.3, p10, Respondent's Heads of Argument.

[37] See p18, FA.

[38] See PT v LT 2012 (2) SA 623 (WCC) at 634E.

[39] See Swissborough Diamond Mines v Government of RSA 1999 (2) SA 279 (T) at 324F-G.

[40] See Zoutendijk v Zoutendijk 1975 (3) SA 490 T at 492C.

[41] See Du Preez v Du Preez 2009 (6) SA 28 (T) at 33B, per Murphy J.

[42] See para 13, AA.

[43] See para 36, p10, ibid.

[44] See para 15 at p 78, AA.

[45] See Leppan v Leppan 1998 (4) SA 455 (W) at 458D.

[46] See pp8-13, FA.

[47] See section 2 of the Constitution, which expressly declares it as the supreme law of the Republic such that law or conduct inconsistent with it is invalid whilst the obligations imposed by it must be fulfilled.

[47] See section 2 of the Constitution, which expressly declares it as the supreme law of the Republic such that law or conduct inconsistent with it is invalid whilst the obligations imposed by it must be fulfilled.

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