

SOUTH AFRICA / JUDGMENT

T.J.S v M.N.M (2024/147933) [2024] ZAWCHC 432 (24 December 2024)

[2024] ZAWCHC 432**COURT**

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

2024/147933

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Source record**FLYNOTES:**

FAMILY – Children –
Jurisdiction –
Case between parties pending in
Children’s Court in Cape – Respondent relocating to
Pretoria with child –
Secured employment there and has
support of her family – Urgent court order that child be
returned – Respondent
intends to live and work in Pretoria –
No proceedings in Cape Town High Court – Court lacks
jurisdiction –
Children’s Court in Wynberg retains
jurisdiction to hear the custodial dispute – Interim order
reconsidered and
set aside.

REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
CASE NO: 2024-147933
In

the matter between: TJS
Applicant
And
MNM
Respondent
Date
Heard: 17 December 2024

Delivered: Electronically on 24 December 2024

JUDGMENT

LEKHULENI J

Introduction

[1] This is an application in terms of Rule 6(12)(c) of the Uniform Rules for the reconsideration of an order granted by the urgent court on 13 December 2024 against the respondent in which the court ordered the respondent to remain present in the greater City of Cape Town until the finalisation of proceedings in the Magistrates Court, alternatively, any other application that may be made for the removal of the minor child from the Western Cape and or the Republic of South Africa. In addition, the respondent was ordered not to remove the minor child from the Republic of South Africa without an order of this court or the consent of the applicant. The respondent was further ordered to return the minor child, ATNM from Pretoria to Cape

Town within three days of granting the said order and no later than 17 December 2024.

[2] Upon receipt of the order, the respondent, brought an urgent application in terms of Rule 6(12)(c) of the Uniform Rules in which she sought an order that the interim order directing her to return the child to Wynberg in the Western Cape be reconsidered and set aside. The respondent asserted that the applicant in the main application did not satisfy the requirements of urgency and that the court did not have jurisdiction to hear and grant the order directing her to return the child to Cape Town. To this end, the respondent requested the court to reconsider and set aside the order issued on

13 December 2024.

Background

Facts

[3] The applicant and the respondent were involved in a romantic relationship and have a minor child named ATNM, born on 10 August 2023 in Claremont, Cape Town, out of such a relationship. The child is currently in the primary care of the respondent. The applicant and the respondent had problems regarding the applicant's exercise of his access rights to the

minor child. Subsequent thereto, the applicant approached the Wynberg Children's Court for assistance. The parties were then referred to the Cape Town Child Welfare Society for mediation.

- [4] Mediation took place. As a result of the mediation, the Wynberg Children's Court made an interim order on 5 July 2024 in which the applicant was granted video call access to the minor child every Monday, Wednesday, Friday and Saturday between 20h00 and 21h00. The applicant was also granted supervised contact with the child for 1-2 hours, and the parties were directed to communicate via WhatsApp regarding the arrangements in terms of this order. The matter was postponed to 13 September 2024.
- [5] On the second return date, 13 September 2024, the interim order of 5 July 2024 was amended. The Children's Court ordered the applicant to exercise supervised contact with the minor child every alternate Saturday for two hours during the first month. The court also ordered unsupervised contact with the child every alternate Saturday for two hours during the second month and video calls with the child every Monday, Wednesday, Friday and Saturday between 20h00 and 21h00. The parties were further directed to communicate via WhatsApp regarding the arrangements concerning this order. A new court date was scheduled for 11 December 2024.
- [6] In the main application, the applicant stated that in November 2024, the respondent requested permission to take the minor child to her family in Swaziland during December 2024. However, the respondent did not mention any plans to move to Pretoria. The applicant refused the respondent's request to take the child to Swaziland. The applicant asserted that his decision was informed by the fact that the respondent started interfering and, at times, refused him contact with the minor child. According to the applicant, the main reason for his refusal was that the court had set a date for the parties to return to court on 11 December 2024.
- [7] The respondent subsequently approached the court clerk and requested assistance for consent to take the child to Swaziland in December 2024 to visit her relatives. She was informed that she needed to file a separate application with the court. During this time, the respondent took the minor child from the Western Cape and traveled to Pretoria without the applicant's consent.
- [8] In her application for reconsideration, the respondent asserts that following their appearance in the Wynberg court, she communicated her ongoing financial struggles to the applicant. As a result, she informed the applicant that she may need to relocate back to her family (home) in Pretoria, where she would be financially assisted by her family and have a support system. The respondent further asserted that before her departure, she informed the applicant that she could

no longer sustain her stay in Cape Town and would be relocating back home to Pretoria. She provided the applicant with an address so he could visit the minor child. The respondent stated that she managed to secure employment in Pretoria, which she is scheduled to start in January 2025.

[9] The respondent further asserted that she always rented her place in Cape Town and took care of her financial responsibilities. She also averred that she does not have the means to remain in Cape Town as she no longer has a place to stay. According to the respondent, the financial responsibilities of living in Cape Town became too much for

her to handle, especially now that the minor child is entirely her responsibility while the applicant contributes only sporadically. She is currently based in Pretoria and does not have the means to relocate to Cape Town and secure accommodation. In terms of Rule

6(12)(c), she sought an order that the order granted on 13 December 2024 be reconsidered and set aside.

Principal Submissions by the Parties

[10] Mr Tyaliti, the respondent's Counsel, submitted that the court did not have jurisdiction to grant the order on 13 December 2024 as the respondent and the minor child reside in Gauteng outside the area of jurisdiction of this court. Counsel submitted that this court had no jurisdiction as the respondent lived in Gauteng from the first week of November 2024. Mr Tyaliti further argued that the Wynberg order did not allow the respondent to remain in Cape Town for the applicant's convenience. The applicant can still contact the minor child by visiting him in Pretoria.

[11] Mr Tyaliti contended that the respondent has the right to work and live wherever she likes. The respondent has no financial means for accommodation and neither did the applicant provide the same. The respondent will be prejudiced if the order is not set aside, as she cannot afford to travel to Cape Town and find accommodation. Counsel contended that the respondent had secured employment in Pretoria. According to Mr Tyaliti, the respondent wants the applicant to return to the Cape for his convenience. Counsel implored the court to grant the relief sought in the notice of motion.

[12] On the other hand, Mr Basson, the applicant's Counsel submitted that this court has jurisdiction. The child and the applicant were residing in the Cape, and the court retained jurisdiction over them. Mr Basson further submitted that the respondent breached the court order made in the Wynberg Children's Court. Counsel argued that court orders must be obeyed. Mr Basson further argued that the respondent must comply with the order that granted the applicant visitation rights. It is impractical for the applicant to have physical contact with the minor child while the child is in Pretoria. Counsel submitted that the assertion that the applicant can visit the child in Pretoria at any time is unreasonable.

[13] The applicant's Counsel submitted that by taking the child to Pretoria, the respondent, in a way, severed the applicant's rights of contact with the child. Counsel contended that the court agreed with the applicant's request on 13 December 2024. The applicant wants the respondent to comply with the court order. The order was made to ensure that the father sees the child. According to Mr Basson, the respondent did not place anything before the court to show that she could not afford to live in Cape Town. If the court were to order that the respondent stays in Pretoria, Counsel argued, the court would be endorsing a breach of the court order. It was submitted that the respondent has family in Cape Town and did not indicate why she cannot live with the said family. Mr Basson applied for the dismissal of the reconsideration application with costs.

Issues

In Dispute

[14] There are two relevant issues that this court must consider. First, this court must determine whether the urgent court had jurisdiction to grant the court order, which it did, although the respondent

relocated and resides in Gauteng. Secondly, whether this court should reconsider and set aside the interim order directing the respondent to return to the Western Cape with the minor child?

Discussion

[15] For completeness, I will first consider the respondent's jurisdictional point before considering the merits of her application.

Did the urgent court have jurisdiction to hear the matter?

[16] The jurisdiction of the High Court in its most basic form is regulated by section 21 of the Superior Courts Act 10 of 2013 ("the Superior Courts Act";). (see *Deguelde v Companies and Intellectual Property Commission* (211/23) [2024] ZAWCHC 222 (22 August 2024) para 52). Of particular importance in this case, are the provisions of section 21(1) and (2) of the Superior Courts Act, which provides as follows:

"(1) A division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance..."

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third-party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division..."

[17] Section 21 of the Superior Courts Act provides, inter alia, that this Court shall have jurisdiction over all persons residing in its area of jurisdiction. Simply put, section 21 of the Superior Courts Act clothed a division of the High Court of South Africa with jurisdiction

over all persons residing or being in, and in relation to all causes arising within its area of jurisdiction. (see *YC v JRC* (20375/2024) [2024] ZAWCHC 273 (20 September 2024) at para 16). A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such Court has jurisdiction.

- [18] The time for determining the jurisdiction of the Court to entertain an action, is the time of the commencement of the action. (*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 310D - E.). In determining whether a person can be regarded as residing within the court's area of jurisdiction for the purpose of Section 21 of the Superior Courts Act, the court must employ a pragmatic and realistic approach. This evaluation should adequately consider all pertinent circumstances associated with the case at hand.
- [19] When it is stated that an individual resides at a particular location, it is clearly understood to mean that this location serves as his home his primary place of residence where he typically sleeps following the completion of his daily activities. The time when an application is regarded as having been instituted, for the purposes of jurisdiction, is when the application papers are served. (See *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N); *Mayne v Main* 2001 (2) SA 1239 (SCA) at 1243C).
- [20] As discussed above, the respondent impugned the jurisdiction of this court. The respondent disputes that she was resident in the area of jurisdiction of this Court at the time of the service of the application. Mr Tyaliti argued that the respondent relocated permanently to Gauteng in November 2024 with the minor child. According to the respondent, when the application was issued and served, the respondent was already a resident of Gauteng. Counsel submitted that this court does not have jurisdiction over this matter as the respondent does not reside within the jurisdiction of this court.
- [21] It is trite that the onus of establishing jurisdiction based on the respondent's residence rests on the applicant. (*Terblanche NO and Others v Damji and Another* 2003 (5) SA 489 (C). Simply put, the applicant must prove in this case that the respondent is ordinarily resident within the area of jurisdiction of this court. In establishing territorial jurisdiction, there are several factors which must be considered, each of which may go some way towards proving that residence has been established. Significantly, a presence which is merely fleeting, or transient would not satisfy the requirement for residence; some greater degree of permanence is necessary.
- [22] The Supreme Court of Appeal ('SCA') in *Mayne v Main* (supra) approved the basic principles which govern a matter such as the present as set out in *Ex parte Minister of Native Affairs* 1941 AD 53. The court summarised the principles as follows at 1243A-E of the judgment:

"(1) In giving a court statutory jurisdiction over a person who resides in its area the Legislature has simply followed the common-law rule actor sequitur forum rei.

- (2) The question is not one of domicile but of residence. A defendant may have his domicile at one place and his residence for the time being at another.
- (3) A person can have more than one residence. Where that is the case, he (or she) must be sued in the court having jurisdiction at the place where he is residing at the time when the summons is served.
- (4) A person cannot be said to reside at a place where he is temporarily visiting. Nor does a person cease to reside at a place even though he may be temporarily absent on certain occasions and for short periods.
- (5) Apart from the above, the Courts have studiously refrained from attempting 'the impossible task' of giving a precise or exhaustive definition of the word 'resides'. Whether a person resides at a particular place at any given time depends upon all the circumstances of the case seen in the light of the applicable general principles.”
- [23] In addition to these principles, the SCA held that although a person may have more than one residence for the purposes of jurisdiction, a person can only be residing in one place at any given moment (at 1243F). The court held that for the purposes of jurisdiction our Courts do not recognise the concept of a vagabundus. A person must reside somewhere (at 1249B). A person's intention is not necessarily conclusive. The objective facts must be looked at to decide the question of factual residence (at 1248I - J).
- [24] Regarding the meaning of residence, the SCA (at 1243F-I) embraced three definitions of residence as being amongst the more appropriate definitions thereof. They are the following:
- “(a) It has never been laid down what degree of permanence is required in residence, but at all events it ought to be shown that the person sought to be brought within the jurisdiction had some interest in the place which he was served, in the sense that there was*
- some good reason for regarding it as his place of ordinary habitation at the date of service. (Hogsett v Buys 1913 CPD 200 at 205.)
- (b) When it is said of an individual that he resides at a place it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done.
- (c) In *Tick v Broude and Another* 1973 (1) SA 462 (T) at 469F-G it was said that residence is a concept which conveys 'some sense of stability or something of a settled nature.’”
- [25] In applying the principle discussed above to the facts of this case, I am of the opinion that at the time the applicant's application were served upon the respondent through WhatsApp, the respondent was not a resident of the Western Cape. The respondent was permanently resident in Haymeadow Crescent, Pretoria. The following reasons bear this out:

- [26] The applicant was struggling in the Western Cape. She asserted in her affidavit that she does not have the means to remain in Cape Town as she no longer has a place to stay. Her financial responsibilities in Cape Town became more than she could handle, especially with the minor child being her full responsibility. According to her, the applicant only contributed when he wanted to. The respondent's family lives in Pretoria. The respondent stated that she left Cape Town to relocate permanently to Pretoria, where her family would provide a support structure. On the facts, her move to Pretoria was meant to be permanent, not just temporary.
- [27] Most importantly, the respondent informed the applicant that she was struggling financially and could not keep up with the financial needs of staying in the Western Cape. She subsequently relocated to the Gauteng Province. Following her relocation, the respondent secured employment in Gauteng and is scheduled to commence her position at the beginning of January 2025.
- [28] The respondent and the minor child are in Gauteng. When the application was issued and served upon the respondent, the respondent was in Pretoria, Gauteng. The respondent's residence in Pretoria cannot be said to be transient or for a fleeting moment. The respondent intends to live and work in Pretoria. The applicant did not dispute that the respondent obtained new employment in Pretoria. According to the applicant, the respondent simply transferred within the Virgin Active Group, so her salary would remain the same.
- [29] In my opinion, the respondent has demonstrated a stronger degree of permanent residence in Pretoria. Therefore, this court lacks jurisdiction as the respondent and the minor child do not live within its jurisdiction. In *Ceronio v Snyman* 1961 (4) SA 294 (W) at 297H, the court stated that the only proper forum for deciding whether or not a child should be entrusted to either of its parents and, if so, subject to what safeguards as to the child's welfare, is the Court which exercises the upper guardianship over the child, that is, the Court in whose jurisdiction the child is. (See *Martine v Large* 1952 (4) SA 31 (W)).
- [30] The argument by Mr Basson that this court retains jurisdiction is erroneous and unsustainable. I am mindful that once jurisdiction is established, it continues to exist until the end of the action, even though the ground upon which the jurisdiction was established ceases to exist. *McConnel v McConnel* 1981 (4) SA 300 (Z) at 302B-C.
- [31] However, it bears emphasis that there is no pending matter or a court order between the applicant and the respondent in this court. There are no court proceedings between the applicant and respondent in this court that would grant this court the continuance of jurisdiction. The case between the parties is pending in the Children's Court in Wynberg. That court, in my view, retains jurisdiction to hear the custodial dispute between the parties even after the relocation of the respondent to Pretoria. It would have been a different case if the care and contact dispute proceedings were pending in this court.

- [32] In my view, the doctrine of the continuance of a court's jurisdiction, once such jurisdiction is established at the commencement of proceedings, does not apply where the jurisdiction was established in another court (the lower court in this case) and the subsequent proceedings between the same parties are instituted in the High Court after the respondent and the child have left the area of jurisdiction of the High Court. The continuance of the Children's Court's jurisdiction does not extend to include this court's jurisdiction. Consequently, this court did not have jurisdiction to hear the applicant's application.
- [33] Even if am wrong in my finding, the relocation of the respondent to Pretoria is based on genuine and reasonable grounds. In considering whether the decision of the respondent to relocate to Pretoria is in the best interests of a child, the court has to consider the circumstances of the respondent, who is the primary carer of the child, the reasonableness of her decision to relocate, other practical consideration on which the decision is based and the extent to which the advantages and disadvantages of the relocation on the child have been thought through. Our courts have consistently recognised and will not lightly interfere with the right of a primary carer of children who has properly been awarded custody to choose in a reasonable manner how to order his or her life. (*KM v JW* (95071/2016) [2018] ZAGPPHC 610 (26 January 2018) at para 11).
- [34] As mentioned earlier, the reasons for the respondent leaving the Western Cape cannot be ignored. These reasons were not presented to the urgent court when the interim order was granted. The respondent stated that she informed the applicant about her financial struggles and her intention to relocate back to Pretoria, where she could receive financial assistance and support from her family. She has obtained employment in Pretoria, with a start date scheduled for January 2025. The respondent has asserted that the applicant has made minimal contributions toward the maintenance of the minor child. Additionally, the respondent indicated that the applicant has not contributed to her rent, municipal rates, or utility expenses.
- [35] In his answering affidavit to the reconsideration application, the applicant admitted that the respondent informed her that she was struggling and facing financial difficulties. The applicant disputed that the respondent informed him that she intended to relocate to Pretoria. In my opinion, the respondent's intention to relocate to Pretoria is both sincere and legitimate. The circumstances of this case indicate that she can no longer afford to reside in Cape Town, as she currently lacks stable housing. The financial obligations associated with living in Cape Town have become excessively burdensome, particularly given that she is now responsible for the care of the minor child.
- [36] The respondent asserts that the applicant only provided financial contributions at his discretion. While the applicant contests this assertion, it is important to note that there is currently no maintenance order against the applicant for the child's support. Furthermore, the applicant requests that the respondent return to the Western Cape despite the financial difficulties the respondent is currently facing. The applicant did not offer to assist the respondent with the rental payment and rates. The applicant's counsel argued that the

respondent should reside with her aunt in Wynberg. I do not agree with this suggestion.

[37] It is essential to emphasise that when a custodial parent seeks to relocate, a court will not lightly refuse permission for the children to leave a particular province if the decision made by the custodial parent is demonstrated to be genuine, bona fide, and reasonable. (see JP v JC [2016] 1 AII SA 794 (KZD) at para 36). Furthermore, in this case, the child is still relatively young and entirely dependent on the respondent. A supportive structure in Pretoria will enhance the respondent's ability to care for the child, who is one year and four months old and continues to be breastfed. In my opinion, the respondent's relocation is not motivated by a desire to frustrate the applicant. On the contrary, this relocation serves the best interests of the child.

[38] I appreciate that the applicant may not enjoy reasonable contact with his child as he would if the respondent is in the Western Cape. Unfortunately, that is the nature of separation of parenting or cohabitation that does not endure throughout a child's life. That is the fate of a child whose parents do not live together. In DB v LW 2020 (1) SA 169 (GJ) at para 52, Satchwell J stated:

"The solution of our courts can never be to order that separated parents must live in close proximity to each other in order that each parent lives in close proximity to a child. Our courts have not been appointed the guardians of adults, and parents are not the prisoners of our courts."

[39] As previously stated, the fact that the respondent was struggling financially to live in Cape Town was not mentioned before the urgent court that granted the interim order. In my view, had this information been placed before that court, it would not have granted the order as it did. Notwithstanding the jurisdictional finding above, I believe that the family advocate must investigate the matter so that the Wynberg Children's Court may consider their recommendations and, if necessary, incorporate them into the order dealing with the respondents' contact with the minor child.

Order

[40] In the result, the following order is granted:

40.1 The interim order granted on 13 December 2024 is hereby reconsidered and set aside.

40.2 The court did not have jurisdiction to hear the main application.

40.3 The office of the family advocate is hereby directed to expeditiously investigate the child's best interest and submit their report to the Children's Court in Wynberg.

40.3 Each party is ordered to pay its own costs.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Adv Basson

Instructed by: Johan Victor Attorneys

For the Respondent: Adv Tyaliti

Instructed by: Nkohla and Partners Inc

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