REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 317/2012

In the matter between:

LYNDA AVRIL JORDAAN **APPLICANT**

and

WYNAND JORDAAN **RESPONDENT**

Neutral citation: *Jordaan v Jordaan* (A 317/2012) [2012] NAHCMD 106 (11 December 2012)

Coram: PARKER AJ

Heard: **6 December 2012**

Delivered: **11 December 2012**

Flynote: Applications and motions – Urgent application – Custody and control of minor child – Court finding that a case has been made out for the relief sought, and awarding custody and control of minor child to applicant.

Flynote: Statute – Children's Status Act 6 of 2006, s 11 – Interpretation and application of subsection (4), read with subsection (5), of the Act.

Summary: Applications and motions – Urgent application – Custody and control of minor child – Custody and control of minor child had been awarded previously by the court to the applicant in a final order of divorce – Court finding that application for interim custody of minor child lodged with the lower court has no legal basis, and the interim order made by the lower court in respect of the application was made *per incuriam* as the lower court's decision is ultra vires the Act and accordingly invalid.

Summary: Statute – Children's Status Act 6 of 2006, s 11 – Interpretation and application of subsection (4), read with subsection (5), of the Act – Court finding that since there existed a valid agreement between the parties as to who should be primary custodian of the minor child and such agreement was made an order of the court in a final divorce order, application lodged with the magistrate's court under s 11(4) of the Act has no legal basis because the parents, ie the parties, had agreed in a Settlement Agreement (which was made an order of the court) as to who should be the primary custodian of the minor child – Consequently in making the interim custody order the learned magistrate acted *per incuriam* and so the order is invalid.

ORDER

1. The applicant's non-compliance with the forms and service as provided for by rule 6(12) of the rules of court is condoned, and matter be heard as one of urgency.

2. A rule nisi be issued calling upon the respondent to show cause, if any, at 10h00 on 8 February 2013 why an order in the following terms should not be granted:

a) directing that custody and control of the minor child be awarded to the

applicant subject to the respondent's reasonable right of access with supervision; and

b) directing respondent to pay the costs of this application on a scale as between attorney and client.

3. Paragraphs 2(a) and 2(b) shall operate as an interim order with immediate effect pending the return date of the rule nisi on **8 February 2013** at **10h00**.

4. For the avoidance of doubt the custody and control of the minor child remains with the applicant until the return date.

JUDGMENT

PARKER AJ:

[1] This application is brought to the court by notice of motion, and the applicant prayed that it be heard on urgent basis, and the applicant sought the relief set out in the notice of motion. The respondent moved to reject the application. Having read the notice of motion and other process and documents filed of record, and having heard Ms Schulz, counsel for the applicant, and Mr Wylie, counsel for the respondent, I made the order set out below, and said then that I would give reasons for my decision. The order is this:

'1. The applicant's non-compliance with the forms and service as provided for by rule 6(12) of the rules of court is condoned, and matter be heard as one of urgency.

2. A rule nisi be issued calling upon the respondent to show cause, if any, at 10h00 on 8 February 2013 why an order in the following terms should not be granted:

a) directing that custody and control of the minor child be awarded to the applicant subject to the respondent's reasonable right of access with supervision; and

b) directing respondent to pay the costs of this application on a scale as between attorney and client.

3. Paragraphs 2(a) and 2(b) shall operate as an interim order with immediate effect pending the return date of the rule nisi on **8 February 2013** at **10h00**.

4. For the avoidance of doubt the custody and control of the minor child remains with the applicant until the return date.'

And my reasons are as follows.

[2] This matter revolves around the custody and control of the minor child X. In a settlement agreement concluded between the parties and made an order of court on 26 January 2007 in a final divorce order, the custody of X was awarded to the applicant. In the course of events, the applicant gave to the respondent the custody and control of X on two occasions. On the last occasion, while experiencing some financial downturn the applicant moved in to live with the respondent's parents. At that material time, X went to stay with the respondent. It was when X was living with the respondent that the respondent 'lodged an application for interim custody in terms of section 11(4) of the Children's Status Act 6 of 2006 ("the Act") on 17th day of January 2011'; and '[O]n the 20th day of January 2011 the Magistrate's Court of Katutura made an interim custody order in terms of section 11(5) (of the Act) whereby I was granted interim custody and control of X'.

[3] The starting point of the present enquiry is indubitably the final order of divorce that the court *per* Gibson J made on 26 January 2007, as aforesaid, that is,

about six good years ago. The order (in material respects) reads:

'1. That the bonds of the marriage subsisting between the plaintiff (the respondent in the present proceeding) and the defendant (the applicant in the present proceeding) be and are hereby dissolved.

2. That the agreement between the parties filed of record and marked "B" is hereby made an order of Court.'

[4] For the purposes of this application the part of the final order of divorce that has particular probative value is the following; that is to say –

'The defendant shall have the custody and control of the minor child, X J (born 28/01/2002), subject to the plaintiff's right of access to him ….'

Another aspect of the final order of divorce that has probative value in the present proceeding is that the custody and control of X was agreed by the applicant and the respondent in their Settlement Agreement; and what is more, they agreed that the Settlement Agreement should be made an order of court; and the court did that. This factual finding is critical in this proceeding, as I shall demonstrate shortly.

[5] The peg on which the respondent hangs his opposition to the instant application is the lower court's order of interim custody of X, which is mentioned above. In this regard, in my view, the final order of divorce and the interpretation and application of subsection (4), read with subsection (5), of the Act hold the key to the determination of the present application. Section 11 of the Act provides:

'(4) Despite subsection (3) or anything to the contrary in any law, if the parents of a child cannot agree as to who should have primary custody of the child, and there is a possibility that the best interests of the child may be compromised or prejudiced, the person who has physical custody of the child may, in the prescribed form and manner, make an ex parte application to court for an interim order of custody of the child.

(5) On receiving an application made in terms of subsection (4) the court may grant the interim order to the applicant or to any other person, taking into account the best interests of

the child.'

[6] In terms of s 11(4) of the Act a person who has physical custody of the child may make an application or custody of the child 'if the *parents of a child cannot agree* as to who should have primary custody of the child'. (Italicized for emphasis) In the instant case, it is an irrefragable fact that when the respondent lodged the aforementioned 17 January 2011 application with the lower court, he knew very well that there was in existence not only a valid agreement between the parties as to who should be the primary custodian of X but that such agreement is an order of the court. That being the case subsection (4), read with subsection (5), of the Act was not available to the respondent. Indeed, by lodging the aforementioned application with the lower court the respondent set at naught and treated with contempt the final order of divorce that the court granted in which custody and control of X were awarded to the applicant. If this court did not grant the relief sought by the applicant in the instant proceeding, it would amount to the court approving the conduct of the respondent which is contumacious of the 26 January 2007 final order of divorce made by the court. Thus, as far as this court is concerned, the application that the respondent lodged with the magistrate's court in terms of s 11(4) of the Act has no legal basis, and the interim custody order that was made by the magistrate's court in terms of s 11(5) of the Act was made *per incuriam* as the learned magistrate acted ultra vires the Act; and so the interim order is invalid. For these reasons, this court granted the relief sought in the notice of motion as hereinbefore set out.

C Parker

Acting Judge

APPEARANCES

APPLICANT: F Schulz
Of P D Theron & Associates, Windhoek

RESPONDENT: T Wylie
Instructed by Neves Legal Practitioners, Windhoek