



CASE NO: I 2118/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

STEFAN SCHNEIDER

PLAINTIFF

And

YULIA NIKOLAEVNA SOFONOVA

DEFENDANT

CORAM: UEITELE, AJ.

Heard on: 27 MARCH 2012

Delivered: 10 APRIL 2012

UEITELE A, J

Introduction

[1] The plaintiff instituted action against the defendant in this Court for an order for the restitution of conjugal rights and, failing compliance therewith, a final order of divorce together with ancillary relief. The ancillary relief claimed by the plaintiff is in the following terms *“An order directing that the plaintiff would have the custody and control (sic) of the minor child born of the*

marriage between the parties, subject to the Defendant's reasonable rights of access..."

[2] The defendant entered notice to defend the action but failed to file her plea and as a result of the failure to file the plea she was barred from further participating in the matter. The plaintiff set the matter down for hearing and on 05 December 2011 plaintiff presented oral evidence in support of his claim for both the restitution ancillary relief. I must, however, pause here and observe that the record of the proceedings of 05 December 2011 was transcribed. When I perused that record I did not find evidence given by the plaintiff as to why is the preferred parent to be awarded the custody of the minor child.

[3] This court after hearing the oral evidence issued a *rule nisi* in the following terms:

“The Court grants judgment for the Plaintiff for an order of restitution of conjugal and orders the Defendant to return to or receive the Plaintiff on or before the 13th of February 2012, failing which to show cause if any to this Court on the 12th of March 2012 at 10H00, why :

- 1 The bonds of the marriage subsisting between the Plaintiff and the Defendant should not be dissolved; and
- 2 The custody and control (*sic*) of the one minor child born of the marriage between the parties should not be awarded to the Plaintiff subject to the Defendant's reasonable access..."

[4] It is appropriate to pause here and observe that on 5 December 2011 when this Court made the order quoted above in paragraph 2 the defendant was out of Namibia (she left Namibia on 25 October 2011) she was living in

Russia, . When the defendant left Namibia she took with her the minor child born of the marriage between her (i.e. the defendant) and the plaintiff.

[5] On 07 March 2012 Engling, Stritter & Partners acting on behalf of the defendant gave notice of the defendant's intention to oppose the finale order of divorce and filed an affidavit with the Registrar of this Court in which affidavit the defendant sets out the grounds on which she opposes the final order of divorce and the ancillary relief.

[6] On the return date the matter was called before me and because there was an affidavit opposing the confirmation of the *rule nisi* and an affidavit showing cause, I postponed the matter to 27 March 2012 for arguments. On 27 March 2012 the defendant was represented by Ms van der Westhuizen and the plaintiff by Mr. Brandt.

[7] The defendant, in her affidavit in support of the opposition to the confirmation of the *rule nisi* and showing cause appears to oppose both the confirmation of the decree of divorce and the granting of the ancillary relief.

[8] I pointed out to Ms van der Westhuizen that from the defendant's affidavit it is clear that the defendant is not willing to return to the plaintiff. The parties agreed that the decree dissolving the marriage could be made final. I accordingly issued an order dissolving the marriage between the plaintiff and the defendant. On the authority of the decision in ***Vahekeni v Vahekeni*** 2008

(1) NR 125 (SC) I allowed the question of the custody of the minor child to be argued.

The grounds on which the defendant opposed the confirm of the rule nisi

[9] The defendant in her affidavit raises, *in limine*, that this Court lacks the necessary jurisdiction to adjudicate the custody of the minor child. She based her submission that this court lacks jurisdiction on the following facts:

- (a) The parties are both foreign nationals and were married in another jurisdiction.
- (b) Neither parties are domiciled within the jurisdiction of this Honourable Court.
- (c) The minor child is not within the jurisdiction of this Honourable Court.

[10] On the merits the defendant denies that it would be in the best interest of the minor child that the plaintiff be awarded custody of the minor child, she sets up in some detail an explanation of why she took the child to Russia and she says that she did so in circumstances of urgency and in fear of her own life and the safety and the wellbeing of the minor child by reason of the acts (physical assaults) and threats of the plaintiff at the time. The plaintiff has chosen not to answer these grave assertions and has not filed a replying

affidavit. But in view of the conclusion that I have arrived at in this matter I do not express any opinion on the truth or otherwise of the allegations.

[11] Mr. Brandt on behalf of the plaintiff submitted that this Court has jurisdiction in terms of section 1 of the Matrimonial causes Act, 1939. He argued that *“the court retains jurisdiction on the doctrine of continuance of jurisdiction once jurisdiction was established at the commencement of the divorce proceedings.”*

[12] In the light of the above arguments I find it appropriate to briefly survey the legal principles governing the concept of jurisdiction and apply those principles to the facts of this matter.

Jurisdiction

[13] In the South African case of ***Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board*** 1950 (2) SA 420 (A) Watermeyer CJ at page 424 defined jurisdiction as:

“...the power or competence of a Court to hear and determine an issue between parties, and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties etc...”

[14] In the matter of ***Ewing McDonald & Co Ltd v M & M Products Co*** 1991 (1) SA 252 (A) Nienaber AJA at page 257 said:

“Jurisdiction in the present context means the power vested in a Court by law to adjudicate upon, determine and dispose of a matter (cf ***Graaff-Reinet Municipality v Van Ryneveld's Pass***

Irrigation Board 1950 (2) SA 420 (A) at 424; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation)* 1987 (4) SA 883 (A) at 886D). Such power is purely territorial; it does not extend beyond the boundaries of, or over subjects or subject-matter not associated with, the Court's ordained territory...”

[15] And in the case of ***Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)*** 1987 (4) SA 883 (A) at page 486 Viljoen JA, said

“Jurisdiction ('gerigtsdwang') is defined by *Vromans*, following *Berlichius*, as 'a lawful power to decide something in a case or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction'.”

[16] Pistorius David in the book ***Pollak On Jurisdiction*** (2nd Edition 1993) remarks at page 3 that “...the court must, within its territory, have authority over the defendant sufficient to be able to enforce its orders” and in support quotes in the case of ***Schimler v Executrix in the Estate of Rising*** 1904 TH 108, who at page 111 said:

“The jurisdiction of every country is territorial in its extent and character, for it is derived from the sovereign power, which is necessarily limited by the boundaries of the state over which it holds sway. Within those boundaries the sovereign power is supreme, and all persons, whether citizens, inhabitants, or casual visitors, who are personally present within those boundaries and so long as they are so present, and all property (whether movable or immovable) for the time being within those boundaries, are subject to it and to the laws which it has enacted or recognized. All such persons and property are therefore subject to the jurisdiction of the courts of the country which the laws of the country have established so far as such laws give them the jurisdiction. Over person not present within the country, jurisdiction can only be exercised to the extent of any property they may possess in the country; and over persons who are not in the country and have no property in the country, no jurisdiction at all can be exercised.

[17] David (*supra*) further argues that the ‘doctrine of jurisdiction depends upon the power of the court to give an effective judgment, and quotes the

pronouncement by De Villiers JP in the case of **Steytler v Fitzgerald** 1911 AD 295 at page 346 where the learned Judge President said:

“A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit but also of giving effect to its judgment.’

[18] In the case of **Barclays National Bank Ltd V Thompson** 1985 (3) SA 778 (A) Hoexter JA said at page 796

“I think, that in the law of jurisdiction the principle of effectiveness relates to the mere power of a Court to give an effective judgment rather than to the exertion of that power in any particular instance. The matter is succinctly stated by Pollak in footnote 2 at 208 of **The South African Law of Jurisdiction** ‘... the principle of effectiveness does not mean that a court has no jurisdiction unless it can in fact make its judgment effective against the particular defendant. It means merely that the judgment of the court should normally be effective against a person in the position of the defendant. That is why the domicile of the defendant, although unaccompanied by physical presence, is a ground for jurisdiction in an action for a judgment sounding in money’.”

The legal principle applied to the present matter.

[19] In the present matter the facts that are common cause are as follows:

- (a) The plaintiff is a German citizen and is currently (i.e. on the return date) residing in Germany. The defendant is a Russian citizen and is currently residing in Russia. The minor child born of the marriage between the plaintiff and the defendant lives with the mother (the defendant) in Russia.
- (b) The plaintiff and the defendant married each other on 25 April 2009 in the State of Florida (United States of America).
- (c) The plaintiff and defendant moved to Windhoek during 2009.

- (d) The combined summons commencing the action were personally served on the plaintiff on 18 July 2011 at her residence at Gutsche Street No, 34 Eros Park Windhoek, Namibia.
- (e) The defendant left Namibia and returned to Russia on or about the 25th of October 2011.
- (f) This matter was set down on two different occasions the first notice of set down was served on the Registrar on 07 November 2011 setting the matter down for hearing on 14 November 2011, the second Notice of set down was served on the Registrar on 29 November 2011 setting the matter down for hearing on 05 December 2011.

[20] Mr. Brandt who appeared for the plaintiff submitted that section 1 of the Matrimonial Causes Jurisdiction, Act, 1939(Act 22 of 1939) confers jurisdiction on this court to hear the matter and that the Court retains its jurisdiction on the doctrine of continuance jurisdiction once jurisdiction was established at the commencement of the divorce proceedings. Mr. Brandt referred me to the case of **Di Bona v Di Bona** 1993 (2) SA 682 (C) for the doctrine of continuance of jurisdiction. His reliance on this case must be based on the following *dicta* by Rose Innes J:

“It might, however, be contended that respondent was within the jurisdiction of this Court at the time of the order of divorce and at the time that she committed the alleged contempt of Court by taking the children out of the country without applicant's consent. The contention might be that a subsequent action or application for her committal for contempt of that order is really part of those original proceedings in the sense that it is merely a step to enforce the order given in the original proceedings. It might then further be contended that the doctrine of continuance of jurisdiction, once established at the commencement of proceedings, applies to all subsequent proceedings aimed at enforcing the original order for which there was jurisdiction.”

I will later in this judgment come back to this *dictum*.

[21] Section 1 of the Matrimonial Causes Jurisdiction, Act, 1939 (Act 22 of 1939) provides as follows:

“1 Jurisdiction

(1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is-

- (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
- (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in Namibia for a period of not less than one year immediately prior to that date.

(2) A court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.

(3) A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in Namibia shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in Namibia on the date on which the divorce action was instituted.

(4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.

(5) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be.”

[22] Section 5 of the Matrimonial Causes Jurisdiction, Act, 1939 (Act 22 of 1939) provides as follows:

“5 Any division of the Supreme Court of South Africa which tries any action or claim in reconvention for divorce or for restitution of conjugal rights or for judicial separation by virtue of the jurisdiction conferred upon it by section one or four shall have jurisdiction to make an order determining the mutual property rights of the husband and wife or concerning the custody, guardianship and maintenance of any minor child born of the marriage subsisting between them; and any such division which has tried any such action or claim in reconvention by virtue of the jurisdiction so conferred upon it shall have jurisdiction at any time thereafter to amend any order made by it concerning the custody, guardianship or maintenance of any such child.

[23] The golden rule of statutory interpretation is that words must be given their ordinary grammatical meaning, unless doing so would produce an absurd result. I conclude that the words used in sections 1 and 5 of the Matrimonial Causes Jurisdiction Act, 1939 are clear and unambiguous, and must be given their 'literal meaning in context' (see GE Devenish ***Interpretation of Statutes*** (Juta 1992) at page 37). It is therefore clear that both the plaintiff and the defendant were ordinarily resident in the area of jurisdiction of the court on the date on which the summons was issued and has been ordinarily resident in Namibia for a period of not less than one year immediately prior to that date. This court thus has jurisdiction to hear the divorce action.

[24] Section 5 of the Matrimonial Causes Jurisdiction Act, 1939 confers jurisdiction on this court to make an order concerning the custody, guardianship and maintenance of any minor child born of the marriage subsisting between the parties to divorce action.

[25] The matter is however not as simple as that. In ***Pollak on Jurisdiction*** (*supra*) at page 145 the learned author argues that where the child is not

present in the area of jurisdiction of the court, '*the doctrine of effectiveness has been held to preclude the court from exercising jurisdiction*'. He cites as authority the case of **Combe v Combe** 1909 TH 241 and **Cerenion v Snyman** 1961(4) SA 294. In the latter case Marais J said at pages 297-298:

“It has been laid down in a number of cases, decided before the 1953 Act, that the order for the handing over of the child to the parent to whom custody has been awarded, can only be made by the Court having jurisdiction in respect of the place where the child happens to be at the time. The reason is that, though a Court may decide that, as between the two parents, one of them is entitled to the custody of the minor child and make a declaratory order to that effect, the only proper forum for deciding whether or not the 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, i.e. the Court in whose jurisdiction the child is. The upper guardian has to determine the child's position, irrespective of the rights of the parents inter se, in accordance with what appears to be in the best interests of the child.”

[26] In the **Di Bona v Di Bona** 1993 (2) SA 682 (C) on which both Ms van der Westhuizen and Mr. Brandt relied the facts were briefly as follows:

A husband and wife were divorced by order of the Supreme Court of South Africa (the Cape Provincial Division) on 13 June 1991. The parties filed consent papers and in terms of the consent paper the wife was granted custody of the two children of the marriage. The husband's rights of access to the children were defined in clause 2 of the consent paper. He was to have reasonable access to the children at all reasonable times and in addition had the right to have the children spend alternate weekends and alternate school holidays with him. Clause 2.6 of the consent paper provided that neither party should remove the children from the jurisdiction of the Court without the other party's consent, which should not be unreasonably withheld.

On 19 June 1991, six days after the decree of divorce was granted, the wife left South Africa with the two children and went to live with her parents in England (where she went to live permanently). She did so without the consent or knowledge of the husband and in breach of the order of Court made in terms of the consent paper.

On 21 June 1991 husband brought an *ex parte* application in the Supreme Court of South Africa (the Cape Provincial Division) as a matter of urgency, without notice to the wife, for a *rule nisi* calling upon respondents to show cause why an order of Court should not be granted attaching *ad confirmandam iurisdictionem* the movable and immovable property in Cape Town belonging to first respondent. The attachment was to confirm jurisdiction in an action to be instituted by husband against wife for an order committing her to prison for contempt of Court and directing her to comply with clause 2 of the consent paper providing for applicant's access to the children and providing that they should not be removed from the jurisdiction of the Supreme Court of South (the Cape Provincial Division). The *rule nisi* was granted and on the return date the wife opposed the confirmation of the order. The wife opposed the confirmation amongst others on the ground that the appropriate forum in which the husband should seek effective relief relating to the custody of or access to the children is in the English Court in whose jurisdiction they are presently residing.

[27] Rose Innes J upheld the contention that the Court did not have jurisdiction he said:

In our law, and English law would appear to be the same, the only Court that has jurisdiction to order the handing over of children and to authorize, if need be, the Sheriff to take the children

from one parent and to hand them over to another, is the Court of the place where the children are to be found and where they are living and under whose judicial guardianship the children are at the time of the making of the order. In South Africa the Supreme Court is not bound by a foreign order of Court relating to the custody of or access to children who are in South Africa and who are not, and were not, in a foreign country, the Court of which has purported to make such order. The function and duty of the South African Court, where a dispute arises as to the custody of or access to the children, is to establish what is in the best interests of the children, whatever another Court may have found in this regard and to make its own order accordingly. It has to form an independent judgment on the evidence before it and in the course of doing so it may give such weight to a foreign custody or access order or an order relating to the well-being of the children as the circumstances may justify, but it is certainly not bound by such foreign order nor will it grant process in aid of the enforcement of such an order without the enquiry which I have mentioned. (See *Märtens v Märtens* 1991 (4) SA 287 (T) at 292; *Matthews v Matthews* 1983 (4) SA 136 (E); *Desai v Desai* 1987 (4) 178 (T); *Abrahams v Abrahams* 1981 (3) SA 593 (B); *Zorbas v Zorbas* 1987 (3) SA 436 (W); and *Riddle v Riddle* 1956 (2) SA 739 (C) a

[28] I am conscious of the decisions in, *Matthews v Matthews* 1983 (4) SA 136 and *Desai v Desai* 1987 (4) 178 (T) which did not follow the decision of *Cerenion v Snyman* 1961(4) SA 294 and *Martine v Large* 1952 (4) SA 31 (W).

[29] The brief facts in the case of *Matthews v Matthews* 1983 (4) SA 136 are as follows:

On 1 March 1983 a husband and wife were divorced from one another by order of the South-Eastern Cape Local Division of the Supreme Court of South Africa. By consent of the parties the custody of the minor children was awarded to the husband and the consent was made an order of court. The children were then living with their father in Port Elizabeth.

On 4 May 1983 the wife, who had come to Port Elizabeth, removed the two children from the school which they were attending in Port Elizabeth and without the consent of the husband took the children with her to Johannesburg. The husband then lodged an application for an order directing the wife to return the children. The wife opposed the application and, took a point *in limine* to the effect that the South-Eastern Cape Local Division of the Supreme Court of South Africa did not have jurisdiction to entertain the application in view of the fact that the two children are not physically present within the area of jurisdiction of that Court. The point *in limine* was dismissed.

[30] My reading and understanding of the decision in **Matthews v Matthews** 1983 (4) SA 136 is that the reason why the court dismissed the point *in limine* in that case is the fact that the court found that it could give effect to its order and thus had jurisdiction. Van Rensburg J said the following:

“There can be no doubt that any order made by this Court for the handing over of the two children in question will be effective, notwithstanding the fact that the two children are within the area of jurisdiction of another Division of the Supreme Court....In this regard I would also refer to s 26 (1) of the Supreme Court Act 59 of 1959 which is to the following effect:

‘The civil process of a provincial or local division shall run throughout the Republic and may be served or executed within the jurisdiction of any division.’..

It is clear that effectiveness is a factor to be taken into account in determining whether or not a Court has jurisdiction. **Estate Agents Board v Lek** 1979 (3) SA 1048 (A) at 1063B - C.

Quite apart from the question of effectiveness, in my view the dictates of convenience and common sense indicate that this Court should have jurisdiction to enforce its own order where it can be effectively enforced...”

[31] Before I conclude I will briefly deal with the *dicta* (quoted above in paragraph 20) relied on by Mr. Brandt. Rose Innes held that the doctrine of continuation of jurisdiction was not applicable to cases of civil imprisonment. He said:

.”In my opinion the doctrine of the continuance of a Court's jurisdiction, once such jurisdiction is established at the commencement of an action or other proceeding, does not apply to an application for arrest or committal for contempt where the respondent has left South Africa. I am in agreement with **Pollak's** observations in this regard. The learned author says with reference to those South African cases relating to civil imprisonment of persons in a province other than the province belonging to the Court making the order where the doctrine of continuance of jurisdiction has been applied:

'It is obvious that the extension of jurisdiction in such a matter must be confined to the case in which the defendant or respondent is physically present within the Union and cannot be extended to the case where the defendant or respondent is outside the Union. If the defendant or respondent is physically present within the Union the civil imprisonment order can be made effective. (See **Irving and Coe v Dreyer** 1921 CPD 185.) If he is not present the order is *brutum fulmen*.'

[32] I am in agreement with Rose Innes and Pollak. The doctrine of the continuance of a Court's jurisdiction, once such jurisdiction is established at the commencement of an action or other proceeding, does not apply to a dispute regarding the custody of a minor where the child has left Namibia and is thus not in the court's area of jurisdiction. There can be no doubt that this court will not be able to give effect or enforce any order made by it with regard to the minor child if the minor child is beyond the territorial boundary of Namibia. I am accordingly of the view that the point *in limine* must succeed and that this Court does not have jurisdiction to entertain the question of the custody of the minor child.

[33] As regards the cost both Mr. Brandt and Ms van der Westhuizen agreed that the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs must apply in this case.

[34] In the result I make the following order.

- 1 The rule *nisi* in respect of the ancillary relief is discharged.
- 2 The plaintiff must bear the costs of the opposition of this application, which costs are to include the costs occasioned by one instructing and one instructed counsel.

UEITELE, AJ

ON BEHALF OF THE PLAINTIFF:

Instructed by:

MR CHRIS BRADNDT

CHRIS BRANDT ATTORNEYS

ON BEHALF OF THE DEFENDANT

Instructed by:

MS. C E VAN DER WESTHUIZEN

ENGLING STRITTER & PARTNERS