

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 1883/ 2015

In the matter between:

Q J

PLAINTIFF

and

E J

DEFENDANT

Neutral Citation: *Q J v E J* (I 1883/2015) [2019] NAHCMD 49 (8 March 2019)

CORAM: **PRINSLOO J**

Heard: 05-07 November 2018 and 03 December 2018

Delivered: 8 March 2019

Reasons: 13 March 2019

Flynote: Husband and wife - Custody of minor children – Court has to consider the best interest of the child in determining the appropriate parent to be

granted custody of the minor child - Section 3 of the Child Care and Protection Act 3 of 2015 - In present case, custody awarded to mother - Awarding custody to father would involve the relocation of the minor child, which would be very disruptive to the minor child.

Summary: The parties were married to each other on 08 February 2011 in Arlington Virginia, USA. As time passed, the marriage between the parties had irretrievably broken down to which the plaintiff initiated divorce proceedings against the defendant after returning to Namibia with the minor child. Although there was no dispute in terms of there being no hope reviving the marriage, the main bone of contention between the parties arose in respect of the custody and control of the minor child born of the parties.

The defendant, being an American national, having obtained a custody order in a Maryland court of the minor child and noting that the minor child was born in the US and further that the plaintiff returned to Namibia with the minor child at the time when she was only three years old, was of the opinion that this court should award custody and control of the minor child to him subject to the plaintiff's rights of reasonable access on the basis that the minor child was uprooted from the US without his consent.

However, on the other hand, the plaintiff feared that if the defendant was to be granted custody and control over the minor child, he would never allow the minor child to return to Namibia as the minor child is a US citizen by birth.

Held - The court, as the upper guardian, must take the burden in deciding, considering the circumstances surrounding the matter in its entirety, to whom custody and control of the minor child must be awarded to, subject to the other parent's rights of reasonable access

Held further - Having regard to all the relevant factors as discussed, this court is of the opinion that it would be in the best interest of the minor child if custody is awarded to the plaintiff, with reasonable access by the defendant to his daughter.

ORDER

1. The defendant's conditional counterclaim is dismissed.
2. The bonds of marriage subsisting between the parties is hereby dissolved.
3. Custody and control of the minor child is hereby awarded to the plaintiff subject to the defendant's rights of reasonable access and contact in accordance with paragraph [78] of the judgment, which portion is attached hereto and marked **Annexure A**.
4. The defendant must pay maintenance in respect of the minor child in the amount of N\$ 3000 per month, which amount is to be paid on or before the seventh day of each consecutive month. The maintenance is to escalate at a rate of 10% p.a. on the 1st day of April of each consecutive year. The first payment is to commence on 1 April 2019.
5. Cost of suit.

JUDGMENT

PRINSLOO J

Introduction

[1] The plaintiff instituted divorce action against the defendant in which she primarily sought the following order:

- 'a) An order for Restitution of Conjugal rights and failing compliance therewith;
 - i) A Final order of divorce
- b) An order that the custody of the minor child be awarded to the Plaintiff subject to the Defendants rights of reasonable access
- c) An order that the Defendant pays maintenance towards the minor child in the amount of N\$ 3000 per month.
- d) An order that each party retains the property currently in his/her possession
- e) Cost of suit.'

[2] The defendant opposed the divorce. What is notable in this action is the position that the defendant, being an American national, obtained what is termed as a "limited divorce order" in Maryland in the United States of America on 17 August 2015, which granted him legal custody of the minor child. Furthermore, the parties in this action were married in community of property on 08 February 2011 in Arlington Virginia, USA. One minor child was born of the parties pre-marital and subsequently legitimized by the marriage between the parties.

[3] As grounds for divorce, the plaintiff alleges that the defendant wrongfully, unlawfully, constructively and with the fixed and settled intention to terminate the marital relationship engaged in the following conduct:

- 'a) emotionally abused the plaintiff;
- b) failed to communicate with the plaintiff meaningfully;
- c) psychologically abused the plaintiff;
- d) belittled the plaintiff regularly;
- e) shows no respect towards the plaintiff;
- f) physically abused the plaintiff in front of the parties' minor child.'

[4] The defendant, in opposing the divorce action, raised a special plea of *lis alibi pendens* as well as one of *res iudicata*. The special plea of *lis alibi pendens* was raised with reference to the limited divorce that was granted in favor of the defendant and it was pleaded that the litigation pending between the parties had the same subject-matter and therefor the defendant prayed that the plaintiff's action be stayed pending the final determination of the action between the parties, which action was instituted on 14 August 2014 in Maryland in the United States of America.

[5] The special plea of *res iudicata* was raised with reference to the custody of the minor child and the defendant pleaded that sole physical custody was awarded to him by the Circuit Court of Maryland for Montgomery County and the plaintiff's present action is a claim for the same thing, on the same grounds involving the same parties and therefore prayers of the plaintiff were already finally adjudicated upon by a court of competent jurisdiction and was decided in favor of the defendant.

[6] Neither of the special pleas were however further pursued by the defendant.

[7] In the defendant's conditional counterclaim¹ he denied the allegations raised by the plaintiff and countered that the plaintiff assaulted him in front of the minor child and friends, which led to the defendant opening a case of second degree assault against the plaintiff. He further alleged that the plaintiff emotionally abused him and his son (plaintiff's stepson), and the minor child concerned by ill-treating them and conducting herself in a cruel and vicious manner.

[8] The defendant further pleaded that the plaintiff:

1. Failed to communicate with the defendant meaningfully.

¹ In the event that the special pleas were not upheld.

2. Psychologically abused her stepson, their minor child and the defendant.
3. Regularly belittled the defendant.
4. Physically deserted the defendant, without just cause or reason, and permanently left the United States of America to the Republic of Namibia on 23 October 2013, under the pretense of visiting her family in Namibia, thereby abandoning the defendant.
5. Refuses the defendant access to the minor child at times and access is dependent on the plaintiff's emotions and said minor child is classified as kidnapped or abducted and a missing persons notice was issued by Interpol in terms of the Hague Convention of the Civil Aspects of International Child Abduction.

[9] That during the subsistence of the marriage the defendant paid an amount of 1800 USD and 133 USD for applying for a green card for the plaintiff's benefit as well as 1250 USD for the round trip ticket bought in October 2013 and defendant seeks repayment thereof².

[10] In addition thereto the defendant claims that the order for restitution of conjugal rights be dismissed with costs. As to the issue of custody the defendant claims that sole custody and control of the minor child be awarded to him and that he be authorized to remove the minor child permanently from the Republic of Namibia to Maryland, United States of America.

[11] As indicated above, the special pleas were not pursued further by the defendant and the divorce is not contested as the parties are in fact *ad idem* regarding the granting of a final order of divorce. This is evident from the fact that the grounds of divorce as enumerated in the plaintiff's claim, the issue of maintenance in respect of the minor child and the defendant's conditional counterclaim do not form part of the issues in dispute as set out in the joint proposed pre-trial order drafted in terms of rule 26 of the Rules of this Court.

² Defendant did not pursue this prayer.

[12] In this regard the parties are bound by their pre-trial report, which constitute their binding compromise. Vide Rule 26(10) of the Rules of the High Court³.

[13] Therefore the divorce will proceed as unopposed and the only remaining issue for determination is the custody of the minor child (hereinafter referred to as K), which is a huge bone of contention between the parties. The issues to be determined by this court as set out in the joint proposed pre-trial order is as follows:

‘1. Rule 26(6) (a) ISSUES OF FACT

1.1 Whether it would be in the best interest if the minor child is awarded to the Plaintiff?

1.2 Whether it would be in the best interest if the minor child is awarded to the Defendant?

1.3 Whether the full custody order obtained in the American Court, is in the best interest of the best (*sic*) minor.

2. Rule 26(6) (b) ISSUES OF LAW

2.1 Whether the legal custody of the minor should be awarded to the Plaintiff or to the Defendant in this matter.’

Evidence adduced

[14] The following evidence was adduced during trial:

The plaintiff

[15] The plaintiff confirmed that she got married to the defendant on 8 February 2011 in Arlington, Virginia, United States of America. One child, K, was born from the couple on 18 June 2010, and K was subsequently legitimized by the marriage of the couple in 2011.

³ Lee’s Investments (Pty) Ltd v Shikongo (HC-MD-CIV-ACT-CON-2016/03394) [2018] NAHCMD 321 (12 October 2018).

[16] She stated that on 23 September 2014 she instituted divorce proceedings out of the Namibian High Court and stated in her particulars of claim that the defendant acted with the malicious intent to terminate the marriage as he emotionally abused her, failed to communicate with her, belittled her regularly, showed no respect for her, and physically abused her in front of their minor children.

[17] The plaintiff stated that as a result of the conduct of the defendant she left the United States on 23 October 2013 with their minor daughter, who was three years of age at the time, for the Republic of Namibia where they have been residing ever since.

The parts of the plaintiff's evidence which are relevant to the issue of custody may be summarized as follows:

[18] The minor child, K, is in grade 2⁴ and is settled in her school as well as in her community and is very close to her maternal family.

[19] The plaintiff submits that the best interest of the child combines taking into account different factors and circumstances characterizing the child, as well as the circumstances and capabilities of a child's potential custodian(s) in order to guarantee the most important objective, which is choosing the best environmental, well-being, and supportive circumstances that will ultimately contribute to a child's positive development.

[20] On this score, the plaintiff refers to the social workers' report filed by the Ombudsman's office at para 4.9, which reads that:

'She feels safe, loved and secure in her grandparents' home and she has clearly stipulated that she does not wish to return to the US. Currently, K lives in a familiar

⁴ As in 2018.

environment, she is settled into her daily routine and she is surrounded by family members who she knows and trusts. If K's stability was to be uprooted at this point in her life, she would suffer great emotional and psychological damage.'

[21] With reference to the above, the plaintiff submits that the minor child's best interest would be served if custody and control were awarded to her as the minor has been to date in a stable and healthy environment in which she has started her primary education.

[22] Considering the notion that a Maryland court granted custody and control to the defendant, the plaintiff submits that the best interest and welfare of the parties' minor child could not have been considered because only the defendant made oral submissions before that court and she was not present nor privy to those proceedings. She stated that although she was notified of the proceedings she was unable to attend as she was unemployed at the time and also unable to instruct counsel in the United States to oppose the defendant's application. The plaintiff submits that the decision to grant custody to the defendant was both unreasonable and unjust.

[23] The plaintiff further addresses the point raised by the defendant with reference to the concept of parental child abduction and the allegation that the plaintiff committed same when she left the US with the minor child in 2013. Plaintiff submits that the defendant's insistence on the idea that the plaintiff "kidnapped" or "abducted" the minor child is misleading because the plaintiff submits that the defendant was pertinently aware at all times of the whereabouts of the plaintiff and their minor child. The plaintiff stated that the defendant as a fact gave her consent to come to Namibia along with their minor child. She further denied that she left the United States with the sole intent of abandoning the defendant. She stated that she came to Namibia to get out of a toxic relationship and to clear her head. Once there was distance between her and the defendant, and she could think clearly, she realized that she could not return to an abusive relationship and she then instituted the action for divorce.

[24] The plaintiff acknowledged that should the court grant her custody of the minor child, that the defendant will be entitled to reasonable access to her and proposes that they open up the channels of communication to enable the defendant to have access to their minor child. She admitted to not reacting to the defendant's WhatsApp calls but stated that he has a tendency of calling at unreasonable hours of the night and then insists on talking to K. She stated that a relationship must be established afresh between father and daughter. The plaintiff further submitted that when the defendant visits K in Namibia the access should be supervised as he previously indicated that he has an American passport for K and will be able to take her out of the country without the plaintiff's knowledge.

[25] In concluding, the plaintiff submits that it is undeniable that whilst K is under her care she has been maintained, well looked after and able to grow and develop positively as is evident from the social worker's report. The plaintiff submits that K's best interest must be considered before those of either the plaintiff or the defendant. The plaintiff further submits that it would not be in the best interest of the minor child to suddenly change the environment to which she was accustomed to and where she feels happy, safe and secure.

The defendant

[26] The defendant confirmed the evidence of the plaintiff that he agreed to the plaintiff and their minor child, K, traveling to Namibia on 23 October 2013 and stated that they were due to return on 20 November 2013. During the period that the plaintiff was in Namibia she indicated that she wanted to extend their stay to January 2014, to which the defendant agreed. However, as time passed he enquired from the plaintiff about their return to the United States but the plaintiff apparently either ignored him or evaded the issue. This apparently persisted for six months by which time the defendant realized that the plaintiff had no intention of returning home to continue with their marriage. He then proceeded to institute proceedings against the plaintiff in the Circuit Court of Maryland for Montgomery

County during July 2014. These proceedings were served on the plaintiff on 5 August 2014. In order to secure the return of his daughter the defendant then instructed a local legal firm to ascertain the whereabouts and return of his daughter and was informed that the plaintiff filed for divorce in the High Court of Namibia. The plaintiff informed the defendant that she will not be returning to the United States in March 2015 and the defendant then proceeded to file a missing person's report with the Montgomery County Police Department, Special Victims Investigations Division, Silver Springs, Maryland. During a custody hearing in the Circuit Court of Maryland for Montgomery County in August 2015 a limited divorce and sole custody of the minor child was granted to him.

[27] With respect to the best interest of the minor child, the defendant submits that legal and physical custody was awarded to him by the American court, during which proceedings the court took into consideration that K is an American child that was domiciled within its jurisdiction and uprooted from the American soil. The defendant further submitted that the American court was guided by a welfare report to reach its decision and it was not an order made in a vacuum, despite the child's absence from the country.

[28] The defendant further submitted that he has a home and testified that he intends to buy a bigger house come next year, and has the financial means and is able to provide the best possible education to the minor child.

[29] In terms of the American court order, the defendant submits that the plaintiff was perfectly aware of the proceedings when it was initiated. The defendant further contends that the excuses raised by the plaintiff for not opposing the proceedings is a pure reflection of the lack of interest in the proceedings. The defendant further highlights the fact that he proactively elected to participate in the Namibian proceedings as opposed to the conduct and attitude that the plaintiff showed to the American court and its proceedings.

[30] The defendant submits that his right were denied to have reasonable access to K and during the supervised visitation scheduled by the social worker during November 2018 it appeared that K was coached and negatively influenced about him. On this score, he testified that the minor child said the following words:

'I do not want to go to America like, it seems she was coached to say certain things and to limit the information she gives during this event. So I brought her a book bag, with some clothes, she said I do not want to take it, I know I do not want it, it is nice but I do not want it no thank you. And that was the first time she did that, so it was very traumatizing to see my daughter speak to me that way but clearly if she is able to speak to me, her father, her grandmother in that way because I saw the report about she was disrespectful in school, if she is raised that way to speak to her father that can carry on badly in her childhood and adulthood.'

[31] The defendant was adamant that it would not be in the best interest of the minor child if the custody and control was awarded to the plaintiff, simply because there is no guarantee that the plaintiff will comply with the custody order, taking into account the fact that there has been a court order that the plaintiff already breached. The defendant further submits that should custody be awarded to him the minor child would be in a better environment where she would be encircled with the extended paternal family but would still have full access to her extended maternal family as well. The defendant highlights that the plaintiff testified that he is a good father and that same is evident from all his efforts to bring K home with him. He further testified as follows:

'K has plenty of support from her family and including the US government, the last time I came, the government paid for me to come here, and if K was able to come home now, the government, and for the record I do not have a passport now. If she was allowed to come home, the US Embassy would give her an emergency passport, pay for her ticket back. It is in her best interest because she will be reunited with her brother who she grew up with. And she will have excess to her routes, her home country which is the United States, yes she is Namibian but she is American as well.'

[32] With respect to the social welfare report prepared by the Ombudsman, the defendant highlights that it failed to make any recommendation and only presented court with an evaluation. On this score, the defendant submits that the court should take a holistic approach in the application of the report, reason being that during the interview, the minor child was adamant that Namibia is her home and appeared to portray America in a violent and not safe image. The defendant submits that one needs to consider the age of the minor child as well as the fact that she was three years old when she was uprooted from America. The defendant further again submits that the minor child seems to have been coached on what to say.

[33] Furthermore, the defendant submits that he picked up that the minor child had a rude demeanour and that he read in the social workers report that this conduct was also apparent from her school. The defendant is of the view that the plaintiff failed to keep a tight leash on K's discipline, resulting in her rude demeanour and that the minor child would be in a more disciplined environment with him.

[34] In concluding, the defendant submits that the court should not consider the argument that the minor child will be uprooted should custody be awarded to him as she was initially uprooted from the US when the plaintiff took her away from her home. The defendant conceded that it is customary for the mother to be awarded custody, however, he submitted that the plaintiff has failed to prove that he is incapable of taking care of the minor child. The defendant submits that this is further evident by his conduct in these proceedings.

Social worker's report

[35] An investigation was conducted with regard to the circumstances of the parties and the minor child at the instance of the court by the investigation team of the Office of the Ombudsman. The investigation team consisted of a social worker,

Mrs Elmi Pretorius and a legal officer, Ms Daphne Coetzee, herein after referred to as the investigation team.

[36] After having interviewed a number of sources to assess what the best interest of the minor child would be, a report was drafted by Mrs Pretorius and the said report was admitted into evidence by agreement between the parties.

[37] The general background of the parties were discussed with reference to their employment status, housing circumstance and financial position and it is clear that both parents are capable of providing for the needs of their daughter.

[38] For purposes of this judgment I will however concentrate on the observations of the investigation team relating to the minor child, K.

[39] K is described as a happy, energetic and talkative child. She is popular at school and has several friends at school. She performs well at school and is always neatly dressed and well taken care of. The principal of the school however remarked that at times K can be disruptive and disrespectful to teachers and her peers and opined that K might benefit from stricter discipline and greater parental involvement. She also remarked that K does not reveal information about her personal life and in the two years that K had been a student at the school she has never heard K speaking about her father.

[40] K was only three years old when they relocated to Namibia and was eight at the time of the drafting of the report. Mrs. Pretorius remarked that in spite of K's tender age she is aware of the fact that her parents are getting divorced and that her mother has to go to court. She knows that her father is residing in the United States of America and that he 'wants to take her back with him'. K does not like discussing the personal and intimate aspects of her life and during the interview she indicated to the investigation team that she did not want to talk about her family anymore.

[41] It would appear that the conflict between the plaintiff and the defendant left K confused and she believes her father is “not a nice guy”.

[42] It is the opinion of the investigation team that K enjoys a good and trusting relationship with her mother, who is her primary care giver. The plaintiff provides for the minor child’s physical, emotional and financial needs. She also spend ample time with K and her baby sister.

[43] K has a strong bond with her maternal grandparents and she feels safe and loved by them. K also has a good relationship with her cousin and her baby sister.

[44] On 02 November 2018 the investigation team conducted a supervised visit with K, the defendant and her paternal grandmother at a local eatery. The purpose of the supervised visit was to facilitate a reunion between father and daughter and to allow the investigation team to observe the interaction between K and her father.

[45] K was very shy to start off with and did not want to hug her father and grandmother when they arrived, nor was she willing to accept a gift they brought her. During the visit K warmed a little towards the defendant and her grandmother but apparently remained guarded throughout and kept on insisting that she wanted to go home. This visibly upset the defendant but Mrs. Pretorius remarked that one cannot lose sight of the fact that K did not see or spoke to her father in more than a year and a half and have not seen her grandmother for close to seven years. She remarked further that K cannot be expected to immediately feel comfortable and safe with her father and grandmother.

[46] From the interview with the minor child it was clear to the investigation team that K has negative perception of her father as she saw him as the man who was ‘mean to mommy’. When asked about her extended family in the United States K stated that she cannot remember any of her paternal family members,

however she remembers her older brother Nathaniel but indicated to the team that she had not been in contact with him for some time.

[47] The social worker expressed her concern regarding the fact that K is apparently afraid of the defendant and does not trust him as she believes that he is going to come and get her and take her back to the United States. She also has the perception that the United States is “a terrible place and people get shot there”. K is adamant that Namibia is her home and that she wishes to stay with her mother and grandparents in Windhoek.

[48] In her evaluation Mrs. Pretorius said the following:

- ‘Both Mr J and Mrs. G are parents who only want the best for their daughter. Both parties have high aspirations for their children; both want their children to be safe, happy and healthy, and respecting individuals; both parties yearn to have their children close.
- K has lived in Namibia since the age of three, and although it is alleged that Mrs. G “abducted” her from the USA K grew up in Namibia and she considers this to be her home. She feels safe, loved and secure in her grandparents’ home and she has clearly stipulated that she does not wish to return to the US. Currently K lives in a familiar environment; she is settled into her daily routine, and she is surrounded by family members whom she knows and trusts. If K’s stability was to be uprooted at this point in her life she would suffer great emotional and psychological damage.
- K has been denied the chance and privilege to build a relationship with her father, and it is of utmost importance that Mr. J is allowed to exercise his right as father. K needs to be allowed to get to know her father and build a relationship with him if she is to ever feel that he can be trusted or that she can feel comfortable around him.
- Mr. J and Mrs. G has unresolved conflict between them; they have both indicated that they are willing to have a civil relationship for the sake of the children.’

Discussion

Limited Divorce

[49] As discussed earlier the parties were married in Arlington, Virginia, United States of America on the 8th of February 2011 and on the 17th of August 2015 in the Circuit Court of Maryland for Montgomery County granted the defendant an order for a limited divorce.

[50] The concept of limited divorce is a foreign concept in the Namibian Law. The defendant raised this concept in his submissions and it is important to consider the meaning and scope of limited divorce and how it would impact on the proceedings *in casu*.

[51] In *Ricketts v Ricketts*⁵ Bell described a limited divorce as follows:

‘A limited divorce, which may be decreed for a limited or an indefinite period, MD Code (1984, 2004 Repl. Vol.) §7-102 (c) is “one from bed and board. It grants unto the injured spouse the right to live separate and apart from the one at fault. However, the parties remain man and wife, and there is no severance of the marital bonds” *Courson v Courson* 213 Md. 183, 188, 129 A 2d 917, 920 (1957). See *Thomas v Thomas*, 294 Md.605, 609, 618. 451 A.2d 1215, 1217, 1222 (1982), noting, in addition, that “[t]his Court has said that ‘a divorce a *mensa et thoro*⁶ is practically nothing more than judicial permission to live separate and apart’ quoting *Dougherty v Dougherty*, 187 Md. 21, 31, 48 A.2d 451 (1946). This is in contrast with an absolute divorce, which effects a complete severance of the marital bond, and entitles either of the parties, or both, to remarry.’

[52] In terms of Maryland Family Law Section 7-102 the relevant court may decree a limited divorce on the following ground:

⁵ *Ricketts v Ricketts* 393 Md. 479 (Md. 2006).

⁶ Derived from Latin meaning ‘from bed and hearth’.

- '(1) cruelty of treatment of the complaining party or of a minor child of the complaining party;
- (2) excessively vicious conduct to the complaining party or to a minor child of the complaining party;
- (3) desertion; or
- (4) voluntary separation, if:
- (i) the parties are living separate and apart without cohabitation; and
 - (ii) there is no reasonable expectation of reconciliation.
- (b) As a condition precedent to granting a decree of limited divorce, the court may:
- (1) require the parties to participate in good faith in the efforts to achieve reconciliation that the court prescribes; and
 - (2) assess the costs of any efforts to achieve reconciliation that the court prescribes.
- (c) The court may decree a divorce under this section for a limited time or for an indefinite time.
- (d) The court that granted a decree of limited divorce may revoke the decree at any time on the joint application of the parties.
- (e) If an absolute divorce is prayed and the evidence is sufficient to entitle the parties to a limited divorce, but not to an absolute divorce, the court may decree a limited divorce.'

[53] Having regard to the nature and scope of a limited divorce order it is evident that the parties are still considered as husband and wife, even though they are living separately and in different countries.

[54] I am therefore in agreement with counsel for plaintiff that the parties are still considered married and as the plaintiff was domiciled in the jurisdiction of this court when the divorce action was instituted there is no reason why this court cannot adjudicate the matter *in casu*.

Custody order issued by the Circuit Court of Maryland for Montgomery County

[55] On the same date that the Circuit Court Maryland issued the order for limited divorce to the defendant it also issued an order awarding the defendant sole legal custody and sole physical custody of the minor child.

[56] One of the questions to determine is whether the custody order issued by the Circuit Court of Maryland is in the best interest of the child and I must also consider if courts in our jurisdiction are bound by this custody order.

[57] Having regard to the Circuit Court order it is not clear what the court considered to come to the ultimate conclusion that sole legal custody and physical custody should be awarded to the defendant. At the time, the plaintiff and the minor child were no longer in the jurisdiction of the said court as they left the United States approximately 22 months earlier.

[58] It is my understanding that the State Courts in the United States of America would be bound to recognize and enforce the custody order in question and to some extent the signatories to the Hague Convention, more specifically the Hague Convention of the Civil aspects of International Child Abduction. In the matter *in casu* the defendant alleges in his conditional counterclaim parental abduction⁷. Namibia is not a signatory to the Hague Convention on Civil aspects of International Child Abduction, although this agreement is appended to the Child Care and Protection Act, 3 of 2015 (hereinafter referred to as the Act).

[59] In *SS v YS*⁸ Ueitele J was faced with a similar set of facts where the minor child was removed by her mother to Russia after the divorce was instituted in the High Court of Namibia. The court discussed the issue of jurisdiction as follows in the aforementioned matter:

[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

⁷ The defendant admitted during cross-examination that he fully knew where and with whom the minor child was.

⁸ Case I 2118/2011 delivered on 10 April 2012.

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.’

[60] S. 5⁹ 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. The minor child is permanently residing in Namibia with the plaintiff and have been so residing for the past six years. Having regard to the issue of jurisdiction over the child and the plaintiff and provisions of the Matrimonial Causes Jurisdiction Act this court clearly has jurisdiction to consider the issue of custody in respect of the minor child.

⁹ ‘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.’

[61] I am therefore of the considered view that this court is not bound by the custody order issued by the Circuit Court of Maryland and can issue a custody order that is appropriate under the circumstances.

Discussion and the Applicable law

Best Interest of the child

[62] This court sits as the upper guardian of all minors within its jurisdiction. The discretion that is to be exercised when decisions pertaining to the best interests of children are to be made is unique, and not to be circumscribed in the narrow or strict sense of the word¹⁰. Further to this, where the interests of minor children are involved, the litigation amounts to a judicial investigation of what is in their best interests¹¹. The court is not bound by the contentions of the parties¹².

[63] As the upper guardian, this court is duty bound to consider the best interests of minor children holistically and separately from those of the parents, especially in divorces where either party points fingers at the other for various aspects that went wrong in the marital relationship. Unfortunately when there are minor children in the mix, the minor children are hardly spared and are usually caught in the middle of the disagreements between the parents. In situations like those, children get the worst remnants from the disagreements which could and usually become violent, either verbally or physically and parents forget that their actions cause various degrees of damage to their minor children, be it physically, emotionally or mentally.

[64] It is obvious to this court that both the plaintiff and the defendant love their child and neither can reconcile themselves with the idea of not having K in their care. However, regardless of the order that this court makes, one of the parties will be deprived of the privilege to be K's primary caregiver. The parties'

¹⁰ *Bezuidenhout v Bezuidenhout* 2005 (2) 187 (SCA) para 17

¹¹ *Jackson v Jackson* 2002 (2) SA 303 (SCA) para 5

¹² See *Shawzin v Laufer* 1968 (4) SA 657 (A) at 662H – 663A, *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504 and *Girdwood v Girdwood* 1995 (4) SA 698 (C)

circumstances are also of such a nature that they literally resides at opposite sides of the world.

[65] In *P v P*¹³ para 24 at 101J – 102A, the court held that:

“In determining what custody arrangement will best serve the children's interests . . . a Court is not looking for the perfect parent — doubtless there is no such thing. The Court's quest is to find what has been called the least detrimental available alternative for safeguarding the child's growth and development.’

[66] A perfect parent is not what this court has in mind but in determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure K’s physical, moral, emotional and spiritual welfare.

[67] This can be assessed by reference to the factors or criteria as set out in s. 3 of the Child Care and Protection Act, which reads as follows:

‘3 Best interests of the child

(1) This Act must be interpreted and applied so that in all matters concerning the care, protection and well-being of a child arising under this Act or under any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general, the best interests of the child concerned is the paramount consideration.

(2) In determining the best interests of the child, the following factors must be taken into consideration, where relevant-

(a) the child's age, maturity and stage of development, sex, background and any other relevant characteristics of the child;

(b) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(c) views or opinions expressed by the child with due regard to the child's age, maturity and stage of development;

¹³ *P v P* 2007 (5) SA 94 (SCA).

- (d) the right of the child to know and be cared for by both parents, unless his or her rights are persistently abused by either or both parents or continued contact with either parent or both parents would be detrimental to the child's well-being;
- (e) the nature of the personal relationship between the child and other significant persons in the child's life, including each of the child's parents, any relevant family member, any other care-giver of the child or any other relevant person;
- (f) the attitude of each of the child's parents towards the child and towards the exercise of parental responsibilities and rights in respect of the child;
- (g) the capacity of the parents or any specific parent or of any other care-giver or person to provide for the needs of the child, including emotional and intellectual needs;
- (h) the desirability of keeping siblings together;
- (i) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child or any other care-giver or person, with whom the child has been living;
- (j) the practical difficulty and expense of a child having contact with the parents or any specific parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents or any specific parent on a regular basis;
- (k) the need for the child to maintain a connection with his or her family, extended family, culture or tradition;
- (l) any disability that the child may have;
- (m) any chronic illness from which the child may suffer;
- (n) the need for the child to be brought up within a stable family environment and where this is not possible in an environment resembling as closely as possible a caring family environment;
- (o) the need to protect the child from any physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation;
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; or
 - (iii) any family violence involving the child or a family member of the child;

- (p) the need to avoid or minimise further legal or administrative proceedings in relation to the child; and
- (q) any other relevant factor.'

[68] Mrs. Pretorius crisply dealt with the majority of the aforementioned factors in her report and her evaluation is to the point. It is clear that K is settled in Namibia with the plaintiff and her maternal family, and this is the only home she knows. When she was brought to Namibia she was three years old and have no memory of her paternal family in the United States. It is the prayer of the defendant to award him custody and allow him to remove the minor child to the United States.

[69] On a question of the court the defendant indicated that he does not think that K will be traumatized should she be relocated to the United States as there is a host of professionals ready to provide the medical help and support needed to help K with the transition and to assist her to adapt to her new environment

[70] Having regard to Mrs. Pretorius report in which she stated that if K's stability is uprooted at this point of her life it would cause her to be traumatized which would cause her to suffer emotional and psychological damage, this court must respectfully disagree with the contentions of the defendant. Logic dictates that this little girl cannot summarily be uprooted and literally be torn away from the only environment that she knows.

[71] As it is, K is afraid of the defendant and does not trust him as she is convinced that he wishes to take her away from her mother and grandparents.

[72] The defendant submitted that he felt that the child was unduly influenced and based this observation on a single visitation he had with K on 02 November 2018.

The defendant failed to make an allowance for the fact that K has not seen him in a year and a half and to her he is literally a stranger. When K expressed certain

views the defendant opined that K was influenced. This is possible to some extent given the acrimonious relationship between the plaintiff and the defendant. One of the reason why K does not know her father is because the parties are to date unable to resolve their issues and differences in a civilized manner. It is very clear from the social workers report that K is extremely negatively affected by this acrimony.

[73] The defendant and K need to be allowed to re-build their father-daughter relationship but that will take time and the answer is not in granting sole custody to the defendant.

Conclusion

[74] It is in situations like these that the court, as the upper guardian, must take the burden in deciding, considering the circumstances surrounding the matter in its entirety, to whom custody and control of the minor child must be awarded to, subject to the other parent's rights of reasonable access.

[75] This court had the benefit of hearing both the plaintiff and the defendant and the opportunity to observe both of them during the court proceedings. I have no doubt in my mind that both, in their own way have K's best interest at heart but unfortunately it is with exclusion of the other party. Each one is of the opinion that he or she is the best parent to have custody of their minor child. This is however not possible. The parties need to realize that their daughter is growing up and the time has come that they need to put their differences aside in the interest of their daughter. The court needs to impress on the parties not just to pay lip-service to their commitment to work towards a civil relationship for the sake of their child, but to work pro-actively towards the said relationship for the sake of K.

[76] Having regard to all the relevant factors, this court is of the opinion that it would be in the best interest of the minor child if custody is awarded to the plaintiff. It therefore goes without saying that I cannot agree with the findings of the Circuit Court Maryland.

[77] I am of the opinion that a comprehensive custody order will go a long way in restoring the father-daughter relationship. Having said that it is important to note that it is impossible for a court to micro-manage the contact arrangements provided for in a court order. However, this court will endeavor to make an order with the aim to facilitate extensive but reasonable access by the defendant to his daughter.

[78] The court orders therefore that the defendant has access to the minor child as follows:

1. Virtual access:

- 1.1 Defendant to have virtual access to the minor child via skype or FaceTime or any other appropriate social-media application every Monday and Thursday between 19h00 and 20h00 Namibian time.
- 1.2 Defendant to have virtual access to the minor child every Sunday from 18H00 to 20h00.
- 1.3 Any costs relating to the defendant exercising contact with the minor child is for his expenses.
- 1.4 The defendant shall purchase a device for the minor child by which he will be able to have contact with her.

2. Visitation in Namibia:

- 2.1 That the minor child be allowed to visit the Defendant from 15h00-18h00 during the week and from 10h00-20h00 on weekends when the Defendant is in Namibia until the minor child attains the age of 12, where after the minor child will be allowed to spend the entire weekend with the Defendant during his visits in Namibia. Visitation during the week to remain the same upon attainment of the age of 12.

- 2.2 If the child is involved in extra-mural activities when the defendant visits he shall be entitled to transport her to and from such activities and attend same.
- 2.3 The defendant shall indicate one month in advance if, when and where he is going to exercise access with the minor child.
- 2.4 When the defendant visits the minor child in Namibia he will provide the plaintiff with full details of his accommodation in Namibia for the duration of his stay and will provide the plaintiff with the details of his return flight to the United States of America.
- 2.5 The defendant must hand in his passport with the Namibian Police's Gender Based Violence Unit for the duration of his stay.

3. School progress:

The plaintiff shall provide the defendant with the contact details of the school in order for the defendant to contact the relevant school pertaining to the minor children's progress and/or school reports.

4. Relocation by the Plaintiff:

Should the plaintiff relocate from her current address she will be obliged to provide the defendant with the new address where the minor child will be residing.

5. Medical Aid:

The plaintiff shall retain the minor child on her medical aid. Plaintiff shall advise the defendant of any surgery or any other invasive procedures, treatments and/or prognoses.

6. Minor child's visit to the defendant in the United States of America:

That the minor child be allowed to visit the defendant in the United States of America at the cost of the defendant, once she has attained the age of 14. Such visit will be with prior arrangement with the plaintiff and should be

arranged as such that it does not interfere with the schooling of the minor child.

[79] My order is hereby as follows:

1. The defendant's conditional counterclaim is dismissed.
2. The bonds of marriage subsisting between the parties is hereby dissolved.
3. Custody and control of the minor child is hereby awarded to the plaintiff subject to the defendant's rights of reasonable access and contact in accordance with paragraph [78] of the judgment, which portion is attached hereto and marked **Annexure A**.
4. The defendant must pay maintenance in respect of the minor child in the amount of N\$ 3000 per month, which amount is to be paid on or before the seventh day of each consecutive month. The maintenance is to escalate at a rate of 10% p.a. on the 1st day of April of each consecutive year. The first payment is to commence on 1 April 2019.
5. Cost of suit.

J S Prinsloo
Judge

APPEARANCES

PLAINTIFF:

D Hans - Kaumbi
Ueitele & Hans Inc.

DEFENDANT:

A Jason
Shikongo Law Chambers

