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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO: 52308/2009

In the matter between:

J.D. Applicant

And

E.D. Respondent

JUDGMENT

LEDWABA, J

[1] This is an opposed urgent application filed by the applicant wherein he seeks full rights of contact and care to his minor child, a [.....], born [.....] and that the relief be postponed pending the finalisation of the family advocate report. Furthermore, that, pendent life, he be granted rights of contact specified in clause 4 of the notice of motion to operate with immediate effect.

[2] The respondent's counsel raised two points in limine viz, that the applicant did not advance sufficient grounds for the matter to be heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules and that this court does not have jurisdiction to hear this application.

[3] For convenience sake, I directed the parties to argue the points in limine and the merits together.

[4] I will start with summarising the facts that are common cause between the parties for a proper appreciation of the issues when I deal with the points in limine and the merits.

4.1. Both parties are resident in Tzaneen at the district of Limpopo.

4.2. They were [.....] to each other in [.....] on [.....] and their [.....] still subsists.

4.3. The respondent issued divorce summons against the applicant in the North-Eastern Divorce Court (NED court) to be held in Polokwane in July 2009, under case number P161/2009, wherein divorce, parental responsibilities and rights and other ancillary relief are sought.

4.4. The parties were staying together and the respondent left the applicant on or about 4th July 2009 to stay with her parents. She took the minor child with her when she left the common home.

4.5. After the respondent and the child left, the applicant has been visiting the child at the respondent's parental home. The respondent allowed him to visit the child for some

hours and did not allow him to remove the child. According to the applicant, the respondent is alienating him from the child.

[5] Respondent's counsel, Mr. Botha submitted that at the beginning of August 2009 applicant's attorney informed the respondent's attorney's that if applicant is not allowed to remove the child by 5th August 2009, when he exercises his visitation rights, an urgent application will be launched in the High Court; see annexure JD5 on page 44 thereof.

[6] The respondent's attorneys in their letter dated 4 August 2009 (annexure JD6) in response to the applicant's attorney's letter, annexure JD5, inter alia, said the following:

“....naar ten aansien van u dreigement om die Hoogeregshof op n dringende basis te nader, wys ons u daarop dat daar geen redes vir dringendheid in hierdie aangeleentheid bestaan nie en dat daar geen basis vir so 'n dringende aansoek bestaan nie en dat die aansoek geopponeer sal word.

Ons is deur die balju in kennis gestel dat die dagvaarding vandag op u klient beteken sal word. ”

[7] This urgent application was served on the respondent after summons was served on the respondent.

[8] The respondent in paragraph 3.14.3 of the opposing affidavit stated the following:

“3.14.3 I instructed my attorney to proceed to issue summons in the North Eastern Divorce Court, as I do not possess the funds to proceed with defended litigation in the High Court of South Africa. It is significant to note that, although the applicant states that he is not capable of contributing more towards the maintenance of Jessica, he apparently is able to afford legal representation in the High Court of South Africa in respect of this application

[9] The applicant's response to the above paragraph is the following:

“I take note of the allegations contained in this paragraph and would like to place on record that I have borrowed the funds to bring this application from my parents as it is important for me to maintain a proper relationship with Jessica. It is also very important that my parents have no contact with Jessica and it is impossible in the circumstances, in the way that access is unilaterally granted by the Respondent and her parents, for my parents to have any contact with her. They love her dearly and would like to have a relationship with their granddaughter. The only way for my parents to have contact with Jessica is through Skype as they live in the United States of America and in the circumstances this is not possible.”
(own underlining).

[10] Applicant’s counsel submitted that when the NED court and the High court have concurrent jurisdiction on the pendent lite application brought by the applicant the proper forum to hear the application is the court wherein the main action was instituted unless if the matter is so urgent that it warrants the court in which the main action is pending could not deal with the relief sought pendent lite.

[11] In *Venter v Venter* 1970 (1) SA 11 the editors summary reads as follows:

“Where there is an action pending in either the Witwatersrand Local Division or the Transvaal Provincial Division, even if there is concurrent jurisdiction, matters which are ancillary to the main action ought to be decided in the same division.

A divorce action was pending between the parties in the Witwatersrand Local Division and was already on the roll of opposed cases. Applicant applied for the temporary custody of the minor child of the marriage pending the divorce action.

Held, that the Court had no jurisdiction

[12] The NED court have the same jurisdiction as any High Court in relation to the divorce matters, see section 10(1)(a) of the Administration Amendment Act 9 of 1929. The applicant's counsel after he was given an opportunity to file further heads of argument on the issue of jurisdiction. He submitted that if proceedings are pending in the NED court same cannot oust the jurisdiction of the High Court which is the upper guardian of the minor children.

[13] Significantly, in matters involving what is in the best interest of a child, I am in agreement with what was said in *Shawzin v Laufer* 1968 (4) SA 657 (A) at 662H-663A:

“In view of the circumstances of this case I think it necessary to make a few comments on the duty of a Court, sitting as upper guardian of minor children, when it has to resolve a dispute concerning custody. To the court, as upper-guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to be applied, namely the predominant interests of the child. The singularity of the subject is evidenced by a number of features. An order of the court as to custody and access may at any time be varied by the Court for good cause. An agreement relating to custody may be made an order of Court if the Court is satisfied that what has been agreed upon is in the best interests of the children, but such order also can be varied by the Court for good cause. Also, from the procedural point of view, an application to vary an agreement is different from the ordinary application, in that the court need not consider itself bound by the contentions of the parties and may, in suitable cases, notwithstanding the fact that the onus is on the applicant to show good cause, depart from the usual procedure and act *mero motu* in calling evidence,

irrespective of the wishes of the parties. In the result, it could be said that, while in the form there is an application for variation of the order of Court, in substance there is an investigation by the Court, acting as upper-guardian...”

[14] In this application before me, the main relief sought by the applicant is that he be granted full rights of contact and care, pendente lite, pending the finalisation of the family advocate's report. The respondent also prays for the parental rights of care in the divorce summons.

[15] The principle in Venter's case is, in my view, to avoid any matter ancillary to the main issue to be dealt with in a different forum unless there are urgent and compelling reasons.

[16] In terms of section 28(2) of the Constitution Act 108 of 1996, "A child's best interests are of paramount importance in every matter concerning the child. "

[17] My approach to the matter is that as much as the child's interest are of paramount importance there are no explicit urgent grounds in this application persuading me to deviate from the principle in Venter's case.

[18] The applicant could approach the NED court in terms of Rule 32 of the NED court rules, for the relief sought in this application, which is similar to the Rule 43 proceedings of the Uniform Rules of this court. The costs in the NED court would be lesser and the court is nearer to where the parties are resident.

[19] The applicant in the application has not set out reasons why he is approaching this court on a urgent basis for the relief he could have obtained in the NEDC on a 'quicker' procedure pending the finalisation of the main action. Applicant stated in his papers that he has already instructed his attorney to request the office of the family advocate to institute a enquiry in terms of section 4 Mediation in Certain Divorce Matters Act 24 of 1987.

[20] The respondent stated that she instituted the divorce proceedings in NED court because she cannot afford the High Court costs.

[21] Applicant failed to clearly furnish the court with reasons why he could not bring this application in the NED court despite being informed that the issue of jurisdiction would be raised.

[22] The applicant is not denied his right to visit the child, the issue is that he wants to remove the child. I do not think that there is an urgent need in the interest of the child warranting that I should entertain the application.

[23] **I therefore, make the following order:**

The matter is struck from the roll and the applicant is ordered to pay the costs.

A P LEDWABA

JUDGE OF THE HIGH COURT