



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: 20375/2024

In the matter between:

YC

Applicant

and

JRC

First Respondent

In re the minor child (Born 28 July 2014)

MC

Heard: 20 September 2024

Delivered Ex tempore: 20 September 2024

JUDGMENT

LEKHULENI J

1. Introduction

[1] This is an urgent application in which the applicant seeks an order pending the finalisation of the relief sought in Part B, that the respondent be compelled to allow the minor child, MC, to travel from Durban to Cape Town on 21 September 2024 and remain in the care of his mother, the applicant, until 6 October 2024. In addition, the applicant seeks an order that the Office of the Family Advocate in Cape Town liaise with the Office of the Family Advocate in Durban to consider an acceptable interim parenting plan and to comment on a draft parenting plan attached to her application. The applicant also sought an order that the draft parenting plan attached to her application be implemented immediately and until such time as the divorce proceedings between the parties instituted under case number D10408/2022 in the KwaZulu-Natal Division of the High Court either become settled or is finalised.

[2] In part B of the application, the applicant seeks an order to transfer the divorce action from the Division of the KwaZulu-Natal High Court to the Western Cape High Court held in Cape Town. In addition, the applicant asserts that she will seek an order in part B that the Office of the Family Advocate in Cape Town investigate the circumstances of the applicant and respondent on what would be in the best interest of the minor child and to ascertain what the child's wishes are with a view of honouring section 10 of the Children's Act 38 of 2005 (*"the Children's Act"*) in respect of the precepts of allowing the voice of the child to be heard. The urgency in this matter is based on the fact that the minor child is scheduled to fly from Durban to Cape Town on 21 September 2024 if this Court were to grant the applicant's application.

2. Background facts

[3] The applicant and the respondent were married to each other on 12 March 2010, and the marriage still subsists; however, the applicant has instituted divorce proceedings in the KwaZulu-Natal Division of the High Court under case number D10408/2022. The divorce proceedings were initiated on 5 October 2022 and have not yet been finalised. The applicant, the respondent, and their minor child lived in Durban until 4 June 2024. On that date, the applicant left their shared home in

Durban and relocated to Cape Town without informing the respondent, leaving the minor child with the respondent.

[4] According to the applicant, she suffered an emotional and mental breakdown and had to receive treatment for same. Upon her discharge from the Mental Health Clinic on 04 June 2024, she flew to Cape Town to be with her mother and other members of her extended family as she needed support. She left the minor child in the care of the respondent in Durban.

[5] As the Spring holidays loomed, the parties, through their legal representatives, exchanged correspondences on how the applicant and the respondent would share the holidays with the minor child. The applicant expressed her wish for the minor child to spend the entirety of the September holidays in her care. Conversely, the respondent proposed dividing the holiday period, suggesting that the minor child spend time with the respondent from 21 to 28 September, and with the applicant from 28 September to 6 October 2024. The parties could not agree on the dates the minor child should spend with them during this September holidays. In contemplation that the child will spend the entire holiday with her, the applicant bought a return flight ticket for the son to fly from Durban to Cape Town on 21 September 2024 at 09h00.

[6] The respondent, on the other hand, asserted that the applicant was aware that the contact with the minor child was in dispute and that her unilateral decision to hijack the entire holiday with the minor child was not with his consent. Despite the lack of agreement between the parties, the respondent asserted that the applicant proceeded to book flights for the minor child on her terms and disregarded his wishes to spend half of the holiday with the minor child. The respondent further stated that the applicant insists on exercising contact with the minor child for the entirety of the holidays, notwithstanding that he had tendered that they share the holidays as co-holders of parental rights and responsibilities.

[7] Significantly, the respondent raised two preliminary points. The respondent asserted that this Court does not have jurisdiction to hear this matter, and that this application should be dismissed with costs for lack of urgency. In his answering

affidavit, the respondent drew the court's attention to a letter addressed by the respondent's attorney to the applicant's legal representative on 19 September 2024, shortly after receiving the urgent application advising him of the fatal error in this application. In the correspondence, the applicant's representative was given an opportunity to withdraw the application by no later than 11h45 on 19 September 2024, failing which the respondent's legal representative stated that he would appoint Counsel to appear in court and seek a punitive cost order against him.

[8] The second preliminary point raised by the respondent is that this matter is not urgent. The respondent stated that the applicant's behaviour is appalling. According to the respondent, the applicant ignored multiple requests dating back to 8 August 2024, to confirm whether she intended to have contact with the minor child during the September and October holidays. It is further the respondent's contention that despite his tender for one week of the school holidays, the applicant unilaterally decided that she would exercise contact with the minor child for the entire school holiday, knowing very well that he intended to share holiday contact with the minor child. The respondent is open to having the child spend half of the holidays with the applicant and another half with him.

3. Principal submissions by the parties

[9] At the hearing of the application, Ms Naidoo, the applicant's Counsel, submitted that this Court has jurisdiction to hear the matter. Counsel submitted that this court enjoys inherent jurisdiction to hear the matter as the upper guardian of minor children, particularly since there is currently no parenting plan between the parties regulating the question of care and contact. Counsel sought to pray in aid of this argument the decision in *J v J* 2008 (6) SA 30 (CPD), where the court stated that the best interest of the child should not be sacrificed on the altar of jurisdictional formalism.

[10] Furthermore, Ms Naidoo submitted that there will be no prejudice if this court hears the matter as the respondent has filed the relevant answering affidavit and that the Family Advocate has not opposed the relief sought in respect of the minor child. Counsel also relied on section 34 of the Constitution, which guarantees the right of

access to courts. Ms Naidoo further submitted that the respondent has the minor child in his care daily and should allow the applicant to spend the whole School holiday with the child. Counsel further submitted that the matter is urgent, particularly in that it involves the interest of a minor child. Ms Naidoo implored the court to grant the relief sought in the notice of motion.

[11] On the other hand, Ms De Wet, the respondent's Counsel, submitted that this court does not have jurisdiction to hear the matter. Counsel submitted that the minor child is in Durban, outside the jurisdiction of this court. According to Ms De Wet, it would have been a different case if the minor child had been in the Western Cape, even if it had been on a temporary basis. Counsel also submitted that the applicant sought an order to implement the draft parenting plan attached to the application immediately. According to Ms De Wet, the implementation of the parenting plan sought by the applicant falls within the purview of section 22(4)(b) of the Children's Act.

[12] Furthermore, it was Ms De Wet's submission that the prayer the applicant seeks that the respondent must be compelled to allow the minor child to travel to Cape Town on 21 September 2024 and to remain in the care of the applicant falls squarely within the extension of rights envisaged in section 28(1) of the Children's Act. Ms De Wet contended that this Court cannot invoke its inherent jurisdiction in a case where its jurisdiction is excluded by a statute. To this end, Counsel relied on the decision of the Constitutional Court in *South African Broadcasting Corporation Limited v National Director of Prosecution and Others* 2007 (1) SACR 408 (CC) para 91, where the court noted that the power in section 173 of the Constitution is not an unbounded additional instrument to limit or deny vested entrenched rights.

[13] Counsel submitted that the inherent power to regulate and control its process and to preserve what is in the interest of justice does not translate into judicial authority to impinge on a right that has otherwise vested or has been conferred by the Constitution. Ms De Wet argued that this court does not have jurisdiction to hear this matter and cannot use its inherent jurisdiction to clothe itself with jurisdiction to hear this matter. On the question of urgency, Ms De Wet submitted that the applicant knew as of 8 September 2024 that there was a dispute on the sharing of these

holidays but did nothing. According to Counsel, the urgency herein was self-created. Ms De Wet implored the court to dismiss this application with costs.

4. Issues to be decided

[14] This court is enjoined to consider two issues. *First*, whether this matter is urgent as envisaged in Rule 6(12) of the Uniform Rules and *Second*, whether this court has jurisdiction to hear this application notwithstanding that the child currently resides in Durban.

5. The Applicable Legal Principles and Discussion

[15] For convenience, I will consider the question of jurisdiction first, as it is central to this application. The jurisdiction of the High Court in its most basic form is regulated by section 21 of the Superior Courts Act 10 of 2013 (*"the Superior Courts Act"*). (see *Degueldre v Companies and Intellectual Property Commission* (211/23) [2024] ZAWCHC 222 (22 August 2024) para 52). Of particular importance in this case are the provisions of section 21 (1) and (2) of the Superior Courts Act, which provides as follows:

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

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

[16] Simply put, section 21 of the Superior Courts Act clothed a division of the High Court of South Africa with jurisdiction over all persons residing or being in, and in relation to all causes arising within its area of jurisdiction. A Division also has

jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such Court has jurisdiction.

[17] In *JS v WF* (63698/13) [2020] ZAGPPHC 350 (10 July 2020), the court stated that the starting point of any discussion regarding the issue of jurisdiction should be the Supreme Court of Appeal decision in *Hugo v Vessels* [1987] 2 All SA 290 (A) para 8, where the court stated that a court can only be said to have jurisdiction in the matter if it has the power not only of taking cognisance of the suit, but also of giving effect to its judgment. As a result, to answer the question as to whether a Court has the necessary jurisdiction to adjudicate a matter a two-fold inquiry must be undertaken. The first is to determine whether the Court is at all empowered to take cognisance of the suit, and the answer to this question will depend on the existence of one or more of the acknowledged grounds for jurisdiction, the *rationes jurisdictionis*. This in turn, is dependant and informed by the nature of the litigation before the Court. The second question can only be answered with reference to the doctrine of effectiveness and the Court's power to enforce its order.

[18] While recently, in *Degueldre v Companies and Intellectual Property Commission* (211/23) [2024] ZAWCHC 222 (22 August 2024) para 52, Henney J, writing for the full court on the question of jurisdiction, relied on *Veneta Mineraria Spa v Caroline Collieries (Pty) Ltd* 1987 (4) SA 883 (AD) at 886 H-J, where the Appellate Division, as it then was, stated that there is a distinction between the so-called grounds of jurisdiction by virtue of which a court would normally have *ipso jure* jurisdiction and jurisdiction by virtue of which jurisdiction is conferred on a court. Where the court would normally have *ipso jure* jurisdiction, these are threefold: firstly, by virtue of the defendant's domicile being in that court's jurisdiction; secondly, by virtue of the contract having been entered into in that the court's jurisdiction or performed in the court's jurisdiction. Lastly, by virtue of the subject matter in an action being situated in the court's jurisdiction. In cases where jurisdiction is conferred upon a court is where there is an order of attachment of the goods or arrest of a person. And finally, where a party consents to the jurisdiction of that court.

[19] Reverting to this matter, section 29 of the Children's Court provides that an application in terms of section 22(4)(b), 23, 24, 26(1)(b), or 28 may be brought

before a High Court, a Regional Court in a divorce matter or a Children's Court' as the case may be, within whose area of jurisdiction the child concerned are ordinarily resident. Section 29(1) confers jurisdiction on the High Court, a Regional Court dealing with a divorce matter, and the Children's Court in relation to making a parental responsibilities and rights agreement an order of court, court-assigned contact and care, court-assigned guardianship, an order confirming paternity and paternity, and suspension, termination, extension or circumscription of parental responsibilities and rights.

[20] In my view, the applicant's case falls within the purview of section 28(1)(b). Section 28 provides that:

“(1) A person referred to in subsection (3) may apply to the High Court, a Regional Court in a divorce matter or a Children's Court for an order -

(a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or

(b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child

...

(3) An application for an order referred to in subsection (1) may be brought -

(a) by a co-holder of parental responsibilities and rights in respect of the child;

(b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;

(c) by the child, acting with leave of the court;

(d) in the child's interest by any other person, acting with leave of the court; or

(e) by a family advocate or the representative of any interested organ of state..."

[21] Section 19 of the Children's Act confers full parental responsibilities and rights in respect of a child on the biological mother of the child. Section 20 confers full parental responsibilities and rights in respect of a child on the biological father of the child who was married to the child's mother at the time of the child's conception or birth or any time in between. It is, therefore, incontestable that in terms of sections 19 and 20 of the Children's Act, the applicant and the respondent both hold full parental rights and responsibilities in respect of the minor child: they are both co-holders of parental responsibilities and rights.

[22] As co-holders of parental rights and responsibilities, they have the responsibilities and rights set out in section 18 of the Children's Act. Section 18 envisages that a person may have either full or specific parental responsibilities and rights in respect of their child. The minor child in the present matter has been in the care of both parties ever since he was born until the parties separated in June 2024 when the applicant relocated to the Western Cape. The child currently resides with the respondent in Durban, and the applicant has reasonable contact with the child.

[23] Ever since the applicant relocated to Cape Town, in the Western Cape, in June 2024, she has been exercising contact with the minor child, amongst others, through video calls and text messages. The applicant stated that she last saw the minor child between 22 and 28 July 2024 and has not seen him nor spent time with him since then. The applicant asserted that the respondent has daily in-person contact with the minor child, while she is only able to have contact with the minor through video calls. The applicant also asserted that in the absence of a clear parenting plan, the respondent would seemingly continue to be obstructive, hence the need for an interim parenting plan. To this end, the applicant attached an unsigned draft parenting plan, which she implored the court to endorse and implement.

[24] In my view, in addition to the prayer for the implementation of the draft parenting plan, the applicant seeks an order that her parental rights and responsibilities be extended as envisaged in section 28(1)(b) so that she can exercise close contact with her child who is currently in Durban during the September – October school holidays. The applicant seeks an order for the child to come and spend time with her in the Western Cape during the Siring holidays. Section 28(1)(b) authorises the extension of a person's exercising of any or all his or her parental responsibilities and rights. In other words, the court can either give a person who already has parental responsibilities and rights additional parental responsibilities and rights, or it can delineate the parental responsibilities and rights the person has.

[25] In considering this application, the minor child's best interests remain the yardstick against which everything must be measured. *Shawzin v Laufer*, 1968 (4) SA 657 (AD) 662G-H. It is the paramount consideration. Section 28(4) of the Children's Act enjoins a court when considering an application such as this, to take into account:

- (a) the *best interests of the child*;
- (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
- (c) the degree of commitment that the person has shown towards the child; and
- (d) any other fact that should, in the opinion of the court, be taken into account. (my emphasis)

[26] Section 28(2) of the Constitution underscores the paramountcy of the child's best interests. It provides that a child's best interests are of paramount importance in every matter concerning the child. Section 28(2) has been interpreted as creating an 'expansive guarantee' and constitutes not only a guiding principle but also a right. (S

v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) para 22). The principle of the best interests of the child has also been incorporated in section 9 of the Children's Act 38 of 2005. The importance of protecting the best interests of minor children lies partly in the fact that they are a vulnerable group of people that make up a large constituent part of our society. However, they lack the means to act in their own interests. (*RMD v KD* (16995/22P) [2023] ZAKZPHC 2 (13 January 2023) at para 24).

[27] Whilst I appreciate the paramountcy of the child's best interest, I do not understand this right to trump over a court's jurisdictional competence or capacity to hear a matter. I also do not understand this right to be giving a court jurisdiction where Parliament has, in its infinite wisdom, explicitly excluded such jurisdiction in legislation. Expressed differently, where there is legislation excluding the court's jurisdiction, in my view, this Court cannot use its inherent jurisdiction or invoke the child's best interest principle to lay claim over a matter. This Court has the power to exercise its inherent jurisdiction when no law directly provides for a given situation. (See *Ex Parte Millsite Investment Co Pty Ltd* 1965 (2) SA 582 (T) at 585 G-H).

[28] In the present matter, section 29 serves as an overriding determinant of jurisdiction in circumstances where a Court is called upon to extend, suspend or circumscribe a parent's parental rights and responsibilities. In my view, this Court cannot entertain an application instituted in terms of section 28 in which its jurisdiction is explicitly excluded by section 29 of the Children's Act in instances where the minor child concerned is not ordinarily resident in its jurisdiction, even if by consent between the parties.

[29] In *N v N; In re N* (2425/16) (2017) ZAECPHC 61 (14 December 2017), the court noted that the terms of section 29 are clear and unambiguous and, serve as an overriding determinant of jurisdiction in circumstances where a Court is called upon to extend, terminate, suspend or circumscribe the parental rights and responsibilities of a parent. Goosen J, as he then was, noted that the requirement is that the minor child must be ordinarily resident within the area of jurisdiction of the Court. This is a territorial limitation of jurisdiction.

[30] While in *Ceronio v Snyman* 1961 (4) SA 294 (W), it was held that although a Court with the necessary jurisdiction to adjudicate divorce proceedings between parties could make an order relating to the custody of a child, only the Court having jurisdiction in respect of the place where the child happened to be at the time, had the jurisdiction to order that the child be handed over to the parent to whom custody was awarded. Marais J explained:

"The reason is that, although a Court might 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 interest of the child."

[31] As previously stated, section 29 of the Children Act statutorily excludes the jurisdiction of this Court from hearing applications in terms of section 28 of the Act, where minors are not ordinarily residents in the Court's area of jurisdiction. As a result, this Court, in my view, does not have the jurisdiction to consider granting the relief that will amount to an extension of the applicant's current parental responsibilities and rights, as this application was instituted in this Court without the minor child being ordinarily resident in the Court's area of jurisdiction. Only the KwaZulu Natal High Court, where the child is ordinarily resident within its territorial jurisdiction, has jurisdiction to hear the applicant's application. Notably, the divorce proceedings between the parties, addressing the issue of care and contact, are pending before the KwaZulu Natal High Court.

[32] Pursuant to the view I take, I deem it unnecessary to consider the issue of urgency. Additionally, Ms De Wet also informed the court that regardless of the outcome of this application, the respondent still wishes to spend half of the holidays with the child, while the applicant would have the child for the remaining half of the holidays. Notwithstanding the court's decision on this application, it is my heartfelt

plea to both parties to prioritise their child's best interests consistently and to refrain from allowing their disagreements to overshadow their judgment.

6. Order

[33] Consequently, the applicant's application is hereby dismissed, and the applicant is ordered to pay costs on Scale A.

LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Adv Naidoo
Instructed by: Hanekom Attorneys

For the Respondent: Adv De Wet
Instructed by: Strauss Daly Attorneys