



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case no: 775/2025

In the matter between:

S H

Applicant

and

M L H

Respondent

JUDGMENT

Brauns AJ

- [1] *Pentimenti* is a very interesting Italian term, often applied in the study of art where repented traces or sketches concealed by layers of paint soon reveal themselves it helps artists to analyse their intentions, motives and impulses. It is used not only to produce the final product or result but also show the undesired parts of their work. The art of searching beneath the layers of paint to reveal what is hidden, is the idea behind this 'philosophy'. This is the way in which this court approaches the matter before it¹.

¹ Douglas Oliveira Diniz Goncalves '*Pentimenti* reading: Unravelling hidden interests and values behind constitutional drafts' 2022 (Jan) *Academia Letters* (www.academia.edu),

- [2] Before this court, is an application which arises from an action for divorce, currently pending before this court. For the sake of convenience, the applicant and respondent are plaintiff and defendant, respectively, in the main action. In the present matter, and in accordance with prevailing judicial practice, the parties and the minor child will be referred to by their respective initials only.
- [3] The applicant approached this court in terms of rule 43². The interim relief claimed relates to the primary residence and contact of a seven-year-old minor child born of the marriage pending the finalization of his action for divorce from the respondent. It is clear from the papers exchanged that that applicant, the father, is resident in South Africa, within the area jurisdiction of this court and the respondent, the mother, is ordinarily resident in Malaysia.
- [4] The parties were married to each other on 17 July 2016 out of community of property subject to the accrual system. The marriage produced one child, "L," born on 18 July 2018, who presently resides with the respondent in Malaysia. The parties have been separated and living apart since 18 January 2025.
- [5] The issue before this court is on a preliminary point of law raised by the respondent before the hearing of the main application. The point is whether this court, is empowered to make an order in terms of rule 43 that would be effective and enforceable in Malaysia.

The parties' submissions

- [6] The common cause facts are the following; The minor child is ordinarily resident in Malaysia. It is accepted that Malaysia is not bound to automatically enforce South African custody or parental-rights orders and that any enforcement abroad would require local legal processes, the outcome of which is uncertain. The Family Advocate's investigation remains relevant to

² accessed 3-11-2023
The Uniform rules of Court

determining the child's best interests, and it is further acknowledged that the Malaysian legal system may apply its own family-law principles, which could differ significantly from South African law.

[7] The issues in dispute are confined to questions of law and characterisation of the relief sought. The applicant contends that this court retains jurisdiction to entertain the rule 43 application despite the child's residence abroad, and that the effectiveness of any interim order does not depend on its immediate enforceability in Malaysia. The respondent, on the other hand, argues that the relief sought amounts in substance to a custody order under the Children's Act 38 of 2005³, which requires jurisdiction determined by the child's ordinary residence, and that effectiveness must mean present enforceability rather than speculative future recognition.

[8] In determining these issues, it is necessary first to consider whether jurisdiction properly vests in this court, having regard to both rule 43 proceedings and the principles governing matters affecting children under the Children's Act. Once jurisdiction is established it will become necessary to address the question of whether any order granted would be effective in law, notwithstanding the child's residence in Malaysia and the uncertainty of foreign enforcement.

Legal Framework

[9] In contrast to the Children's Act, the Divorce Act 70 of 1979⁴ is silent on matters concerning the relocation of a minor child and the regulation of care and contact during the pendency of divorce proceedings. While the Divorce Act provides the jurisdictional basis for a divorce action and requires the court to ensure that proper arrangements are made for the welfare of any minor child before granting a decree, it does not expressly prescribe how interim relocation disputes or cross-border residence issues are to be addressed.

³ herein after referred to as the Children's Act
⁴ herein after referred to as the Divorce Act

These questions are primarily guided by the Children's Act, which contains comprehensive provisions on the best interests of the child, parental responsibilities and rights, and jurisdiction in children's matters.

The Divorce Act

- [10] It is best to start off by having regard to the Divorce Act. Section 1 defines a "court" as a high court or a regional division of the magistrates' court which, by law, has jurisdiction in divorce matters. The Divorce Act also defines a "divorce action" as encompassing not only the claim for a decree of divorce but also any related relief such as interim maintenance, costs contributions and arrangements regarding minor children.
- [11] Section 2, provides that a court has jurisdiction if either party is domiciled or ordinarily resident in its area, provided such residence has continued for at least one year prior to the institution of the action. Jurisdiction attaches to the divorce action as a whole, and this court must therefore satisfy itself that it is competent to entertain all ancillary relief flowing from the pending divorce proceedings.
- [12] Section 6, expressly safeguards the welfare of minor and dependent children. A decree of divorce may not be granted unless the court is satisfied that proper provision has been made for the welfare of the children, or that the arrangements proposed are the best that can reasonably be achieved in the circumstances. The court may call for a Family Advocate's report, direct further investigations, appoint legal representation for the child, and make any order regarding guardianship or custody if that serves the child's best interests.

The Children's Act

- [13] Section 2 affirms that the Children's Act must be interpreted and applied to promote the protection, well-being and development of children, consistent with the Constitution and international law. Section 6 prescribes general

principles applicable to all proceedings concerning children, including respect for their dignity, the promotion of their rights in the bill of rights, and recognition of their individual circumstances and developmental needs.

- [14] Section 7, sets out the factors to be taken into account when determining the best interests of a child. These include, among others, the nature of the child's personal relationships with parents and caregivers, the likely effect of any change in the child's circumstances, the child's age, maturity and stage of development, and the need for stability and security. The best-interests standard is not a single test but a composite weighing of all relevant circumstances to ensure that the child's welfare is paramount.
- [15] Section 23, empowers a court to assign contact or care in respect of a child to an interested person by order of court. In determining such an application, the court must consider the best interests of the child, the relationship between the child and the applicant, the degree of commitment shown by the applicant, and any other relevant factors. This section underscores that parental responsibilities and rights are not absolute, and that the court retains a supervisory role to ensure that any allocation of care or contact aligns with the child's welfare.
- [16] Section 28, regulates the termination, extension, suspension or restriction of parental responsibilities and rights. A court may only make such an order if it is in the best interests of the child, and in doing so must apply the principles in sections 6 and 7. This ensures that any adjustment to parental responsibilities or rights remains anchored in constitutional and statutory safeguards.
- [17] Section 29, deals with court proceedings in matters concerning children. It provides that any person holding parental responsibilities and rights in respect of a child, or an interested party acting in the child's best interests, may approach a court for appropriate relief. Importantly, it also governs jurisdiction: generally, proceedings may be brought in the high court or children's court where the child is ordinarily resident. This reinforces the requirement that

orders affecting children must be made by courts that are best placed to assess and protect their interests.

[18] Read together, sections 7,23,28 and 29, require this court to approach questions of jurisdiction and effectiveness through the prism of the child's best interests. Even when technical jurisdictional objections are raised, sections 6 and 7 require the court not to lose sight of its duty to ensure that the child's rights are respected and that any decision promotes the child's welfare. Sections 28 and 29, in turn, ensure that any order affecting parental responsibilities and rights is made within the proper forum and remains practically capable of advancing the child's interests.

[19] In *AR v BMR*,⁵ the court held that, when the interests of minor and major dependent children are in issue in divorce proceedings, irrespective of whether such proceedings are opposed or unopposed, the provisions of section 6 of the Divorce Act, are applicable. The section compels a court to satisfy itself, which may include considering a report and recommendation by or referral to the Family Advocate, that the order sought indeed serves the child's interest. If it does not, then the court may not grant a decree of divorce. Section 6 does not clothe the court with a discretion. A duty and obligation are placed on the court by section 6(1) and (3).

[20] In addition, section 7(1), calls upon the court to consider various factors when considering the best interests of minor children. Section 9, mirrors the constitutional imperative of the best interests of the child that is of paramount importance in all matters concerning a child and which must be applied⁶.

[21] When it comes to the interests of minor children, legal practitioners and the court cannot follow a cookie-cutter approach. Each matter must be approached and considered on its own merits. Each child is an individual with his/her own specific needs. Consequently, when considering the best interest

⁵ [2023] ZAGPPHC 2035 (8 December 2023) para 1 -2
⁶ *AR supra* para 3

of children and when parties reach an agreement regarding the exercise of parental rights and responsibilities, such an agreement must be specifically tailored to suit the unique needs of the child involved. In addition, the evidence in support of the relief sought, should specifically address the best interest of the child within the unique context of the particular child⁷.

Analysis

- [22] In deciding rule 43 applications, the court has a wide discretion and in determining interim maintenance or arrangements regarding children, courts place primary emphasis on the best interests of the child. This includes assessing the child's emotional, physical, and educational needs, together with each parent's ability to provide for those needs.
- [23] This court is confronted with an apparent conflict between sections 23 and 28 of the Children's Act, on the one hand, and section 2 of the Divorce Act, on the other. The dispute arises in circumstances where one parent resides with the minor child in Malaysia, while the other parent is ordinarily resident in South Africa, seeks interim relief under rule 43 pertaining to care and contact.
- [24] In *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others*⁸, the conourt laid down the guidelines to statutory interpretation. In addition, the Constitutional Court stated that there is no principle of interpretation that requires a court to interpret one piece of legislation with reference to another, for the reason that one statute may assign a different definition to the "word or expression" compared to that of the other. However, statutes dealing with the "same subject matter", or which are in "*pari materia*" should be construed together and harmoniously. When constitutional rights are at issue, and where the ordinary grammatical meanings of the words used in the impugned provisions give effect to the constitutional rights and

⁷ Op cit para 80
⁸ (CCT68/19) [2019] ZACC 47

values, the words must bear that meaning rather than the meaning ascribed to those words in another piece of legislation.

- [25] Accordingly, in *Amabhungane Centre For Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*⁹ the court infused its ‘interpretative skills’ into the very heart of the statute to bring alive the true or actual meaning as intended by the legislature.
- [26] Having considered the relevant provisions of both the Children’s Act and the Divorce Act, it is apparent that the Children’s Act contains the comprehensive legislative framework governing the best interests of the child, including specific guidance on matters of care, contact, and decision-making affecting a child’s well-being.
- [27] The Divorce Act, while providing the procedural basis for divorce proceedings and jurisdictional requirements, is largely silent on substantive issues of care and contact *pendente lite*. Its focus is on the dissolution of the marital relationship rather than on regulating the detailed incidents of parental responsibilities and rights. Although the Divorce Act recognizes applications for interim relief—including maintenance and temporary custody or access—it does not prescribe criteria by which such applications must be assessed, other than the court’s inherent discretion.
- [28] By contrast, the Children’s Act expressly codifies the best interests of the child standard in section 7, requiring a holistic enquiry into the child’s emotional, physical, educational and social needs, as well as the likely impact of any change in circumstances, including separation from a parent or relocation. Sections 23 and 28 of the Children’s Act, further empower the courts to assign or circumscribe parental responsibilities and rights and to regulate contact or care arrangements, always guided by the paramountcy of the child’s best interests

[29] In matters of relocation, whether temporary or permanent, the factors enumerated in section 7 of the Children's Act are directly relevant. These include the practical difficulty and expense of maintaining personal relations with a parent living elsewhere, the effect of separation from a parent, siblings or extended family, and the need to protect the child's emotional security and developmental stability. The Divorce Act contains no equivalent provisions.

[30] Accordingly, by way of interpretation, it is the Children's Act—not the Divorce Act—that provides the statutory framework for determining the best interests of the child in cases involving relocation. The Divorce Act establishes jurisdiction and procedural competence, but the Children's Act furnishes the substantive principles and criteria by which such disputes must be resolved.

[31] This interpretive approach directly informs the jurisdictional inquiry that follows.

Jurisdiction

[32] The doctrine of effectiveness in civil procedure is a principle that dictates whether a court can exercise jurisdiction over a matter. It essentially states that a court should not issue a judgment unless it can be enforced or unless compliance with the judgment can be expected. This means a court must have the ability to ensure its orders are carried out within the legal system.

[33] The location of the defendant (whether they are within or outside South Africa) is crucial in determining whether the court can effectively enforce its judgment. Jurisdiction is fundamental. A court must have jurisdiction in a matter for its judgment or order in that matter to be valid. Without jurisdiction the judgment or order is a nullity. No pronouncement to that effect is required. It is simply treated as such.¹⁰ Once a court has jurisdiction, it retains that jurisdiction until the suit is concluded.¹¹

¹⁰ Trade Fairs and Promotions (Pty) Ltd v Thomson and another 1984 (4) SA 177 (W) at 183DE.
¹¹ Mills v Starwell Finance (Pty) Ltd 1981 (3) SA 84 (N) at 88A-B.

- [34] In *Lin v Director*¹², my sister, Roberson J, held that, by virtue of their marriage, the applicant and Lin both had full parental responsibilities in respect of the child, W¹³. In seeking an order that the mother be declared the primary caregiver of W, the applicant was effectively seeking an order in terms of s 28 (1)(b) of the Children's Act, namely a circumscription of Lin's parental responsibilities. Even assuming that W was unlawfully removed by Lin to China, or was being unlawfully retained there, the fact was that he was not present within this Court's jurisdiction and the court therefore held, that it did not have jurisdiction to order his return to the applicant in South Africa.¹⁴
- [35] In *VV v OV*¹⁵ where it was held that, *whether or not the respondent submitted to the jurisdiction of this court was a factual question which required consideration of whether the cumulative effect of the proven facts established submission to the jurisdiction of the court on a balance of probabilities*. This court aligns itself with that authority.
- [36] In *NAN v CN*,¹⁶ the court found that section 18(5) permits a court to dispense with a co-guardian's consent in specific instances (e.g. passport, travel) without permanently removing guardianship. Jurisdiction is based on the non-consenting guardian being subject to the court's authority and depends on the nature of relief sought. If the relief simply overcomes a temporary refusal to consent, the court may act without the child being resident locally. If the relief effectively removes or fundamentally alters parental rights, jurisdiction is restricted to the court where the child resides¹⁷.

¹² Lin v Dept of International Relations Co-operation (3207/2010) [2010] ZAECPHC 71 (30 November 2010)

¹³ Ss 19 and 20 of the Children's Act

¹⁴ Lin, *supra* at para 25

¹⁵ 2025 (1) SACR 498 (WCC) at para 19- this is a judgment regarding an application for contempt of court against a respondent for non-payment of a court-ordered financial obligation, ultimately ruling that the court lacked jurisdiction to enforce the order due to the respondent's domicile in Saudi Arabia.

¹⁶ In re: J.N (2425/2016) [2017] ZAECPHC 61 (14 December 2017)

¹⁷ Section 28 of the Childrens Act

- [37] In the recent case of *Heidi Nicole Koch N O and Another v The Ad hoc Central Authority for the Republic of South Africa and Another*,¹⁸ the SCA had to make a decision in a case where a father based in the United Kingdom (“UK”) requested the return of his child from South Africa (“SA”). The SCA held that the SA courts would be bound to order the return of the child to the UK unless circumstances existed where a person opposing the application for the child’s return established that “...*there is a grave risk that the [child’s] return would expose [him or her] to physical or psychological harm or otherwise place the child in an intolerable situation...*”
- [38] In *YC v JRC*¹⁹ it was held that the high court’s inherent power as upper guardian of minors did not override explicit statutory limits on jurisdiction. The “best interests of the child” principle, while paramount, could not create jurisdiction where legislation excluded this. The court cited authority confirming that a court must have both power to take cognizance of the case and power to give effect to its judgment (doctrine of effectiveness). While child welfare must always guide the court, this principle did not allow a court to hear a case it had no legal power to decide.
- [39] *AR*,²⁰ confirms that while section 2 of the Divorce Act determines which court has jurisdiction over a divorce action and related interim applications, it does not provide substantive guidance on care or contact of a minor child. That framework is supplied by the Children’s Act, particularly section 29 read with sections 7, 23 and 28, which enshrine the paramountcy of the child’s best interests as the guiding principle. In this case—where one parent resides abroad and the other seeks interim care or contact in South Africa—this interpretation supports the view that the court properly assumes jurisdiction under the Divorce Act, but must resolve all child-related disputes by applying the Children’s Act criteria, ensuring that relocation or separation issues are assessed holistically with reference to the child’s emotional, physical, and developmental needs rather than the parents’ convenience.

¹⁸ (188/2021) (2022) ZASCA 60 (26 April 2022)

¹⁹ (20375/2024) [2024] ZAWCHC 273 (20 September 2024)

²⁰ FN 6 above, *supra*

- [40] Regarding the question whether jurisdiction vests in this court notwithstanding the child's residence in Malaysia, the applicant relies on the principle that rule 43 relief is incidental to a pending divorce action, and that once jurisdiction is established in respect of the divorce, it continues throughout all interlocutory proceedings. The respondent, by contrast, submits that the substance of the relief sought is not merely ancillary but amounts to a custody order under the Children's Act, which is governed by the ordinary residence of the child.
- [41] The Divorce Act makes no explicit provision regarding relocation disputes or interim arrangements *pendente lite*, but it does confer jurisdiction where either party is domiciled or resident within this Court's area for the prescribed period. This jurisdiction extends to the divorce action as a whole. However, the Children's Act prescribes that in matters primarily concerning the care, contact, or guardianship of a child, jurisdiction ordinarily follows the child's place of residence. These overlapping statutory schemes must be interpreted harmoniously: the Divorce Act establishes the Court's authority to hear the divorce and incidental matters, while the Children's Act ensures that orders concerning children remain firmly grounded in their best interests and linked to the forum best suited to protect those interests.
- [42] A rule 43 application concerning the primary residence of a minor during divorce is governed by the Children's Act. Such applications provide interim relief and must prioritize the child's best interests, whether the present application is truly incidental to the divorce or constitutes a stand-alone custody dispute is therefore critical. If the application is properly characterized as incidental relief under rule 43, jurisdiction follows the pending divorce and is not defeated by the child's relocation. If, however, the relief sought amounts to a substantive variation or allocation of parental responsibilities and rights under section 28 of the Children's Act, the jurisdictional inquiry must focus on the child's ordinary residence in Malaysia.
- [43] In resolving this issue, this court must give effect to sections 6 and 7 of the Children's Act, which make the best interests of the child paramount.

Technical jurisdictional objections must not obscure the central inquiry into whether the child's welfare will be advanced or prejudiced by the granting or refusal of interim relief. Even if enforcement abroad is uncertain, this court is not relieved of its constitutional and statutory duty to ensure that decisions concerning the child are made through a proper judicial process and informed by expert investigation, such as that of the Family Advocate.

- [44] The doctrine of effectiveness requires that courts assume jurisdiction only where their orders can be practically implemented. In *VV v OV*²¹ the court held that even where jurisdiction exists, orders must have practical effect. It refused contempt proceedings because enforcement against a respondent outside South Africa was impossible. This principle applies generally: courts should not issue orders that cannot realistically be enforced, even if jurisdiction exists on paper.
- [45] In *J.S v W.F.*,²² the high court confirmed its jurisdiction to finalise relocation, contact, maintenance, and declaratory issues but could not alter parental rights under section 29 of the Children's Act, because the children habitually resided in France. Jurisdiction was held to be assessed at the time of filing, not after parties relocate. Both *N.A.N. v C. N*²³. and *J.S. v W.F.* clarify that South African courts generally retain jurisdiction once validly seized (doctrine of continuance) but may not alter parental rights under section 28 of the Children's Act, unless the child is locally resident. Courts balance jurisdiction with the child's best interests and may decline orders if a foreign forum is clearly more appropriate.
- [46] As indicated above, section 2 of the Divorce Act confers jurisdiction in divorce proceedings based on domicile or ordinary residence, covering related interim applications, including rule 43. Section 29 of the Children's Act governs applications to assign, suspend, or terminate parental responsibilities,

²¹ FN 13 above

²² (63698/13) [2020] ZAGPPHC 350 (10 July 2020)

²³ FN 14 above

requiring compliance with specific procedures and a best-interests assessment.

[47] These provisions serve complementary purposes: section 2 of the Divorce Act, determines the competent forum, while section 29 of the Children's Act, prescribes how child-related applications are to be brought and assessed. In disputes over interim care or contact during divorce proceedings, jurisdiction arises from the Divorce Act, while the Children's Act governs the substantive and procedural framework. Section 2 of the divorce Act, does not override section 29 of the Children's Act; rather, it identifies the forum, while section 29 of the Children's Act, sets out how parental-responsibility applications must comply with the Children's Act. Together, these provisions confirm that South African courts may adjudicate child-related issues during divorce but must do so guided by the child's best interests. The Acts operate in tandem: the Divorce Act determines where a case may be heard; the Children's Act prescribes the principles and procedures for deciding child issues.

[48] In the result, and in accordance with the doctrine of effectiveness, it is declared that while this court retains jurisdiction over the divorce action between the parties in terms of section 2 of the Divorce Act, it cannot exercise jurisdiction under section 29 of the Children's Act to make orders concerning the care, contact, custody, or guardianship of the minor child, who is ordinarily resident in Malaysia; any such relief must be sought before the competent court of that jurisdiction, subject to applicable principles of private international law. The preliminary point of law raised by the respondent is upheld.

Costs

[49] The issue of costs falls evenly within the decision of this Court, to be exercised judicially having regard to the facts of the case. As a general principle, the successful party is entitled to his/her costs unless there are compelling reasons to depart from that rule.

[50] There is no compelling reasons to depart from the rule.

[51] Resultantly, the following order is made:

- 1. *The application brought by the applicant in terms of rule 43 of the Uniform Rules of Court on 12 August 2025 is hereby dismissed.***
- 2. *Costs of the application shall stand over for determination by the court hearing the divorce action.***

L R BRAUNS
ACTING JUDGE OF THE HIGH COURT

Heard : Wednesday, 13 August 2025
Delivered : Tuesday, 02 September 2025

Appearances:

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