



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX-TEMPORAE JUDGMENT

Case no: A 268/2015

In the matter between:

NEIL KRIEL

APPLICANT

And

SONJA KANTAK

FIRST RESPONDENT

VICKY NIKOLAIDES

SECOND RESPONDENT

MARGARET RICHTER

THIRD RESPONDENT

CARLYNNE STANDER

FOURTH RESPONDENT

In re: application for the interim custody and control of **DAMIAN KRIEL** (age 5 months)

Neutral citation: *Kriel v Kantak* (A 268-2015) [2015] NAHCMD 242 (7 October 2015)

Coram: PARKER AJ

Heard: 7 October 2015

Delivered: 7 October 2015

Flynote: Marriage – Custody of minor children – Application to grant custody of minor child to applicant pending finalization of application in terms of Children’s Status Act 6 of 2006 – Application for custody already launched in Children’s Court

(Lower Court) and pending – Court held that the High Court is not entitled to usurp the statutory powers and functions of the Lower Court or a tribunal when that court or tribunal has not determined the dispute or matter before it – In the instant case, the fact that the High Court is the upper guardian of minor children does not entitle the court to usurp the statutory powers and functions of the Children’s Act – Consequently, court refused to grant the relief sought and dismissed the application.

Summary: Marriage – Custody of minor children - Application to grant custody of minor child to applicant pending finalization of application in terms of Children’s Status Act 6 of 2006 – Application for custody already launched in Children’s Court (Lower Court) and pending – Court held that the High Court is not entitled to usurp the statutory powers and functions of the Lower Court or a tribunal when that court or tribunal has not determined the dispute or matter before it – In the instant case, the fact that the High Court is the upper guardian of minor children does not entitle the court to usurp the statutory powers and functions of the Children’s Act – In instant case application in terms of Act 6 of 2006 was launched by applicant some three days previously in the Lower Court and was pending – Applicant says that that court has breached his rights on the basis that court refuses to hear him – Court found that in that event applicant should have sought an order of mandamus which is an effective remedy to compel the Lower Court’s performance – Court refused to grant the relief sought and dismissed application.

ORDER

- (a) The application is dismissed.
- (b) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The applicant has launched an application by notice of motion, and prays the court to hear it on the basis of urgency. The applicant prays the court to grant an order in terms of the alternative prayer to prayer 2.1 (underlined):

- 2.1 That the applicant be granted interim custody and control of the minor child, Damian Kriel, pending the finalization of an application in terms of section 12(2) of the Children's Status Act, Act 6 of 2006, which application for the custody of the said minor child was launched by the applicant on 2 October 2015;

Alternatively -

That the applicant be granted interim custody and control of the minor child, Damian Kriel, pending the finalization of an enquiry as to the best interest of the minor child by this honourable court;

- 2.2 That the first respondent be compelled to return the minor child, Damian Kriel, to the custody of the applicant with immediate effect, and failing same, that the deputy sheriff be authorized and ordered to immediately remove the minor child from the custody of the first respondent and to return the said minor child to the custody of the applicant;
- 2.3 That the first respondent shall have supervised access to the minor child, Damian Kriel, every weekend and at every other time as agreed to between the applicant and first respondent in advance;

2.4 Directing that the first respondent, together with any other opposing party, shall pay the costs of this application.

[2] It is important to note that the applicant in his papers states that there was already an application launched in the Lower Court on 2 October 2015 for the custody and control of the minor child (the subject of the application). That application was launched less than three court days ago. Mr Small, counsel for the applicant, says the applicant's rights to be heard in the Lower Court, have been violated because the Lower Court has denied the applicant his rights to be heard. In that event, the effective remedy to seek, I should say, would be an order of mandamus commanding the Lower Court to hear the matter and give the applicant a hearing there. The applicant has not done that, but rushes to the court at breakneck speed for the court to hear his application on the basis that the court is the upper guardian of minor children.

[3] It is crucial to point out that where a statute vests powers in the Lower Court or a tribunal to determine a dispute or determine a matter, the High Court should decline doing anything that tends to usurp that court's or that tribunal's powers and functions given to it by legislation when that Lower Court or tribunal has not determined the dispute or matter. This proposition of rule of practice is so trite that I need not cite authority therefor.

[4] In the instant case, the application before the Children's Court was launched barely three court days ago, as aforesaid. A learned magistrate of the said Lower Court was served with papers at 14h50 yesterday, Tuesday 6 October 2015. For the applicant to ask this court on 7 October 2015 to grant him interim custody and control of the minor child pending the finalization of an application in terms of the Children's Status Act 6 of 2006 (the alternative prayer to prayer 2.1 of the notice of motion) is not only unreasonable, but it also offends the aforementioned proposition of law which is against the usurpation by the High Court of powers and functions vested in the Lower Court or a tribunal before that Lower Court or tribunal has decided. As I have said, where such Lower Court or tribunal refuses to carry out its

statutory function, there is the effective remedy of mandamus available to compel the Lower Court's performance. See *Nguvauva v Minister of Regional and Local Government* 2015 (1) NR 220.

[5] Based on these reasons, I refuse to grant the relief sought in terms of Prayer 1 and the Alternative to Prayer 2.1 of the notice of motion, whereupon -

(a) The application is dismissed.

(b) There is no order as to costs.

C Parker
Acting Judge

APPEARANCES

APPLICANT : A J B Small
 Instructed by Köpplinger-Boltman Legal Practitioners, Windhoek

RESPONDENTS: No appearance