

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON POINT IN LIMINE

Case No: I 3754/ 2012

In the matter between:

S K

APPLICANT

and

S K

RESPONDENT

Neutral Citation: *S K v S K* (I 3754/ 2012) [2017] NAHCMD 344 (17 November 2017)

Coram: PRINSLOO J

Heard: 9 November 2017

Delivered: 17 November 2017

Reasons: 21 November 2017

Flynote: Impact of *res judicata* in family law (divorce matters) considered – Whether court becomes *functus officio* in divorce matters once a settlement agreement dealing with the custody of minor children has been made an order of court.

Summary: A final order of divorce was granted to the parties on 16 February 2017 incorporating a settlement agreement reached between the parties, which was consequently made an order of court. The custody of the children was dealt with in terms of the said settlement agreement, in which terms the parties agreed that the applicant (defendant in the main action) shall have care and control over the two minor children subject to the Respondent's right to reasonable access. During July 2016 both minor children went to stay with the respondent. The eldest child KL stayed for approximately two weeks with the respondent and then moved back home. The youngest child, K who is also the child in question, remained with the respondent to date, and had indicated that she (minor child in question) wished to stay with the respondent. In order for the court to consider the issue of the custody of the younger minor child, the court called for *viva voce* evidence in order to assess the best interest of the child. After the matter was set down for the hearing of oral evidence the applicant raised a point *in limine* in this matter objecting to the court hearing oral evidence on the basis that the matter of custody is *res judicata* and that the issue cannot be revisited by this court by admitting new evidence and that said approach would violate the well-established principle of *res judicata*

Held – Portion of settlement agreement dealing with custody and access is not *res judicata*.

Held further – Custody orders are subject to variation by court when new conditions supervene.

Held – An agreement which is made an order of court but does not create rights is not a subsequent bar to variation, on good cause shown.

Held further – In custody matters due weight must be given to the best interest of the minor child.

ORDER

1. Point *in limine* raised in respect of the legal issue of *res judicata* is dismissed.
2. Costs to stand over and be determined at the conclusion of the main application.

RULING

[1] Applicant and respondent were granted a final order of divorce by this Court on 16 February 2017. The divorce proceedings were contested and quite acrimonious. During judicial case management and with the assistance of counsel, settlement was reached between the parties. There was a number of contentious issues between the parties, however the parties eventually signed the settlement agreement on 16 February 2017. The case hereafter proceeded on an unopposed basis and a final order of divorce was granted and the settlement agreement was made an order of court.

[2] In terms of the settlement agreement the parties agreed that the applicant (defendant in the main action) shall have care and control over the two minor children subject to the respondent's right to reasonable access.

[3] Clause 2.1 and 2.2 of the Deed of settlement reads as follows:

'2.1 Subject to what is agreed upon in the subparagraphs herein Defendant shall have care and control of the two minor children, namely:

2.1.1 K- L K, born 19 April 2000;

2.1.2 K K, born on 14 February 2003.

2.2 Plaintiff, as guardian of the two minor children, shall have reasonable access to the minor children'.

The application:

[4] On 05 April 2017 the applicant filed a Notice of Motion seeking the following relief which I will summarize for sake of brevity:

1. That the respondent is compelled to comply with the court order dated 16 February 2017 within 14 days from date of order.
2. That the respondent be compelled to comply with clause 2.1 of the settlement agreement signed by both parties on 16 February 2017 and which was incorporated in the final order of divorce.
3. That the respondent is ordered to take the minor child, K K into the applicant's custody in accordance with clause 2.1 of the settlement agreement incorporated into the court order dated 16 February 2017.
4. Should the respondent fail and/or refuse to comply with orders 1, 2 and 3 that the applicant be allowed to approach this court for the respondent to be found in contempt of the court order.

[5] In opposition to the notice of motion filed by the applicant, the respondent as conditional counter-application praying for relief in the following terms:

1. A variation of the custody order incorporated in court order dated 16 February 2017, to award custody of K K to respondent;
2. Variation of the maintenance order incorporated in the court order dated 16 February 2017, to order the respondent to pay maintenance to the applicant in respect of one minor child only, being K- LK.

[6] In support of both the applications founding and answering affidavits were filed. In further support of the counter application the respondent also filed an affidavit of the minor child, K K and an expert report of one Ms. Bailey, who had various sessions with

K K and the Respondent and to which sessions the applicant was invited to attend but declined to partake.

[7] The court heard the arguments of the parties on the main and counter application but hereafter indicated to the parties that the court as upper guardian of all minors required the hearing of *viva voce* evidence to determine what would be in the best interest of the minor child.

[8] After the matter was set down for the hearing of oral evidence the applicant filed a point *in limine* in this matter objecting to the court hearing oral evidence on the basis that the matter of custody is *res judicata* and that the issue cannot be revisited by this court by admitting new evidence and that said approach would violate the well-established principle of *res judicata*.

[9] The parties filed heads of arguments on this issue and this court is now called to make a ruling whether or not the issue of custody and control of the minor child is *res judicata* or not.

Brief background history of the matter:

[10] Before I proceed to discuss and consider the legal position in this matter it is necessary to briefly refer to the current position of the minor child, K K.

[11] From the answering/founding affidavit of the respondent it appears that during July 2016 both minor children came to stay with the respondent. The eldest K-LK stayed for approximately two weeks with the respondent and then moved back home. The youngest child, K K, who is also the child in question, remained with the respondent to date.

[12] At the time of the divorce K was thus residing with the respondent herein and the respondent had *de facto* custody and control of K K since July 2016.

[13] Once the final divorce order was granted K K did not/was not returned to the care of the applicant.

[14] According the affidavit deposed to by the respondent the basis on which he signed the settlement agreement was because of the verbal undertaking by the counsel for the applicant that K K would not be forced to move back home to the applicant and would continue living with him should she so chooses. He therefor denies that he is in contempt with the relevant court order.

[15] The submissions in this regard was confirmed in the confirmatory affidavit deposed to by the counsel for the respondent.

[16] No affidavit to the contrary was filed by the counsel for the applicant. This issue was addressed during argument on behalf of the respondent but there was no response to the averments made in this regard and thus remains unchallenged to date of this ruling.

Point of Clarity

[17] It is common cause between the parties that the applicant was granted custody of the minor child, K K. It is also common cause that the said minor child did not return to the applicant after the final order of divorce was granted on 16 February 2017.

[18] At first glance it might appear that the respondent is indeed in default of the settlement agreement and therefore the respondent should first purge his default before the court can hear him.

[19] On behalf of the applicant much was made of the fact that the respondent is in default of the court order dated 16 February 2017 and therefore the respondent must first purge his default before he can be heard by this court.

[20] In the matter of *Di Bona v Di Bona and Another*¹ Rose Innes J at 688 said:

“The rule, however, that a person in contempt of Court will not be heard is not an absolute rule. This appears clearly from the judgments of Romer LJ and Denning LJ in *Hadkinson's* case and in this regard those judgments have been adopted by our

¹ 1993 (2) SA p682 (C)

Courts in *Kotze's case supra*, *Clements case supra*, and in the decision in *Byliefeldt v Redpath* 1982 (1) SA 702 (A) . In *Hadkinson's case* Romer LJ mentioned a number of exceptions to which he said the consequence of the refusal to hear a person in contempt is undoubtedly subject.”

[21] What is important to note is that the court is not currently dealing with an application for the committal of the respondent for contempt of court and for purpose of the point *in limine* it is not necessary to determine if there is default on the part of the respondent. This is however an issue that the court must consider in the main application to determine whether the respondent should be compelled to return the minor child to the applicant as prayed for in the main application.

Submissions by the applicant

[22] The applicant submits that the issue of custody has become *res judicata* and can no longer be revisited by this court. The applicant further submits that the only way the issue of custody can be revisited is by way of variation order upon changed circumstances and until that occurs, the respondent must comply with the current court order that dealt with the settlement agreement as entered into between the parties.

[23] The applicant further submits that the settlement agreement entered into between the parties is a compromise which has the same effect of *res judicata* and a party to a compromise cannot on a whim go against such compromise, which would amount to contempt of court and the ancillary consequences thereto.

[24] Therefore, in conclusion, the applicant is of the view that the matter of custody has already been resolved with the court order dated 16 February 2017 and the matter can no longer be revisited by the introduction of new evidence, such the testimony of one of the minor children.

Submissions by the respondent

[25] The respondent submits that in relation to the settlement agreement, it was signed or agreed to with the understanding that the living arrangements with the minor

children would not change, i.e. that the minor child would not be forcibly removed from the respondent's home, otherwise referred to as the undertaking between the parties. In this regard, the respondent still holds the position that he could not be in contempt of court as the applicant has not proved beyond reasonable doubt that the respondent's non-compliance with the court order dated 16 February 2017 is willful and with *mala fides*.

[26] The respondent further submits that the settlement agreement incorporated into the court order dated 16 February 2017 is merely a recording of the settlement agreement and not necessarily a part and parcel of the court order itself. In this regard, the respondent submits that the settlement agreement is a contract on its own and if the applicant is to sue the respondent, the applicant should do it through the settlement agreement and not by way of court order, which in that regard would be the wrong remedy sought by the applicant. In this regard the court was referred to the matter of *Thuta v Thuta*.²

[27] In relation to the argument that the court is *res judicata* in respect of the custody issue, the respondent is of the view that due to the undertakings that living arrangements would not change upon finalization of the divorce, it is the applicant who is in actual breach of the settlement agreement and this does not mean that the parties can never enter into a dispute regarding the implementation and interpretation of that agreement. In this regard, it is for the court, as the upper guardian of minors, to have recourse to any source of information (e.g. the expert's testimony and the minor's testimony) in whatever nature to bring about an end to the custody dispute. The respondent submits that in this regard, a mechanical approach cannot be implemented on the altar of jurisdictional formalism.

Res judicata:

[28] *Res judicata* is a Latin term meaning "a thing adjudicated". This refers to an issue that has been definitely settled by judicial decision. This bars the same parties from

² 2008 (3) SA 494 (TKH)

litigating a second lawsuit on the same claim or any other claim arising from the same transaction that could have been but was not raised in the first suit.

[29] The essential elements for *res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court:³

- 1.) between the same parties,
- 2.) based on the same cause of action (*ex eadem petendi causa*), and
- 3.) with respect to the same subject-matter, or thing (*de eadem re*).

Requirements (2) and (3) are not immutable requirements of *res judicata*. The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.

[30] The argument advanced is that the settlement agreement as reached between the parties, being a compromise (transaction) has the effect of *res judicata*.

[31] The question that this court must consider is the impact of *res judicata* in Family law and if it may be perceived differently than in other areas of law.

[32] In the matter of *Di Bona v Di Bona and Another*⁴ on page 696 of the judgment Rose Innes J said the following:

“The refusal of Courts of a country where the children are to enforce custody and access orders made by a foreign Court is based not only upon the propositions aforementioned but also upon other legal grounds. Both South Africa and in England, a foreign order of Court may be enforced only if it is a final and conclusive judgment or order, that is to say, if the judgment is regarded by the Court which made it as *res iudicata*. A judgment which is variable by the Court which pronounced it is not a final order and will never be enforced by the Courts of any other country. (See Dicey and Morris (op cit at 428).) An order for the custody of, or access to, children is par excellence a variable and not a final order, and will not be enforced per se in England if granted in this country. (my underlining)”

³ Bafokeng Tribe v Impala Platinum Ltd and Others 1999 (3) SA 517 (B) at 566B - 567B

⁴ 1993 (2) SA p682 (C)

[33] This specific issue of *res judicata* was discussed in the matter *PL v YL*.⁵ During the course of the aforementioned judgment the court considered the judgment of *Thutha v Thutha*⁶ and the issues raised therein.

[34] The court in the matter of *PL v YL* discussed the judgment of *Thutha* in great detail and the findings in this regard need not be repeated. What is important for the purposes of the current ruling is the fact that the court specifically addressed the issue of whether the court would become *functus officio* in a divorce matter once settlement agreement has been made an order of court

[35] Van Zyl ADJP stated the following in this regard on page 53 of the judgment:

'[45] With regard to the second question raised, once the court has made a consent judgment it is *functus officio*⁷ and the matter becomes *res judicata*.⁸ This means *inter alia* that as a general rule the court has no authority to correct, alter or supplement its own order that has been accurately drawn up. Subject to what is said hereinunder, in divorce matters this is in practice effectively only limited to those terms of the order which deal with the proprietary rights of the parties and the payment of maintenance to one of the spouses where there is a non-variation clause. The reason for this is that the general rule is subject to a number of exceptions, in terms of the Divorce Act, the rules of court⁹ and at common law.¹⁰ The exceptions in the Divorce Act relate to

⁵ 2013 (6) SA 28(ECG)

⁶ 2008 (3) SA 494 (TkH)

⁷ See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F – G. See generally Erasmus Superior Court Practice at B1 – 306F to B1 – 306G.

⁸ *Atmore v Atmore* 1932 TPD 154 and *Keshavjee v Ismail* 1956 (4) SA 90 (T).

⁹ In terms of rule 42(1) of the Uniform Rules of the High Court of South Africa (Namibian equivalent Rule 103 of the Rules of the High Court of Namibia:

'(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.'

¹⁰ '(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant. . . .

(ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the sense and substance of the judgment or order. . . .

(iii) The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. . . .

matters which fall within the exclusive jurisdiction of the court and which that Act requires the court to determine and to grant an order as it may find to be justified. Consequently, orders dealing with the custody, guardianship, or access to and the maintenance of any of the minor children, do not assume the character of final judgments as they are always subject to variation in terms of section 8(1) of the Divorce Act.¹¹

[46] A further exception to the general rule that an order of court, once pronounced, is final and immutable, is created by section 8(1) of the Divorce Act. As stated, in the absence of non-variation clause in the settlement agreement, it permits the court to rescind, vary or suspend a maintenance order granted earlier.....

Further on page 55 at D: Save for the foregoing, the effect of the consent order is otherwise that it renders the issues between the parties in relation to their proprietary rights and the payment of maintenance to a former spouse, where the agreement includes a non-variation clause, *res judicata*, and thus effectively achieves a “**clean break**” as envisaged by the scheme of the Divorce Act.’

[36] From the aforementioned cases it is quite evident that the portion of the settlement agreement that deals with custody and access is not *res judicata*. When it comes to custody orders, these are subject to variation by the court which made it, when new conditions supervene which call for a variation. An agreement, made an order of court, which ordinarily does not create any rights but rather determines the amount of liability of the parents, is no bar to a subsequent variation,¹² provided there is good cause. The contemplations of the parties to the agreement, as embodied therein, should not be ignored, but due weight must be given to what the interests of the child demands.¹³

Conclusion

(iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order. . . .’ Per Trollop JA in *Firestone v Genticuro* supra n88 at 306H – 307G.

¹¹ Act 70 of 1979.

¹² *Williams v Carrick* 1938 T.P.D 147.

¹³ *Raichman’s Estate v Rubin* 1952 (1) SA 127 (C).

[37] This court takes the view that when deciding on custody matters, it is not the interests of the parents that must take precedent but those of the minor children. This is in line with the fact that during divorce proceedings, spouses go through many emotions and frustrations which, more often than not, affects children in various unpredictable ways.

[38] Two opposing applications serve before this court and it is necessary, in order to decide the issues, to have *viva voce* evidence of the person(s) who could assist the Court in regard to the welfare of the child. It would only be in this way that the question of the suitability of the homes, character of the parents and their ability to provide for and take care of the child could be properly assessed.

[39] I cannot state it any better than what was said by Fabricius AJ in the matter of *Kotze v Kotze*¹⁴ when he remarked as follows:

‘This Court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interests are. It is not bound by procedural strictures or by the limitations of the evidence presented, or contentions advanced or not advanced, by respective parties. 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), where, in my view, Van Zyl J correctly stated at 708J that:

“As upper guardian of all dependent and minor children this court has an inalienable right and authority to establish what is in the best interest of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach on this authority.”

[40] My ruling is therefor as follows:

1. Point *in limine* raised in respect of the legal issue of *res judicata* is dismissed.
2. Costs to stand over and be determined at the conclusion of the main application.

¹⁴ 2003 (3) SA p628 (T) at 630.

J S Prinsloo

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