

Flynotes: Matrimonial proceedings – Rule 103 (1) (a) rescission of an interim order wrong procedure in terms of rule 90 applications – Party to utilize rule 90 (7) for variation of interim orders where divorce matters are pending – Rule 90 does not contemplate ordinary applications.

Summary: This court was called upon to rescind an order it made in relation to the best interest of the child on 14 December 2017, after applicant launched an application in terms of 90 of the rules of court .At the insistence of the applicant, the matter was set down for 14 December.

On the day of the hearing, the applicant's legal practitioner was engaged elsewhere and could not attend the hearing. The applicant himself was in Zimbabwe at the time. Due to applicant's legal practitioner's inability to attend the hearing, applicant had instructed another legal practitioner to stand in for her and ask the court for a postponement. The postponement was refused and the instructed practitioner who stood in for applicant's legal practitioner had no further instructions.

The respondent's legal practitioner then requested this court to hear evidence from the respondent on issues pertaining to the best interests of the minor child. The respondent was granted leave to testify, and testified that the applicant had put their 12 year old daughter in a taxi from Okahandja to Windhoek after the said child continuously cried and wanted to return to her mother in Windhoek.

Upon arrival at home, daughter had informed her mother (the respondent) of her traumatic encounter as she was the only female in the taxi that the father (applicant) had placed her.

Held – That although the applicant received no *audi* due to its legal practitioner's absence from court, the court could exercise its inherent common-law jurisdiction to act in appropriate circumstances in the interests of minor children to make an order.

Held further that in order to invoke that common-law inherent jurisdiction, the applicant (respondent *in casu*) must establish (a) that considerations of urgency justify the intervention; and (b) that the intervention is necessary to protect the best interests of the minor child.

Held further that – the applicant in this matter ought to have followed this procedure and ought to have founded his case for variation of the order, having regard to the considerations ordinarily operative in proceedings in terms of the Rule.

ORDER

1. Application to rescind paragraph 3 and 5 of court order dated 14 December 2017 is refused with cost, limited to Rule 32(11).
2. The matter is postponed to 18 May 2018 at 8:30 for Status Hearing (Reason: To set date of trial)

RULING

Prinsloo J:

INTRODUCTION:

[1] This is an application brought in terms of rule 103(1)(a) and (2) in terms of the Rules of Court to rescind a court order dated 14 December 2017, and more specifically paragraphs 3 and 5 of the order which related to the custody and maintenance of three (3) minor children.

[2] The two paragraphs of the court order that the applicant takes issue with reads as follows:

'3. Interim custody of the (3) minor children of the parties, pending the finalization of the divorce, is hereby granted to the Respondent subject to the Applicant's rights of reasonable access as per Annexure "A" provided the Applicant's access to the minor children during the week does not interfere with the minor children's school activities;

5. The applicant shall pay an amount of N\$ 4000-00 per month per child in respect of the minor children's maintenance to the Respondent on or before the 7th of each month.'

BACKGROUND:

[3] On 01 December 2017 the applicant launched an application in terms of rule 90 in terms of which he sought interim custody of the parties' three (3) minor children. The matter was set down for hearing on 14 December 2017 on the insistence of the applicant's legal practitioner.

[4] On the morning of the hearing, the applicant's legal practitioner sent another legal practitioner to apply for a postponement as neither the applicant nor his legal practitioner was at court. The court was made to understand that the applicant was in Zimbabwe and his legal practitioner was engaged elsewhere.

[5] As the matter was set down on the insistence of the applicant's legal practitioner, who was absent, and no proper application for postponement was served before court, the application for the postponement was refused. The legal practitioner standing in on behalf applicant had no further instructions to proceed with the matter and requested to be excused from court.

[6] The court was hereafter requested by the legal practitioner acting on behalf of the respondent to allow the respondent to testify about issues that relates directly to the

interest and well-being of the minor children and more specifically regarding an incident involving the couple's ten year old daughter that occurred the previous night.

[7] The court granted the respondent leave to testify during which evidence the respondent explained to the court that the preceding day, whilst the children were with her in Windhoek where she now live and work, the applicant phoned her and insisted on taking the children to Okahandja, without them having any clothes or food. Around 18:00 the applicant called the respondent informing her that their ten year old daughter was crying continuously and wanted to return to her mother in Windhoek and told the respondent to drive and pick the child up. She informed the applicant that she will come and pick her up and will phone him as soon as she leaves for Okahandja. When she called to inform the applicant that she was leaving, the applicant told her that he placed the child in a taxi on route to Windhoek. The child had no phone with her and around 20:00, the respondent got a call from a strange number and it was the taxi driver informing her that he was told to drop the girl. She arranged to pick the child up at the gate of the Katutura State hospital's gate. Once at home the respondent was informed that their daughter was the only female passenger in the taxi and was very traumatized by the experience.

[8] She further stated that their middle child has special needs and need to attend speech therapy in Windhoek and the youngest child (17 months old) has a phobia of water and difficulty in eating and cries a lot. The youngest child therefor also had special needs that need to be attended to.

[9] The respondent further explained to the court that the passports of the children expired during November 2017 and the respondent needed to travel to Zimbabwe to renew their passports. She explained that the children are on her passport and on the basis of her work permit, the children can school in Namibia but in spite of the fact that the passports of the children expired, the applicant was not willing to assist in getting the travel documents in order. At the time the respondent had to obtain emergency travelling documents to be able to travel with the children.

[10] The respondent then ultimately prayed for interim custody in light of the urgent needs of the children. An interim order was granted regarding maintenance and custody of the three children and leave was granted to the respondent to travel with the children to Zimbabwe to renew their passports.

THE APPLICATION:

[11] It is exactly this procedure followed by court that the applicant takes issue with. The applicant applied for rescission of the interim order of this court in terms of rule 103(1)(a)¹ on the basis that the order was incorrectly sought or incorrectly granted in the absence of the applicant and that the applicant was not granted *audi*.

[12] It is argued on behalf of the applicant that there was no counter-application before court that enabled this court to grant such an order and that no notice was given to the applicant on evidence that will be lead. It was submitted that the court should have struck the matter in terms of rule 68 due to the absence of the applicant.

THE LAW APPLICABLE

[13] One should however not lose sight of the fact that this was an application in terms of rule 90. Rule 90 applies to matrimonial proceedings which are pending before court. It sets out its own specific procedure to be followed which is truncated and is a procedure, calculated to be expeditious and inexpensive, whereby defined issues may be resolved on an interim basis pending the final adjudication of the divorce.

¹ Rule 103. (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment - (a) erroneously sought or erroneously granted in the absence of any party affected thereby;

[14] The rule does not contemplate an ordinary application on notice of motion, but rather a streamlined and inexpensive procedure.² It is therefore not an application as set out under Part 8 of the Rules of Court.

[15] Rule 90(6) provides as follows:

‘(6) The managing judge may hear such evidence as he or she considers necessary and may dismiss the application or make such order as he or she thinks fit to ensure a just and expeditious decision.’

[16] There is therefore nothing in rule 90 preventing the court from hearing evidence. The circumstance in the matter *in casu* are unique in the sense that the applicant’s legal practitioner was not present at the hearing of the matter and issues were raised regarding the well-being and safety of the minor children and certain decisions had to be made by the court in this regard as upper guardian of all minors.

[17] In *McDonald v Moor* (A 244-2015) [2015] NAHCMD 235 (21 September 2015) Geier J state the following:

‘[35] There are however certain dicta, emanating from the South African courts, which are to the effect that a court, in determining, what is in the best interest of minor children, when determining the issue of custody, does so as their upper guardian – and - because of this role - have held that the court has extremely wide powers in establishing what is in a particular child’s best interest. In this regard the court is apparently not even bound by procedural strictures, or by the limitations of the evidence presented, or even by the contentions advanced by the parties. The court may have recourse to any source of information, of whatever nature, which may be able to assist in resolving custody disputes. See for instance *Terblanche v Terblanche*³ and also *AD v DW (Centre for Child Law as Amicus Curiae; Dept for Social Dev as Intervening Party)*⁴, a Constitutional Court decision, at [30], where the court, per Sachs J, approved in general a flexible approach to be followed, in determining what is in a particular child’s best

² Herbstein and van Winsen Fifth Edition, ‘The Civil Practice of the High Courts of South Africa’, at page 1543. *Leppan v Leppan* 1988(4) SA 455 (W) at 457 F – H.

³ 1992 (1) SA 501 (W) at 503 I to 504 D.

⁴ 2008 (3) SA 183 (CC) (2008 (4) BCLR 359; [2007] ZACC 27).

interest – and - that this path should not, mechanically ‘ ... *be sacrificed on the altar of jurisprudential formalism.*’

And further:

‘ [36] The full bench of the Cape Provisional Division, per Justices Cleaver, H J Erasmus and Yekiso put the test as follows in *J v J* ⁵:

“[20] As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child.⁶ In *Terblanche v Terblanche* ⁷ it was stated that when a court sits as upper guardian in a custody matter –

. . . it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.

In *P and Another v P and Another* ⁸ Hurt J stated that the court does not look at sets of circumstances in isolation:

“I am bound, in considering what is in the best interests of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.”

[18] I am of the opinion that although the applicant received no *audi* due to its legal practitioner’s absence from court, the court could exercise its inherent common-law jurisdiction to act in appropriate circumstances in the interests of minor children to make

⁵ 2008 (6) SA 30 (C).

⁶ *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA) para 32 at 200E; see also para 36 at 201B. See further below para [36].

⁷ 1992 (1) SA 501 (W) at 504C.

⁸ 2002 (6) SA 105 (N) at 110C-D.

an order, notwithstanding that there are no counter-application before court. In order to invoke that common-law inherent jurisdiction, the applicant (respondent *in casu*) must establish (a) that considerations of urgency justify the intervention; and (b) that the intervention is necessary to protect the best interests of the minor child.

[19] The occurrence of the night prior to the application before court where a 10 year old female child is loaded on a taxi with unknown men to be dropped off in Windhoek, leaving the child traumatized, calls for such an intervention. I am further of the opinion that the intervention was indeed necessary to protect the interest not only of couple's daughter but also the other children who are both in need of special treatment.

[20] I am thus not convinced that the application was neither erroneously sought nor erroneously granted.

Was the correct procedure followed in filing the application in casu?

[21] I am of the opinion that rule 103 is not the correct rule in terms of which the current application was brought before court. The order that was granted is interim in nature and Rule 90 provides, in the context of the specialised proceedings created by the rule, for a basis upon which a court's order made in terms of the rule may be varied. The form and procedure of the variation proceedings is the same as provided for in a Rule 43 application *ab initio*.

[22] The applicant in this matter ought to have followed this procedure and ought to have founded his case for variation of the order, having regard to the considerations ordinarily operative in proceedings in terms of the Rule.

[23] In *Chelsea Estates & Contractors CC v Speed-O-Rama* 1993(1) SA 198 (SE) Mullins J referring to the decision in *Leppan*,⁹ stated at 202 D:

⁹ 1988(4) SA 455 (W).

“Where there are specific provisions in the rules which provide for a particular form of application, such specific provisions must be followed, and not more general provisions.”

[24] This court must insist that the applicant utilizes the rules that are specifically provided to deal with the variation of interim orders where divorce matters are pending as set out in Rule 90(7).

[25] My order is therefore as follows:

1. Application to rescind paragraph 3 and 5 of court order dated 14 December 2017 is refused with cost, limited to Rule 32(11).
2. The matter is postponed to 18 May 2018 at 8:30 for Status Hearing (Reason: To set date of trial)

JS Prinsloo

Judge

APPEARANCES:

APPLICANT:

T MUHONGO

instructed by Ileni Gebhardt & Co Inc., Windhoek

RESPONDENTS:

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