REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: HC-MD-CIV-MOT-GEN-2022/00032

In the matter between:

GERHARD JOACHIM KUHN **APPLICANT**

and

STEPHNIE KUHN **RESPONDENT**

Neutral citation: *GK v SK (*HC-MD-CIV-MOT-GEN-2022/00032) [2021] NAHCMD 122 (18 March 2021)

Coram: TOMMASI J
Heard: **14 February 2022**
Order: **15 February 2022**
Reasons: **18 March 2022**

Flynote: Practice – Applications and Motion - Urgent application for interim custody pending finalisation of the divorce action – whether court has jurisdiction in light of the provisions of the Child Care and Protection Act 3 of 2015 and considering *MA and*

Others v AG 2021 (1) NR 292 (Supreme C) – facts of this matter distinguishable as court seized with divorce matter and has jurisdiction to hear matter – applicant ought to have brought proceedings under Rule 90 – Rule 90 makes specific provision for a speedy and inexpensive resolution of the issue of interim custody – bringing a substantive application an abuse of the court process – applicant failing to show circumstances rendering matter urgent and substantial redress available in the form of the final resolution of the issue during trial enrolled to be heard within a month

Summary: The applicant, the father of the minor child, applies for interim custody by way of an urgent substantive application indicating that an application to the Children's court procedure would be too slow and it may order that the minor child be put in a place of safety. The applicant further indicated that the procedure prescribed by Rule 90 would be too restrictive in that it does not allow for the filing of voluminous affidavits and annexures. The matter is enrolled for trial within a month from the date on which the matter was heard. The reason advanced is that the minor child is suffering weight loss and this may be a sign of a major depressive disorder. It is recommended that the minor child's case be attended to as soon as possible. The respondent maintains that the minor child enjoys good physical health, that his weight and height was well within the norm for his age and that there is no evidence of abuse or neglect.

Held that; the divorce matter is pending before this court and it this fact which distinguishes it from the facts in *MA and Others v AG 2021 (1) NR 292 (SC*). It is not an issue of jurisdiction but rather whether the applicant failed to use the procedure prescribed by the Rules and specifically designed for the speedy and inexpensive resolution of such disputes. Bringing an urgent application when there is an effective alternative remedy provided for by the Rules of court is an abuse of the court process.

Held further that; the applicant failed to prove that the circumstances of the minor child is such that it renders the matter urgent particularly in light of the fact that the applicant would be afforded substantial redress in the trial which is scheduled to be heard within a month from the date on which the application was heard.

ORDER

Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

1. The first point raised *in limine* i.e. that the court does not have jurisdiction and ought not to assume jurisdiction herein, is dismissed with costs.

2. The second point raised *in limine* i.e. that the procedure adopted is irregular in view of the fact that there is currently divorce proceedings pending and the applicant ought to have used the specialised procedure provided for in rule 90, is considered together with the third point raised *in limine*.

3. The third point raised *in limine* i.e. that the matter is not urgent is upheld and condonation for the non-compliance with the Rules of Court is refused for lack of urgency as envisaged in Rule 73(3) of the Rules. Paragraph 1 of the Notice of motion is dismissed with costs, such costs to include the cost of one instructed and one instructing counsel.

4. The application is struck from the roll.

JUDGMENT

TOMMASI J:

[1] The applicant herein brought an urgent application in which the applicant essentially seeks an order for the temporary custody of the minor child. The respondent

opposed the application and raised three points *in limine*. The court granted the above order and the matter was struck from the roll. The following are the reasons for the court's ruling.

[2] The applicant applied for a rule nisi to be issued seeking, *inter alia*, the following relief:

'(a) Temporary custody and control of the minor child to be awarded to the applicant.

(b) An order that respondent be restrained from removing the minor child under any circumstance from the custody and control of the applicant.

(c) An order that the applicant be allowed to fetch the child from the respondent at her place of residence or any other place where the child may be and in the event that the respondent fails to comply with this order that the court direct the deputy sheriff of Walvisbay or the Station Commander of the Namibia police to remove the minor child from wherever he may be.

(d) That the court amends previous orders issued granting the respondent custody of the minor child in the following matters HC-MD-CIV-MAT-2020/04528 and .HC-MD-CIV-MOT-2020/00420.'

[3] The applicant herein is married to the defendant and there is currently a divorce matter pending in the court under case no HC-MD-CIV-MAT-2020/04528: He states that he opted not bring the matter to court in terms of Rule 90 of the High Court Rules as it restricts the applicant as far as the volume of papers to be filed. The applicant further did not want to risk dealing with the matter in terms of the Child Care and Protection Act, 2015 (Act 3 of 2015) as his son may be placed in a place of safety if so advised by a social worker. He is further of the view that it would in any event take too long as welfare reports must be compiled and the matter may be postponed several times.

[4] He states that the minor child has lost 19% of his body mass the past 2 months. He weighed 21 kg during or about 3 December 2021 when he was with him in Gobabis. He weighed 17.8kg on 17 January 2022 and 17.1 kg on 22 January 2022. This was a huge concern for the applicant and this is the reason why he applies for interim custody of his son on an urgent basis.

[5] He further sketched the history of the matter. It is clear from a reading thereof that the relationship between the applicant and his wife has become extremely acrimonious particularly when it comes to the welfare of the minor son. The applicant already obtained two welfare reports which he attached in support of his application. One of these reports were updated after being provided by the applicant with videos, pictures and further information. It is the latter updated report which opines that the minor child shows signs of major depressive disorder and that the prolonged legal proceedings have now caused the minor child to become emotionally distressed and "assumably" depressive" It must be stated that this information was not explicitly set out in the founding affidavit.

[6] The applicant stated that he took his minor son with him to his parents' farm in the Gobabis district during October 2020. The respondent removed the minor son from his custody with the assistance of two social workers and eight police officers, all heavily armed and without a court order. The respondent only obtained an interim protection order during the week after she had taken their son from him in Gobabis. The applicant approached this court on 10 November 2020 by filing an urgent application for the respondent to restore custody of his son to him but was unsuccessful mainly because the minor son has been residing with the respondent for some time.

[7] He entered into an agreement with the respondent which provides for access to his son every weekday afternoon from 14H00 and 17H00 and he may also sleep over with him once every weekend. He however experiences various difficulties with the respondent failing to comply with the letter of the agreement and generally frustrating his access to the minor child. He also mentioned that she unilaterally decided to place him at a day care facility and made it clear that he was not allowed to take him from the school.

[8] On 29 November 2021 he made arrangements to take the minor son to Gobabis for the holidays and the respondent refused to allow him to go before 6 December 2021 without a valid reason. He therefore took him to the plot and returned him on 27

December 2021 to the respondent. He maintains that she does not take care of him and does not spend much time with the minor child during the day or before bedtime.

[9] The reasons he advances which tender matter is urgent are that the respondent: (a) placed the minor child in day care facility where he is not allowed to fetch him. (b) He fetches the minor child from the respondent's mother in law and she swears at him in the most crude language in the presence of the minor child; (c) Respondent and her mother on 21 January were hiding the minor child so that he was not able to have access; (d) On 26 January 2022 the minor child was crying heartbreakingly when he went to fetch him and informed him that the respondent informed him not to speak to his father and this unsettled him; and (e) the weight loss which occurred after the returned the minor child to the respondent.

[10] He urged the court to grant him interim custody as this would be in the best interest of the minor child. The child will live with him on his parents' plot and his mother will take care of him whilst he works in his father's factory. The child would eat a variety of healthy food and not only "slap chips" which the respondent was feeding him. He submitted that the minor child is 4½ years old and he does not have to attend school. He can play all day and not just sleep and watch television as is the case at the school he attends.

[11] The respondent raised several points *in limine*. The first point is that this court has no jurisdiction to hear this matter, alternatively should not assume jurisdiction for the following reasons:

'In essence, the applicant seeks relief that interim custody and control of the minor child be awarded to him pending the finalisation of the divorce action between the parties which is set down for trial from 14 – 18 March 2022.
The Children's Court was established in terms of the Child Care and Protection Act of 2015. The Act provides that every Magistrate's court is a Children's Court and has jurisdiction in any matter arising from the application of the Act, which includes issues relating to custody and interim

custody. The legislature has thus envisaged a specialised court (children's court) to, amongst others; deal with all matters relating to the custody, including interim custody, of minor children.

[12] Ms Petherbridge, counsel for the applicant simply argued that the High court is the upper guardian of all children and has jurisdiction to hear the matter. Mr Lochner, counsel for the respondent argued that this court, in terms of the existing authority, ought to be brought in the Children's Court. He referred this court to *MA and Others v AG 2021 (1) NR 292 (SC)* and *NK V SK 2015 JDR 2246 (Nm).*

[13] In *M A and Others v AG, supra* the appellant(s) aggrieved by the refusal of the High court to exercise jurisdiction in an application for guardianship as a court of first instance, which ordinarily resorted under the jurisdiction of the Children's Court established under the Child Care and Protection Act, 3 of 2015, appealed to the Supreme Court. In this case an application for guardianship was first brought in the Children's Court which, in a preliminary ruling, found that it lacked jurisdiction to determine the validity of the will and postponed the matter. The appellant(s) then launched an application in the High Court seeking an appointment as a guardian; and order for the custody and control of the minor child; and an order suspending the proceedings in the Children's Court.

On appeal the court held that:

> 'It was clear from the scheme of the Act that the legislature envisaged a specialist court with its specifically ordained powers and procedure and an environment appropriate to and tailored for the nature of enquiries to be held by that court. One such enquiry pertained to applications for custody and guardianship. The High Court could thus not be faulted in declining jurisdiction when the legislature specifically ordained a specialist court in the form of the Children's Court to hear and determine applications for guardianship as a court of first instance (with the High Court as the court of appeal)'

[14] In the *NK v SK, supra* the applicant applied for interim custody of a minor child pending the finalisation of an application in terms of the Children's Status Act 6 of 2006. The court in that case found that the fact that the High Court is the upper guardian of

minor children did not entitle it to usurp the statutory powers and functions of the Children's Court and refused to grant the applicant the relief sought.

[15] It is clear however that the facts in both these cases can be distinguished from the facts herein. This divorce matter is pending in this court under case no HC-MD-CIV-MAT-2020/04528 and this court is seized with it. This court has jurisdiction therefore to hear the matter. The issue is not one of jurisdiction but rather whether or not the applicant was entitled to approach the court by way of a substantive application on an urgent basis before the duty judge. The first point *in limine* in respect of jurisdiction was therefore dismissed.

[16] The second point *in limine* raised was that the procedure adopted in bringing the application is flawed and irregular for the following reasons:

> 'There are currently divorce proceedings pending between the parties under case no HC-MD-CIV-MAT-2020/04528 relating to the issues of custody and maintenance in respect of the minor child. The matter is already set down for trial.
> Any interlocutory application in matrimonial proceedings seeking inter alia an order for interim custody must be brought in accordance with the specialised procedure laid down by rule 90, which interlocutory application, must be heard and determined by the managing judge.
> These procedures also apply when such an interlocutory application is brought on an urgent basis.
> The applicant attempts to circumvent the specialised procedures created by rule 90 when he brought this application as a substantive urgent application seeking interim relief covered by rule 90.'

[17] Ms Petherbridge maintains that the procedure was not suited as it was restricting the applicant in terms of the volume of documents to be filed. Mr Lochner on the other hand argued that this is not a valid reason for bringing the application in this manner and the application is not that voluminous in any case. He also referred this court to *GR v ER, 2018 (2) NR 589 HC* where the court declined an application in terms of Rule 103 (1) (a) for the rescission of an interim custody order which was initially brought in terms

of Rule 90. The court held that the correct procedure would have been to utilise the rules that were specifically provided to deal with the variation of interim orders where divorce matters were pending as set out in rule 90(7).

[18] It is expedient to deal with the 2nd point together with the third point raised *in limine*. The third point *in limine* is that the application is not urgent for the following reasons:

> 'An applicant in an urgent application must set out explicitly the circumstances relied upon that render the matter urgent and the reasons why he could not be afforded substantial redress at a hearing in due course. The only circumstances is that the child has lost just over 3kg of weight in the last few months and that he will suffer more physical damage in the coming days. The respondent denies that he minor child suffers any physical harm and states that he is healthy. No medical report whatsoever is annexed to the applicant's founding papers in support of his concern of physical harm to the minor child. The respondent attached a medical certificate confirming the veracity of the claim that the minor child is healthy.
> The allegation that the recent actions necessitate his urgent application is a bare and vague conclusion without any substance.
> The applicant does not even attempt to explain to the court why he will not have substantial redress at a hearing in due course.
> The weight loss was established on 22 January 2022 and the founding affidavit was signed on 28 January 2022 and the application filed on 1 February 2022. The matter was removed from the roll due to a defective notice of motion. The amended notice of motion was filed on 8 February 2022 and served on 11 February 2022. Having regard to the timeline which clearly shows that this matter is not urgent.'

[19] The requirements for an applicant to approach the court on an urgent basis are clearly set out in Rule 73 (4) i.e. that the affidavit filed in support of an urgent application must set out explicitly the circumstances which he or she avers render the matter urgent; and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. There is a plethora of cases dealing with the issue of urgency. Mr Lochner referred this court to *Mweb Namibia (Pty) Ltd v*

Telecom Namibia Ltd and Others 2012 (1) NR 331 (HC), *Jansen v Beukes, 2021 JDR 0166 (Nm)* and others.

[20] The applicant's averments regarding urgency are already captured above. Much of the concerns raised appear in the Welfare Reports of Ms Catherine Du Toit who recommends that the applicant be granted full custody of the minor child. The first report is dated 20 October 2021 and a more recent and updated report was also attached. The issues raised are not new issues although some issues raised in the reports are disconcerting to say the least. The only "new" issue is the weight loss and other behavioral signs which leads Ms Du Toit to conclude that the minor child suffers from a major depressive disorder. The current mental state of the minor child can hardly be ascribed to the actions of the respondent alone given the fact that the minor child was in the custody of the applicant for a considerable period in December 2021. He further currently has access to the minor child in the afternoons which affords the applicant an opportunity to meet the nutritional needs of the minor child or ensure that he obtains medical attention. The limited access to the minor child may not be ideal in the circumstances but the situation does not appear to pose an immediate and urgent danger to the life and health of the minor child.

[21] The issues raised in the welfare report must be ventilated properly and this is best dealt with by way of oral evidence. The upcoming trial is in fact the best platform to finally put this matter to rest. A final decision would be in the best interest of the minor child. To urgently grant a temporary custody order where there is a real possibility that it may be reversed by the trial judge would only unsettle the minor child even more. The fact that the trial is scheduled only one month from date of the hearing of this matter offers the applicant substantial redress in due course.

[22] The procedure used by the applicant deliberately circumvented the procedure prescribed by the Rules. Not only would the applicant be afforded substantial redress at the trial but would also have been heard by the managing judge if an application was brought in terms of Rule 90 who is empowered to summarily deal with the application

and hear oral evidence, if necessary. No valid reasons were advanced why this procedure was not followed. The documents filed were not voluminous and therefore the restriction would not apply. The procedure in terms of Rule 20 is specifically designed to offer a litigant in a pending divorce action a speedy and inexpensive remedy. The practice of approaching the court on urgent basis before a duty judge when an effective alternative is available constitutes an abuse of the court process and should be discouraged.

[23] This applicant failed to persuade this court that the circumstances herein renders the matter urgent and it is clear that the applicant would be offered substantial redress at the trial which is scheduled to be heard within a month. It is for these reasons that the respondent's third point *in limine* was upheld and the matter struck from the roll for lack of urgency.

M A TOMMASI

Judge

APPEARANCES

PLAINTIFF:	M Petherbridge of Petherbridge Law Chambers Windhoek
DEFENDANT:	L Lochner Instructed by Delport Legal Practitioners Windhoek