REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No.: AR458/2010

In the matter between:

THOMAS DAVID JONES **APPELLANT**

and

AMANDA DE LANGE **RESPONDENT**

JUDGMENT

SISHI J

Introduction

[1] This is an appeal against a judgment of Gorven J, who found in favour of the respondent in a matter involving the enforcement of a court order.

[2] The respondent brought an urgent application in the court *a quo* wherein she sought an order in the following terms:

1. That the respondent return the minor child Christopher Reece Jones, to the applicant within three days of the granting of this order.

2. That failing his return, the sheriff is authorised and instructed to immediately remove the minor child Christopher Reece Jones from the respondent or any person in whose custody he may be and hand him over to the applicant.

3. That the respondent bears the costs of the application.

4. That service by the sheriff Kempton Park of the scanned commissioned application papers be deemed to be proper service".

[3] After considering the papers and the argument, the court *a quo* ordered the appellant to return the minor child Christopher Reece Jones to the respondent by 5pm on Saturday, 17 October 2009 and ordered the appellant to pay the costs of the application.

[4] The appellant was granted leave by the court *a quo* to appeal to this court. The respondent who appeared in person opposed the appeal.

Background

[5] The parties were married to each other and two children, namely, Christopher Reece and Tegan were born out of this marriage. The parties got divorced on 7 November 2003 in what was known then as the Witwatersrand Local Division. Custody of the two minor children, Christopher and Tegan was awarded to the respondent. The appellant was afforded reasonable access to the minor children. The appellant after the divorce, remained in Johannesburg and the respondent returned to live in Durban with the two children. This situation pertained at the time the respondent brought an urgent application against the appellant. Appellant re-married his present wife, Samantha Higgs, in July 2006 and remained living in Johannesburg. The respondent also remarried, namely to one Peter De Lange on 31 March 2007 and resided together with him in Pinetown, although at the time of the application, they were no longer living together.

[6] The appellant and his wife relocated to Switzerland on contract in March 2008. In October 2008, the appellant returned to South Africa for a visit. During his return, he had access to the children and took them to Cape Town for holiday. On holiday he spoke to them about his enjoyable life in Switzerland.

[7] He then thought that it might be a good opportunity for Christopher to spend some time with the appellant in Zurich Switzerland, especially as he had experienced so little quality time with his father since the age of four (4).

[8] The respondent approached the appellant and the parties discussed the possibility of Christopher spending some time with the appellant in Switzerland. The respondent considered this to be in the best interest of Christopher in that it would afford Christopher the opportunity of bonding more deeply with the appellant. She further thought that it would a wonderful opportunity for Christopher to experience Europe.

[9] After the parties had agreed on this temporary arrangement, Christopher went to Switzerland with the appellant and his family and they returned from Switzerland on 29 August 2009. The parties had agreed that the arrangement whereby Christopher would stay with the appellant in Switzerland would be reviewed after a period of one year.

[10] When she spoke to him after his return from Switzerland, it became apparent to her that although Christopher enjoyed Switzerland, he had not developed the bond with the appellant that he had hoped he would. Christopher expressed a desire to

come back home and live with her and his younger sister.

[11] She discussed the matter with the respondent, the parties did not reach agreement in this regard. The appellant suggested that Christopher stays with him until the end of the year. She insisted that Christopher should be returned to her at the end of the September Holiday. The appellant had placed Christopher in an English medium school in Gauteng for that year. The respondent preferred that Christopher should come home and complete his last term of grade 6 with his former peers at his previous school which was an Afrikaans medium school.

[12] The appellant took Christopher for the holidays from 23 September to 2 October 2009. According to the respondent, the agreement was that after the holidays, Christopher would be returned to him and would spend the rest of the year at his old school with her at home. When the appellant returned the children on 2 October 2009 from the holidays, the appellant refused to return Christopher to the respondent. The respondent took Christopher as he had been placed in a school in Gauteng. The appellant therefore took Christopher away with him against the Respondent's wish.

[13] The respondent thereafter brought an urgent application before the Court *a quo* for the return of Christopher and other ancillary relief.

Issues on Appeal

[14] The full grounds of appeal are broadly stated as follows in the Appellant's Heads of Argument which were amplified during argument:

14.1 The appellant was concerned that the matter proceeded to final judgment without him being given the opportunity to put his version before Court, by way of a considered affidavit responding, where appropriate, to the allegations made by the applicant in her founding affidavit.

14.2 On the facts as they stood, the Court *a quo* erred in dealing with the matter as one of immediate urgency and in finding that it would be in the best interest of the minor child Christopher that he immediately be returned to his mother.

14.3 Undue weight was attached to the anachronistic "rights of the custodian parent", and the modern concept of *"care"* now expressed in the Children's Act 38 of 2000, was not taken cognisance of.

14.4 The Court *a quo* erred in finding that it had jurisdiction to hear the matter.

[15] Before dealing with the grounds of appeal, the Court was informed that Christopher went for a holiday, and did not go back to his father. He is presently residing with his mother, the respondent. The factual position is that Christopher is presently with his mother. This appeal has now become academic. Counsel for the

appellant conceded this appeal is about the issue of costs.

It would be appropriate in this appeal to first deal with the two grounds of appeal, namely urgency and jurisdiction as they should have been raised first in the Court a quo.

Urgency of the application

[16] Mr Rowan argued that the matter was not one of extreme urgency or of such compelling urgency that it had to be disposed of there and then. The question of whether the application was urgent or not is a matter which should have been raised on behalf of the appellant in the Court *a quo* as a point *in limine*. This issue could have been argued in the Court *a quo* without filing any answering affidavit.

[17] When a matter is found not to be urgent, the Court is entitled to refuse to enrol it and to strike it from the Roll.

> "See: ***Commissioner , SARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 SCA at 299 G and 300 E/F"***

[18] There is no indication from the record that Mr Murray who appeared for the appellant in the Court a quo ever raised the issue of lack of urgency in this application. This issue is therefore being raised for the first time in this appeal.

[19] In paragraph 7.7 of the appellant's Heads of Argument, it submitted that the Rule 49.11 papers reveal that the appellant was advised that at that hearing issues relating to jurisdiction and urgency would be raised, and that if these were not

successful, he would then be given an opportunity to file an answering affidavit.

[20] I have already indicated in this judgment that no application to have this matter adjourned was made in the Court *a quo* and that the issue of urgency was never raised in the Court *a quo* as a point *in limine* or in any other manner.

[21] In making this submission, Mr Rowan lost sight of the fact that the Rule 49.11 Application papers were not before the Court *a quo* when the application was made, and therefore are not relevant for the purposes of determining this appeal.

[22] In any event, matters involving custody, care or primary residence of minor children are treated on an urgent basis. The Court *a quo* considered that the respondent was a custodian parent in the matter. It also considered the temporary arrangement between the parties that the child stay with the appellant for a period of 12 months, that the circumstances had changed, and that Christopher the minor child wanted to return to his mother.

[23] In my view, the submission that the Court *a quo* erred in dealing with the matter as one of immediate urgency and in finding that it would be in the best interest of the minor child, Christopher that he immediately be returned to his mother, has no substance. The Court *a quo* did not err in this regard.

Jurisdiction

[24] An objection to the jurisdiction of the Court should be taken *in limine* and if this is not done before *litis contestatio* has been reached, that party will be assumed to have submitted to the court's jurisdiction ***"See: Commercial Union Assurance Co. Ltd v Waymark N.O. 1995 (2) SA 73 (TKGD) at 80 D-E"***

The Court either has jurisdiction or it does not have jurisdiction to deal with the matter.

[25] If the Court finds that it has no jurisdiction to deal with the matter, that is the end of the matter. If the Court finds otherwise, it proceeds with the matter. That is an important reason why this issue of jurisdiction should be raised at the beginning of the proceedings.

[26] It was contended in the appellant's heads of argument before us that the Court *a quo* did not have jurisdiction to hear the matter. In the course of argument counsel for the appellant indicated that he was not able to pursue this point with any degree of vigour, but he did not abandon it.

[27] The case made by the respondent in the Court *a quo* was that she and Christopher were ordinarily resident within the area of jurisdiction of this Court, and that his custody was awarded to her by the Witwatersrand Local Division when she and the appellant were divorced. Counsel for the appellant submitted that the concept of "custody" of a child has been overtaken by the provisions of the Children's Act, No. 38 of 2005. It is not entirely clear what this submission means. The Divorce Act No. 70 of 1979 still refers to the custody of children. Section 1(2) of the Children's Act provides that in addition to the meaning assigned to the terms "custody" and

"access" in any law, and the common law, those terms must be construed to also mean "care and "contact" as defined in the Children's Act.

[28] Section 19(1) (a) of the Supreme Court Act 59 of 1959 provides that a Provincial or Local Division shall have jurisdiction over all persons residing or being in and in relation to al causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognisance.

[29] ***Van Tonder v Van Tonder 2000 (1) SA 529 OPD*** was a case in which a child had been unilaterally removed by the non-custodian parent from the custody of the custodian parent. In dealing with the question of jurisdiction the Court said at 533 J and further that the applicant's complaint concerned the breach of her prima facie right to have the child in her custody. At 534 I and further the Court pointed out that an order for the return of the child could be enforced even though the child was then in the territorial jurisdiction of another division of the High Court. Effectively the child was removed from the custody of the mother within the area of the Court's jurisdiction and the Court held that it was not necessary for her to go to the Court to whose jurisdiction the child had been taken.

[30] In the circumstances, I am satisfied that the Court *a quo* had jurisdiction to entertain the application.

Whether appellant was denied the opportunity to place his case before Court.

[31] Mr Rowan argued that the Court *a quo* acted with undue haste and consequently erred in making the order it did. The appellant should have been given an opportunity to put his case before Court. The Court asked Mr Rowan more than once if Mr Murray who represented the appellant in the Court *a quo* had asked for an adjournment in order to file answering affidavits to respond to the respondent's allegation as set out in her founding affidavit. The Court even referred Mr Rowan to page 1 of the transcript where at the commencement of the proceedings in the Court *a quo*, the Judge asked the following question:

> *"Are you here to resist the order, or are you here to ask for an adjournment or what is the position?"*

[32] This question was directed to Mr Murray who represented appellant in the Court *a quo.* Mr Rowan submitted that Mr Murray in the Court *a quo* did not say he wanted an adjournment in so many words, he submitted that Mr Murray got drawn at the outset into an argument which was a full argument but he kept on saying that the problem was that the appellant's version was not before Court.

[33] What is clear from the reading of the record is that at no stage did Mr Murray who appeared on behalf of appellant in the Court *a quo* applied for an adjournment so that he could file an affidavit in response to the allegations made by respondent in the founding affidavit. He actually chose to argue the matter as it stood.

[34] Mr Rowan argued that the Court should have, of its own accord granted an adjournment of this matter as the Court is the upper guardian of all minor children. It

was therefore improper for the Court *a quo* to make a snap decision.

[35] Mr Murray in the Court *a quo* cannot now complain that he was not given an opportunity to file an affidavit when it is clear from the record that he was obviously content to argue the matter on what was before Court then. He never asked for an adjournment to be given an opportunity to file affidavits. He can therefore not complain that he was denied an opportunity to file answering affidavits especially when the Court specifically asked him, more than once if he wanted an adjournment or not.

In the circumstances, I am satisfied that this ground of appeal has no substance and falls to be rejected.

Whether the Court a quo attached undue weight to the rights of the Custodian Parent

[36] In the Court *a quo* the matter was treated on the basis that both parents are good parents. The boy was not in danger either emotionally or physically. The respondent, who had a valid custody order approached appellant to have the boy returned to her, appellant refused. She then approached the Court to have the Court order enforced.

[37] Counsel for the appellant submitted that the modern concept of *"care"* now expressed in the children's Act 38 of 2005 was not taken cognisance of.

[38] Counsel for the appellant submitted that there should have been an allowance

for the provisions of the new Children's Act to be applied namely, the child to be a participant in the proceedings to let his feelings be known, and professional intervention sought so that one could get an independent evaluation rather than the subjective views of the mother.

[39] Counsel for the appellant has referred to a number of the provisions of the Children's Act in the Heads of Argument which includes Section 12(2), Section 20(b), Section 18(2), Section 18(4), Section 31 and Section 9. In my view, in presenting the argument, Counsel for the appellant lost sight of the fact that the Court *a quo* was not dealing with a custody enquiry. There was already a custody order in existence made in 2003 giving the custody of the minor child to the respondent. That order had not been altered or varied by any competent Court. The provisions of the Children's Act of 2005 do not affect the custody arrangements made in that court order.

[40] Section 314 of the Transitional Provisions of the 2005 Children's Act provides as follows:

> *"Anything done in terms of a law repealed, "in terms of Section 313 which can be done in terms of a provision of this Act, must be regarded as having been done in terms of that provision of this Act"*

[41] In any event this whole argument relating to the Children's Act of 2005, was not placed before the Court *a quo*, it is brought in for the first time during this appeal.

[42] In the circumstances, I am satisfied that the argument that the Court *a quo* attached undue weight to the rights of a custodian parent has no merit and falls to be

rejected.

Costs

[43] On the issue of costs, Counsel for the appellant submitted that the proper way to approach these cases, and that that has been the case over years where parents are acting bona fide in the best interest of their children, parties are normally ordered to pay their own costs. The Court a quo should never have granted costs against the appellant.

[44] In the light of the findings already made earlier on in this judgment, namely that all the grounds of appeal referred to above have no substance, there is, in my view, no reason why this Court should interfere with the costs order made by the Court *a quo*. I am satisfied that the Court a quo did not commit any misdirection which entitles this Court to interfere with its judgment including the costs order made. There is no reason why the costs of this appeal should not follow the result.

[45] In the result, the appeal should fail.

[46] I make the following order:

a) The appeal is dismissed with costs.

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SISHI J

_____
D PILLAY J **I agree**

_____
PLOOS VAN AMSTEL J **I agree**

Representatives

Date of Hearing	:	23 February 2011
Date of judgment	:	19 May 2011
Appellant's Counsel	:	Advocate P.A.C. Rowan SC
Appellant's Attorneys	:	Kohler Inc. 11th Floor Metlife Building 391 Smith Street DURBAN Ref: Martin Kohler/01/L2064 Tel: 031 306 4616
Respondent's Counsel	:	In person
Respondents Attorneys	:	BERGMANS ATTORNEYS Attorneys for the Respondent Mooney Ford Attorneys C/O Venn Nemeth & Hart Inc. 281 Pietermaritzburg Street PIETERMARITZBURG Telephone : 033 355 3106 Ref: PRJ Dewes/Brenda/32m170510