IN THE HIGH COURT OF ESWATINI

JUDGMENT

Civil Case No. 461/2018 (a)

In the matter between

PER SONNE NODDEBOE **APLICANT**

And

AMANDA JANE NODDEBOE (nee PARSONS) **RESPONDENT**

Neutral citation: *Per Sonne Noddeboe v Amanda Jane Noddeboe (nee Parsons)* (461/2018) [2018] SZHC 135 (June 2018)

Coram: **MAMBA J**

Heard and decided: **15 June 2018**

Reasons handed down: **25 June 2018**

[1] Civil law – Jurisdiction of the Court – Application for interim custody order for children born of the marriage pending Divorce Action. Children and mother (Respondent) living beyond the jurisdiction of this Court. Applicant husband claiming that he is domiciled within the jurisdiction of the Court and thus the Court has jurisdiction to award interim custody to him by virtue of such domicile.

[2] Civil Law – Jurisdiction of Court – Danish businessman resident in eSwatini – has house in both Denmark and eSwatini – Children holding Danish Citizenship and resident in Denmark. Mother resident in UK and in possession of children's passports. Mother alleging that only Court in Denmark, where children reside, has jurisdiction to hear issue of custody and access.

[3] Civil Law – Custody of minor children – primary consideration is what is in the best interests of the children – Court is the upper Guardian of such children – proper Court is that within whose jurisdiction the children are at the time of the hearing and making of the custody order. Principle of effectiveness means that the Court must have competency to monitor, supervise and give effect to its own judgment.

[4] Civil Law – enforcement of foreign orders and judgments. Court generally not bound to enforce an interim or variable Court Order relating to custody of or access to children made by a foreign Court.

[1] The Applicant is an adult businessman residing at Ngonini Estates, Pigg's Peak in the region of Hhohho. Although this is disputed by the Respondent, the Applicant states that he is also domiciled in the Kingdom of Eswatini.

[2] The Respondent is Amanda Jane Noddeboe, a major female whose current address or whereabouts is unknown to the Applicant. She currently stays in London, in the United Kingdom. In her Opposing Affidavit, the Respondent states that she resides in London, UK, C/O Vardags, 10 Old Bailey, London, EC4M 7NG, UK. She has, however, refused to divulge her residential address '--- because the Applicant has in the past been violent and abusive towards me and I fear for my personal safety if my address were known to him'.

[3] It is common cause that the parties got married to each other in terms of Civil Rites in 1993. The marriage was contracted in Stutterheim in the Republic of South Africa and is out of community of property and is subject to an ante-nuptial contract (ANC). The marriage still subsists. There are 3 minor children born of the marriage and they are at the centre of this application. The children are at a boarding school in Denmark and have been attending school there since 2016. It is the Applicant's further desire that they should do their university education in that country as well.

[4] The Applicant is a national or citizen of Denmark and has a house in the countryside in that country.

[5] The Applicant avers that the Respondent deserted him on 23 March 2018 by leaving the matrimonial home at Ngonini to stay in the UK. He avers that the Respondent persists in the said desertion which is malicious and he has thus filed an action before this court for a decree of divorce, under case number 461/2018. This court; it is common cause granted the Applicant leave to sue by edictal citation. This was on 27 March 2018 and the indendit was served on the Respondent in Denmark on 15 April 2018. On the same date, a Petition for Divorce by the Respondent was issued out of the Central Family Court in London and was later served on the Applicant in Denmark.

[6] The Applicant denies or disputes the allegation that the court in the UK has jurisdiction to hear the said Divorce Petition. He argues that in terms of the Applicable law, it is this court that has the requisite jurisdiction by virtue of him domiciled in this country. This issue can only be determined by the relevant court in London and not this court. It is further not the business of this court to second-guess that decision.

[7] Pending the said divorce action filed before this court by the Applicant, he now applies *inter alia*, for the following relief:

> '3. Granting the Applicant interim custody of the minor children of the parties ---.
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> 4. Ordering that the Respondent shall cease and desist from withholding and/ or retaining the passports of the said minor children and that the Respondent shall deliver same to the said minor children forthwith.
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> 5. Ordering that said minor children, who are schooling in Denmark, for their upcoming school holidays shall be with the Respondent for the period 15th June 2018 to 23rd June 2018 and with the Applicant for the period 23rd June 2018 the 14th August 2018, the Respondent to make said minor

children and their passports available on the 23rd June 2018 in Denmark.

5.1 Ordering that removal of said minor children from Denmark by the Respondent for the purposes of said holidays, shall be restricted to taking them to the United Kingdom.

5.2 Ordering that the Respondent furnishes the Applicant with the address/s the children will be at during their period with the Respondent, indicating the nature of the accommodation.

5.3 Ordering that the Respondent shall not expose the children to male friend/s of the Respondent.

6. Ordering, subsequent to the holidays referred to in 5 above, that the Respondent shall have reasonable access to the children in Denmark but that the Respondent shall not remove the children from Denmark without the Applicant's prior written consent, said consent which shall not unreasonably be withheld'.

[8] It is common cause that the children's passports are in the possession and custody of the Respondent; probably with her in the UK. The children are in Denmark and the Applicant wants to be granted interim custody of

these children pending the divorce action that he has filed before this court.

[9] In support of his application, the Applicant states that:

> '22. I am advised and verily believe that [this] court is the upper Guardian of all minor children within its jurisdiction and that the interests of children are paramount for purposes of custody. It is respectfully submitted that it is in the best interests of the children that interim custody be awarded to me.
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> 22.3 The children's existing environment is a stable and long standing one, home being the farm in Eswatini and school boarding school in Denmark, which would require the status *quo* to be maintained.
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> 26. The children are at school in Denmark, where their elder half-brother works for a bank in Copenhagen.
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> 38. The Respondent is unlawfully withholding the children's passports after she had appropriated them unto herself. Despite me taking issue therewith through an attorney's

letter, the Respondent is persisting with this retention and is setting conditions for releasing the children's passports.

39. Not only is this retention unlawful, but there is currently nothing preventing the Respondent from again spiriting the children away from Denmark to an undisclosed location/s'

[10] The Applicant states that this court has jurisdiction to hear this application and grant the relief sought because the substantive prayer sought herein is an interim order for the custody of the children pending the divorce action, which has been filed in this court. He says he is domiciled within the jurisdiction of this court and because of that fact alone, this court has jurisdiction to hear and determine his divorce action and the resultant interim relief therein. He argues or avers that minor children follow the domicile of their father and consequently, the children in question herein are domiciled in this country – where he is domiciled. And, finally, I think he avers that, it is only this court that has jurisdiction to entertain or hear his divorce action; simply because he, as the husband, was domiciled in Eswatini when the divorce action was instituted by him.

[11] In general terms, on the legal issue of jurisdiction and domicile, the Applicant's averments would appear to be a correct statement of our Roman Dutch Common Law. See *Mamba v Mamba* (1451/09) [2011]

SZHC 43 (13 January 2011) and also the Authorities cited by Counsel for the Applicant in her Heads of Argument: viz, *HR Hahlo, The South African Law of Husband & Wife*, (12th ed. 1963 at pages 519-525 *& Van Blerk v Van Blerk* 1960 (3) SA 494 (W) at 495).

[12] The above statement of the law is rather old, archaic, lacking in legal reasoning, logic and fairness. It is arbitrary and discriminatory of married women. There is, in my judgment, neither rhyme nor reason to uphold this rule of our common law in this day and age. This rule of our common law is plainly inconsistent with the constitutional right of equality before the law, freedom against discrimination based on sex or gender and the right to one's dignity. The rule basically relegates a married woman to a mere vassal, an appendage to a man and an immature or irrelevant minor or individual who has to follow her husband unquestioningly. That cannot be legally sound or proper or just. That divorce is a matter or issue of status is of no moment. Women have status and dignity too. Take for instance the case of a husband who leaves his wife in Utopia and takes up domicile in Ruritania. There he remarries and virtually breaks all his Civil Rites marriage obligations to his wife in Utopia. The wife wants to sue him for divorce. She has to file the divorce action in Ruritania where her husband is domiciled, but she is impecunious and cannot afford to go or institute her divorce action there.

She is virtually without a remedy in her own country of Utopia, because of her husband's new domicile. That cannot be just or even logical.

[13] In fairness to Counsel for the Applicant she did not argue that this rule is fair or not discriminatory against women. Her argument was that it remains the law in this jurisdiction until and unless declared or decreed otherwise by a competent court and this was not such a court.

[14] One notes that this rule of the Common Law was to some extent changed by statute in Namibia. *Section 1 of the Matrimonial Causes Jurisdiction Act 22 of 1979* provides that:

> '(1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is –
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> (a) Domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
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> (b) Ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in Namibia for a period of not less than one year immediately prior to that date'.

This section is similarly worded to *Section 2 (1) of the Divorce Act 70 of 1979 of South Africa.* (See *M v M* (A216/2014) [2015] ZAFSHC 36 (5 March 2015). Sub Section 1 (4) of the same Act, however, stipulates that 'The provisions of this Act shall not

derogate from the jurisdiction which a court has in terms of any other law or the common law'.

[15] For the avoidance of doubt, it must be pointed out that my views as stated above on the constitutionality or otherwise of the general rule concerning the domicile of the husband in matters of divorce and ancillary relief thereto, are merely obiter in this case. This is the case because this case does not turn on that issue. I pointed this out to both Counsel during argument of this application. Both were agreed on this.

[16] Both the children and the Respondent are outside the jurisdiction of this court. They were outwith such jurisdiction at the commencement of this application and the divorce action filed by the Applicant.

[17] The Applicant complains in the excerpts quoted above, that the Respondent is unilaterally taking decisions on the general welfare of the children, to his prejudice and to the prejudice of the said children. The question that immediately announces itself and which this court must answer is this: Would this court be in a position to monitor or enforce its interim order for custody under such circumstances – where both children and the Respondent are outside the court's jurisdiction? Or put otherwise, would such an order be effective? If it would not be capable

of being monitored or made effective then it would be pointless to issue it.

[18] In her Answering or Opposing Affidavit the Respondent states as follows:

> '11. I am advised that it is a trite legal principle that the court will refuse to make orders that they cannot give effect to. Custodial rights impose continuous and ongoing duties and responsibilities. Were the court to make an order granting interim custody to the applicant it would not be in a position to enforce, monitor and implement such order, because the children reside outside of the jurisdiction of the court. Furthermore, the court as the upper guardian of minor children, would not be in a position to supervise and regulate the applicant's claimed custodial rights and its concomitant duties and responsibilities.
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> 12. The court in Denmark, being the country where the children have lived for the last two years and wherein the children will reside for the foreseeable future (and possibly permanently), is properly and appropriately vested with

jurisdiction to deal with matters relating to their care and welfare and matters pertaining to custody and access.

13. I emphasise in this regard that it is solely the applicant's wish and choice that the minor children are residing in Denmark for the purpose of their high school and thereafter tertiary education and will continue to be in this country for the foreseeable future'.

I agree with these remarks or submissions made by the Respondent. These submissions are in accordance with our law and are applicable in this case.

[19] Jurisdiction properly-so-called in this context means the authority or power of the court to enforce its orders. It stands to reason, I think, that where a party against whom a Court Order is made is beyond the jurisdiction of the court, enforcement or compliance with that order cannot be sufficiently or adequately guaranteed. In *Schimler v Executrix in Estates of Rising* 1904 TH 108 at 111 the court stated as follows:

'The jurisdiction of every country is territorial in its extent and character, or it is derived from the sovereign power, which is necessarily limited by the boundaries of the state over which it

> holds sway. Within those boundaries the sovereign power is supreme, and all persons, whether citizens, inhabitants, or casual visitors, who are personally present within those boundaries and so long as they are so present, and all property (whether movable or immovable) for the time being within those boundaries, are subject to it and to the laws which it has enacted or recognised. All such persons and property therefore subject to the jurisdiction of the courts of the country which the laws of the country have established so far as such laws give them the jurisdiction. Over persons not present within the country, jurisdiction can only be exercised to the extent of any property they may possess in the country; and over persons who are not in the country and have not property in the country, no jurisdiction at all can be exercised'.

See also *Barclays National Bank LTD v Thompson* 1985 (3) SA 778 at 796.

[20] It is trite law that where no legal effect can be given to an order of a court, that court has virtually no jurisdiction over the matter. In *Cerenion v Snyman* 1961 (4) SA 294 at 297-298 Marias J had this to say on the issue:

> 'It has been laid down in a number of cases, decided before the 1953 Act, that the order for the handing over of the child to the

parent to whom custody has been awarded, can only be made by the court having jurisdiction in respect of the place where the child happens to be at the time. The reason is that, though a court may decide that, as between the two parents, one of them is entitled to the custody of the minor child and make a declaratory order to that effect, the only proper forum for deciding whether or not the child should be entrusted to either of its parents and, if so, subject to what safeguards as to the child's welfare, is the court which exercises the upper guardianship over the child i.e. the court in whose jurisdiction the child is. The upper guardian has to determine the child's position, irrespective of the rights of the parents *inter se*, in accordance with what appears to be in the best interests of the child'.

[21] In *Di Bona v Di Bona and Another 1993 SA 682 at 695D- 696D* the court stated as follows:

'In regard to the relief to be claimed in the proposed action that first be ordered to return the children to South Africa and to afford access to them, the position is quite clear. In our law, and English law would appear to be the same, the only Court that has jurisdiction to order the handing over of children and to authorise,

if need be, the Sheriff to take the children from one parent and to hand them over to another, is the Court of the place where the children are to be found and where they are living and under whose judicial guardianship the children are at the time of the making of the order. In South Africa the Supreme Court is not bound by a foreign order of Court relating to the custody of or access to children who are in South Africa and who are not, and were not, in a foreign country, the Court of which has purported to make such order. The function and duty of the South African Court, where a dispute arises as to the custody of or access to the children, is to establish what is in the best interests of the children, whatever another Court may have found in this regard and to make its own order accordingly. It has to form an independent judgment on the evidence before it and in the course of doing so it may give such weight to a foreign custody or access order or an order relating to the well-being of the children as the circumstances may justify, but it is certainly not bound by such foreign custody nor will it grant process in aid of enforcement of such an order without the enquiry which I have mentioned. (See *Martens v Martens* 1991 (4) SA 287 (T) at 292; *Matthews v Matthews* 1983 (4) SA 136 (E); *Desai v Desai* 1987 (4) 178 (T); *Abrahams v Abrahams* 1981 (3) SA 593 (B); *Zorbas v Zorbas* 1987 (3) SA 436 (W); and *Riddle v Riddle*

1956 (2) SA 739 (C) at 744-5, which decision was cited with approval and applied in *Kats v Kats* (*supra* at 379D-G)

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 in 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. This Court accordingly has no jurisdiction to make an effective order in respect of children who are in England and no longer within South Africa. In any event, this Court clearly has no jurisdiction to order the handing over of a child which is in another jurisdiction where the writ of Court does not run. (See *Ceronio v Snyman* 1961 (4) SA 294 (W) at 297H-298B, applying *Coomb v Coomb* 1908 TH 241; *Anderson v Van Vuuren* 1930 TPD 118, *Martine v Large* 1952 (4) SA 31 (W).)

This Court accordingly has no jurisdiction to entertain the proposed action insofar as it relates to an order for the return of the children from England to South Africa and for the handing over of the children to applicant pursuant to whatever rights of access to the children he may have. He must have recourse to the appropriate English Court, which is the upper guardian of these two children, to seek his remedies in this regard'.

This judgment was followed in *Corr v Corr (2822/12) [2013] ZAWCHC 2014 (2) SA 138.*

[22] It is plain to me that the custody order which is the main order sought by the Applicant herein is not a final order. It is interim and therefore *not res judicata*. For that reason, it cannot be enforced or made effective by a foreign court. In *Corr* (*Supra*) Savage AJ stated:

'[20] The crucial time for determining the jurisdiction of a court to entertain an action is at the commencement of the action. (*Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries* 1969 (2) SA 295 (A) at 310C).

[21] The Court has the power to adjudicate upon, determine and dispose of a matter within its territory with due regard to the

nature of the proceedings or the nature of the relief claimed or, in some cases both, and whether the Court is able to give an effective judgment *(Gallo Africa v Sting Music* 2010 (6) SA 329 (A) at 3311, 332A-B and 3333D-E). The Court's *ratio jurisdictionis* may be founded on domicile, contract, delict or *rationereisitae* (*VenetaMineraria Spra v Carolina Collieries* (Pty) Ltd 1987 (4) SA 883 (A) at 893E-894B). Although effectiveness lies at the root of jurisdiction it is not necessarily the criteria for its existence *(EwingMcDonald & Co Ltd v M & M Products* 1991 (1) SA 252 (A) at 259D-260E).

[22] Jurisdiction once established –

'…continues to exist to the end of the action even though the ground upon which the jurisdiction was established ceases to exist … If an action is instituted against a defendant on the ground of residence and he changes his residence during the course of the trial the Court similarly is bound to give judgment which may not be effective (see Becker v Foster 1913 CPD 962). This principle is based on practical considerations because the due administration of justice might be seriously hampered if the rule were otherwise.

This may well be a case where logic should give way to expediency.' (*Thermo Radiant Oven Sales Ltd supra* at 310).

[23] Where a court had jurisdiction at the commencement of proceedings, a successful party is entitled to an order to the extent to which it can be made effective, even though it may not be possible to do so immediately. *Cats v Cats* 1959 (4) SA 375 (C) per Rosenow J at 381A-D.

> 'It seems to me also that, in so far as such an outcome can be prevented, an unsuccessful party should not be allowed to frustrate proceedings, in which he himself participated, by the simple process of removing himself from the effective jurisdiction of the Court'.

[23 In any event, and, apart from the above want of jurisdiction, I have very grave doubts about the Applicant's alleged domicile in Swaziland. His residence in Swaziland appears established or proven. Domicile is one's permanent home or that place which one considers to be his permanent or final home. The Applicant is a National of Denmark. He has a house there. His children have Danish Citizenship and attend school in that

country. According to the Respondent, the Applicant has refused to apply for eSwatini Citizenship. His only tangible connection with eSwatini is his house and business interests at Ngonini. Again, these remarks are obiter and I would rather reserve such a ruling or determination for the Court that would deal with the divorce action.

[24] For the facts herein stated; namely that this court cannot monitor, supervise or manage or execute and make effective the order sought herein, the application was refused on account of the want of jurisdiction. Each party was ordered to bear his or her own costs of the application.

FOR THE APPLICANT: **ADV. M. VAN DER WALT**
FOR THE RESPONDENT: **MR. DLAMINI**