



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 81868/18

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED |

16/11/2022
DATE


SIGNATURE

KEABETSWE NOGE

Applicant

**FOR THE APPOINTMENT OF *CARATRIX AD LITEM*
FOR BZ**

JUDGMENT

PHOOKO AJ

INTRODUCTION

- [1] Section 14 of the Children's Act 36 of 2005 provides that every child has the right to institute legal action or to be assisted in bringing such proceedings before a

court if the matter falls within the jurisdiction of that court. This right originates from section 28 of the Constitution of the Republic of South Africa, 1996 that “recognises in specific content that children, i.e. persons under the age of 18, have special needs which require special protection”.¹

- [2] This is an *ex parte* application brought by the Applicant seeking an order *inter alia* appointing Tabo Jacob Mokoena who is the grandfather to BZ² (“the minor child”) as curator *ad litem* to the minor child to enable him to continue with a claim for loss of support instituted against the Road Accident Fund because of the death of his mother in a motor collision.
- [3] The collision of the motor vehicles and death of the minor child’s mother occurred at or along Botshabelo, in the Free State Province.

JURISDICTION

- [4] The Applicant contends that this Court has jurisdiction to adjudicate this matter because a summons in the action against the Road Accident Fund was issued within the jurisdiction of this Court.
- [5] I have reservations about the power and competency of this Court to adjudicate over the current application. I address this issue later in the judgment.

THE ISSUES

¹ *Ex Parte: Molantoa obo R & M and Others* [2018] ZAGPPHC 953 at para 1.

² The names have been withheld because the person concerned is a minor.

- [6] The issues to be determined by this Court are whether (i) it has jurisdiction to preside over this matter and (ii) whether the non-joinder of a party who has a direct and substantial interest constitutes a defect in this application.

THE FACTS

- [7] The minor child lost his mother in Botshabelo, in the Free State Province on 26th May 2018 as a result of a motor vehicle accident.
- [8] The minor child's grandfather, Tabo Jacob Mokoena, who also resides with the minor child in Botshabelo, in the Free State Province gave the Applicant a power of attorney to bring the present application to have him appointed as the curator *ad litem* for the minor child.

APPLICABLE LAW

- [9] In this section, I briefly consider the aspects of jurisdiction in the context of the appointment of curators, and the subject of non-joinder.

Jurisdiction

- [10] Jurisdiction is the power of the court to receive and dispose of a dispute before it. The Master's jurisdiction is provided for in section 4(2) of the Administration of Estates Act 66 of 1965 which provides as follows:

“In respect of the property belonging to a minor, including property of a minor governed by the principles of customary law, or property belonging to a person under curatorship or to be placed under curatorship, jurisdiction shall lie-

(a) in the case of any such person who is ordinarily resident

within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; and

(b) in the case of any such person who is not so resident, with the Master appointed in respect of any such area in which is situate the greater or greatest portion of the property of that person: ...”

[11] The above provision applies to all applications for curatorship including the present one.

[12] Furthermore, 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 all causes arising and all offences triable within its area of jurisdiction...”

Section 19(b) states:

“A provincial or local division shall have jurisdiction over all persons residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such provincial or local division has jurisdiction ...”

[13] The courts have also been able to provide guidance in matters where they were approached to appoint curators on behalf of people who were domiciled outside their area of jurisdiction.³

[14] It is therefore clear that in the absence of any persuasive circumstances, the curator *ad litem* must be appointed within the area of the jurisdiction where the concerned person is resident and/or where the greater or greatest portion of the

³ See for example, *Ex Parte: Beukes* [2011] ZAWCHC 267.

property of that person is situated.

Non-joinder

[15] It is now settled law that any party who has a direct and substantial interest in the subject matter must be joined in the proceedings to safeguard their interests.⁴

The Supreme Court of Appeal in *Absa Bank Ltd v Naude NO*⁵, formulated the test for non-joinder as follows:

“The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.”

[16] In light of the above, if the answer is in the affirmative, the party that has a direct and substantial interest in the subject matter must be joined in the proceedings as failure to do so may result in the matter not being heard. If the answer is in the negative, a court may depending on the circumstances of the case, proceed to adjudicate over the case as the outcome will not have a dire impact on third parties who are not cited in the proceedings.

[17] There is what is referred to as a “necessary joinder”, where the failure to join a party amounts to a non-joinder and the court can decline to hear such an application until such joinder has been effected and/or “*the parties have consented to be bound by the judgment or waived their right to be joined.*”⁶

Further, there is what is referred to as the “joinder as a matter of convenience, where the joinder of the party was permissible and would not give rise to

⁴ *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para at 21

⁵ [2015] ZASCA 97 at para 12.

⁶ *Mahlangu v Mahlangu and another* [2020] ZAMPMHC 5 at para 5.

misjoinder”.⁷

[18] I will consider whether the non-joinder, in this case, was necessary and/or it was that of convenience.

APPLICANT’S SUBMISSIONS

[19] The core of the Applicant’s case is that this application was served before the Master of the High Court in Pretoria. According to counsel, the Master of the High Court in Pretoria raised a concern to the effect that they are unable to endorse the current application unless the Master of the High Court in Bloemfontein has expressly waived its jurisdiction.

[20] Based on the concerns raised by the Master of the High Court in Pretoria, counsel submitted that they then notified the Master of the High Court in Bloemfontein about their intent to appoint a curator *ad litem* in Pretoria even though the minor child resides with his grandfather in Bloemfontein. To this end, counsel submitted that the Master of the High Court in Bloemfontein *inter alia* enquired as to why jurisdiction should be in favour of the Master of the High Court in Pretoria when the person concerned resides in Bloemfontein, and why someone from Bloemfontein is not appointed as a curator *ad litem*.

[21] Counsel further argued that the Master of the High Court in Pretoria does not have any problem exercising its jurisdiction if they receive the required waiver of jurisdiction from the Master of the High Court in Bloemfontein.

⁷ *Ibid.*

[22] Counsel argued that the concerns raised by the Master of the High Court in Bloemfontein were unreasonable and were fully addressed in the founding affidavit in that the curator *ad litem* is the grandfather to the minor child and that they live together in Bloemfontein. In addition, counsel submitted that the claim against the Road Accident Fund was initiated in Pretoria and therefore they sought to protect the interest of the minor child.

[23] In an attempt to persuade this Court to preside over this case, counsel relied on the case of *Ex Parte: Molantoa obo R & M⁸ and Others* where it was *inter alia* held that the appropriate person to be appointed as curators should be a relative such as a grandfather in the present case. Based on this, counsel argued that the concerns of the Master of the High Court in Bloemfontein were correctly addressed.

[24] Therefore, counsel argued that this Court should allow him to move this application in Pretoria.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[25] Concerning jurisdiction, the Applicant has in my view deliberately opted to avoid dealing with the concerns raised by both the Master of the High Court in Pretoria and the Master of the High Court in Bloemfontein. For example, the Master of the High Court in Pretoria⁹ has *inter alia* indicated that:

“According to the information in the application the person for whom the application is brought is not residing within the jurisdiction of Master, Pretoria.

⁸ [2018] ZAGPPHC 953 at para 12.

⁹ Letter from the Master of the High Court, Gauteng Division: Pretoria, CaseLines 18:1.

Section 19 of the Supreme Court Act 59 of 1959 gives powers to the High Court of the division over matters and persons who are within its territorial jurisdiction.

If you still wish to register the matter with Master Pretoria kindly furnish me with the following:

1) Letter from the Master's Office under which jurisdiction the matter recites confirming that they decline their jurisdiction and consents to register the matter at Master Pretoria."

....

[26] A plain reading of the letter from the Master of the High Court in Pretoria raises valid concerns. The letter is comprehensive in that it also cites legislation and decided cases dealing with a problem similar to the present one. Disappointingly, the Applicant decided to only engage with the selective parts of the letter which requires consent from the Master of the High Court in Bloemfontein waiving jurisdiction. The first question to be asked is whether the Master of the High Court in Bloemfontein has waived her right to exercise jurisdiction. The answer is no.

[27] The second question is whether the Applicant has adequately dealt with the concerns of the Master of the High Court in Bloemfontein. A perusal of the founding affidavit including counsel's submissions only shows partial answers, such as that the person to be appointed as a curator *ad litem* is a grandfather to the minor child and resides with the minor child in Bloemfontein. The following other issues raised by the Master of the High Court¹⁰ in Bloemfontein remain unanswered:

"Do you want me to waive jurisdiction in favour of the Master in Pretoria? If so, then you need to provide my office with reasons as to why jurisdiction should be waived ... In addition to this if a Curator

¹⁰ Email from the Master of the High Court, Gauteng Division: Pretoria, CaseLines 19.

bonis is to be appointed or a Trust to be created why should the Master [of] Pretoria oversee the matter and not the Master in Bloemfontein?”

[28] Instead of addressing the above issues, and possibly obtaining a waiver of jurisdiction from the Master of the High Court in Bloemfontein, the Applicant decided to bypass the Master of the High Court in Bloemfontein and institute these proceedings. In my view, the contention raised by the Applicant in that the concerns raised by the Master of the High Court in Bloemfontein were unreasonable has no merit. Any person and/or office that has the sole jurisdiction to deal with a matter would have asked questions if such powers were to be taken from them without a reasonable explanation. Therefore, the concerns of the Master of the High Court in Bloemfontein have not been adequately addressed.

[29] Regarding the Applicant’s contention that the Master of the High Court in Pretoria has no problem in dealing with the matter, I am not convinced that this is entirely true. The fact that the Master of the High Court in Pretoria raised several concerns including a need to consult with the Master of the High Court in Bloemfontein shows that there are outstanding issues that require attention.

[30] The legal position as outlined above is clear in that this matter falls within the jurisdiction of the Master of High Court in Bloemfontein because the person for whom the application is brought resides in Bloemfontein. I find the following paragraph from the case of *Ex Parte: Beukes*¹¹ relevant in this case:

“The Master at the seat of this court, in Cape Town, has declined to make a report in terms of rule 57 in respect of the application

¹¹ (3016/2009) [2011] ZAWCHC 267 (15 June 2011) para 4.

for the appointment of a curator *bonis* to the patient. The Assistant Master of the High Court at Cape Town asserts that the Master at the seat of this court does not have jurisdiction in the matter because the patient lives in Kakamas. Kakamas falls within the territorial jurisdiction of the Master having his office at the seat of the Northern Cape High Court, in Kimberley. It is not apparent on the papers whether the Master at Kimber[ley] has ever been requested to make a report. There is a letter from the Assistant Master at Kimberley in the papers, in which he enquires why the application for the appointment of a curator *bonis* was brought in this court rather than in the Northern Cape High Court.”

[31] In light of the above, I am of the view that there is currently nothing whatsoever in this matter that gives this Court the power to vest the jurisdiction to the Master of the High Court in Pretoria at this stage to deal with a matter that falls within the powers of the Master of the High Court in Bloemfontein. The only exception would be where the Master of the High Court in Bloemfontein were to waive its jurisdiction and/or a certain portion of the property of the person concerned falls within the territory of this Court. This settles the matter of jurisdiction.

[32] About the non-joiner, this Court has been asked to take away the jurisdiction of the Master of the High Court in Bloemfontein and vest it with the Master of the High Court in Pretoria. This Court is asked to do so without hearing the side of the Master of the High Court in Bloemfontein even though the Master of the High Court in Bloemfontein has a direct and substantial interest in the subject matter. This is evident from the email sent by the Master of the High Court in Bloemfontein where they *inter alia* ask, “why should the Master [in] Pretoria oversee the matter and not the Master in Bloemfontein?” In *Judicial Service*

*Commission and Another v Cape Bar Council and another*¹² the court held that:

“It has now become settled law that the joinder of a party is only required as a matter of necessity- as opposed to a matter of convenience- if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned...”

[33] I am of the view that the joinder of the Master of the High Court in Bloemfontein was a necessity as the judgment of this Court has the effect of taking away their jurisdiction and vesting it with the Master of the High Court in Pretoria. I view the Applicant's decision to approach the court as premature for failure to comprehensively engage with the Master of the High Court in Bloemfontein. The haste to litigate was not in the best interests of the minor child.

[34] After careful consideration of the Applicant's both written and oral submissions, I am of the view that this Court has no power to impose upon the Master of the seat of this Court an obligation to assume jurisdiction over a matter that falls within the domain of the Master of the High Court in Bloemfontein. Even if this Court were to do so, the non-joinder of the Master of the High Court in Bloemfontein constitutes a major defect in this application.

ORDER

[35] I, therefore, make the following order:

(a) The application is struck off.

¹² 2013 (1) SA 170 (SCA) para at 12.



M R PHOOKO AJ

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 November 2022.

APPEARANCES:

Counsel for the Applicant: Adv D Westebaar

Instructed by: Kotlolo Attorneys

Date of Hearing: 12 August 2022

Date of Judgment: 16 November 2022