

SOUTH AFRICA / JUDGMENT

A.C.J.S v A.S (4216/2018) [2021] ZALMPPHC 6 (18 February 2021) [2021] ZALMPPHC 6

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

4216/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO:4216/2018

In

the matter between:

ACJ

S[....]

APPLICANT

AND

A

S[....]

RESPONDENT

JUDGMENT

KGANYAGO J

- [1] The applicant and the respondent are married to each other out of community of property. From the said marriage three minor children were born. The parties had marital problems which led to the applicant moving out of the common home on 21st January
2018. The respondent was admitted to an alcohol rehabilitation centre on 13th June 2018. After the admission of the respondent at the centre, the minor children started living with the applicant up to date.
- [2] On 11th January 2018 the applicant instituted divorce proceedings against the respondent. On 31st August 2018 the respondent was admitted at Polokwane Mediclinic after attempting suicide. On 16 October 2018 the applicant obtained an interim protection order against the respondent which was made final on 21st May 2019.
- [3] The applicant brought a Rule 43 application seeking primary care and residence of the minor children. In that application the family advocate recommended that the primary residence and care of minor children be retained by the applicant. On 8th November 2018 the court awarded the applicant primary care and residence of the minor children with the respondent having reasonable contact. Following the order of the 8th November 2018, respondent requested the family advocate to conduct a further investigation wherein the family advocate will have a consultation with the respondent, applicant and all the three minor children. The family advocate did that and filed his supplementary report dated 24th February 2020. The findings of the family advocate in the supplementary report was that both applicant and respondent will remain co-holders of full parental responsibilities and rights with regard to care, guardianship and maintenance of the children. The primary residence of the minor children remained with the applicant.
- [4] It is the applicant's contention that the respondent does not agree with family advocate's recommendations. The applicant in his founding affidavit has stated that after he and the respondent had separated, he had a love relationship with another woman who had two children. That woman together with her two children moved to live with the applicant together with his three children from July 2019 to 1st July 2020. That woman assaulted one of the applicant's son and that resulted in the applicant ending their relationship, and that woman moved out of the applicant's house on 1st July 2020.
- [5] According to the applicant, as the respondent was dissatisfied with the family advocate's report, she had immediately utilized the incident of their son being assaulted to launch an application on 17th July 2020 to have the minor children re-evaluated by an independent psychologist. The applicant further stated the respondent had reported the incident of the assault of the minor child to the SAPS Child Protection Unit on or about 30th June 2020. It is the applicant's contention that the respondent is blowing this incident of the assault on their

son out of proportion in order to justify her own personal agenda of having the minor children reassessed.

- [6] The applicant in the founding affidavit has stated that the minor children have informed him that they object to be further assessed and evaluated by any professional as that will open old wounds that they wish to leave in the past. He had further stated that the minor children have told him that for the past two years they have been residing with him, and they wish to continue residing with him.
- [7] The divorce proceedings have not yet been finalized and the applicant is of the view that what is preventing the divorce to be finalized is the insistence of the respondent that the minor children be evaluated as she does not accept the family advocate's recommendations. Based on this the applicant has brought an application seeking an order that Mrs Anita Campbell a practicing attorney be appointed as curatrix ad litem and legal representative of the minor children. The applicant avers that if a curatrix ad litem is appointed that will allow the minor children to have a voice in regard to any possible reconsideration of the recommendations made in the reports and the existing court order and/or any other litigation in the divorce action that involves or affects them. Mrs Campbell has consented to act as curatrix and legal representative on behalf of the minor children in the event the applicant's application is successful.
- [8] The respondent is opposing the applicant's application. In her opposing affidavit, the respondent has stated that she is not opposing the appointment of Mrs Campbell as legal representative of the minor children, but is opposing her appointment to act as a curatrix ad litem as well with the special power and authority to engage any professional person to assist in the determination of children's best interest in as far they pertain to the present arrangements regarding primary care and residence, including contact arrangements with person's which may include a psychologist and/or psychiatrist and/or social worker, and for the curatrix ad litem to compile a report in respect of the primary care and residence and contact arrangements of the minor children.
- [9] The respondent has submitted that it is unnecessary to appoint a curator ad litem as she had already on 17th July 2020 under the same case number brought an application in this court for an order that both the applicant and the respondent as well as their minor children be assessed by a psychologist appointed by the court to determine the best interest of minor children as far as the issue of primary residence is concerned and furnish this court with a report and recommendations in that regard. The respondent has further stated that one of the reason why she brought the said application was that she did not accept the family advocate's report.

- [10] The respondent has conceded that her marriage with the applicant has disintegrated and that it took a major toll on her emotionally and psychologically. She became depressed and anxious and turned to drinking alcohol in order to try to cope. During June 2018 she was admitted at a rehabilitation centre and she believes she will never abuse alcohol again.
- [11] The applicant is seeking orders that the three minor children be joined to the proceedings as interested parties and that Mrs Campbell be appointed as curatrix ad litem and legal representative of minor children. The ages of the three minor children are that the first born is aged 15, second born aged 12 and third born aged 3. I will first deal with the issue of an appointment of curatrix ad litem.
- [12] In the case at hand the function of the curatrix ad litem will be to protect the interest of the minor children. Where in appropriate case a curatrix ad litem has been appointed for the minor children, that curator is required to be vigilant in protecting the rights of the interest of minors. (See Rein NO v Fleisher NO and Others[1]).
- [13] The applicant and the respondent are involved in an acrimonious divorce which seems the main dispute is about the primary care and residence of the three minor children. The applicant and respondent are dealing with the custody issue as if the minor children have no rights at all. In Minister of Welfare and Population Development v Fitzpatrick[2] Goldstone J said:

“Section 28(2) is not exhaustive of the children’s rights. Section 28(1) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this Court in Fraser v Naude and Others”.

- [14] Section 10 of the Children’s Act[3] provides as follows:

“Every child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child be given due consideration.”

- [15] That means that the minor children have got a right to be consulted in any dispute that affect them and also express their views. In the case at hand since both parties are involved in an acrimonious divorce it will be difficult for both parties to consult with the three minor children in a meaningful way, and accept the wishes of the minor children without suspecting that the minor children might have been influenced by either party in how they will be expressing their own wishes. It is clear that there is no longer any trust that exist between the applicant and respondent. Due to the ages of the minor children, they will not be able to represent themselves or even instruct anyone to represent them.
- [16] In Christian Education South Africa v Minister of Education[4] Sachs J said:

“There is one further observation to be made. We have not had the assistance of a curator ad litem to represent the interests of the children. It was accepted in the High Court that it was not necessary to appoint such a curator because the State would represent the interests of the child. This was unfortunate. The children concerned were from a highly conscientised

community and many would have been in their late teens and capable of articulate expression. Although both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure”

[17] The minor children have been subjected to more than one assessment dealing with the same issues. The respondent has launched an application seeking an order that the minor children be subjected to another assessment. The applicant in his founding affidavit has stated that the minor children have told him that they are objecting to being further assessed and evaluated by any professional as that would re-open old wounds that they wish to leave in the past. Taking into consideration the parties acrimonious divorce, the alleged minor children’s wishes as stated by the applicant sound self-serving. It will need an independent person who will be able to make sensible enquiries on the minor children’s wishes so as to enable their voices to be heard.

[18] Once appointed a curatrix ad litem will be able to assess the circumstances surrounding the parties divorce proceedings and consider whether the steps taken by legal practitioners acting for both applicant and respondent were reasonable, correct and in the minor children’s best interest

and whether that should be ratified. In my view, taking into consideration the circumstances of this case, failure to appoint a

curatrix ad litem might cause grave injustice to the minor children. It is therefore in the interest of justice that a curatrix ad litem be appointed for the minor children.

[19] The appointed curatrix ad litem will be conducting litigation on behalf of the minor children and must be able to act independently to ensure integrity in the service that she will be rendering. It will therefore be undesirable if Mrs Campbell is appointed both as curatrix ad litem and legal representative of the minor children.

[20] The applicant is seeking a punitive costs order against the respondent. A divorce proceeding is an emotional process which in most cases affect people’s state of mind. They usually take irrational decisions unintentionally. In most cases primary residence and care are awarded to women. She had carried that child for nine months undergoing all sort of emotions during that period. It will therefore not easily sink on her that primary residence and care of a 3-year-old has been awarded to a man who did not go through what she did to bring that life to earth. In my view, this is not a case that deserves costs on a punitive scale.

[21] In the result I make the following order:

21.1 That all the minor children born of the marriage between applicant and respondent, viz:

21.1.1 A[...] C[...] J[...] S[...] (Born 5 October 2005) identity number [...]

21.1.2 D[...] P[...] S[...] (Born 27 September 2008 identity number [...]

21.1.3 A[...] S[...] (Born 23 April 2018) identity number [...]

be joined, as interested parties as the second, third and fourth defendants respectively in the divorce proceedings between the applicant and respondent under this honourable court's case number 4216/2018;

21.2 That Mrs Anita Campbell, practising as an attorney at Anita Campbell Attorneys at 5 Waterbessie street, Aqua Park, Tzaneen is appointed as curatrix ad litem of the aforementioned minor children.

21.3 That as curatrix ad litem of the minor children, Mrs Anita Campbell is authorised:

21.3.1 To always act and do anything that a curator is expected to do on behalf of the minor children, whenever there is litigation between the applicant and the respondent that involves or affect them or their interests;

21.3.2 To determine the children's best interest from time to time in relation to proceedings between the applicant and the respondent that may be brought by either of them, viz-a-viz, primary care and residence, and contact;

21.3.3 To investigate the children's living circumstances insofar as they relate or may relate to the present and future care and contact arrangements, including primary residence;

21.3.4 To interview the applicant and/or the respondent and/or any other person or official who has any other relevant information pertaining to the present primary care and residence, and contact arrangements of the minor children;

21.3.5 To have unrestricted access to the minor children;

21.3.6 To have access to any and all documents or records (including official documents or records) that directly or indirectly pertain to the present primary care and residence and including contact arrangements of the minor children;

21.3.7 To engage any professional person who has the necessary expertise to assist in the determination of the children's best interest as they pertain to the present primary care and residence, including contact arrangements. The persons may include a Psychologist and/or a Psychiatrist and/or Social Worker.

21.3.8 To, on notice to both the applicant and respondent, approach a Judge in Chambers of this division for an order clarifying and/or expanding upon and/or restricting any power necessary in order to promote and protect the children's best interest;

21.3.9 To direct Mrs Campbell to compile a report for this honourable court for submission to the honourable court in respect of the primary care and residence, and contact arrangements of the minor children within (ninety) 90 days from the date of this order or as soon thereafter as directed by this honourable court;

21.3.10 To order that both the applicant and respondent shall be jointly liable in equal shares for the costs of the curatrix ad litem and of any expert engaged by the curatrix ad litem, provided that such an engagement(s) shall take place after prior consultation with them. Such costs to be paid within 30 (thirty) days of date of invoice or any such period granted by the curatrix ad litem after consultation with all the parties;

21.4 The respondent to pay the costs of this application on party and party scale.

KGAMYAGO J

JUDGE OF THE HIGH COURT

APPEARENCES: COUNSEL FOR APPLICANT : ADV DH HINRICHSSEN BRIEFED BY : VAN
ONSELLEN & PARTNERS COUNSEL FOR RESPONDENT : MS MC DE KLERK BRIEFED BY : DDKK
ATTORNEYS DATE HEARD : 18 JANUARY 2021 DATE DELIVERED : 18TH FEBRUARY 2021

[1][1984] ZASCA 102; 1984

(4) SA 863 (A) at 874 B-C

[2] 2000 (3) SA 422 (CC) at para 1

[3] Act 38 of 2005

[4]

[2000] ZACC 11; 2000

(4) SA 757 (CC) at para 53

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