

SOUTH AFRICA / JUDGMENT

Baloyi v Baloyi (6208/2014) [2015] ZAGPPHC 728 (16 October 2015)

[2015] ZAGPPHC 728**COURT**

North Gauteng High Court, Pretoria

BEFORE

De Klerk

CASE / FILE NUMBER

6208/2014

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case****number: 6208/2014****16/10/2015****In the matter between:**

WALTER

BALOYI PLAINTIFF

And

KHATHUTSHELO

BALOYI DEFENDANT

JUDGMENT**DE KLERK (AJ)****Introduction:**

- [1] In this divorce the main issue to be decided is the primary residence of the two minor children born from the marriage between the parties, to wit a boy who is currently 6-years old and a girl who is 4-years old.
- [2] Each party contends that it would be in the best interests of the minor children to reside with them and has advanced a number of reasons in support of their contentions.

- [3] It may be convenient at the outset to mention that the evidence revealed that both the Plaintiff and the Defendant are loving and capable parents who were at various stages the minor children's principal carers.
- [4] The children are too young to obtain their point of view.
- [5] The circumstances on which the Family Advocate's report was based have changed since the report was compiled more than a year ago. Consequently I do not derive much assistance from the Family Advocate's recommendation.
- [6] In P v P 2007 (5) SA 94 (SCA) at para [14] it was held that:

"Determining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgment based on its finding of facts in the exercise of its inherent jurisdiction as the upper guardian of minor children..."

- [7] The factors set out in Section 7 of the Children's Act, Act No. 38 of 2005, constitute a non-exhaustive check list of criteria which serve as guides relevant to the application of the best interest standard.
- [8] I shall deal with the criteria and factors set out together.

Common cause facts:

- [9] Both parties gave evidence during the trial which gave the court the opportunity to observe them whilst testifying and to formulate a better impression of the parties and an understanding of the facts.
- [10] It is common cause that the Plaintiff and the Defendant were both busy professionals. The Plaintiff, a senior VIP Protector

worked long irregular hours as the designated driver of the then Governor of the Reserve Bank, Ms. Gill Marcus.

- [11] The Defendant conducted her own business from the marital home whilst also furthering her studies in architecture. The Defendant also attended site inspections and meetings with clients.
- [12] During January 2014 the Defendant left the marital home. The Defendant took the children to her family in Soshanguve.
- [13] The Plaintiff's testimony was that when he went to fetch the children they were distressed and were asking for the Defendant.
- [14] A legal battle ensued between the parties about the children's interim residency. This Court eventually awarded the Plaintiff interim primary residency of the children.

The Plaintiff's evidence:

- [15] The Plaintiff made arrangements with his employer to adjust his working conditions, so that he could work business hours, to enable him to take care of the children.
- [16] The Plaintiff employed a trained nanny to assist him with the children and to look after the children after school.
- [17] The Plaintiff sought professional advice on how to deal with the emotional aspects of the divorce. The Plaintiff continuously engages in conversation with the children and explains the consequences of the divorce to them.
- [18] The Plaintiff's testimony was further that he prefers to prepare dinner for himself and the children and to bath them.
- [19] They spend time together e.g. watching television, going to the shopping centre or for walks.
- [20] The Plaintiff takes the children to school and is very involved in their school progress and activities.
- [21] The children are both doing well at school. Their son enjoys sport, especially soccer. The Plaintiff described their daughter as loving, friendly, energetic and bright. She speaks English fluently. The Plaintiff further describes the children as "beautiful" and happy.
- [22] In his testimony the Plaintiff accused the Defendant of not always exercising contact with the children in accordance with the Court Order. On occasion she had not seen them for an entire month. On other occasions she had returned them earlier because of other commitments.
- [23] The Defendant is also not contributing financially towards the children's maintenance.

The Defendant's evidence:

- [24] The Defendant testified that she is residing with her sister and the latter's 7-year old son in a town house in close proximity to the marital home.
- [25] The Defendant indicated that the arrangement was only temporary and that she intends to purchase her own house in due course.
- [26] The Defendant is presently concentrating on her studies. She attends classes at the University of Johannesburg on Mondays, Wednesdays and Fridays until 14:00. On Thursdays she attends site meetings. If all continues as contemplated the Defendant expects to graduate at the end of 2016.
- [27] The Defendant has a close bond with the children and they consider the Defendant's sister as their second mother.
- [28] The Defendant takes the children to the movies and to the park.

- [29] The Defendant's testimony was that according to her it was not in the best interest of the children to engage in conversation with them about the separation and divorce. When asked questions by the children for instance why they were no longer staying together, she would advanced as the reason that she is "going to school".
- [30] The major complaints directed by the Defendant against the Plaintiff are that the children cry when they have to go back home, that the Plaintiff is not always at home and that the nanny is the one who takes care of the children.
- [31] The Defendant conceded that the Plaintiff is presently putting the children first.

Expert Reports:

- [32] The Family Advocate and Family Counsellor interviewed the parties during April 2014 and submitted their report during October 2014.
- [33] They recommended that the primary residence of the minor children be awarded to the Defendant.
- [34] It is important to note that the Family Advocate premised its recommendations to a large extent on the factual finding that the Defendant conducted her own business from home which enabled her to attend to the children herself.
- [35] The Family Counsellor raised as a concern the fact that the Defendant was not frank and truthful with the children about the divorce and concluded that such conduct might result in a false sense of comfort for the children and may further lead to instability on their part.
- [36] A Social Worker in private practice, a certain Elza Cilliers, also compiled a report. In her report Mrs Cilliers referred to a communique with Mrs Marcus who described the Plaintiff as reliable, thoughtful and responsible and who performed his duties in an exemplary manner.

Legal principles:

- [37] The question of what a child's best interests are must be determined according to the facts and particular circumstances of each case and not on generalisations such as the "tender age" doctrine or the principle of "preserving the status quo".
- [38] Undue weight should furthermore not be placed upon any one factor, but these factors, like all other relevant factors, must first of all be considered against the backdrop of the specific circumstances of each case and secondly weighted against all other relevant factors to be considered in determining what would be in the best interests of the child.
- [39] The Constitutional Court in *AD & DD v DW* [2007] ZACC 27; (2008 (3) SA 183 (CC)) held that:
- "To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the*

best interest of the child concerned”.

[40] In her work, “Divorce mediation and the best interest of the child” Lesbury van Zyl on p 67 makes the following remarks in respect of the principle of preserving the status quo:

“Judges, being aware of children’s need for security and stability, are reluctant to move them and so cause them further distress than the family break-up has already occasioned. However, this is not always a wise policy, for it means that permanent custody is often awarded on the basis of an arrangement made when the parents were in turmoil and least able to make reasonable decisions. Here too, as with the maternal preference rule, the lawyer’s knowledge of the strong influence of the status quo may influence the advice they give their clients. Besides, if parents, who have temporary custody realise that they are in a superior bargaining position, they may try to delay proceedings, since the longer they have temporary custody the stronger their position, become.”

[41] Sweeping statements such as young children should reside with their mothers and/or contact with their fathers should be restricted to short periods of time, are untenable.

[42] Ordinary human experience tells one that the continued involvement, companionship, love and support from both father and mother after separation and divorce, enhances a child’s sense of security.

[43] In *Chodree v Vally* 1996 (2) SA 28 (W) at 32 F-G/H it was held that:

“... love and affection from both also enhance the security and stability of a child...”

[44] The Court should further not only take a short term view of the possible unsettling effects occasioned by any change in the

children’s lives, but also consider the possible long term benefits to be obtained in each specific case.

[45] Divorce inevitably occasions change in the lives of children such as adjusting to the daily absence of one parent, while living with the other and going back and forth between two different households. Each individual child also responds differently towards a divorce.

[46] In *M v M* 1973 (2) All ER 81 (Fam Div.) 85 it was held that:

“Where the parents have separated and one has the care of the child, access by the other often result in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long term advantages to the child of keeping in touch with the parent concerned so that they do not become strangers, so that the child later in life does not resent the deprivation and turns against the parent who the child thinks, rightly or wrongly, has deprived him, and so that the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the child’s development which that parent by its companionship and otherwise would make.”

[47] There is further no doubt that over the last number of years the roles and responsibilities of parents within the family structure as well as social norms and patterns have changed.

- [48] Fathers have also taken up parenting roles, and mothers have also followed careers. The norm these days is rather that of working parents who manage with the assistance of aftercare, domestic workers and family.
- [49] It was held in *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O) at 101 B-D/E that mothering is not only a component of a woman's being, but is also part of a man's being, and that a father, depending on the circumstances, possesses the capacity and capability to exercise custody over a child as well as a mother.
- [50] In *Van Der Linde v Van Der Linde* 1996 (3) SA 509 (O) at 515 it was held that the concept of mothering is indicative of a function rather than a persona. It includes the sensitive attachment which flows from the attention devoted from day to day to the child's need of love, physical care, nutrition, comfort, peace, security, encouragement and support.
- [51] In *V v V* 1998 (4) SA 169 (C) at p176 it was held that:
- "The old position where the custody of young children was invariably granted to mothers has change. As far as young children are concerned, the pendulum has swung to accommodate the possibility of a father being a suitable custodian parent to young children."*
- [52] Therefore primary residence and contact were not to be given on preconceived notions, assumptions or judicial preferences but must be the result of a well considered decision based on an individual and full investigation.

Evaluation of the evidence:

- [53] In this matter I am faced with a situation where both the Plaintiff and the Defendant are good, loving parents, who are able to care for their children.
- [54] Whilst together the Defendant was the primary caregiver. Since February 2014 the Plaintiff is caring for the children with the assistance of a nanny.
- [55] Although the Plaintiff and the Defendant's relationship is very acrimonious, no serious allegations were made against each other.
- [56] The Defendant's concern that the nanny is taking care of the children is not born out by the evidence.
- [57] The children are at school during the day (until 13:30 and 15:30 respectively) and with the nanny during the rest of the afternoon.
- [58] During the evenings the Plaintiff takes care of the children. The Plaintiff also takes the children to school.
- [59] The Defendant is a professional woman who is working and studying. The children will be in no better position, if in her primary care.

[60] The Defendant's further concern is that the children cry because they do not want to go back home to the Plaintiff. The

Plaintiff on the other hand testified that at times the children do not want to visit the Defendant.

[61] Experience has shown that children will often give different versions to different parents in a situation like the present. The children do not want to be separated from either parent and still indulge the hope that their parents would reconcile.

[62] The Plaintiff's concern is that the Defendant is not always exercising her contact. The Defendant on the other hand testified that the Plaintiff sometimes frustrates her contact with the children.

[63] I got the impression from the evidence that it was not a case of lack of interest on the Defendant's part, but that she was rather worn out by the continued conflict between her and the Plaintiff over the children.

[64] I share the Family Advocate's concern that the fact that the Defendant is not frank and truthful with the children about the divorce, might create a false sense of comfort which in turn may lead to instability on the part of the children.

[65] The Defendant's aforesaid conduct as well as her failure to contribute towards the children's maintenance are in my view, indicative of a lack of insight on her part in what is in the children's best interests.

[66] The Defendant has furthermore chosen this point in time to concentrate on her studies. The latter, together with any kind of

employment, would make stiff demands on inter alia her free time.

[67] The Plaintiff has shown remarkable commitment. He has on the other hand re-arranged his life to best suit the children. He is able to spend time with the children, communicate with them and fulfil the nurturing role. Experience has shown that the

companionship of children's parents is of inestimable value to the children.

[68] I was particularly struck by the fond manner in which the Plaintiff spoke about his daughter.

[69] The children are doing well at school. They appear to be happy and secure.

[70] The Defendant is not yet on her feet and will only complete her studies by the end of 2016.

Conclusion:

[71] I am satisfied that the true interests of the minor children would be best served if primary residence is awarded to the Plaintiff.

[72] It seems obvious that it would be in the best interests of the children to have maximum contact with the Defendant to enable them to embrace having two parents and two homes and to fully benefit from their relationship with both parents.

Order:

[73] In the result it is ordered that:

1. The marriage between the Plaintiff and Defendant is dissolved;
2. The joint estate of the Plaintiff and Defendant is to be divided equally;
3. Plaintiff is awarded care and primary residence of the minor children;
4. Defendant shall be entitled to reasonable contact of the minor children, which contact shall include:

4.1 Every Tuesday when the Defendant may pick the children up from school until 18:00, when she shall drop them off at the Plaintiff's

residence;

4.2 Every alternate weekend from Friday, when the Defendant shall pick the children up from school, until the Monday morning when she shall take them to school;

4.3 Alternate long weekends from after school on the day that such long weekend commences until the morning school starts;

4.4 Alternate school holidays with Easter and Christmas alternating on an annual basis.

4.5 Unfettered telephonic contact at all reasonable times;

4.6 The minor children may spend Mother's day with the Defendant and Father's day with the Plaintiff;

4.7 The minor children may spend the Plaintiff's birthday with him and the Defendant's birthday with her.

4.8 Both the Plaintiff and the Defendant may spend equal time with the minor children on their birthdays.

5. Defendant is ordered to pay the minor children's pre-school and school fees, 50% of their school trips and to purchase clothes for them twice a year, to wit winter clothes by the 30th of April and summer clothes by the 30th of September.
6. Each party to pay his/her own costs.

DE KLERK

ACTING JUDGE OF THE GAUTENG DIVISION HIGH COURT, PRETORIA

PLAINTIFF'S REPRESENTATIVES

ADVOCATE :

INSTRUCTING ATTORNEY: CHARL LOCHNER ATTORNEYS

DEFENDANTS' REPRESENTATIVES

INSTRUCTING ATTORNEY: NOKO RAMABOYA MASON ATTORNEYS

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