

SOUTH AFRICA / JUDGMENT

G.J.U v B.U (183/2013) [2013]

ZAECGHC 17 (15 February 2013)

[2013] ZAECGHC 17

COURT

Eastern Cape High Court, Grahamstown

BEFORE

P.W. Tshiki

CASE / FILE NUMBER

183/2013

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, GRAHAMSTOWN

Case no: 183/2013

Date heard: 14.2.2013

Order given: 15.2.2013

In the matter between:

G J UApplicant

and

B U (born Van Der Watt)Respondent

REASONS

FOR JUDGMENT

TSHIKI J:

A) INTRODUCTION

- [1] The applicant and respondent herein were divorced by this Court in Port Elizabeth on 23rd August 2011 and their settlement agreement marked “B” was made an order of the Court.
- [2] Annexure “B” includes the terms agreed to by the parties relative to, inter alia, the following issues:

- [2.1] maintenance for the respondent herein;
- [2.2] every aspect relating to parental responsibilities and rights in respect of their children;
- [2.3] children's views regarding the settlement agreement;
- [2.4] children's religious upbringing;
- [2.5] mediation in the event that the parties are unable to make a joint decision in respect of the children where a joint decision is required;
- [2.6] parties' division of their property.

[3] It is significant to state that in their agreement the parties agreed, inter alia, as follows in respect of their minor children:

[3.1] that they shall act as co-guardians of the children born of the marriage, S V U now 8 years old and C K U now 7 years old;

[3.2] that they shall at all times exercise their parental responsibilities and rights in respect of the children in a manner that will promote, protect and safeguard their best interests;

[3.3] that they shall be co-holders of full parental responsibilities and rights in respect of the children as referred to in sections 18(2)(a) and 18(2)(b) of the Children's Act 38 of 2005 (the Act);

[3.4] they agreed that it is in the best interests of the minor children for the children to primarily reside with the plaintiff (respondent herein) subject to the defendant's (applicant herein) rights of reasonable contact with them at all reasonable times which shall include but not be limited to the right to have the children with him. This clause also included the applicant's right relative to periods and times of reasonable contact with the children during school terms as well as during school holidays. The above is inclusive of special occasions such as mother's day, father's day, parent's birthdays as well as children's birthdays.

[4] In the present proceedings applicant's complaint is firstly that the respondent has relocated with the children to East London without obtaining the consent of the applicant which consent is required by the provisions of the Deed of Settlement which was made an order of the Divorce Court. Secondly, that respondent has relocated with the minor children to East London without obtaining a formal investigation by either the Family Advocate and or an independent clinical psychologist to ascertain whether the move would be in the best interests of the children. Given that the respondent has refused to provide her consent for a formal investigation to be conducted by an independent clinical child psychologist to determine the best interests of the children as far as the issue of primary residence is concerned, the respondent has also failed to bring an application to this Court to obtain its required consent prior to the relocation of the children to East London.

B)

ISSUES

[5] The applicant has now sought an order in Part A of the notice of motion by way of a Rule Nisi in the following terms:

[5.1] that the minor children shall reside primarily with the applicant pending the finalization of Part B, details of which are dealt with later.

[5.2] that the respondent shall be entitled to reasonable contact with the children which shall include, but not limited to:

[5.2.1] one weekend visit in East London per month, from the Friday afternoon after school to the Sunday evening at 17h00, pending the finalization of Part B; and

[5.2.2] the Easter school holidays and one half of the winter holidays.

[6] At the time of the argument of the application the parties somewhat agreed that there was no longer a need to grant an interim order and that the order that the Court should grant in respect of Part A of the application should be made final pending the finalization of Part B. Part B relates to the application by the applicant for the variation of the Deed of Settlement which includes the portion of the Deed of Settlement relating to the custody of the children inclusive of the non custodial parent's right (the respondent herein) to have access to the minor children.

[7] After hearing argument, on 14th February 2013, I reserved my judgment and on the following day I granted the order that follows and indicated that my reasons thereof would follow later:

"1. That leave to bring this application by way of urgency in terms of Rule 6 (12)(a) of the Rules of this Court is hereby granted.

2. That the Family Advocate is hereby instructed to conduct an urgent investigation in respect of whether it is in the best interests of the minor children of the parties herein, S V U and C K U, to reside primarily with the Applicant in Port Elizabeth or to relocate and to reside with the Respondent in East London.

3. That Dr Madalyn Johnson, an independent clinical child psychologist, is hereby authorised to conduct an urgent assessment in respect of whether it is in the best interests of S V U and C Kate U to reside primarily with the Applicant in Port Elizabeth or to relocate and to reside with the Respondent in East London.

4. That pending the outcome of the investigation referred to in paragraphs 2 and 3 above:

4.1. that the minor children, S V U and C K Upton, shall continue to reside with the Respondent, in East London.

4.2. that the Applicant's parental rights and responsibilities in respect of the children S V U and C K U, in terms of the Children's Act 38 of 2005, shall continue to be governed by the terms of the order of the Divorce Court as contained in the Deed of Settlement, save for the following:

4.2.1. that the Applicant shall be entitled to reasonable contact with the minor children, which shall include, but not limited to

4.2.1.1. not more than three weekend visits in East London per month, from the Friday afternoon (if they have started schooling) to the Sunday evening at 17h00, pending the finalization of the investigations in paragraphs 2 and 3 above;

4.2.1.2 the Easter school holidays and one half of the winter holidays.

5. That each party shall pay its own costs inclusive of the costs reserved on 7th February 2013."

[8] In this judgment, I will not deal with Part B of the application for the reason that its adjudication is not yet ripe as it depends on the availability of the reports by both the Family Advocate and the clinical child psychologist which are still to be sought.

[9] The issue before me on 14th February 2013, was whether I should grant the applicant an order to have custody of the minor children pending the finalization of the order sought in Part B of the application.

[10] It is common cause that the respondent herein is the parent who was granted custody of the children with the consent of the applicant. It is my respectful view that when granting the custody to respondent, the Court had considered all the circumstances of the parties and their minor children more so when it made the settlement agreement an order of the Court.

[11] There is no real dispute of fact which cannot be properly decided on affidavit herein and the only issue being the best interests of the children which includes their interim custody until Part B stage has been resolved.

[12] Applicant's main complaint is that respondent has contravened the terms of the Court order by removing and relocating with the minor children to East London without the consent of the applicant failing which that of this Court.

[13] The question to decide at this stage is whether it will be in the best interests of the two minor children to grant a temporary order of their custody to the applicant. Can the Court grant such an order where there is a reasonable likelihood that a final order may differ regarding the final custody of the minor children?

[14] Not very long ago and on 23 August 2011, the divorce Court granted custody of the minor children to the respondent and in my view it did so after having considered all the relevant factors including the interests of the children. Applicant's complaint herein is that respondent has violated the Divorce Court order by removing and relocating with the minor children to East London without either the consent of the applicant, mediation decision or the order of this Court. It seems to me that, instead of seeking an order in terms of Part A

particularly for the interim custody of the minor children, applicant should have instituted proceedings seeking a contempt of Court order against respondent for the latter's violation of the divorce order.

[15] Both parties herein have a legal duty to maintain the children in accordance with their respective means. It appears from the admitted facts that the applicant has the means to pay for the school fees of the children as against the respondent whose resources are limited compared to those of the applicant.

[16] Reasons given by the applicant for refusing to pay for the children's schooling in East London are, inter alia:

[16.1] that the decision to relocate the children was never discussed with him;

[16.2] that the opportunities in terms of schooling, friends and quality of life are better in Port Elizabeth than in East London;

[16.3] that the children are afraid of their mother's boyfriend Mr Clemens with whom they presently stay in East London together with the respondent;

[16.4] that applicant contends that the house in which the children would reside with him in Port Elizabeth is a large home. The home however, is that of the applicant's fiancée in which respondent stays with his fiancée.

[17] In all matters concerning children, the principle which runs like a golden thread through the fabric of our whole law relating to children [is] that the interests of the children are paramount. [Tebbutt AJ in *Segal v Segal* 1971 (4) SA 317 (C) at 321 and 324 quoted in Schäfer *The Law of Access to Children* 1st ed p 51. See also section 9 of the Children's Act 38 of 2005].

[18] 'The introduction of the Children's Act marked a significant development of the law relating to the protection of children's rights in South Africa. The fundamental purpose of the Act is to give effect to the rights of children contained in the Constitution and to bring about the development of our law affecting children in accordance with the fundamental values enshrined in the Constitution, the society's obligations in terms of international law, and to provide for the establishment of structures and services which promote the development of children ... A reading of the Act indicates that it seeks to accord to parents equal responsibility for the care and wellbeing of their children, and that it seeks to ensure that, as far as may be reasonable possible, parental responsibilities and rights are exercised jointly, in the best interests of children'. [Goosen J in *PD v MD* 2013]

(1) SA 366 (ECP) paras 10 and 12]. (My emphasis)

- [19] According to the respondent the children are in no imminent danger, they are being well looked after by her, are happy in their surroundings and have made new friends with whom they cannot wait to go to Gonubie Christian school. They have in fact settled in their new environment. In particular, she states that it will not be in their best interests to be uprooted from their familiar, stable and supportive environment in which they have been since 26th December 2012.
- [20] I must say though that the issue at hand is whether the removal of the children from East London to Port Elizabeth would be in their best interest. It is common cause that if they are taken back to Port Elizabeth and stay with the applicant, they will be exposed to a new environment where the applicant stays with his fiancée. My main fear herein is the real likelihood that the Family Advocate and or the child clinical psychologist might recommend that the children remain with their mother after they have been relocated to Port Elizabeth for a few months. This, in my view, can never be in their best interests. The only sound decision, in my view, is to allow the process in Part B to take place and once a final recommendation is received only then will the Court make a final and informed decision as to the custody of the children. It will not be in the interest of the children to be tossed from pillar to post before the new final decision on their custody is determined. As for the applicant, in terms of section 18(2)(d) of the Act, he has an obligation to pay for the school fees of the minor children wherever they are schooling. He has no right to deny the children their right to schooling for the reason that the respondent had relocated with them contrary to the order of the divorce Court.
- [21] I come to the conclusion that the interests of the minor children herein require that they be relocated, if need be, only once the Court has made such a decision after having considered all the relevant circumstances including the recommendations by the family advocate as well as the child clinical psychologist. Having said the above I am also mindful of the allegations made by the applicant against the respondent's fiancée vis a vis the minor children. From her answering affidavit it does not appear that the respondent has any fear that the minor children are in danger when they are with her fiancée in East London. I have no reason to believe that the children are in danger when staying with their mothers fiancée.
- [22] As for the costs I did not think that any award of costs against either party would be justified. Applicant had to approach the Court on the basis of the respondent's conduct explained in the papers before me. At the end of the day, this Court will have to finally decide who should be awarded custody of the children after all the circumstances have been considered. At this stage, I am of the view that no costs order should be granted against either party.
- [23] It is for the above reasons that I made the above order on the 15th February 2013.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

Counsel for the applicant : Adv R Brooks

Instructed by : Van Wyk Attorneys

PORT ELIZABETH

Counsel for the respondent : Ms K Govender

Instructed by : Legal Aid Board

GRAHAMSTOWN

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