

SOUTH AFRICA / JUDGMENT

M[...] v B[...] (16306/2021) [2021] ZAGPPHC 230 (12 April 2021)

[2021] ZAGPPHC 230

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

16306/2021

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 16306/2021

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

NOT

REVISED

In

the matter between: V[...]
M[...] : C[...] P[...]
APPLICANT
and
B[...]:
J[...] E[...]
RESPONDENT

JUDGMENT

Van der Schyff J

INTRODUCTION

- [1] The applicant and respondent are the parents of K V[...] M[...], a boy born on [...]. K is currently six years and seven months old. The parties divorced in 2018. They concluded a settlement agreement in terms whereof they both retained their full parental rights and responsibility and equal guardianship in respect of K. The parties agreed that K would 'for the foreseeable future primarily reside with' the respondent, 'until such time as the parties may otherwise agree upon, having due regard to the child's best interest and his wishes.' The applicant was entitled to remove the child from his primary residence every alternative weekend from Friday to Sunday and for at least half of every long and short holiday. The parties also agreed that if the respondent wishes to relocate with the minor child to an area exceeding a radius of 100km from Centurion, the parties shall engage in discussions to reach an agreement regarding the applicant's rights as set out in paragraph 1 of the agreement. Paragraph 1 deals with the residency and contact rights of the parties regarding the minor child.
- [2] Despite the respondent's re-marriage, the relationship between the parties was amicable. The applicant's contact rights were extended in 2020 to include a mid-week sleepover on Wednesday and sleepovers on Sundays. On or about 5 February 2021, the respondent informed the applicant that she and her husband intended to relocate to the Western Cape. The applicant states that the respondent and her husband conveyed that K would then remain behind in Pretoria and reside with him. The respondent, however, submits that this was one of the options that she considered when it became clear that she and her husband would relocate. She realised, however, that it would not be in K's best interest. At the applicant's request and during a round table conference with both parties' attorneys on 22 February 2021, the parties agreed that Ms. Jana van Jaarsveld, an educational psychologist, would investigate K's best interest. It suffices to state at this juncture that Ms. Van Jaarsveld concluded in her report that became available on 24 March 2021 that it would be in the minor child's best interest to remain in Pretoria in the care of his father and not to relocate with his mother to the Western Cape. The respondent informed the applicant on 26 March 2021 via Whatsapp that she is relocating to the Western Cape with the minor child, regardless of Van Jaarsveld's findings.

URGENCY

[3] The applicant approached the court on an urgent basis. He seeks an order that the minor child be returned and that he be awarded the primary care and residence of the minor child, pending an investigation by the Office of the Family Advocate. The respondent

opposed the application. She contended that the application is not urgent and that any urgency that may exist is self- created because the applicant was aware of her intention to relocate as far back as 4 February 2021. I disagree. This matter is inherently urgent. The parties agreed during February 2021 that an expert would assess the minor child. It would have been an abuse of process if the court were approached on an urgent basis in view of the parties' agreement. It is in the best interests of the minor child to hear this application on an urgent basis.

[4] The respondent instituted a counter application. Both parties seek to be awarded the primary care and residence of the minor child, pending further investigation.

ADMISSABILITY OF VAN JAARSVELD'S REPORT

[5] The respondent objected to the admissibility of the report of Ms. Jana Van Jaarsveld. She acknowledged that Van Jaarsveld is a qualified educational psychologist but stated in her answering affidavit that the report filed by Van Jaarsveld is a legal/forensic

report and this, she submitted, falls outside the scope of practice of an educational psychologist. The applicant submitted that both parties, duly represented by their attorneys, agreed that Van Jaarsveld would be a suitable expert to assess K. He stated that Van Jaarsveld considered all the facts, concerns, and issues. She is suitably qualified to determine the best interests of the child.

[6] I disagree with the submission that Van Jaarsveld's report is inadmissible merely because she is an educational psychologist. Due to the extent of similar cases that are being dealt with regularly in the High Court, I can take cognisance of the fact that educational psychologists are often involved in the assessment of children who are the subjects of custody disputes between divorcing parents. Van Jaarsveld emphasised the minor's development phase and attachment considerations in her assessment. It cannot be negated that these aspects fall within her field of expertise. I find no evidence indicating that Van Jaarsveld was a 'hired gun.'

DISCUSSION

[7] When child custody disputes turn in court, it is difficult for everyone involved. The children involved are the unfortunate victims when adults litigate over their fate. In matters of this nature, children must often feel like leaves blown around in the wind. But children are vitally important, and this is why the legislature prescribed in section 9 of the Children's Act, No. 38 of 2005, that '[i]n all matters concerning the care, protection, and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

[8] The affidavits filed of record reflect that both the applicant and the respondent are loving parents. I can find no evidence in any of the affidavits that indicate that any of the parents would be unable to care suitably for K. Due to the factual reality brought about by the respondent's husband moving to the Western Cape, a hard decision is to be made regarding the minor child's place of residence. It is against this background that the applicant approached the court for interim relief. In casu the court has the benefit of a report filed by an educational psychologist.

[9] The following aspects are evident from Van Jaarsveld's report:

9.1 She conducted her investigation to determine the best interests of the minor in light of his mother's proposed relocation to Cape Town;

9.2 Her report records the assessment, findings, and recommendation

regarding the views and wishes of the minor child and the best interest of the minor child in light of the proposed relocation;

9.3 She conducted lengthy interviews respectively with the applicant and his partner, and the respondent and her husband and noted the concerns raised by both parents;

9.4 She conducted five 60 minute sessions with K. Her report reflects that the sessions were conducted in May 2021, but this is an oversight since the investigation occurred during March 2021;

9.5 She indicated that K expressed his wish to stay with his father, the applicant when his mother relocates to Cape Town from the second session onwards. He understands that he will see his mother less;

8.9 Van Jaarsveld concluded that (i) K finds his stability rooted in his school and that it would be detrimental to uproot him; (ii) he places significant reliance on his extended family in Centurion, in particular his cousin W, and that this is an important factor that contributes to his sense of stability, security, and belonging, (iii) K's relationship with the applicant contributes significantly to his stability, security, and sense of belonging; (iv) K did not mention his mother's husband spontaneously or in a positive light during any of the five interview sessions; (v) K has an attachment with his mother that will be sustained if he was to remain in Pretoria; (vi) K's strongest and most secure attachment appears to be with his father.

[10] Having regard to the guidelines set out in section 7 of the Children's Act as well as her observations and findings, Van Jaarsveld recommended that it would be in K's best interests to be in the care of his father, the applicant, and to continue his school career at Bakenkop Primary School.

[11] The respondent states in her answering affidavit that her son is happy and already adjusting to his new environment in Cape Town. It was argued on her behalf that she was the minor's primary caregiver since his birth, that he has never been away from her for prolonged periods (14 days), and his nucleus family consists of her, her newborn baby daughter, and

her husband. She depicted the relationship between K and her husband as good. She explained that K would be attending a good school with fewer pupils where he would be afforded more personal attention than in Bakenkop Primary School. The respondent is concerned that the applicant suffers from depression. She highlighted that the applicant was admitted to Vista Clinic for 14 days after his firstborn son relocated abroad. This incident, however, occurred a long time ago and is explained by the applicant. The respondent considered, even if briefly, the option that the minor child would remain with his father when she relocates. The divorce settlement agreement attests to the fact that the parties foresaw that the residency arrangement may be amended in the future and that the child's voice would be given consideration. K might be of tender age, but due to his parent's divorce, he has experienced being apart from one of them from very early in his life. When he stated that he understands that he will not see his mother if he resides with his father, and notwithstanding repeatedly expressed the wish to remain in his father's care when questioned by an expert, it cannot summarily be disregarded as the ignorant utterance of an immature child.

- [12] I must reiterate that neither party made out a case that the other would not be a good parent to K. As it generally happens, dirty laundry comes out as litigation proceeds, and incidents that happened in the past are taken out of context. However, nothing mentioned by either of the parties raises a concern that K will not be adequately looked after and loved while in either party's care. The papers filed attest to the fact that the parties have been able to put their minor child's interest above their own personal interest in the past. They are encouraged to deal with this new reality occasioned by the respondent and her husband moving to Cape Town in the same manner.
- [13] A court should be slow to make final orders in matters like the current where an application is brought on an urgent basis. I agree with the applicant's counsel's submission that the Family Advocate must investigate the minor child's best interests and that no final order must be made before the Family Advocate's report is received. In the interim, I cannot ignore the factually substantiated recommendation made by Van Jaarsveld.
- [14] As far as an appropriate costs order is concerned, I am of the view that each party should carry their own costs for this application.

Both parents seek their child's best interests, and there is no victorious party in litigation of this nature.

ORDER

In the result, the following order is granted:

1. Pending investigations by the Office of the Family Advocate, the primary care and residence of the minor child is awarded to the applicant and K is to be placed in the care of the applicant within 7 calendar days from the date of this order;

2. The respondent shall exercise the followings rights of contact:
 - 2.1. Every alternative weekend from Friday after school until 16h00 on Sunday, or any other dates as arranged by the parties.
 - 2.2. Every short school holiday and half of every long school holiday, or as arranged by the parties, with the understanding that the period over Easter, Christmas and New Year shall rotate annually between the parties, subject thereto that the minor child shall spend the upcoming April holiday with the applicant with alternate weekend contact with the respondent to enable him to settle in;
 - 2.3. Every long weekend that is not part of a school holiday or a specific religious holiday from the day preceding such long weekend to 17h00 on the last day of such weekend, or as arranged by the parties;
 - 2.4. Daily telephonic contact between 17h00 – 20h00. When the minor is with the respondent the applicant is entitled to the same telephonic contact;
 - 2.5. The minor child's birthdays shall be shared equally between the parties, to the extent that it is practically possible.
 - 2.6. The minor child is to spend the weekend of mother's day with the respondent and weekend of father's day with the applicant, or as arranged by the parties.
3. The Office of the Family Advocate is requested to investigate the best interests of the minor child and to make recommendations and report on his best interests, regarding the dispute of primary residence and the contact to be exercised by the non-custodian parent. In the event that the Family Advocate opines that it is necessary to involve a clinical psychologist to assess the minor child for purposes of obtaining the input of such expert relating to the question as to which of the parties should have primary care and residence of the minor child, the Family Advocate may appoint such clinical psychologist and the parties will be liable in equal shares for the costs of the clinical psychologist;
4. The applicant's attorney is to file a copy of the application inclusive of Van Jaarsveld's report, all the parties' contact details and this order with the Office of the Family Advocate before Friday 16 April 2021 and provide proof thereof to the respondent's attorney;
5. Ms. Jana van Jaarsveld is to nominate a person to monitor and provide therapy to the minor child, if necessary, upon him primarily residing with the applicant as per prayer 1 herein above, and the applicant and respondent will be equally responsible for the costs of such therapy;

6. The applicant and respondent must attend mediation to mediate the issue of the travel expenses of the minor child between Cape Town and Pretoria. It is noted that the applicant placed on record that he will not, pending finalisation of Part B of the matter, claim any maintenance from the respondent for the minor child in order that such funds be utilised by the respondent for the travel expenses of the minor child;
7. The relief sought in Part B of the application is postponed sine die and the parties are authorised to approach the Acting Deputy Judge President to request the appointment of a case manager if the
need therefore arises;
8. The applicant and respondent are granted leave to supplement their papers as necessary for the hearing of Part B within 15 days after the Family Advocate's report and recommendations are made available;
9. Each party is to carry their own costs in relation to Part A of the application.

E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture it will be sent to the parties/their legal representatives by e-mail. The date for hand-down is deemed to be 9 April 2021.

Counsel for the applicant:

Adv. L van der Westhuizen

Instructed by:

Stopforth Swanepoel and Brewis Inc.

Counsel for the respondent:

Adv. N Erasmus

Instructed by: Potgieter

Louw Attorneys Inc.

Date of the hearing:

8 April 2021

Date of judgment:

12 April 2021

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