

SOUTH AFRICA / JUDGMENT

M.B v N.B (CA&R60/2017) [2018] ZAE CGHC 74 (28 August 2018)

[2018] ZAE CGHC 74

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, J C Coltman

CASE / FILE NUMBER

CA&R60/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA&R 60/2017

In the matter between:

M B Appellant

and

N B Respondent

APPEAL JUDGMENT

Bloem J.

[1] The issue in this appeal is whether the mother or father of the minor children in question should be their primary care-giver. The right to maintain contact with the children and the responsibility to contribute to their maintenance are ancillary to the above issue.

[2] The undisputed facts are that on 31 July 2004 the parties entered into a marriage in community of property. Two sons (the

children) were born of that marriage during 2005 and 2009 respectively. The parties encountered marital problems and during June 2011 the husband, the appellant herein, instituted an action against his wife, the respondent herein, for a decree of divorce. The respondent delivered a plea in reconvention wherein she also claimed a decree of divorce. Each claimed a right to primary care for the children and that the other party be awarded reasonable contact with the children

and contribute towards their maintenance by the payment of a monthly cash amount to the party to whom the right to primary care for the children had been awarded.

[3] Prior to the hearing in the East London regional court the parties reached agreement on the division of the joint estate and that each be awarded 50% of the other's pension interest in the respective pension funds of which they were members, calculated from the date of marriage to the date of the decree of divorce, if granted. They also agreed that both of them act as the

children's co-guardians and co-holders of parental responsibilities and that the one party should pay maintenance to the

other party to whom the court would award the right to primary care for the children. The only issue that the magistrate was required to decide was whether to award the right to primary care for the children to the appellant or respondent.

[4] On 8 December 2016 the magistrate found that both parties were capable and competent to have custody of the children but awarded the right to primary care for the children to the respondent "because she has a support base in the form of the grandparents of the children and her siblings. This is the thing that the plaintiff is lacking. During the time that the plaintiff was staying with the children, he was assisted by a nanny/helper and such an employee cannot be trusted as she can leave anytime when the working conditions are not favourable". The order that she issued is quoted hereunder:

"1. The decree of divorce is granted.

2. Both parties are declared co-guardians of the two minor children as provided in Section 18 of the Children's Act, Act No. 38 of 2005.
3. Both parties are declared holders of parental responsibilities and rights in respect of the two minor children.
4. The primary residence of the children shall be with the Defendant and Plaintiff to have reasonable contact with the children as follows:
 - (i) Every alternative weekends from Friday at 17h00 until 17h00 on Sunday.
 - (ii) Public Holidays shall also alternate from 17h00 a day before till 17h00 on the day of the holiday.
 - (iii) The parties shall also alternate the short school holidays with the Plaintiff having the children on the first one and the Defendant on the second one.
 - (iv) The parties to alternate winter and summer Holidays. Defendant having the children for winter and the Plaintiff having them in summer.
 - (v) Shared access of the Children's birth days, Mothers and Fathers birth days.

(vi) The Defendant to keep the children registered in her medical aid.

(vii) Plaintiff to pay an amount of One Thousand Five Hundred Rand (R1500.00) per month per child for maintenance with effect from the 1st of January 2017 and on or before the 7th of each succeeding month until they become self-supporting.

5. Plaintiff is entitled to 50% of the Defendant's pension held at Alexander Forbes which is payable to the Defendant at the date of divorce and the said fund is ordered to endorse its records accordingly.

6. The Defendant is entitled to 50% of the Plaintiff's pension held at Cape Joint Retirement Fund which is payable to the Plaintiff at the date of divorce and the said fund is ordered to endorse its records accordingly.

7. Division of the remainder of the joint estate.

8. Each party to pay its own costs."

[5] The submissions made on behalf of the appellant are threefold. Firstly, it was submitted that no evidence was placed before the magistrate for her to find that the appellant's helper was not reliable and could leave her employment with the appellant at any time. The second submission was that the above order was made contrary to the recommendations of a psychologist whose evidence was tested by cross-examination and who has been found by the magistrate to have responded to all questions satisfactorily. Thirdly, it was submitted that the magistrate should not have made the above order as it was made in accordance with recommendations contained in the report prepared by the family advocate despite the fact that the family advocate did not testify and the appellant, when he testified, challenged the findings in the family advocate's report.

[6] Regarding the helper's trustworthiness or lack thereof, Ms van der Merwe, counsel for the respondent, conceded that there was no factual basis upon which the magistrate made the finding that "she can leave anytime when the working conditions are not favourable". In my view that concession was correctly made. That was the only basis upon which the magistrate found in favour of the respondent. The magistrate did not take into consideration any of the factors set out in section 7 of the Children's Act[1] to determine whether it would be in the best interests of the children to award the right to primary care for them to the appellant

or respondent. The magistrate accordingly misdirected herself when she took into consideration a factor in respect whereof no evidence was placed before her and when she did not consider relevant factors to determine whether it would be in the best interests of the children to award the right to primary care for them to the appellant or respondent. The result is that her finding in this regard must be set aside.

[7] Despite the above concession Ms van der Merwe submitted that, if the evidence that was placed before the magistrate were holistically

evaluated, this court will nevertheless award the right to primary care for the children to the respondent. Before I consider that submission, it would be appropriate to deal with the appellant's submission relating to the family advocate's report.

[8] The magistrate made reference to the family advocate's report. In terms of the Mediation in Certain Divorce Matters Act (Act 24 of 1987)[2] a family advocate is appointed by the Minister of Justice to exercise the powers and perform the duties granted or assigned to him or her by or under Act 24 of 1987 or any other law. The powers and duties of the family advocate are set out in section 4 of Act 24 of 1987 which makes provision for a family advocate to enquire into and furnish the court with a report and recommendations concerning the welfare of the children of the marriage concerned. According to its preamble one of the aims of Act 24 of 1987 is to provide for the consideration by a court in certain circumstances of the report and recommendations of a family advocate before granting a decree of divorce or other relief. In my view a court may consider the report and recommendations of a family advocate without the family advocate concerned having given oral evidence to confirm the contents of that report and recommendations. That is so because the court, in its endeavour to determine who should be the children's primary care-giver, has extremely wide powers in establishing what is in the best interests of the children.[3] In addition this court sits as upper-guardian of the children. In *Terblanche v Terblanche van Zyl* J stated that in such an enquiry a court is not bound by procedural strictures or by the limitations of the evidence presented

or contentions advanced by the respective parties. The court may have recourse to any source of information, of whatever nature, which may assist it to determine the best interests of children insofar as the primary care-giver for them is concerned.[4] Legal niceties should not frustrate the quest to determine the best interests of a child[5] or, as Sachs J put it in *AD and another v DW and others* (Centre for Child Law as amicus curiae; Department for Social Development as intervening party)[6] that a child's best interests should not be mechanically sacrificed on the altar of jurisdictional formalism. The appellant's submission that the magistrate should not have had regard to the family advocate's report, cannot, in the circumstances, be sustained.

[9] I will now consider the submission that the respondent is entitled to the order granted by the magistrate. It is common cause that the parties have not been living together as husband and wife since May 2011 when the respondent left the common home. The circumstances under which she left the common home are in dispute. It is unnecessary to deal with the dispute in that regard. What is undisputed is that shortly after the respondent had left the common home she collected the children on legal advice. However, on 26 May 2011 and at the appellant's instance the magistrate's court at East London issued an interim protection order in terms whereof the respondent was inter alia ordered to release the children into the appellant's primary care. Pursuant to that order the appellant collected the children from the respondent's parental home in the company of the police. The respondent testified that her contact with the children depended on the appellant's mood. She accordingly approached the children's court at East London which, on 15 December 2011, granted her structured contact with the children. The children resided with the appellant at the common

home until 28 July 2014 because on 24 July 2014 the East London regional court issued an order in terms whereof interim custody of the children was awarded to the respondent pendente lite. Since then the primary residence of the children has been the home of the respondent's parents.

[10] The respondent testified that her parents own a two bedroomed house which was extended by the addition of a dining room and a kitchen. There is also a granny flat consisting of three bedrooms and a bathroom. The children reside with the respondent, both their maternal grandparents and the respondent's sister in that house. The respondent and the children share one bedroom in the main house. The respondent is employed at the East London branch of the Walter Sisulu University as an assistant administrator. She drives the children to and from school. After dropping them off at school she goes to work and collects them after work. When she is out of town she leaves her vehicle at home to enable her parents or her sister to take the children to and from school.

[11] The appellant testified on 6 August 2015. At that stage he resided in the common home which had been sold at that stage.

His evidence was that at the end of that month he was moving into a two bedroomed townhouse with a dining room, sitting room, kitchen and a garage surrounded by an electric fence. The appellant is employed by the Buffalo City Metropolitan Municipality as a candidate valuer. He testified that while the children were residing with him between 2011 and 2014, he drove them to and from school. When he was out of town he would arrange with the respondent, to drive them to and from school and, if she was unavailable, he would leave his vehicle with his sister or cousin to do so. Those arrangements are still available to him should the primary care for the children be granted to him, he testified.

[12] The appellant called Lisa Whittstock, a psychologist, to testify. She had sixteen psychotherapy sessions with the parties' elder son between March 2012 and July 2014. That was the period when the children resided with the appellant. She did not interview any one of them after 28 July 2014, the date from which they resided with the respondent. Although Mrs Whittstock had seen the younger brother at her consultation rooms when he accompanied his elder brother for the psychotherapy sessions, she did not assess him because he was too young. Mrs Whittstock conducted tests on the elder brother to determine the impact of the pending divorce on him. He was well aware of the fact that his parents were divorcing, although he was initially in denial that his parents were in separation. The psychotherapy sessions assisted his understanding of what his parents went through and the impact thereof upon his family. He told her that when he is with his father he misses his mother and vice versa.

[13] Mrs Whittstock was of the view that both parents love the children dearly. She could not find fault in their parenting. The only criticism she had of them was that they did not seem to keep the children's best interests paramount during their conflict. She testified that the children need consistency, stability and prioritising of their relationships with both of their

parents. She expressed the view that the respondent did not have the children's best interests at heart. That opinion was based on two factors. The first was the allegation that the respondent blocked any form of outside professional gaze onto her parenting. She testified that the appellant, on the other hand, went out of his way to take his son to therapy. Secondly, she threatened to approach the children's court for an order that the children be placed in a place of safety if the levels of conflict to which the children were exposed, did not decrease drastically. She testified that the respondent did not respond to that threat, whereas the appellant said that he did not want his children to be placed in a place of safety and that he was therefore prepared to step aside.

[14] Mrs Whittstock did not recommend that the parties share primary care for the children. That is so because of the hostility between the parties. She recommended that there be one primary residence with structured contact to be granted to the other party. She recommended that primary care for the children be granted to the appellant because she found "his parenting to be far more insightful".

[15] The appellant also called a friend, Phumeza Mpahla, who is employed by the Eastern Cape Department of Health as a social worker.

She and the appellant have been friends since long before he married the respondent. Her son and the parties' elder son were born during the same month. They became friends. Her son would sleep at the parties' common home during some weekends and the elder son would also sleep at Ms Mpahla's home. She testified that she was always comfortable to leave her child at the parties' common home, even during the time when the respondent did not share the common home with the appellant and the children between 2011 and 2014. She testified that during that period the appellant looked after the children very well, as he has always put them first in whatever he does. In her view he was very supportive and caring towards the children. She testified that, although the appellant takes alcoholic drinks with her on some Fridays after work, he would leave before 20h00 to go home.

[16] The respondent testified that the appellant would consume liquor with his friends over weekends and return home late. After entering the common home he would leave the door open because of his state of intoxication. She testified that he is generally an aggressive person, but is more aggressive when he is under the influence of liquor. He once assaulted her with a broomstick about gossip that he had heard at the place where he had been consuming liquor. As examples of his aggression, the respondent testified how the appellant waited for her and the children in the driveway at her parents' home. He threw stones at the vehicle while the children were inside it. After that incident he left with the children. On another occasion, while the respondent and the children were visiting a friend on a Sunday afternoon, the appellant arrived unannounced and insulted the respondent in front of her friend and her family. Fortunately the children were outside and did not witness that scene. He again left with the children. Later that same day when the parties happened to be at a shopping mall, the appellant broke the wipers of the respondent's vehicle. One day he chased the respondent who was driving her vehicle. She went to the nearest police station.

He also arrived at the police station and told the policemen that he did not want the respondent's sister in the vehicle in which he claimed to have an equal share by virtue of having been married to the respondent in community of property.

[17] This appeal concerns the care[7] of the children. In terms of section 28 (2) of the Constitution of the Republic of South Africa, 1996 a child's best interests are of paramount importance in every matter concerning the child. Section 9 of the Children's Act provides that in all matters concerning the care, protection and well-being of a child the standard that the child's best interests are of paramount importance, must be applied. What is in the best interests of a particular child or children is a question of fact in each specific case.[8] This matter concerns the responsibilities and rights of the parties to care for, maintain contact with and contribute to the maintenance of the children, as envisaged in section 18 (2) of the Children's Act. Section 7 (1) of the Children's Act provides that whenever a provision of that Act requires the best interests of the child standard to be applied, the factors set out therein must be taken into consideration where relevant. I will only consider the relevant factors set out in section 7 (1).

[18] The undisputed evidence is that the children each has a good relationship with their parents. The appellant did not deny

that the children also have a good relationship with their maternal grandparents and the respondent's sister. No evidence was adduced relevant to the relationship between the children and the appellant's helper. It is furthermore undisputed that each of the parties has a positive attitude towards the children and, when the children are with him or her, exercises parental

responsibilities and rights in respect of them. The appellant testified that he consumes liquor. That was confirmed by Ms Mpahla. On the evidence adduced by the parties I am unable to find that the appellant abuses liquor.

[19] Both parties have the capacity to provide for the needs of the children. Mrs Wittstock testified that the appellant went out of his way to provide for his elder son's emotional and intellectual needs by driving them to the psychotherapy sessions.

He did not only drive the elder son to those sessions. He took the younger son along, as that was what the younger son wanted.

Despite Mrs Wittstock's criticism of the respondent relevant to the alleged lack of interest that she showed for her elder son's physiotherapy, I find that the respondent cannot be said not to provide for the children's needs. For example, she is the one who takes them to and from school.

[20] The history of the children's primary residence is that until May 2011 they resided with their parents in the common home. For the period between May 2011 and November 2014 they resided in the common home with the appellant while the respondent resided with her parents. With effect from November 2014 to date, a period of more than 3 years, they have been residing with the respondent at their grandparents' home. Another change in the children's circumstances, if they were to return to reside with the appellant, might adversely

affect them. They have over the 3 years become accustomed to reside with their mother, grandparents and aunt. The appellant has not shown any practical difficulty or undue expense that he would incur to exercise his right to maintain contact with the children. During his evidence he testified that he would do whatever necessary to maintain contact with them.

- [21] The respondent testified that the appellant is by nature an aggressive person which aggravates when he consumes liquor. She furthermore testified that on occasion he arrived home with blood on his clothing which suggested that he was involved in fights.

There is no evidence that the appellant exhibited such conduct in front of the children or that he exposed them to maltreatment, abuse or violence.

- [22] There is uncertainty regarding the circumstances under which the appellant resides in view of the fact that he testified that he would move from the common home at the end of August 2015. I have taken that into account as well as the respondent's evidence, which the appellant did not dispute, that the children are brought up within a stable and caring family environment where, in the appellant's absence, their grandfather is the father figure within that family environment. In my view it would serve the best interests of the children far better to allow the respondent to continue being the primary care-giver for the children, than to cause them to move from their present environment to the appellant's uncertain environment. The appellant has the right to maintain contact with them. He has not complained that the structured contact with the children that the magistrate ordered has had or will have a detrimental effect on the children.

- [23] An objective assessment of all the facts should have alerted the appellant that an appeal have no reasonable prospect of success.

That is so despite the fact that the magistrate misdirected herself as to the reason why it would be in the best interests of the

children for the right to primary care for the children to be granted to the respondent. Under the circumstances there is no reason why the appellant should not pay the costs of the appeal. On 10 May 2018 the appeal was postponed to enable the appellant to file a complete appeal record. The costs occasioned by the postponement were reserved. The appellant subsequently filed a complete record. There is also no reason why the appellant, who was the cause of the postponement, should not pay those costs.

- [24] In the result, the appeal is dismissed with costs, such costs to include the costs reserved on 10 May 2018.

G H BLOEM

Judge of the High Court

COLTMAN, AJ

I agree.

J C COLTMAN

Acting Judge of the High Court

For the appellant: Mr F T Dengana of F T Dengana Attorneys, East London and Caps Pangwa & Associates, Grahamstown.

For the respondent: Adv C van der Merwe, instructed by Wesley Pretorius and Associates, East London and Netteltons Attorneys, Grahamstown.

Date of hearing: 17 August 2018.

Date of delivery of the judgment: 28 August 2018.

[1] Children's Act, 2005 (Act No. 38 of 2005).

[2] Mediation In Certain Divorce Matters Act, 1987 (Act No. 24 of 1987).

[3] Terblanche v Terblanche 1992 (1) SA 501 (W) at 504C.

[4] Terblanche v Terblanche at 504D.

[5] Minority judgment of Hanke AJA in de Gree and another v Webb and others (Centre for Child Law as amicus curiae) 2007 (5) SA 185 (SCA) at par [99].

[6] AD and another v DW and others (Centre for Child Law as amicus curiae; Department for Social Development as intervening party)

[2007] ZACC 27; 2008

(3) SA 183 (CC) at 193B where Sachs J referred with approval to the approach of the minority in par [99] of de Gree.

[7] In terms of section 1 of the Children's Act "care", in relation to a child, includes, where appropriate – "(a) within available means, providing the child with –

(i) a suitable place to live; (ii) living conditions that are conducive to the child's health, well-being and development; and (iii) the necessary financial support;

(b) safeguarding and promoting the well-being of the child;

(c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;

(d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and principles set out in Chapter 2 of this Act;

- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child".

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 - (i) accommodating any special needs that the child may have; and
 - (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child".

[8] Lubbe v du Plessis 2001 (4) SA 57 (C) at 66E.

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