

SOUTH AFRICA / JUDGMENT

R B v M B (3567/2017) [2018] ZAFSHC 187 (6 December 2018) [2018] ZAFSHC 187

COURT

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

3567/2017

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3567/2017

In the matter between

R B Applicant

and

M B Respondent

HEARD ON: 16 AUGUST 2018

JUDGMENT

BY: CHESIWE, J

DELIVERED: 06 DECEMBER 2018

INTRODUCTION

- [1] This is a Notice of Motion Application on which the Applicant seeks to amend the Deed of Settlement as concluded between the parties and signed on 05 March 2015, be amended by striking of paragraph 1 thereof and replacing it with the paragraphs as set out in prayers 1 of the Notice Of Motion.

BACKGROUND

[2] The parties were married to each other and got divorced on 26 March 2015 in the above Honourable Court. The Deed of Settlement

between the parties was made a court order. The minor children involved in this dispute between the parties are J B born [...] 2010 and A B born [...] 2014.

The marriage between the parties was acrimonious and deteriorated to such an extent that the Respondent obtained a domestic violence interdict against the Applicant, and the case was later withdrawn by the Respondent. The post-divorce tension between the parties continued whereby the Respondent frustrated contact between the children and the Applicant. At the time of their divorce the Applicant thought it would be in the children's best interest to remain in the primary care of the Respondent.

[3] The Applicant exercised regular contact with the one minor child, that is Johan but the maternal grandparents refused to allow the Applicant to have access to Anton alleging that the Applicant does not have a relationship with Anton and that the Applicant denied his paternity of Anton

[3] It came to the Applicant's attention that in November 2016 the Respondent relocated to Durban as part of her enrolment in Hospitality Studies and the Respondent left the children with the maternal grandparents. The Applicant contends that it is during this period that the specifically maternal grandmother frustrated the Applicant's contact with the minor children, as a consequence of the Respondent and the maternal grandmother's conduct this prompted the Applicant to approach the Honourable Court for relief.

ISSUES

[4] The court has to determine whether primary residence should remain with the Respondent or be awarded to the Applicant and if this will be in the interests of the minor children.

[5] The matter was referred to the Office of the Family Advocate for their intervention and the said office compiled a report dated 19 February 2018 and is attached to the application from page 185 – 233.

SUBMISSIONS

[6] Adv. L.A. Roux, counsel on behalf of the Applicant in oral arguments and as well as the Heads of Argument, submitted that the Respondent is uncooperative when it comes to issues affecting the children. He submitted that the Applicant has requested several times that the Respondent should place the minor child Anton in a pre-school to which request the Respondent's reaction was reluctant. He further submitted that the Respondent continued to frustrate contact between the Applicant and the children. Adv. Roux in the Heads of Argument stated that the Respondent relocated to Durban without informing the Applicant about her relocation and that she would leave the children in the care of the maternal

grandmother. Counsel submitted that the courts are to move away from the maternal preference rule which is archaic. In the Heads of Argument several authorities were referred to in respect of the best interest of the minor children. Counsel submitted in conclusion that the court is to award primary care and residence to the Applicant.

- [7] Adv. Van Rensburg Counsel for the Respondent in his oral argument argued that the Applicant was not vocal on his obligation with regard to the children and that Anton did not have the luxury of a father as the Applicant was not involved in the children's life. Counsel further stated that the Applicant has a fatherly bond with Johan but not with Anton. Therefore, the Respondent did not frustrate contact between the children and the Applicant. Counsel disputed that the Respondent took a drastic step by leaving the minor children in the care of the maternal grandmother. He said the Respondent had to go out to improve her opportunities of finding employment by furthering her studies in Durban, and that the Respondent cannot be faulted for wanting to improve her career. Counsel stated that the court is to take into consideration the recommendations of the Family Advocate. .

REPORT OF THE FAMILY ADVOCATE

- [8] The Office of the Family Advocate conducted an investigation in respect of the minor children's best interests. The parties were consulted on 30 November 2017 and collateral information was obtained from maternal grandfather as well as paternal

grandparents. The Family Advocate after its thorough investigation, of which I trust that the office is competent to do so. The Family Advocate further obtained the minor children's views in terms of Section 6(5) of the Children's Act 38/2005,

through assessment tools which indicates the child's world, fantasies and feelings as well as observation interaction between the children and the parents. The Family Advocate recommended that the minor children should remain in the care of the maternal grandparents until such time the Respondent completes her studies.

- [9] Section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996 entrenched the best interests' principle of the children as follows:

"A child's best interests are of paramount importance in every matter concerning the child."

- [10] This principle is further enunciated in Section 7 of the Children's Act 38/2005 (The Act) and was also emphasised comprehensively in *McCall v McCall*[1], and factors are as follows:

- a) the nature of the personal relationship between:-
 - i. the child and the parent, or specific parent; and
 - ii. the child and any other care-giver or person relevant in those circumstances.
- b) the attitude of the parent or any specific parent towards:-
 - i. the child;

ii. the exercise of parental responsibilities and rights on respect of the child

c)

d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any

separation from:-

i. both or either of the parents.

ii. any brother or sister or other care-giver or person, with whom the child has been living (my emphasis)

e) the practical difficulty and expense of a child;

f) the need for the child to remain:-

i. in the care of his or her parent, family and extended family, and

ii. to maintain a connection with his or her family, extended family, culture or tradition.

k) the need for the child to be brought up within a stable family environment and where this is not possible in an environment resembling as closely as possible a caring family environment."

[11] Section 18 of the Children's Act provides that a person may have full or specific parental responsibilities and rights and those responsibilities include rights to care for the child; maintain contact with the child; the right to act as the child's

guardian and to contribute to the child's maintenance.

[12] Section 20 of the Act sets out the parental responsibilities and rights of married fathers and stipulates that the biological father of a child has full parental rights and responsibilities in respect of the child if he married the child's mother. This section is largely based upon the premises of common law rule that a man acquires full rights and responsibilities over a child by virtue of his marriage to the mother.

[13] Indeed it is affirmed in several court decisions that mothers as primary care givers has diminished,[2] and to avoid unfair discrimination against either parent when deciding what is in the best interest for the child, the court is not to view the disruption of the relationship with the mother any different to that of the father, but rather the nature and quality of both parents' relationship with the child.

[14] The best interest principle is trite[3] and this is reflected in our Constitution and the Children's Act as well as in the International Law instruments[4].

[15] Even though the principle is trite it is with great difficulty for many Judges who have to decide on the best interest of the minor children. As there is no wrong or right answer. The best that a person can do is to find an answer that is reasonably

satisfactory.

[16] I must pause to mention that in court after arguments of both Counsels of the Applicant and Respondent I addressed both the

Applicant and the Respondent and maternal grandmother as they were all in court, in order to bring to their attention that it is not in the minor children's best interests that the conflict between the parents continuous and I made the maternal grandmother aware that she must be the peacemaker and mediator between the Applicant and the Respondent and not make matters to degenerate between the parties. I do acknowledge that grandparents have a beneficial role to play in their grandchildren's life, but that role should not supersede the role of the father if he wishes to be involved in his children's life.

[17] The Applicant is aggrieved because the Respondent and the maternal grandmother have unfairly limited his contact rights with the minor children, based on the issue that Anton does not have a relationship with the Respondent and that the Applicant requested paternity tests when Anton was born. The Family Advocate mention in the report that there is mild Parental Alienation with regard to the conduct of the Respondent and the maternal grandmother. It might be that the Respondent is still angry at the Applicant for having requested a paternity test on Anton. There is nothing wrong if a father request such tests if he wants certainty whether he is the father of a child or not. If these test are positive, the father should not be punished by being refused access to the minor child.

[18] In so far as contact is concerned the rights of contact is deemed to be a right belonging to the child and not the parent. The non-custodian parent is however deemed to poses an inherent entitlement to spend time with the child and enjoy the child's

company provided that there are not indications of alcohol or drug abuse or acts of violence against the child. The non-custodian

would therefore be entitled to exercise reasonable contact with the minor child. The Applicant raised the issue that he usually has to drive for 15Km to see the children on the farm of the maternal grandparents whereas the maternal grandmother will be driving into Bethlehem, instead of coming with the minor children into town and let the Applicant collect the children from there. Such conduct of the maternal grandmother is unacceptable as this increases the conflict between the parties.

[19] The Respondent should neither be faulted for having moved to Durban to advance her career. The Respondent left the children in the temporary care of her parents, in that way the Applicant was supposed to continue to have access to the children, as had she moved the children to Durban this would have complicated matters even further.

- [20] Counsel for the Applicant correctly submitted that the courts are to move away from the archaic principle of Maternal Rule, as fathers are just as important in the children's life[5]. I agree on that aspect. The children need both the love, security and attention of both parents. Nor do the children need the current continuous tension between the parents. Aligning myself with Hatting J in Van der Linde supra when he said:
- “Die begrip “bemoedering” is aanduidend van ’n funksie eerder as n persona en is hierdie funksie nie noodwendig gelee in die biologiese moeder nie. Dit behels die teergevoelige gehegtheid wat voorvloei uit die aandag wat van dag to dag bestee word aan die kind se behoeftes aan liefde, fisieke versorging, voeding, vertroosting, gerustheid, geborgenheid, bemoedeging en onderskraging. Allenlik die ouer wat hierdie behoefde kan bevedig sal daarin slag om ’n psigologiese band met die kind te smee in welke ouer se sorg die kind kan ervaar dat sy bestaan nog veeldbeduidend is, en wat met teengeneentheid beskut en beskerm word.”*
- [22] However, Section 10 of the Children's Act also gives the minor child a right to participate heard in matters affecting or concerning the child's life, obviously depending on the child's age, development and maturity and the views expressed by the child must be given due consideration.
- [23] The Family Advocate focused on what is in the best interests of the children in as far as primary residence is concerned. The one minor child Johan was able to participate in terms of Section 10 and according the Family Counsellor, Ms Van Der Westhuizen, she noted the following with regard to Johan that: he has a secured relationship with the maternal grandmother; he shares a close bond with his brother; he has regular contact with the Applicant and the Respondent and shares a good relationship with the Applicant; and that the child's school progress is good. Ms Van der Westhuizen concludes that Johan is functioning well in his current circumstances and it is therefore important to keep stability and structure in Johan's life.
- [24] Ms Van der Westhuizen with regard of Anton was unable to interview Anton due to his young age, but observed that there are some concerns with regard to his development stages in terms of his to speech and language and that for Anton's age he was still on diapers. However, Anton appeared to be comfortable with both the Applicant and the Respondent. Family Counsellor concluded that since the parties divorce on 26 March 2015, the children has been in the primary care of the Respondent and the maternal grandparents. To disrupt the children's current environment in this instance will not be in their best interests. The Applicant in his founding affidavit indicated that: “I am more than more than willing to work with any (my emphasis) recommendations of the Family Advocate to ensure that I accommodate Johan and Anton into my life and offer the best possible opportunities.”
- [25] The Family advocate made recommendations that it deemed are in the minor children's best interest, yet Applicant refused to comply with what he agreed under oath and still opposed the recommendations of the Family Advocate. I have no reason to doubt the Family Advocate's investigation as the office has a duty to protect the minor children's best interests.

The Family Advocate has no reason to place the children in an environment that's harmful or dangerous to the children. The Applicant could not give any reasons that the children are endangered or harmed by the Respondent and the maternal grandmother and must be placed in his care. Except that the Respondent frustrated contact between the Applicant and the children. Both the Respondent and the maternal grandmother could not even give reasons as to why they frustrated contact between the Applicant and Anton, except the allegation that the Applicant denied that he was the biological father to Anton. An allegation which the Applicant denied, as he requested the paternity when he discovered that the Respondent had an extra-marital affair.

[26] The Applicant though he seeks the relief that primary residence of the children be awarded to him, from the Applicant's founding affidavit, it appears that the children will be in most instances left in the care of the paternal grandmother as he will be busy at his work place. There is nothing wrong for the children to be with the paternal grandparents, however to remove the children from the maternal grandparents and place them in the care of the paternal grandparents is not in their best interests, especially if they have been residing in their current residence since the parents divorced.

[27] I am mindful of the fact that fathers have also become domesticated and are good child minders, but it is about the minor children's

best interests. Separation of children from one parent or their stable environment should be avoided at all costs. The children were already uprooted when the parties divorced. To uproot the children again for the second time is not in their best interests. Section 7 of the Children's Act mentioned above enunciate the child's best interests properly and these are factors that must be taken into consideration.

[28] It would therefore be in the best interests of the minor children that the status quo concerning the children is not disturbed.

[29] Though the High Court is the upper guardian of all minor children. The court does not have the opportunity to physically assess the children or interview the children to obtain their view. The office of the Family Advocate is in a better position to interview the parents, grandparents and assess the children. The court has no reason to doubt the Family Advocate's recommendation.

[30] The Respondent and maternal grandmother are not to frustrate contact between the Applicant and Anton. The Applicant has shown that he wants to be involved in the minor children's lives and thus approach the court for relief as set out in his Notice of Motion application.

[31] I am however, I am satisfied with the recommendation of the Family Advocate inclined to confirm the recommendations of the Family Advocate,

COSTS

[32] The Applicant prayed for costs if the matter is opposed. The Respondent's Counsel submitted that the Applicant should have approached the Regional Court given the financial challenges the parties faced.

[33] Generally the basic rule is that all costs are in the discretion of the court. The court's discretion is wide, though not unfiltered and must be exercised judicially upon a consideration of facts of each case.

In essence it is a matter of fairness to both sides. The Respondent cannot be faulted by the court in opposing the application. As she acted in the minor children's best interests nor can the Applicant be faulted for approaching court for relief.

[34] The court take into cognisance the parties are financially challenged and that a punitive costs to anyone of the parties would not be fair and just. [6]

ORDER

[35] I accordingly make the following order:

1. Both parties to be holders of Parental Rights and Responsibilities as contemplated in Section 18 of the Children's Act.
2. That the minor children's primary care, including their residence is to remain with the Respondent.
3. That the maternal grandparents should temporarily continue to reside with the minor children until such time when the Respondent completes her studies.
4. That the Applicant will exercise his contact rights as contemplated in Section 18(2) (b) as follows:
 - 4.1 Reasonable telephone contact with the minor children.
 - 4.2 Contact on alternative weekends with both Johan and Anton, which weekend commence on a Friday at 15:00 till Sunday 17:00.
 - 4.3 The Applicant to have contact with the minor children on every Wednesday from 15h00 till 18h00.
 - 4.4 Short school holidays to alternate between the parties and long school holidays to be shared equally between the parties.
 - 4.5 Contact on Father's day or on the birthday of both minor children if such a day does not coincide with the usual access weekend.
 - 4.6 Maternal grandmother not to frustrate the above contact between the children and the Applicant.
5. Each party to pay their own costs.

S. CHESIWE, J

On behalf of the Applicant: Adv. L.A. Roux

Instructed by:

BLOEMFONTEIN

On behalf of the Respondent: Adv. Van Rensburg

[1] 1994

(3) SA 201 (C)

[2] Van der Linde v Vander Linder 1996 (3) SA 509 (O) at 514 -515 (Hattingh J) ‘mothering’ is just a function that is not necessarily inherent to women.”

[3] Fletcher v Fletcher 1948 (1) SA 130 (A).

[4] The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996; Convention on the Rights of the Child (New York, adopted 20 November 1989; Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (The Hague, adopted 29 May 1993)

[5] See Van der Linder supra

[6] Fripp v Gibson & Co 1913 AD 354 at 363).

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