

SOUTH AFRICA / JUDGMENT

T.P.M v C.M (224/2020) [2021] ZAFSHC 22 (11 February 2021) [2021] ZAFSHC 22

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula

CASE / FILE NUMBER

224/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No.: 224/2020

In

the matter between:

T[...]

P[...]

M[...]

Applicant

and

C[...]

M[...]

Respondent

HEARD

ON:

4 FEBRUARY 2021

JUDGMENT

BY: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 11 February 2021. The date and time for hand-down is deemed to be 11 February 2021 at 11:00

- [1] The parties in this matter are married to each other and are embroiled in a seemingly acrimonious divorce. On 22 January 2020 the applicant launched an urgent application against the respondent praying inter alia for the primary care and residency of the minor children be restored to him. The interim order was granted on an unopposed basis. The rule nisi has been extended on numerous occasions and through the passage of time a number of the prayers have been rendered obsolete. When the interim order was granted, the dispute centred around two children, a boy aged twelve (12) and a girl aged six (6). It has since transpired that the applicant is not the biological father of the boy child. The remaining dispute for adjudication relate to the primary care and residency of the girl child.

Salient facts

- [2] The applicants were married to each other on 12 January 2012. Their marriage was not an easy one, punctuated by times of marital strife. They lived together as a family of four until they separated around June 2019 in Bloemfontein. The respondent left the common home and moved in at her parental home in Thaba Nchu. She left the child in the care of the applicant assisted by a live-in nanny. The minor child is enrolled at a reputable school in the city.

This position changed briefly during the festive season when the child visited her. Her refusal to return the child to the applicant

culminated in this application. The minor child was returned to the applicant around 27 January 2020 as per court order.

- [3] Throughout their marital life, the paternal aunt had been playing a supportive role in their family life. It is common cause that she had also developed a strong bond with the minor child. The minor child is spending weekends at her home and she is also providing financial assistance for her educational needs. As can be gleaned from the papers, there is no love lost between the respondent and the aunt. The respondent considers her to be a dominant figure exercising tight control over the applicant and her because of her financial muscle.

The Law

- [4] I am mindful of the prescripts of the Constitution of the Republic of South Africa[1] and Children's Act[2] that the best interests of the child are paramount in all matters relating to children. This court as the upper guardian of all minors has the inherent jurisdiction to grant such contested custody and primary care to one or both parents as it deems fit within

the context of the best interests of the minor child. Such must be done against the backdrop of the decision which of the parent is better able to promote and ensure the physical, moral, emotional and spiritual welfare of the child.

[5] In *McCall v McCall*[3] King J set out the useful criteria as follows: -

“This can be assessed by a reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational wellbeing and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into
- (l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost
- 12) should be placed in the custody of his father; and
- (m) any other factor which is relevant to the particular case with which the Court is concerned.”

- [6] At some stage this matter was postponed to enable the Office of the Family Advocate to conduct an investigation and prepare a report. The recommendation is that the daily care and residency of the minor child be awarded to the respondent. The second report was compiled by Dr Zeindre Swanepoel who is a practicing educational physiologist. She did not conduct an interview with both parties and as such cannot comment on matters related to the placement of the minor child with any of them.
- [7] The court is not bound to follow any of the reports but these serve a useful purpose to assist in coming to a just decision. In the report, the Family Advocate quotes the correct principles of law that must be taken into consideration for purposes of a decision. The report is lacking on the application of such principles to the

facts

on hand. It is unclear which information was given careful consideration to arrive at the conclusion referred to in the report.

- [8] The starting point is that both parents are generally good parents. In the papers the respondent makes slanderous statements to portray the applicant as a loser who was not even fit to be husband. It is unfortunate that she chose to base her case on such allegations. The evidence point to the contrary. Even when they were still living together with the applicant, the needs of the minor child were attended to by the nanny. This continued to be the case when she left the minor child with him for a period of more than six (6) months.
- [9] Clearly the applicant was the one who attended to her needs in her absence. If he was such a bad parent, this court is not aware of any adverse information about him during that period. It is alleged that he consumes alcohol therefore he cannot be left with the minor child. But she also consumes alcohol. What is apparent is that their consumption of alcohol is moderate and has no bearing on their capabilities as parents.
- [10] The minor child is in the formative years of her school life. It appears that she is excited about her school and has formed stable relationships there. It is apposite to mentioned that she has been in that environment for the past two (2) years. I was referred to her registration at another school in Tweespruit. This turned out to be false and no reliance is placed on it. My view is that the applicant is better placed to provide for the educational wellbeing of the minor child. The point is that the conduct of the respondent is that of a person who is thwarting genuine efforts to provide the best scholastic path for the minor child. It cannot be in the interests of the minor child to do so.
- [11] I broached the proposition with both counsel whether it will be in order if the parent who is not granted the primary care and residency exercises contact rights on weekly basis. Counsel for the applicant stated that the applicant will be amenable to it. The respondent through her counsel indicated that she will be unable to comply to it without stating tangible reasons supported by evidence. This uncompromising stance does not contribute to the best interests of the minor child albeit this being a temporary measure. Under the circumstances

it will be unfair to burden her with frequent contact that she will be unable to exercise.

[12] This brings me to the issue of costs. Counsel for the applicant submitted that each party be ordered to pay own costs. The reason cited was that this will go a long way in paving an easy way towards settlement. This submission is commendable and I agree. Counsel for the respondent argued that the principle that the losing party must pay the costs must be followed. I disagree. This gesture will go a long way towards ensuring co-operation with each other and encouraging them to discharge their mandate of raising the minor child as a well-rounded individual.

[13] In the result I make the following order:-

13.1 The parties are to retain their parental responsibilities and exercise it accordingly in the best interests of the minor child.

13.2 Daily care and residency of the minor child to be with the applicant.

13.3 Contact between the minor child and the respondent to be every alternating weekends from 17H00 on Fridays to 17H00 on Sundays.

13.4 Short school holidays to alternate between the parties and long school holidays to be shared equally and Christmas / New Year days to alternate between the parties.

13.5 The parties to share the birthdays of the minor child equally on the actual day.

13.6 Reasonable telephonic contact at all reasonable times between the parties and the minor child.

13.7 Contact on mother's day from 09H00 to 17H00 if this day does not coincide with the normal contact weekend.

13.8 Contact on father's day from 09H00 to 17H00 if this day does not coincide with the normal contact weekend.

13.9 This order shall operate pending the finalisation of the divorce action between the parties.

13.10 Each party to pay his/her own costs.

M. A. MATHEBULA, J

On behalf of the applicant: Adv. M. Louw

Instructed by:

Lovius Block

BLOEMFONTEIN

On behalf of the respondents: Mr L.G. Fixane

Instructed by:

Fixane Attorneys

/roosthuizen

- [1] Section 28(2) of Act 108 of 1996 provides: A child's best interests are of paramount importance in every matter.
- [2] Section 9 of Act 38 of 2005 reads as follows: - In all matters concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance, must be applied.
- [3] 1994 (3) SA 201 (C) at 205 B - F

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