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IN THE HIGH COURT OF SOUTH AFRICA
(TRANVAAL PROVINCIAL DIVISION)

DATE: 20/02/2008
CASE NO: 39972/05

UNREPORTABLE

In the matter between

LEKGALWA MESHACK NGOBENI

PLAINTIFF

And

PAULINA MANGENA NGOBENI

DEFENDANT

JUDGMENT

MSIMEKI, J

- [1] The plaintiff in this divorce action sought relief on a number of issues which included, inter alia, a decree of divorce, an order that the Defendant forfeits the benefits arising from the marriage in community of property, custody of the minor children, subject to the Defendants' right of reasonable access, maintenance of the minor children and others which I shall not refer to now that the parties have reached a settlement on them.
- [2] The Defendant pleaded to the Plaintiff's particulars of claim and counterclaimed also seeking relief on a number of issues.

Similarly, I shall at this stage not refer to the issues which are regarded as settled.

- [3] The parties failed to reach settlement on the issues of parental responsibilities and rights, primary residence and primary care giver in respect of the two minor children M and T. I am called upon to resolve these issues.
- [4] The parties are agreed that their marriage has irretrievably broken down and that no reasonable prospect exists for the restoration of a normal marriage relationship between them.
- [5] The parties' settlement agreement which they are asking the court to make an order of court deals with the division of their joint estate and the maintenance of their two minor children M and T.
- [6] The Court, in the Rule 43 application, *pendente lite*, ordered that the *status quo* regarding the custody of the two minor children be maintained. This meant that the two minor children remained with the Defendant pending the report of the Family Advocate on the issue of their custody and access. The order was made on 16 February 2006.
- [7] The Family Advocate at the instance of the court, prepared the required report which is dated 9 May 2006. On 13 February 2008

the Family Advocate wrote a letter to the Defendant's attorneys Shapiro and Shapiro. In the letter reference is made to a report by the Counselling Psychologist N. R. Ramothwala. These documents were handed in during the proceedings by Mr de Kock who represents the Defendant. Mr Somo representing the Plaintiff has had sight of the documents. The parties' legal representatives correctly submitted that the Family Advocate is a witness of the court. The letter reads:

"Your letter dated 4 February 2008 refers.

We have noted the report and recommendations of the Counselling Psychologist, Nthabiseng Ramothwala which you have attached to the above-mentioned correspondence.

I have discussed the present matter with a resident Family Counsellor and the following concern was raised:

Ms Ramothwala has not interviewed Mr Ngobeni and therefore should have refrained from making recommendations with regard to the children's permanent residence and contact rights.

It is my opinion that there are insufficient reasons to justify a re-investigation of the present matter and suggest

therefore that you make oral submissions to the Court in this regard.”

I shall come back to the two reports and the letter of 13 February 2008.

- [8] To help me resolve the issues of the parties’ parental responsibilities and rights, primary residence and primary care giver in respect of the minor children, the Defendant and the Plaintiff and his witness testified.
- [9] Save to refer to the reports and the letter the parties did not extensively deal with them understandably because they were well aware of the fact that the Family Advocate could only be called by the court as its witness. Mr Somo, however, submitted that the Family Advocate’s recommendation needed to be considered by the court.
- [10] I turn now to deal with the two reports and the letter. I shall not have regard to the Counselling Psychologist’s report because she did not interview the Plaintiff. This, in any event, was the Family Advocate’s concern regarding this report. The Family Advocate’s report too has its own problems. The report in the main relates to the past circumstances of this matter while my decision has to deal with the present circumstances. The report, in my view, is

not very helpful and its recommendations can therefore, not be considered. The report does not pay regard to the fact that the Defendant now has her own flat. She is no longer living with her family members. She only lives with the two minor children. No evidence was led to show that the environment is not conducive to the proper upbringing of the two minor children. On the contrary, Defendants' uncontroverted evidence reveals that their new home is near M's school, T's crèche and the Defendants work place. Her testimony is further that it takes her less than 10 minutes to reach the children should there be a crisis.

- [11] The Plaintiff's evidence never revealed that the Defendant is a bad mother. His mother's testimony shows that the Plaintiff and the Defendant are good parents. What the Plaintiff is said to have been told by M cannot be relied on as that is clearly hearsay which is inadmissible.

There is no evidence to show that:

1. The Defendant fails to give the children the care that they need.
2. M, as a result of staying with the Defendant, is doing badly at school, or
3. That T is not properly catered for by the crèche which appears

to have been chosen by the parties.

What is clear, however, is that both parties want to be with the minor children. The parties want the bonds of marriage subsisting between them to be dissolved. They are also not living together and can, therefore, not have the children simultaneously. I derive comfort from the testimony of both parties in respect of each other which is that they are both good parents.

[12] I have to determine what is best in the interest of the children and in determining that, I have to have regard to the parent who is better able to promote and ensure the physical, moral, emotional and spiritual welfare of the minor children. In *McCall v McCall* 1994(3) SA 20 CPD at 205 A – F, King J enumerates criteria which should assist a court in determining what is in the best interests of the child. These are:

- 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 well-being 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 particular circumstances the child's preference should be taken into consideration
- l. The desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether the minor children should be placed in the custody of their father; and
- m. Any other factor which is relevant to the particular case with which the court is concerned.

[13] It is important to note that no evidence was led to show that the existing situation is detrimental to the children's interests. Evidence revealed that both parents are good parents. Not much if, at all, was revealed regarding the prevailing environment at the Plaintiff's home. I have not been told what is to happen to the minor children should the status quo be changed. Not much has been said about T who is very young indeed. The only concern that was raised by Mr Somo relates to the fact that M is alone in the house before he is joined by the mother and T. M did

not testify and not much reliance can be placed on the concern. In the light of the evidence at my disposal, it would be difficult indeed to have to reverse or change the status quo. There is no evidence to justify such change. There is indeed no evidence to show how far the Plaintiff's home is from the crèche and the school. We only know that the Plaintiff is a correctional service officer but we do not know where his work place is in relation to M's school and T's crèche.

The Family Advocate in the letter to Shapiro and Shapiro states that:

“there are insufficient reasons to justify a reinvestigation of the present matter”

and suggested that the parties make

“oral submissions to the court in this regard”

[14] I have duly considered the cases of *Van Pletzen v Van Pletzen* 1998(4) SA 95 (OPD), *McCall v McCall* (supra) and *Fletcher v Fletcher* 1948(1) Sa 130 (A) to which Mr Somo referred me. It will, however, in my view, be in the interests of the minor children that the status quo be maintained for the following reasons:

1. The two minor children have always been with the Defendant.
2. T has not been with the Plaintiff since September 2007.
3. M spends virtually all the time with the paternal grandmother whenever the Plaintiff exercises his access to him.
4. On his own version the Plaintiff is unable to personally fetch T from the Defendant whenever he works over time.
5. The Plaintiff is also unable to fetch M on the weekends when he does housework.
6. There is no evidence to show that the existing situation is detrimental to the children's interests.

The Plaintiff's mother testified that she is prepared to assist the Plaintiff should the status quo be changed. However, there is no evidence to show that the Defendant is unable to care for and look after the two minor children. Mr de Kock correctly submitted that no evidence was adduced by the Plaintiff regarding his circumstances and the conditions of his residence where the children would permanently reside were the status quo to be changed. Indeed Plaintiff's evidence failed to disclose how the

children would be cared for during the day, what arrangements are in place for their schooling, transport to and from school.

- [15] Having regard to the love that the parties have for their minor children, in my view, it will be in M's and T's best interests if full parental responsibilities and rights in respect of the minor children M and T are retained by both parties.
- [16] In the absence of evidence showing that the existing situation is detrimental to the children's interests and given the fact that the circumstances on which the Family Advocate's report was based have changed and considering the fact that the parties' marriage has irretrievably broken down with no prospect of restoration, it is, in my view, in the best interests of the parties and the children that the following order be made.
1. That the bonds of marriage subsisting between Plaintiff and Defendant be and are hereby dissolved.
 2. That both parties retain full parental responsibilities and rights in terms of Section 18, 19 and 20 of the Children's Act, 28 of 2005, in respect of the minor children M Ngobeni and T Ngobeni.

3. That the primary residence of the minor children be and is awarded to the Defendant and that the Defendant be the primary care-giver of the minor children.

4. That specific parental rights and responsibilities regarding contact with the minor children in terms of Section 18(2) (b) of the Children's Act, 38 of 2005, be awarded to the Plaintiff.

The contact rights shall include the following:

the right to have the minor children with him for alternate weekends;

the right to have the minor children with him for alternate short school holidays on the basis that the Easter holidays rotate between the parties;

The right to have the minor children with him for alternate long school holiday on the basis that Christmas and new year rotate between the parties;

The right to have telephonic contact with the minor children at reasonable times;

The right to contact the minor children's schools to ascertain what activities the minor children partake in and to enquire about the minor children's academic progress.

The weekends and holidays shall be arranged in such a way that both

children spend their weekends and holidays together.

5. That the Plaintiff pay the costs on the party and party scale.

6. The settlement agreement marked 'X' is made an order of court.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 18 February 2008

For the plaintiff: Adv D. Somo

Instructed by: T. P. Phahla Attorneys

For the defendant: Adv B. H. De Kock

Instructed by: Shapiro and Shapiro Inc.

