IN THE HIGH COURT OF SOUTH ARRICA

NORTH GAUTENG, PRETORIA

CASE NO: 1452/2008

In the matter between:

O R Plaintiff

and

N R Defendant

JUDGMENT

Ismail AJ :

[1] The plaintiff in this matter instituted proceedings against the defendant wherein she sought an order that a decree of divorce be granted She also sough an order that care and the primary residence of the minor child , J, be awarded to her subject to the defendant's rights of reasonable contact to the minor child.

[2] These were the central issues which needed to be determined together with whether or not an agreement had been reached between the parties regarding the settlement of the issues between them. The plaintiff maintained that there was such an agreement and to that extent an agreement was drafted and signed by her. When the agreement was sent to the defendant he reneged on the agreement and refused to sign it.

[3] The parties were married to each other on 10 June 1989 at Durban in community of property. The parties have two children the eldest of which is a major studying mechanical engineering at the Tshwane technikon. The younger of the two children is presently 13 years old. He is a grade 7 pupil at the Uitsig primary school. Both children reside with their mother at [….] Rooihuiskraal (the matrimonial home)

[4] The defendant conducted his own defence as he was no longer represented by the firm of attorneys who initially represented him.

[5] Mrs R, the plaintiff testified and she was the only witness who testified on behalf of the plaintiff. She stated that she was employed at the Department of Public Enterprise. She testified that in terms of her employment contract her duties dictated that she travelled to Cape Town when parliament was in session. This resulted in her being away from home and not being with her children

[6] It was common cause between the parties that the defendant left the matrimonial residence on the 1 April 2008 and that he and his wife have been living apart ever since that date.

[7] The defendant resides in a secured complex in Centurion The unit consist of two bedrooms. He shares this unit with a friend. I was told that this unit is approximately 5 kms away from the matrimonial home.

[8] The plaintiff stated that she did not want to continue with the marriage and she described the relationship currently as" we only speak to each other when necessary". She was adamant that she would not allow the present situation to continue and she sought a divorce She also stated that she was seeing somebody else and she described the relationship as a serious one.

[9] Mrs R conceded that in the past she was away from home when she accompanied the minister on an overseas trip for ten days. She also had to accompany the minister to parliament. These trips have now come to an end as she discussed the matter with the minister. She stated that she is no longer sessional, meaning that she does not have to travel and stay away from home as she previously did.

[10] During cross-examination the defendant put it to the plaintiff that she would go away on trips without informing him and that he would only find out about her absence when the children told him that their mother was away He also put it to the plaintiff that she placed the responsibility of looking after the minor child on the the elder child
which was not fair to the latter

[11] The family advocates office through the efforts of Mr Martin Mutloane compiled a report dated 2 March 2009 wherein Mr Mutloane recommended the following
(a) both parties retain full parental responsibilities and rights in

respect of care guardianship and maintenance

(b) The plaintiff be granted contact towards the minor child
(c) The defendant be vested with residency of the minor child
The family counsellor, Ms Mogadi, on the other hand on the question of residency of the child in her report stated:

' the court may place the child in the residence of either party The child has trust in either one of them '

The minor child had no preference with which parent he resided provided he was not separated from his elder brother. Both the plaintiff and the defendant when they testified agreed that the two children should not be separated The plaintiff was of the view that if the younger child was separated from B it would be detrimental to him as the two brothers are very close. The defendant expressed a similar view

[12] The plaintiff also stated that she and the defendant adopted the latter's brother and sister when their parents died She and the defendant raised the defendant's two siblings She stated that the defendant was very rigid in his ways and that he was a very inflexible and selfish person

[13] The plaintiff requested that she be awarded primary residency of the minor child as she had a good and open relationship with her children furthermore her work conditions had changed materially in that she was no longer sessional In addition thereto the children lived with her in a four bedroom house whereas the defendant resided in a two bedroom unit which he shared with another person

[14] The plaintiff closed its case and the defendant thereafter testified.

[15] Mr R testified that he was employed at the South African Post Office in Pretoria. He stated that he should be the parent who should be awarded the primary care and residency of the minor child since he acted as both mother and father to the child in the plaintiff's absence. He stated that the plaintiff often returned home late leaving the minor child in the care of his elder brother or domestic aid. According to him the plaintiff would not even phone him in order to tell him that she needed him to look after the children. Had she done so he would readily and willingly have agreed to do so.

[16] Mr R stated that the plaintiff only changed her routine in the past few months. He was not convinced that she would not revert to her old routine of spending lime away from the children once the court decided the question of primary care and residency. He also submitted that she was employed in terms of a contract and that there was no evidence to reflect that the terms of her contract had changed. Furthermore he submitted that if the current minister's portfolio changed the new minister might not be as sympathetic as the current minister and he/she might insist on the plaintiff being sessional again.

[17| The defendant also submitted that notwithstanding the plaintiff not having been sessional for some time she still returned home late leaving J in the care of B. When B testified he stated that his

mother on a couple of occasions went to visit a friend The defendant maintained that the plaintiff was in all probability visiting her new friend and that she was not candid with B in this regard.

[18] The defendant was questioned about the settlement agreement which he failed to sign. He was referred to a letter he addressed to the Family Advocate wherein he stated: *" My attorney subsequently indicated that he posted the original agreement to my postal address for my signature and delivery to Shapiro and Shapiro. I checked the box everyday but it did not arrive until 09th August 2008, with the postmark dated 31-7-2008 (refer annexure B for copies of the e-mail correspondence)*
On Sunday the 3rd August 2008 I changed my mind about signing this agreement after I carefully considered the demands of my wife's work commitments and the reduced time she has to be the primary care- giver to J and B. Also the fact that the two boys are constantly alone during her commitments and late nights since my mother-in-law returned to Durban on 18th July 2008 and would not be returning."
Mr R was questioned about the agreement which was reached between him and the plaintiffs attorneys and he responded during cross examination that the settlement agreement was conditional upon his signature being appended to the agreement. He also testified that the plaintiff was aware of this condition and for that reason she received half the proceeds of the sale of the farm in the amount of R41 000.00 If the agreement was in force than she was obliged to have returned the proceeds as she was not entitled to this amount in terms of the agreement

[19] The defendant in terms of the letter which he wrote to the Family Advocate referred to supra in the concluding paragraphs of the letter stated the following *" I share no ill feeling towards my wife and would like her to*
consider the facts of her work commitments and the possible impact it has had on the lives of our two children over the past two years
We as parents have to be selfless in what we do for our children and to make them the highest priority in terms of care giving I firmly believe that J will be correctly placed with me as his primary care-giver whilst my wife can have full access to him at her convenience"
From the above quoted portion of the letter it is clear that the defendant's sole cause of concern regarding the issue of primary care and residency was that the plaintiff was not at all times available to care for the children due to her work commitments The defendant when he testified stated that the plaintiff was a good mother and that she adored the children. His only concern was her absence away from the minor child and that she placed to much responsibility on B to look after his brother during her absence.

[20] The defendant called B to testify B came to testify immediately after his lecture was concluded. Mr Haskins noted his displeasure that the defendant intended to call his son to testify in his parents divorce proceedings. The defendant was adamant that he was only calling B to testify about his mother's absence away from home and her returning late at night to the house due to her work commitments B struck me as a confident and mature young man who testified that he did not consider it an obligation to look after his younger brother during his mother's absence, however he regarded it as his brotherly duty to keep an eye on his younger sibling in his mother's absence. He also stated that he and his brother had a close relationship. He testified that his mother spent more time at home in the recent year than in the past when her work dictated that she had to travel He also indicated that he was very happy at the family home at [….].

APPRAISAL OF THE EVIDENCE

[21] I have no doubt that both Mr and Mrs R love their children very much The report of the family counsellor recommended that they were both capable of having primary care and residency of the minor child In determining which parent should be vested with primary residency and care the court has to determine the question of *the best interest of the child* Section 7 of the Children's Act sets out various factors which a court should take into account when determining this issue See *Commentary to the Children Act- C J Davel & AM Skelton 2-4/*2-8

I do not deem it necessary to mention these factors. The failure to include these factors into the judgment should not be construed to mean that I did not consider them in determining this issue.

[22] The leading case dealing with the question of the best interest of the child is the matter of *McCall v McCall* 1994 (3) SA 201 (C) at 205 B-G where King J set out the factors which a court should consider when deciding the best interest of a child. King J stated
" ..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 parents' 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 stability of the parent to provide tor the basic physical needs of the child, the so-called creature contorts', such as food, clothing, housing and 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, where a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father and
(m) any other factors which is relevant to the particular case which the Court is concerned ' See *Krasin v Ogle* [1997] 1 All SA 557 (W) at 567i -569e

An important factor in determining the best interest of the child as previously alluded to is that the child is living in the common home with his brother and the plaintiff for the past fourteen months ever since the defendant left the common home He is comfortable in that environment and is happy to be with his brother. If he were to be uprooted from this milieu and be placed into the defendant's care it may have a detrimental effect on him and he would have to adjust to his new surroundings and creature comforts' There was no evidence tendered that the child is not coping at school as a result of his parent's separation It appears that both parents share the responsibilities in transporting the child to and from school.

[23] Mr R submitted that the Family counsellor referred to the doctrine of same sex matching in paragraph 8.10 of her report and noted that the children enjoy the company of the defendant, as they enjoy common activities. He submitted that this was an important factor which the court should consider when it determines the issue of primary care. Whilst it it a factor which I must consider I should not look at the diverse factors in isolation but rather take the totality of factors into consideration in determining this issue.

[24] In my view it would be in the best interest of the minor child if primary care and responsibilities were awarded to the plaintiff as she sacrificed her professional or career interest in order to have primary care of the minor child. This coupled with what is stated in para [22] above leads me to believe that the plaintiff is sincere in her quest to obtain primary residency of the minor child and that she has not mast her sails

to suit the wind. It is my considered opinion that she has sincerely made the necessary changes in order to qualify to have the minor child live with her. Having said this it would be just and equitable in the circumstances of this case to grant the defendant liberal visitation rights to the minor child as he had demonstrated that he is equally suited to have the child. He set with the child supervising his homework; cooked for the child, fetched and dropped the child from and to school and has a loving and caring relationship with the minor and B.

The issue of the settlement agreement

[25] The plaintiff seeks an order to the effect that the settlement agreement which the defendant failed to sign be made an order of court as he agreed thereto and subsequently changed his mind and reneged on the agreement The settlement agreement is contained at pages 17-26 of the pleadings bundle. I have to some extent dealt with this issue at para [18] above. Should I find that the agreement is valid then I need not make a finding on the other issues such as maintenance for the children and proprietary right issues Having perused the settlement agreement I noted that the question of reasonable access to the minor child was only addressed at paragraph 2.2 thereof as follows:
'The care and primary residence of J shall be awarded to the Plaintiff subject to the Defendant's right of reasonable contact, at all reasonable times '

[26] It was stated by the defendant that he made the proposals at the meeting held at Shapiro's when the meeting was held with the respective attorneys. This proposal of his was accepted by the plaintiff and to that end the plaintiff's attorneys drew up the agreement and forwarded it to the defendant's attorneys. The defendant's attorneys in turn forwarded the agreement to him with the instruction to sign the agreement and to remit it to Shapiro's. This begs the question why would the defendant's attorneys instruct him to sign the agreement if there was no discussion and agreement relating to the settlement.

[27] The probabilities do not support the defendant's contention that the agreement was a conditional agreement namely subject to him appending his signature to it. This explanation which the defendant gave under cross-examination is opportunistic and disingenous to say the least. The truth of the matter is that there were discussions relating to the matter and that the issues were settled, however the defendant had a change of heart as he thought that his wife had reverted to her old ways of spending time away from home and therefore changed his mind.
[28] For the reasons set out above I am of the considered view that the agreement was effective and all that it needed was the defendant's signature and the matter would have proceeded as uncontested

The issue of Costs

[29] Mr Haskins addressed me on the question of costs and he submitted that I should order that costs be paid from the joint estate Having found that the settlement agreement was valid I am bound by what is contained therein, namely that each party pays its own costs It might be argued that the defendant reneged on the agreement and therefore he should be mulcted to pay the costs. The issue of costs in such matters was dealt with in *Bethall v Bland and Others* 1996 (4) SA 472 at 475 E-I where Wunsh J stated:
" 1. Generally speaking a successful litigant is entitled to his or her costs.

2 Whilst it is quite true that a custody dispute should not be seen as an adverserial contest in the ordinary sense but rather as an enquiry into the best interest of the child, it cannot be denied that in most cases the litigants are advancing their own preferences and seeking satisfaction of their love of the child Often, too. the papers contain many attacks on the character and conduct of the opponent.

3. On the other hand it is also a consideration that a party should not be discouraged from putting up a case which he or she. on broadly reasonable grounds, thinks to be in the interest of the child for fear of having costs awarded against him or her if unsuccessful By the same token, a party who is. on what turns out to be good grounds, confident that his or her case will prevail, should not be discouraged from taking or resisting action because of the costs which he or she will incur

4. However, bona fide and concerned a party may be, his or her opponent's judgment of the issues prevails, it is not, in the absence of the circumstances justifying it. fair that the opponent should be

mulcted in his or her own costs."

The defendant in this matter laboured under the belief that he had a strong case for primary residency of the child particularly in view of the Family Advocates recommendation. For this reason I believe that his insistance in pursuing this matter was not mala fide but driven by the best interest of the child.

For these reasons I am in agreement with the principle set out by Wunsh J in *Bethell's* matter

[30] In the circumstances I make the following order:
(a) a decree of divorce is granted incorporating the settlement agreement

(b) in so far as the defendant had been paid 50% of the sale of the farm she should return the proceeds paid to her with interest at the prime rate from the date that the amount was paid to her.
(c) defendant shall have reasonable access to the minor child which shall include the following.

(1) he shall have access to the minor child every alternative weekend commencing from Friday 17h00 until Sunday 17h00;

(2) During the week when he does not have access to the
minor child he may fetch the child on Tuesdays and Thursdays at 17h00 and he should return the child by 20h00

(3) defendant may spend father's day with the child if it is a non school day from 09h00 until 17h00;

(4) defendant shall have the minor child for one half of the school holidays. The parties shall alternate the school holidays in such a way that plaintiff will have the minor child over Christmas and defendant have the child over Easter. This procedure will alternate, in other words if the minor spent Christmas with the plaintiff in 2009 then the defendant will have the child over Christmas 2010. The same procedure would apply to Easter Save that neither parent shall have the child over Easter and Christmas in one year
(5) The defendant will have telephonic access to the minor child daily between 17h00 and 17h45 on those days that
he does not have access

(d) The defendants counter claim is dismissed;
(e) each party shall pay his / her own costs

Ismail AJ

Appearances
For the Plaintiff: Adv Haskins instructed by Shapiro and Shapiro
Pretoria For the Defendant: In person

Trial heard on 21 October to 28 October 2009.

Judgment delivered: 3 November 2009.