HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

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Case No. A3008/2020

In the matter between:

M[....] C[....] APPELLANT

and

A[....] C[....] RESPONDENT

JUDGMENT

RANDERA AJ (MEYER J concurring)

[1] The Appellant appeals against part of the judgment and order handed down on 13 January 2020 by Magistrate Mowane in the Regional Court held at Vereeniging. The appeal relates to the refusal of the Magistrate to vary and grant the Appellant shared residence of the parties' minor child and to maintain the status *quo*, as it existed at that time.

[2] The Appellant and the Respondent were married to each other on 6 December 2014 and had one minor child L[….] (the minor child) born on 21 January 2013. The Appellant left the matrimonial home in June 2016 taking the minor child with her.

[3] On 8 September 2016, in the Children's Court the parties agreed to a shared parenting plan on a 50/50 basis and which plan was put into effect on "a one week on and one week off" basis. This Order in the Children's Court was obtained pursuant to an agreement between the Appellant and Respondent. At the time the minor child was 3 years and 7 months old.

[4] Some two months later, on 11 November 2016, the Respondent, unbeknown to the Appellant, obtained a Divorce Order in terms of which order the contact arrangements with the minor child were changed. The Appellant had no knowledge of this order and did not consent thereto. The Respondent thereafter implemented the contact arrangement in terms of

the Divorce Order and only afforded the Appellant access to the minor child every alternate weekend.

[5] On 26 January 2018, pursuant to a judgment by Magistrate Reyneke, the 50/50 shared residence arrangement was reinstated. On 21 January 2020, Magistrate Mowane ordered the implementation of the recommendations set out in a Family Advocate's report.

[6] Pursuant to the granting of the Decree of Divorce the Appellant made application for the variation of paragraph 3 and 4 of the Divorce Order to set aside, vary and replace same with the Children's Court Order and that same be incorporated into the Decree of Divorce.

[7] On 26 January 2018, Magistrate Reyneke set aside paragraph 3 of the Decree of Divorce and referred the issue of parental responsibilities and the rights of contact to the Family Advocate and pending the Family Advocate's report the Order of the Children's Court was reinstated.

[8] On 26 July 2018 the Family Advocate compiled a report, in which it was recommended that the primary residence of the minor child be with the mother (the Respondent).

[9] On 5 June 2019 the hearing of oral evidence commenced before Magistrate Mowane. The main issue for determination was the primary residence of the minor child.

[10] On 13 January 2020 Magistrate Mowane handed down judgment and ordered that the primary residence of the minor child to be with the Respondent. The minor child was at that stage 7 years old.

[11] The Respondent implemented the order made by Magistrate Mowane and only afforded the Appellant contact every alternate weekend.

[12] The Appellant thereafter launched an Application, on an urgent basis, in the High Court in which application the Appellant sought to maintain the 'week on/week off' arrangement as was initially agreed on in the Children's Court.

[13] The High Court (Twala J) ordered the Appellant to return the minor child and that pending the outcome of the Appeal instituted by the Appellant, primary residence of the minor child was to remain with the Respondent and the Family Advocate was requested to investigate and compile a report.

[14] The Urgent Application is not before us and neither are the papers made available to us. We are, however, furnished with the Family Advocate's report compiled pursuant to the Order of Twala J.

[15] The issue on appeal before this Court is whether the Order of the Court *a quo* should be set aside and replaced with an Order that the minor child's residence shall be shared between the Appellant and the Respondent on an equal basis.

[16] Counsel for the Appellant submitted that this Court can take cognisance of the second Family Advocates report; the one that was obtained pursuant to the Order made by Twala J. Counsel for the Respondent felt constrained to object to the admissibility of the second Family Advocate's report given the decision of the full Court in *J v J* 2008 (6) SA 30 (C) where, in similar circumstances, the Family Advocate's report that had been obtained after the hearing in the Court *a quo* and before the Appeal hearing, was admitted.

[17] In *J v J* at 30 F the Court was of the view that, as the upper guardian of all minors, the Court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child.

[18] In *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504C, it was stated that when a Court sits as upper guardian in a custody matter –

> ….. it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective Parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.

[19] In *P and Another v P and Another* 2002 (6) SA 105 (N) at 110 C-D, Hurt J stated that the Court does not look at sets of circumstances in isolation:

> "I am bound, in considering what is in the best interests of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order."

[20] In *AD and DD v DW and Others* 2008 (4) BCLR 359 par30, the Constitutional Court endorsed the view that the interests of minors should not be "held to ransom for the sake of legal niceties" and held that in the

case before it, the best interests of the child "should not be mechanically sacrificed on the altar of jurisdictional formalism".

[21] In the present matter, the second report by the Family Advocate was placed before us by way of an affidavit. This report was completed pursuant to the Urgent Application brought by the Appellant and after the Appeal had been noted. The recommendations in the second report are material in so far as the stance adopted by the Family Advocate in the Family Advocate's first report is concerned, in the light of post-judgment facts. The Respondent's attorneys alerted the Appellant's attorneys to the fact that the second Family Advocate report would be placed before the Court hearing the appeal.

[22] It is clear that this Court, as the upper guardian of all minor children, should not be constrained in the exercise of its discretion and is bound to take into account all facts, including the second report of the Family Advocate and recommendations contained therein, in order to determine the best interests of the minor child as far as primary residence is concerned.

[23] The fundamental principle applied by our Courts in matters involving primary residence or shared residence of a minor child is - as it is in all

matters concerning children - that the child's best interests are of paramount importance. (*Jackson v Jackson* 2002 (2) SA303 (SCA) at 307-308A.)

[24] Magistrate Mowane arrived at the conclusion she reached on the basis that it was apparent from the evidence that the parties were not able to communicate with each other in respect of the minor child. This was evident from the differences they displayed in respect of the medical procedure required by the minor child. This is no longer an issue as the minor child has had the medical procedure.

[25] They disagreed in respect of the working conditions of the Appellant as well as the care of the minor child whilst the Appellant was at work, notwithstanding that the minor child's aunt and grandmother look after him while the Respondent is at work. The Respondent alleges that the Appellant's sister would deny the Respondent from having contact with the minor child while in her care. The Respondent alleges that she is available for the minor child throughout the day by virtue of the fact that she is self-employed and works from home whilst the Appellant works shifts and at irregular hours. It is for this reason that the Respondent states that she is better suited to care for the minor child.

[26] Magistrate Mowane's reliance on the working times and conditions of the Appellant for granting the Respondent primary residence of the minor child is misplaced.

[27] The Appellant alleges that the child's needs are not fully catered for while in the Respondent's care, such as that the child's nappy remains unchanged causing a rash. She alleges that the child is not properly assisted when he wants to relieve himself in the toilet; sleeping arrangements for the minor child when residing with the Appellant are not conducive to the child in that not enough blankets or suitable bedding are being made available. The complaint is that the child is not content whilst in the care of the Respondent.

[28] The Appellant's major complaint is that the Respondent makes unilateral decisions in respect of the child and about his schooling, and she leaves the child with third parties when she is unavailable for the child.

[29] Needless to say, in disputed divorces where children are involved, there are often accusations and counter accusations, which result in an emotionally charged situation. These are inevitably felt by the children. That has also been the case in this matter. A reading of the record makes it

clear that the disputes between the parties are not about the best interests of the child, but rather their own wishes where the child should reside.

[30] Both parties conceded to the Family Advocate that the communication between them was very poor and that they blamed each other for the breakdown in communication. Both parents however professed to be good parents and have good relationships with the minor child. They both also conceded that the other parent has good relationship with the minor child.

[31] The minor child informed the Family Advocate that he likes both his parents and their respective homes and that he is happy with both his parents.

[32] The Family Advocate ascertained from the interviews with the minor child that he has good relationships with both parents despite the accusations they made against each other and and he portrayed both his parents “as equally perfect”.

[33] It was clear to the Family Advocate that the accusations and attitudes of the parents towards each other have a negative impact on the minor child.

[34] The Family Advocate states that in her assessment "both parents appear to have the capacity to provide for the basic needs of the child".

[35] It was pointed out by the Family Advocate that:

> …….. "if one considers the changing roles and responsibilities of parents coupled with the relatively new concept of children's rights within the family structure, rights which include the maximum amount of contact with both parents, I am of the view that a more liberal approach to the granting of joint custody may not be inappropriate. I do not believe the general hostility between parents should be a bar to a joint custody order.
>
> As long as both parents are fit and proper persons, it is important that they should have equal say in the raising of the children. This is exactly what a joint custody order allows. One has to weigh up whether input from both parents, even if the input is at times disharmonious, is not preferable to an uninvolved parent. Disagreement and negotiation are a part of life and generally no more so after a divorce than before. Unless the disagreement is of such a nature that the child is put at risk either physically or emotionally, it still seems preferable for the child to learn to deal with the ups and downs of two involved parents, rather than to lose half of his or her rightful parental input. To my mind a joint custody order would not only promote the rights of children subsequent to the divorce of their parents but also help to establish the equality between the sexes" (*Krugel v Krugel* 2003 (6) SA 220 at 228A-D).

[36] In line with this reasoning the Family Advocate makes the recommendation that:

"5.1 Both Parties should remain co-holders of parental responsibilities and rights towards the child.

5.2 the Parties should exercise their respective parental responsibilities and rights as per the recommendations in paragraph 12 of FA1.

5.3 the Parties should appoint a suitably qualified professional to assist them in drawing a parenting plan and for the said professional to mediate disputes between the Parties that may arise on the exercise of their respective parental responsibilities and rights towards the child."

[37] I am of the view that a shared residence arrangement between the Parties will be in the best interests of the minor child.

[38] The Parties were requested to prepare a draft order in relation to the care and contact with the minor child, which we would consider in the event that we were of the view that shared residence would be appropriate in the

circumstances. The Parties have provided us with a comprehensive 'parenting plan' which is acceptable to us.

[39] In the result I make the following Order:

(1) The Appeal is upheld.

(2) The order of the court *a quo* is set aside and replaced with the following order:

The 'Parenting Plan" attached hereto as Annexure A is made an Order of this Court.

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MOHAMED RANDERA AJ

Date of Hearing: 17 May 2021

Date of Judgment: 22 Septemeber- 2021

Attorneys for Appellant: Otto Krause Inc.

Counsel for Appellant: Adv S McTurk

Attorneys for Respondent: Maeyane Attorneys

Counsel for Respondent: Adv H P West