

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:69803/2014

Date: 22.11.2016

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

O G

PLAINTIFF

and

T G

DEFENDANT

JUDGMENT

RANCHOD J

- [1] In this matter the plaintiff has launched divorce proceedings against the defendant who has instituted a counterclaim.
- [2] Both parties agree that the marriage has irretrievably broken down and a divorce order should be obtained. They also agree that as they are married in community of property there should be division of the joint estate which should include equal division of both parties' pension benefits.

- [3] They also agree that both parties should retain full parental rights and responsibilities in respect of the minor children.
- [4] The main issue in dispute is the residency of the minor children born of the marriage between the parties. There are five children, but the eldest has since attained majority. The other four children are currently aged 16, 15 and twins aged 9. The 16 year old is a girl, the 15 year old a boy and the twins are a boy and a girl respectively.
- [5] It is therefore not necessary for me to traverse the causes of the breakdown of the marriage in any detail except insofar as they may be relevant to the issue of the residency of the minor children.
- [6] The trial proceeded over almost three days and much time was spent in leading evidence as to who would be the better parent to be awarded primary residency and care of the minors. The major child has elected to live with his father, the defendant.
- [7] In essence then, this Court has to determine the following issues which are in dispute between the parties:
- 7.1 In whose primary care the minor children should be placed;
- 7.2 Contact rights of the non-custodian parent;
- 7.3 The quantum of maintenance for the minor children; and
- 7.4 Whether the plaintiff is entitled to rehabilitative maintenance.

The best interest of the minor child principle

- [8] A child's best interests are of paramount importance in matters concerning the child¹. In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be

¹ Section 28(2) of the Constitution of the Republic of South Africa, 1996.

applied². This standard is firmly established in international law³.

[9] The Children's Act provides, in section 7(1), factors that must be taken into consideration where relevant, namely:

- (a) the nature of the personal relationship between-
 - i. the child and the parents, or any specific parent; and
 - ii. the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards-
 - i. the child; and
 - ii. the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (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; or
 - ii. any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child-

² Section 9 of the Children's Act 28 of 2005

- i. to remain 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;
- (g) the child's-
 - i. age, maturity and stage of development;
 - ii. gender;
 - iii. background; and
 - iv. any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a 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;
- (l) the need to protect the child from any physical or psychological harm that may be caused by-
 - i. subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - ii. exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

³ Commentary on the Children's Act- CJ Davel & A M Skelton, 2-10: [Revision Service 2. 2012].

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

[10] It is evident that the parties have had an acrimonious relationship during their marriage of some 23 years. The plaintiff alleges she has been verbally, emotionally and physically abused by the defendant who denies it. She says this was especially the case during the first five years of their marriage when she could not conceive a child. The plaintiff testified that she was admitted to a clinic for treatment for depression, during September, 2014 for about a month. On her discharge she left the common home of the parties. She said during her treatment she was taught to stand up for herself and learnt coping skills which enabled her to get out of the abusive relationship.

[11] She left the common home with the three younger children and took with her various items of furniture and appliances which, she said, she required for the sake of the children. She had also gone to fetch the two other children from the school they were attending but was prevented from doing so by the defendant. She says she stayed with the three younger children for about a year. During this time she supported the younger children but the defendant paid all the children's school fees and for their clothing.

[12] The plaintiff issued summons on 19 September 2014. In November 2014 she launched an application in terms of Rule 43 of the Uniform Rules against the defendant for payment of interim maintenance. On 5 November 2014 Basson J granted an order *pendente lite* in terms of which the plaintiff was awarded care and primary residence of the minor children born of the marriage, while defendant was awarded a right of reasonable contact with the minor children at all reasonable times. The defendant was ordered to pay R21 865.00 per month as maintenance for the minor children and a provisional contribution of R1 500.00 per month towards the plaintiff's legal costs. All the payments were to commence on or before 30 November 2014.

- [13] Plaintiff says defendant never complied with the court order and on 19 August 2015 she obtained a further order, which was granted by Magardie AJ in which, *inter alia*, it was ordered that the three youngest children will reside with the plaintiff and the two older ones with the defendant pending a report from the Family Advocate. The defendant was ordered to continue to pay all education related fees and costs of all the children including extra lessons and after care costs of the children. The defendant was also ordered to pay R2 500.00 per month per child as maintenance for the three children in the care of the plaintiff.
- [14] Plaintiff says the defendant paid for the education related costs as per the court order but failed to pay the monthly maintenance of R2 500.00 per child.
- [15] It bears mentioning that the plaintiff was employed at the South African Revenue Service (SARS) during this period until she resigned in August, 2015. She says the reason was that she could not cope at work and also because of the pressure of coping with having to support the children.
- [16] The defendant thereafter launched an application during October, 2015 in terms of Rule 43(6) seeking a variation of the order granted by Magardie AJ. He alleged that the plaintiff was interfering with and frustrating his rights of access to the three minor children who were residing with her, and also when he wanted to assist the children with their school work. He said as a result of him being unable to assist the children the children were suffering academically. He also said the school had contacted the plaintiff but to no avail hence they contacted him and asked him to intervene. He was advised by the school teacher of the twins that they be seen by an educational psychologist, who later had a meeting with the plaintiff so that she could take the children for further consultations. Defendant says plaintiff did not and the children continued to suffer. The defendant sought an order that, pending the divorce action, he be awarded the residency of all the children subject to reasonable contact rights of the plaintiff and that the plaintiff contribute R2 500.00 per month per child towards maintenance of the children.
- [17] During the trial the plaintiff disputed these allegations. She said she knew the twins - especially Thulani - had learning problems but she did all she could including taking Thulani for psychotherapy but neither of them passed grade 3 that year. The

defendant conceded under cross-examination that plaintiff may not have been the cause of the children's poor performance.

- [18] Phatudi J heard the variation application and on 12 December 2015 made an order retaining the status *quo* regarding the residency of the children as ordered by Magardie AJ previously. It was also ordered that the defendant continue to pay R2 500.00 per month per child as maintenance including that all arrears since August 2015 also be paid. However, as far as the educational costs were concerned it was ordered that plaintiff and defendant each contribute equally in this regard. It was also ordered that the defendant retain all the minor children on his medical aid scheme and pay any shortfalls not covered by the scheme. The defendant was also ordered to contribute R4 500.00 per month towards the rental for accommodation of the plaintiff until dissolution of the marriage. During the trial defendant said he did not belong to a medical aid scheme.
- [19] During the course of the trial, it emerged that the eldest child has since come of age and is a major. The dispute about primary care and residency therefore relates to the remaining four children. It is also not in dispute that Mhlali the second eldest child (a girl) left the defendant in January 2016 and went to live with the plaintiff. Plaintiff testified that Mhlali told her she was not happy living with her father and that she had made a mistake in doing so.
- [20] In April, 2016 the plaintiff moved back into the common home with the children who had hitherto been living with her. At the time of the trial the family was still living together albeit, from the evidence of both the plaintiff and defendant, in a hostile atmosphere in which neither of them talks to the other. Plaintiff says she was forced to move back into the common home as she could not make ends meet, more so because the defendant was not making the cash contributions for the maintenance of the minor children in accordance with the previous court order. She said she did not want to lower the living standards of the children.
- [21] Although the issue about the primary care and residency of the children was apparently referred to the Family Advocate in early 2015 already and an interview was conducted by the Family Advocate together with a Family Counsellor during February 2015, when the matter came before Magardie AJ the report had not yet

been available. The learned Judge, *inter alia*, ordered on 19 August 2015 that the report be obtained urgently.

[22] The Family Counsellor says she and the Family Advocate together conducted a joint interview with the parties on 10 February 2015. Thereafter the Family Counsellor interviewed two of the children on 10th February 2015 and the other three on 25 February 2015. The report is dated 2 October 2015 and the report of the Family Counsellor attached to it is dated 30 September 2015.

[23] The Family Counsellor and the Family Advocate recommended that all the children should reside with the defendant as the siblings have close relationships with each other and it is not in their best interests to keep the then current arrangements in place where three children resided with the plaintiff and two with the defendant. However, the Family Advocate's report is somewhat outdated in that since then Mhlali had moved in with her mother and thereafter the plaintiff moved in with the defendant together with the three children in her care. But of importance in that report is that it is undesirable that the siblings be kept apart and that there should be stability in their lives. I should mention that the plaintiff testified she was not happy with the Family Advocate's report and wanted to obtain another independent expert's report. However, she had not done so by the time of the trial, apparently because she was not in a financial position to do so. I am not entirely persuaded by this explanation as she had received a lump sum payment of about R143 000.00, being the proceeds of her pension benefit from SARS upon her resignation, a relatively small amount of which could have been used for the purpose.

[24] The Deputy Judge President (DJP) interviewed the plaintiff and defendant and the children together with the parties legal representatives on 6 October 2016, i.e. shortly before the trial for case management purposes. The content of the interviews have been noted in a pre-trial minute dated (erroneously) 6 June 2016. The two older boys indicated a preference to live with their father while the older daughter and the twins wished to live with their mother. However, all the siblings indicated that they would prefer to live together.

[25] Both plaintiff and defendant (the latter rather belatedly and reluctantly) conceded during the course of the trial that the other parent is a good parent to the children. It

is also apparent that the two older boys share a greater bond with the defendant. Mihlali, the older daughter, left the defendant to go and live with the plaintiff. Plaintiff said the defendant was "ugly" to Mihlali and told her to get out of the house. Defendant testified that he did not know why she left him to go and live with the plaintiff. In my view, he was not being entirely open with the court. He said the relationship with Mihlali was excellent until she moved in with her mother. Since then, he says, the relationship is not good. This does not explain why she moved out in the first place. In any event, there does not seem to be any serious reason for Mihlali to have moved out of the house so as to preclude her from moving back in circumstances where she prefers to be with all her siblings.

[26] Much was made during the trial of the fact that the parties had obtained protection orders against each other in terms of the Domestic Violence Act 116 of 1998. Mihlali had also obtained such an order against the defendant with the assistance of the plaintiff. I do not think it is necessary for me to deal with them as it seems that the parties reacted to each other in a volatile situation fraught with emotions as was evident from the evidence led during the trial. The parties are now in any event getting divorced which should in all probability defuse the situation.

[27] The plaintiff alleged that the defendant has abused her verbally, emotionally and physically which is denied by the defendant. This issue was not explored in any depth during the trial. However, there is no evidence that the defendant has been similarly abusive towards the children. As I said earlier, the plaintiff acknowledges that he is a good parent to the children. He no doubt seems to have a keen interest in the children's welfare including their education as is evident, for example, from the progress reports of the primary school which Zenile, Xhobani and Hlulani attend.

[28] The Family Advocate interviewed the parties and provided the following evaluation:

"8.1 The nature of the relationship between the parties and the minor children
(Section 7(1)(a)) "From the investigation, the Defendant seems to have a good relationship with all the minor children. The Plaintiff's relationship seems to be not clear as the older children do not maintain contact even if they are

not restricted by the Plaintiff. The parties expressed their love and concern for the minor children.

8.2 The attitude of the parents towards the children and the exercise of parental responsibilities and rights in respect of the children" (Section 7(1)(b) From the investigation both parties seem to love and have interest in the upbringing of the minor children.

8.3 'The capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the children including emotional and intellectual needs" (Section 7(1)(c)).

8.3.1 Both parties seem to love and have interest in the upbringing of the minor children. Both parents are able to exercise their right and responsibility towards the children.

8.3.2 Both parties presented as having the ability to care and provide for the needs of the minor children and they are also motivated to care for them. The Defendant seems to be able to monitor the growth and the development as well as physical and mental wellbeing of the children. From the information gathered it appears that the Defendant plays an important role in the education of the children as he was attending to all the educational needs of the children. This was supported by the older minor children who raised concerns about siblings who are residing with their mother regarding their education.

8.3.3 The Plaintiff did not raise any concerns that the Defendant can harm or put the children in a dangerous situation. It appears that the role that the Plaintiff plays in the upbringing of the children was limited due to other commitments.

8.3.4 In conclusion, the undersigned believe that the Defendant is in a position to enable the children to experience success at school, provide social support that can promote social opportunities for the children and able to provide for their basic needs. The undersigned believe that it

would be in the best interest of the children to reside with the Defendant (father) and maintain regular contact with the Plaintiff (mother). The Defendant seems to be able to provide guidance and set boundaries for the children.

8.3.5 In respect the allegations made by the Defendant that the school complained about the progress of the children, the undersigned requested a progress report. However, the school could not provide with the information because the class teacher of the children was *off* sick until further notice.

8.4 "The children's age, maturity and stage of development; gender; background" (Section 7(1)(g))

Based on the information gathered, the older minor children seem to be matured enough to effectively participate in the process. The two minor children who are residing with the Defendant clearly stated that they are happy and comfortable to reside with the Defendant. The two minor children who reside with Plaintiff seems to miss their siblings and their father."

[29] It seems clear from a conspectus of the evidence as a whole that the defendant is in a position to provide a more stable environment for the children. He has a stable job. He no doubt takes a keen interest in the children's education and their homework. The plaintiff conceded as much when she testified that the children do love their father, that he encourages them and enjoys their company and that he is a good father. This is not to say that the plaintiff is not a good parent. At pain of repetition the order that I propose to make is premised on the principle of the best interests of the minor children.

[30] The plaintiff on the other hand, has no fixed employment or income. During the trial she said she had made numerous applications for a job but only received one job offer. However it is to set up a branch in Pretoria for an estate agency in the Eastern Cape. She would have to receive training as an estate agent and get paid on a commission basis.

[31] The plaintiff has also received training as a traditional healer (a Sangoma) which entails her sometimes working after hours during the week and on weekends.

[32] On the principle that it is the best interests of the children that must be considered it seems to me that primary care and residency be awarded to the defendant with reasonable rights of access to the plaintiff.

[33] There is the issue of non-compliance with some of the previous orders of this Court by the defendant. Court orders are to be obeyed. No party may disregard orders validly granted. The defendant has given no acceptable explanation for his default in this regard and should comply with them.

[34] The plaintiff seeks rehabilitative maintenance for 72 months at R5 000.00 per month from the date of the divorce. In my view the period for which the plaintiff claims maintenance is excessive. A period of 12 months would in my view be appropriate.

[35] I make the following order:

1. A decree of divorce is granted.
2. There shall be division of the joint estate of the plaintiff and defendant.
3. Both the plaintiff and defendant are granted full parental responsibilities and rights with regard to the care of the minor children as contemplated in section 18(2)(a) of the Children's Act 38 of 2005.
4. The specific parental right of residence of the minor children is awarded to the defendant.
5. The specific parental responsibilities and rights with regard to contact with the minor children as contemplated in section 18(2)(b) of the Children's Act 38 of 2005 is awarded to the plaintiff as follows:
 - i. Every alternate weekend from Friday 17:00 to Sunday 17:00.
 - ii. Alternate short school holidays and half of the long school holidays with

the first half and second half also to alternate between the plaintiff and defendant.

- iii. Regular telephonic and Skype contact.
 - iv. The parties are to share special days: the minor children are to spend the day with the father on Father's day and on the birthday of the father and the day with the mother on Mother's day and on the birthday of the mother.
- 6. The parental rights and responsibilities with regard to the guardianship of the minor children as contemplated in section 18(2)(c) and 18(3) of the Children's Act 38 of 2005 is awarded to both parties.
 - 7. The defendant is to pay the plaintiff rehabilitative maintenance in the amount of R5 000.00 per month for a period of 12 months commencing from the 7th December 2016.
 - 8. The plaintiff is to pay fifty-percent of the proceeds of her Government Employees Pension Fund to the defendant.
 - 9. The plaintiff is entitled to payment of an amount equal to fifty- percent of the defendant's net pensionable interest in the Pension Fund of which he is a member calculated as at date of divorce and payable in accordance with the relevant provisions of the said Pension Fund which is ordered to note the plaintiff's interest in the pensionable interest.
 - 10. Each party is to pay his or her own costs.

RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff

: Adv N Moses

Instructed by	:Maluleka Msimang & Associates
Counsel on behalf of Defendant	: Adv F.C Lamprecht
Instructed by	: Shapiro & Ledwaba Inc.
Date heard	:28 October 2016
Date delivered	:22 November 2016