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**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

CASE NO: 215/06

Reportable

In the matter between

J. F. POTGIETER

Appellant

and

I. POTGIETER

Respondent

Coram: Farlam, Cameron et Van Heerden JJA, Hancke et Theron AJJA

Heard: 22 March 2007

Delivered: 30 March 2007

Summary: *Divorce – custody of minor children – best interests of child paramount consideration – factual findings made by trial court relating to parties’ parental capacity – approach of appeal court to such factual findings – expert evidence – principles relevant to evaluation of*

Neutral citation: This judgment may be referred to as *Potgieter v Potgieter* [2007] SCA 47 (RSA)

JUDGMENT

VAN HEERDEN JA:

[1] The main issue in this appeal is the custody of two minor children, E. and J. Potgieter, now aged 15 and 11 years, respectively.

[2] The appellant, Dr Potgieter, is the father of the children and the respondent, Mrs Potgieter, is their mother. The parties were divorced on 26 October 2004 by order of the Port Elizabeth High Court (Chetty J) and custody of the children was awarded to Mrs Potgieter, subject to reasonable access by Dr Potgieter as specified in the court order. Dr Potgieter was also ordered to pay maintenance in respect of the children, as well as rehabilitative maintenance for Mrs Potgieter in the amount of R4650 per month for 12 months.

[3] Chetty J refused Dr Potgieter's application for leave to appeal against the custody order and the costs order made against him, but this Court subsequently granted leave to appeal to the Full Court of the Eastern Cape Provincial Division. On 13 January 2006, the Full Court (Erasmus J, with whom Maqubela AJ and Matthee AJ concurred) dismissed the appeal with costs. Dr Potgieter now appeals further with the special leave of this court. The appeal is directed against the custody order, the order for

rehabilitative maintenance in favour of Mrs Potgieter and the costs orders granted against Dr Potgieter.

[4] Dr Potgieter instituted divorce proceedings in February 2003, claiming custody of the two children, then aged ten years and 11 months and seven years and eight months, respectively. Mrs Potgieter opposed the divorce action and counterclaimed for (inter alia) custody of the children.

[5] At the instance of Dr Potgieter, the trial court directed the family advocate (Ms René Claassen) to conduct an enquiry in terms of section 4(1) of the Mediation in Certain Divorce Matters Act 24 of 1987. She appointed Ms Helena Retief, a social worker and family counsellor, to conduct an investigation into the interests of the children as regards custody and access, and also engaged the services of Dr Estelle de Wit, a clinical psychologist, to undertake a psychological assessment of the children. In their written reports and in their testimony during the trial, both Ms Retief and Dr de Wit recommended that custody of the children be awarded to Dr Potgieter, Mrs Potgieter to have restricted rights of access. On the basis of these reports, this was also the recommendation made by the family advocate.

[6] At the insistence of Mrs Potgieter, a report was also obtained from a second clinical psychologist, Ms Carol Vogel. In this report, Ms Vogel agreed with the recommendations of Dr de Wit and Ms Retief in respect of

custody and access. She was thereafter called by Dr Potgieter as his first witness during the trial. Like Dr de Wit, Ms Vogel had administered a psychometric test known as the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) to both parties. Based on the results of these tests, each clinical psychologist diagnosed Mrs Potgieter to be suffering from a borderline personality disorder manifesting itself in, amongst other things, impulsivity; a pattern of unstable and intense interpersonal relationships; abuse of prescription drugs; emotional instability and mood swings.

[7] Dr Potgieter also called a psychiatrist, Dr Peter Crafford, to testify on his behalf at the trial. Dr Crafford had treated Mrs Potgieter for anxiety and depression over a period of about five months some six years before the trial. He had also diagnosed her as suffering from ‘marked borderline personality traits’, with ‘generalised personality disorder’, ‘panic disorder’ and ‘recurrent major depressive disorder’. According to Dr Crafford, although Mrs Potgieter had initially responded well to electro-convulsive therapy, the anti-depressants prescribed for her at that stage did not succeed in keeping her depression at bay. Dr Crafford opined that Mrs Potgieter had serious problems coping with reality and that her insight into her problems was very limited. He was of the view that she did not have the strength of will to persevere with psychiatric treatment, nor was she motivated to undergo individual psychotherapy. He testified that Mrs Potgieter’s ‘generalised anxiety disorder’ was a lifelong condition and that,

although it could be treated, was not curable. It was characterised by excessive uncontrollable worry; mood instability; inability to cope with change; the avoidance of stressors and the formation of inappropriately intense and unstable interpersonal relationships. According to Dr Crafford, Mrs Potgieter's 'long-term prognosis' was not good.

[8] It is important to note that Dr de Wit and Ms Retief premised their recommendations to a large extent on their 'factual finding' that the parties' housekeeper, Ms Maria Zama, had been the children's primary caregiver for a number of years preceding the trial. I will return to this aspect in due course. So too, the family advocate accepted as a fact in her report the allegation that Ms Zama, and not Mrs Potgieter, was the children's primary caregiver.

[9] The family advocate also called a third clinical psychologist, Mr Ian Meyer, to testify at the trial. Mr Meyer had been instructed by Mrs Potgieter's attorneys during the course of the trial to conduct an investigation and compile a report, focussing in his assessment on the parties' respective parental capacity. In accordance with his instructions, he did not reassess the children for fear of traumatising them by subjecting them to a further distressing psychological process. Mr Meyer was of the view that Dr Potgieter showed greater parental capacity than Mrs Potgieter and that custody of the children should be awarded to Dr Potgieter. His

opinion was derived largely from his conclusion that, given her ‘ego strength’, psychiatric history and previous style of coping while she was a full-time mother and housewife with considerable domestic support, she might well not be able to cope with the stress of being a single parent and of managing a household, a job and finances.

[10] Chetty J was unimpressed with the various expert witnesses. He described Ms Vogel as a ‘poor witness’ who was evasive, unable to answer questions directly and reluctant to make obvious concessions –

‘The defensive attitude which she displayed towards her report compounded the problems she experienced under cross-examination and contributed markedly to her unease in the witness box . . . it became obvious that her recommendation was inextricably bound to her diagnosis. She was reluctant to concede that even if the factual substratum upon which her diagnosis rested was different to that which she accepted her conclusion could be different . . . Cross-examination soon established the spurious nature of the allegations which she regarded as fact. Those allegations emanated from the [appellant] and those loyal to him which she unreservedly accepted as factually correct.’

[11] As Erasmus J pointed out in his judgment in the Full Court, it was put to Ms Vogel in cross-examination that her strenuous attempts to ‘defend’ her position and her unwillingness to make any concessions in favour of Mrs Potgieter indicated her lack of objectivity. Her answer was as follows:

'I cannot be neutral, I have decided in my report that Dr Potgieter is the better custodian and maybe I am being too defensive of my report. I have written something which took a long time and [which] I am proud of and I would like to explain why I came to these findings and I see that they are in line with other people's findings, so I know that I am not – it is not just a magical thumbsuck, it is based on as much evidence and quantitative and qualitative measurements that I could find.'

Erasmus J commented, correctly in my view, that this was indeed an unfortunate attitude for an expert whose task was to assist the court in an objective manner.

[12] The trial judge was also critical of Dr de Wit's evidence for much the same reasons. As far as Ms Retief was concerned, Chetty J correctly observed that her report and her testimony made it abundantly clear that she accepted the allegations contained in Dr de Wit's report as factually correct; that she relied heavily on Dr de Wit's findings, and that her recommendations were influenced by Dr de Wit to an appreciable degree. As the family advocate's opinion was in turn based almost exclusively on the recommendations in the reports submitted to her by Ms Retief and Dr de Wit, as well as on the allegations in the pleadings and in the affidavits filed in the Rule 43 application, Chetty J did not derive any assistance from her recommendation either.

[13] As stated by the trial judge at the outset of his judgment, the fundamental principle consistently applied by South African courts in

custody disputes, as indeed in all matters concerning children, is now entrenched in section 28(2) of the Constitution. This section provides that '[a] child's best interests are of paramount importance in every matter concerning the child'. (See further *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 307I-308A, *F v F* 2006 (3) SA 42 (SCA) para 8 and also *Lubbe v Du Plessis* 2001 (4) SA 57 (C) at 66B-67G.) It is not necessary for the purposes of this judgment to repeat the non-exhaustive, albeit comprehensive, 'checklist' of criteria relevant to the application of the best interests standard, set out in *McCall v McCall* 1994 (3) SA 201 (C) along the lines of the checklist of relevant factors recommended by the English Law Commission in its *Review of Child Law, Guardianship and Custody* Law Com No 172 (1988) paras 3.17 et seq. These criteria – and quite a few more – have now been encapsulated in section 7(1) of the Children's Act 38 of 2005 which was signed into law by the President on 8 June 2006, but which is not yet in operation.

[14] Determining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children. This being so, an appeal court will not easily second-guess those findings and conclusions. This is especially so in a case like the present, where the trial court's conclusion – that the best interests of the children 'demanded' that custody

be awarded to Mrs Potgieter – was based to a large extent on favourable credibility findings in favour of Mrs Potgieter and adverse credibility findings against Dr Potgieter and the expert witnesses. (See generally *R v Dhlumayo* 1948 (2) SA 677 (A) and *Santam Bpk v Biddulph* [2004] 2 All SA 23 (SCA) para 5; but cf *Jackson v Jackson* supra at 325B-C.) This was in fact the approach the Full Court followed on appeal to it.

[15] Counsel for Dr Potgieter contended, however, that both the trial court and the Full Court had misdirected themselves in their assessment of the expert evidence. Thus, counsel argued, the material facts on which both Ms Vogel and Dr de Wit based their opinions had been proved and Chetty J's criticism of their evidence was accordingly not justified. According to counsel, the learned judge had erred by finding that these two expert witnesses had unreservedly and uncritically accepted the version of events proffered by Dr Potgieter and those collateral sources loyal to him. This finding did not take into proper consideration the information gleaned from the collateral sources consulted by the experts and the results of the psychometric tests administered by them. Counsel submitted that the trial judge had incorrectly allowed himself to be influenced by statements put to the expert witnesses by counsel for Mrs Potgieter in cross-examination without any factual basis having been laid for such statements and without any evidence being adduced either by or on behalf of Mrs Potgieter to support such statements.

[16] The principles applicable to the admissibility and evaluation of expert opinion evidence are well-established (see, for example, DT Zefferdt, AP Paizes & A St Q Skeen *The South African Law of Evidence* (2003) p 299 ff; PJ Schwikkard & SE van der Merwe *Principles of Evidence* 2 ed (2002) p 89 ff and the cases cited by these writers). As Chetty J pointed out –

‘It is clear . . . that expert opinion is not the mere conjecture, surmise or speculation of the expert: it is his judgment in a matter of fact. It is equally clear, that whilst in many cases a court needs and benefits from an expert’s opinion, the expert witness should not usurp the function of the court.’

(On the proper role and function of expert witnesses in disputes involving children and families, see further *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E-F and *Jackson v Jackson* supra at 311F-G, 323E-324C and 327G-333I.)

[17] The trial judge did not question the specialised knowledge, training or experience of the various expert witnesses, but identified his main problem with such experts as being ‘[their] inability . . . to draw a line between matters of fact and matters of value thereby distorting the judicial process by acting like judges.’ For this reason, he considered their evidence to have ‘no real probative value’.

[18] This was a somewhat unusual case in that, although both Ms Vogel and Mr Meyer were initially engaged by Mrs Potgieter to investigate the issue of custody, both ultimately recommended that custody of the children be awarded to Dr Potgieter. It thus cannot be said that either of them was partisan in the sense that he or she ‘consistently asserted the cause of the party’ who had engaged him or her (see *Stock v Stock* supra at 1296F). While Chetty J was correct in his criticism of Ms Vogel’s evidence, his treatment of Mr Meyer’s report and the testimony given by him can perhaps be criticised as being unduly cursory. The same can be said of the judgment of the Full Court in this regard.

[19] Chetty J disregarded Dr Crafford’s evidence on the ground that, as he had last had contact with Mrs Potgieter some six years before the trial, he was ‘unable to express any meaningful opinion on her present day condition’. However, Dr Crafford testified that the generalised anxiety disorder which he had diagnosed when treating Mrs Potgieter was an incurable lifelong condition and that, without ongoing psychiatric and psychotherapeutic treatment, the long-term prognosis for Mrs Potgieter was not good. Chetty J’s dismissal of his evidence as having little probative value was therefore, in my view, not entirely justified. In this regard, Mr Meyer also testified that, while the borderline personality disorder from which, in his opinion, Mrs Potgieter suffers can be ‘contained and assisted’ with (inter alia) medication, there is no cure for this kind of disorder.

[20] These shortcomings notwithstanding, I do not think that either the trial judge or the Full Court misdirected themselves in the assessment of the expert evidence as a whole. The main factual findings made by the trial court were that Mrs Potgieter had looked after the children as their primary caregiver all their lives; that there was no real evidence that they had suffered any harm in her care; that despite the trauma and stress caused by the protracted divorce proceedings, during which the parties continued to live in the same house with the children, the children were doing very well at school; that Mrs Potgieter dearly loved the children who reciprocated this love; and that, while E. had indicated no real preference as to which parent she wanted to live with after the divorce, J. had expressed a clear desire to live with Mrs Potgieter.

[21] The experts, by contrast, did not base their opinions on these facts and were by and large not prepared to reconsider their opinions when these facts were put to them during the course of their testimony. In the words of Erasmus J:

‘Die problem met die deskundiges se getuienis was nie ’n gebrek aan kundigheid in hul vakgebied nie, maar in hul skynbaar onkritiese aanvaarding van die weergawe van die appellant en sy verwysingsbronne.’

[22] The most telling example of this failing on the part of the expert witnesses was the acceptance by Dr de Wit, Ms Retief and, it would

appear, also Mr Meyer of allegations by Dr Potgieter and by Ms Zama that the latter was the children's primary caregiver during a period of several years preceding the trial. Ms Zama's evidence did not, however, bear out these allegations. While her evidence-in-chief portrayed Mrs Potgieter as an uncaring, neglectful and bullying mother prone to outbursts of rage and physical abuse directed against both Dr Potgieter and her children, her evidence under cross-examination revealed quite a different picture. Ms Zama conceded, albeit somewhat grudgingly, that her function in the parties' household was that of a domestic worker who left at half past four each afternoon, and that Mrs Potgieter was the person who primarily cared for the children on a day-to-day basis. Ms Zama went so far as to concede that Mrs Potgieter, with whom she clearly had a difficult and somewhat turbulent relationship, was in fact 'n goeie ma'.

[23] The Full Court concluded that Mrs Potgieter clearly suffers from personality problems in that she is impulsive, unstable, somewhat inflexible in her personal relationships and prone to confrontation. She herself conceded that she had difficulties in managing her finances (one of the major complaints directed against her by Dr Potgieter). However, it was common cause that, for some years preceding the trial, she had managed to keep her depression, which had in the past led to several suicide attempts, under control with medication. Moreover, it must be remembered that many of her problems manifested themselves during the parties'

increasingly stormy marriage. Particularly in the relatively lengthy period leading up to the trial, both parties were subjected to the enormous strain of living under the same roof while bitterly estranged from each other and in constant conflict. There would obviously be new stresses on Mrs Potgieter in her life as a divorcée and single parent, but the trial judge and the Full Court were of the view that neither her personality problems nor these new stresses would impact on her parenting ability to such an extent that it would not be in the best interests of the children to continue being cared for by her, albeit while they maintained the close relationship they have with Dr Potgieter.

[24] I do not believe that either court misdirected itself in this regard. In determining what custody arrangement will best serve the children's interests in a case such as the present, a court is not looking for the 'perfect parent' – doubtless there is no such being. The court's quest is to find what has been called 'the least detrimental available alternative for safeguarding the child's growth and development'. (See Joseph Goldstein, Anna Freud & Albert J Solnit *Beyond the Best Interests of the Child* (1973) p 53, as cited in *Boberg's Law of Persons and the Family* 2 ed (1999) p 528-529 n 117.)

[25] In concluding that maternal deprivation would 'inevitably have adverse consequences for [the children's] development', Chetty J cited

with ‘wholehearted’ approval the following dictum of Broome J in *Dunsterville v Dunsterville* 1946 NPD 594 (at 597):

‘Experience goes to show that a child needs both a father and a mother, and that, if he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child’s life than the paternal, and if not forged early may never be forged at all. The psychological need of a father, on the other hand, only arises later. It seems to me that if the father is awarded the custody of these young children they will in all probability, notwithstanding the loving care which they will undoubtedly receive from their paternal grandmother, grow up as motherless children, with all the attendant psychological disadvantages.’

Broome J went on to state that –

‘If, on the other hand, the mother is awarded their custody, at any rate during their years of infancy, they will not necessarily grow up as fatherless children, for the relationship between a father and his young children is never one of continuous intimacy, but is necessarily intermittent.’

[26] In more recent cases, the value systems and societal beliefs underpinning the ‘maternal preference’ or ‘tender years’ principle have been challenged and courts have emphasised that parenting is a gender-neutral function and that the assumption that a mother is necessarily in a better position to care for a child than the father belongs to a past era. (See, for example, *Van der Linde v Van der Linde* 1996 (3) SA 509 (O); *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O); *Ex parte Critchfield* [1999] 1

All SA 319 (W) and the other cases referred to by LI Schäfer ‘Young Persons’ in Brigitte Clark (ed) *Family Law Service* (Issue 45) para E42. See also *Boberg’s Law of Persons and the Family* 2 ed (1999) p 534-538 and the authorities there cited.) Chetty J’s reliance on the abovequoted dictum of Broome J in the *Dunsterville* case must therefore be seen in the light of these more recent developments. The later approach, it needs be added, is in any event consistent with the equality principle enshrined in section 9 of our Constitution.

[27] It should also be noted that the minor children have been in Mrs Potgieter’s custody (without the daily presence of Dr Potgieter) for nearly two and a half years since at least October 2004. If Dr Potgieter had, at any time during that period, formed the view that the children were suffering harm of any kind by being in Mrs Potgieter’s custody or that circumstances had changed to such an extent that there was ‘sufficient reason’ for the custody order Chetty J granted to be rescinded or varied, he could have applied to the High Court in terms of section 8(1) of the Divorce Act 70 of 1979. That option obviously remains open to him.

[28] As regards Dr Potgieter’s appeal against the order by Chetty J that he should pay rehabilitative maintenance to Mrs Potgieter in the amount of R4650 per month for a period of 12 months, there is ample evidence to show that Mrs Potgieter required such rehabilitative maintenance and that

Dr Potgieter was able to afford it. Although counsel for Dr Potgieter submitted that the period of payment of such maintenance should be reduced to three or four months, he did not point to anything in the evidence that indicated that Chetty J had erred in his determination of either the amount or the period of payment. In my view, there was no such error.

[29] Finally, counsel for Dr Potgieter submitted that, even if the appeal on the merits were to be dismissed, this Court should make no costs order on appeal and should in addition set aside the cost orders made against Dr Potgieter by the trial court and by the Full Court so that each party bears his or her own costs. In the light of, inter alia, the adverse credibility findings made by the trial court against Dr Potgieter, I am of the view that there is no reason to interfere with the cost orders made by the two previous courts and that Dr Potgieter must be ordered to pay Mrs Potgieter's costs in this Court. I do not, however, believe that it was necessary for Mrs Potgieter to be represented by two counsel in this appeal: indeed, counsel for Mrs Potgieter did not ask for the costs of two counsel.

[30] In the circumstances, the appeal is dismissed with costs.

B J VAN HEERDEN
JUDGE OF APPEAL

CONCUR:

FARLAM JA
CAMERON JA
HANCKE AJA
THERON AJA