B v B (67576/2009) [2015] ZAGPPHC 1014 (27 November 2015)-Not Reportable

Court: Gauteng Division, Pretoria

Case No: 6757/2009

Date(s) heard: 23 November 2015

Delivered: 27 November 2015

Judge: Ranchod, J

DESCRIPTION

Children's rights – Primary residence and care of minor children – where both parties were capable and loving parents but the children had expressed the view to reside with their father – the court found that the child's wishes were not the primary considerations or at all decisive in determining his or her best interest

SUMMARY

(Par 1 - 7) The parties had been divorced by way of a settlement agreement on 8 December 2008. According to the agreement the primary residence of the children was awarded to the respondent (mother of the children). The applicant sought a variation of the agreement so that the children could reside primarily with him.

(Par 9) Both parties had been married to new persons. (Par 12) There were no allegations of pathology or dysfunctionality in any of the two family units. (Par 14) It was also common cause that neither of the parties alleged that the other parent was not a suitable parent. The court had to decide whether the children should be sent to the applicant based primarily on his contention that the children expressed the desire to reside with him.

(Par 23) The court laid down the general principles which were set out in *inter alia; Jackson v Jackson 2002 (2) SA 303 (SCA)* and *P v P [2007] 3 All SA 9 (SCA),* that variation would be granted in circumstances where it is shown that the original arrangements are not in the child's best interest or that there has been a substantial change in the circumstances. (Par 26 - 27) Looking at Section 10 of the Children's Act, 38 of 2005 the court found that the child's wishes were not the primary considerations or at all decisive in determining his or her best interest. It was held that it was the court's duty to establish what was best for the child. (Par 34 - 40) Based on the circumstances of the case, the court found that the primary care and residence of the children should remain with the respondent. The applicant was ordered to pay 30% of the respondent's costs on a party and party scale.

Summarised by: Tshepo Munene (Admitted Attorney of the High Court of South Africa)

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

27/11/2015

CASE N0:67576/2009

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

27/11/15
DATE

SIGNATURE

In the matter between:

R. B. **APPLICANT**

and

A. B. **RESPONDENT**

JUDGMENT

RANCHOD J:

[1] The applicant and the respondent were married to each other on 23 September 2000. Two minor children were born from the marriage namely B. and R.. At that time their place of residence was in Pretoria.

[2] The parties became separated during July 2008 and the respondent in the present application subsequently instituted divorce proceedings. The parties entered into a settlement agreement in terms of which a divorce order was obtained on 8 December 2008. In terms of the settlement agreement the

primary residence of the minor children was awarded to the respondent. B. was six years old at the time and R. three. Shortly after the divorce the respondent and the minor children relocated to Potchefstroom on 31 December 2008 and have been living there ever since. The applicant has continued living in Pretoria up to the present time. It is not in dispute that the applicant has had regular contact with the minor children since the divorce.

[3] Approximately a year after the divorce, on 2 November 2009 the applicant first launched an application for the variation of the divorce order. The respondent opposed it. The variation sought by the applicant was that primary residence of the children be awarded to him. In the alternative, that certain defined parental rights be accorded to him.

[4] The Family Advocate was then asked to do an investigation and make a recommendation. The Family Advocate's view was that as the respondent had very shortly after the granting of the divorce relocated with the children to Potchefstroom, if they were ordered to be returned to Pretoria where they used to live it would subject them to a further disruption. It was felt that since they had already moved it would be best to retain the status quo. The applicant accepted the advice and did not proceed with the application but neither was it withdrawn.

[5] About three and a half years later in March 2013 the applicant requested the Family Advocate to re-evaluate the position regarding the residency of the minor children. He says he did this because both the children had over some time continued to express a desire to reside with him. It appears that the Family Advocate sought to interview the respondent in Pretoria, which she refused to agree to. In an interim report, the Family Advocate did not provide any recommendation except that she requested a psychological evaluation of the family. Applicant says that the psychological evaluation did not take place as the respondent refused to consult with any of the psychologists nominated by the Family Advocate as they were both in Pretoria. The Family Advocate then closed her file.

[6] The applicant then launched an application for the appointment of a curator ad litem for the minor children. A curator ad litem was duly appointed. She is from the office of the Legal Aid Board. It should be noted that that order was granted only as recently as 9 March 2015.

[7] The curator ad litem recommended that both children be placed in the care of the applicant. I will revert to this aspect presently. She also recommended counselling for the parties. The applicant then approached the respondent with a view to settling the matter on the basis that the children be placed in his care from the beginning of January 2016 when the schools would reopen and that he was willing to comply with the recommendations of the curator that both parties should receive parental counselling - something he was willing to implement immediately. The respondent did not react to this suggestion of the applicant. In the applicant's heads of argument he says he now wishes this court to finalise the issue of the place of residence of the minor children.

[8] The respondent concedes that B. was initially unhappy about the move to Potchefstroom and verbalised a desire to reside with the applicant. However, R., apparently did not experience any problems with the relocation to Potchefstroom, presumably because he was much younger at the time. Respondent says she took B. to a clinical psychologist Ms Corne Brink in order to professionally address the problems experienced by her due to the relocation. By the end of May 2009 Ms Brink was satisfied that B. had adapted well to her new surroundings and the therapy was eventually terminated during November 2009. B.'s class teacher had apparently during an interview with a social worker appointed by the Family Advocate confirmed that her performance at school improved after she was taken to Brink. Brink, however, identified negative influence by the applicant on the minor children and recommended that he gave them the assurance that the relocation was in order. The applicant however refused to do so.

(9] At this juncture, it would be apposite to mention that both the applicant and respondent have since remarried other persons. The applicant married

his new wife Antoinette on 17 October 2009 and the respondent married her present husband Gideon du Tait, on 28 December 2009.

[1O] During 2013 respondent and applicant took the minor children to social workers in private practice, Ms Cilliers and Ms Venter respectively. Cilliers assessed the minor children during three sessions of an hour each. The parents of the children did not form part of the assessment. She made no recommendation about the children's primary place of residence but suggested a systemic investigation. On the other hand Venter only had one session with each of the minor children but, the applicant also formed part of the assessment. Venter concluded that both minor children feel a sense of belonging in their father's family.

[11] As I said, the Family Advocate had rendered an interim report on 19 September 2013 in which it was recommended that the status quo be maintained, in other words, that the children remain with the respondent. The Family Advocate had also recommended that a clinical assessment be done in order to assess the psychological, emotional and behavioural functioning of both parties and risk assessment regarding the physical, mental and emotional well-being of the minor children, the parental skills and capabilities of both parents to care independently for the minor children and the parent-child relationship between the minor children and the respondent's new husband.

[12] The respondent did not consult with any of the psychologists nominated by the Family Advocate. Respondent says the applicant was requested to pay for such evaluation, a request to which he did not respond. In any event, the applicant himself is of the view that a psychological assessment as requested by the Family Advocate is unnecessary as there are no allegations of any pathology or dysfunctionality in any of the two family units.

[13] This brings me to the nub of the matter.

[14] It is common cause that neither of the parties allege that the other parent is not a suitable parent. In fact, that much was conceded by the parties in oral submissions before me. The crisp issue is whether the applicant's contention that the children have expressed a desire to live with him should be the primary reason for ordering that the status quo be upset and that this court should order that the children relocate to Pretoria and live with their father. The applicant has repeatedly emphasised that it is B., who has expressed the wish to live with him. It is to be noted that the applicant launched this application in November 2009 which is the time by which Brink had concluded that B. had adapted to her new surroundings.

[15] During argument both parties agreed that it is not only the wishes of a child, or the children, that should be the determining factor in a court deciding where the children should live. The wishes of the children are but one factor among several that a court as the upper guardian of minor children will take into account in arriving at a decision as to what is in the best interests of the children.

[16] The papers are lengthy or voluminous and I am of the view that it is not necessary for me to deal with all the allegations by the parties.

[17] As I said, each parent agrees that the other parent is not a bad parent. There is no real attack by the applicant on the living conditions or other aspects in relation to the children's well-being whilst they have been living with their mother for the past approximately 7 years.

[18] B., in my view, has been ambivalent or undecided as to which parent she would like to live with. In this regard it is common cause that she initially expressed a desire to live with the applicant but, as is apparent from the papers, including a number of "whats app" messages exchanged between her and her father and his wife Antoinette, as well as the Family Advocate that she wants her father to stop the legal proceedings in this matter. These messages are as recently as in September 2015. What clearly emerges from the papers is that B. is aware of the fact that both her parents are good to

her and they provide her with the relevant necessities and support but is caught up in a tug-a- war between the parents.

[19] Having said that, what is apparent is that the applicant stresses what B. told him about her desire to live with him. He concluded that the respondent is manipulative and pressurises B. to change her mind. However, on the papers it appears clearly that he had recently informed B. that if she chose to live with her mother, she and her brother R. would not see him again. This is not the kind of pressure, in my view, that should be put on children by parents in order to convince them to come and live with the respective parent.

[20] I also take note that the respondent has never disputed that B. expressed a desire to reside with the applicant. However, the respondent and at least two therapists, that is, Brink and Cilliers had concerns about the influence exercised by the applicant on B. in this regard. B. herself had indicated that the applicant was constantly discussing the present application with her. This was, in my view, an indirect attempt by the applicant to influence B.'s decision as to where she would choose to live.

[21] As I said, the curator ad litem, Advocate Elizabeth Niewoudt ('the Curatrix') of the Legal Aid Board was appointed on 9 March 2015. The Curatrix was authorised to consult with the minor children and any other interested party or institution in order to provide a report to the court indicating the preference of the minor children and generally what would be in the best interests of the minor children. It is evident that her authority and mandate was not limited to establishing the preference of the minor children on where they want to reside.

[22] In her report dated 7 July 2015 the Curatrix concluded that it would not be in R.'s best interest to be separated from B.. She was of the opinion that both minor children should reside with the applicant from 2016 and should have regular and liberal contact with the respondent. The Curatrix

recommended that both parties should go for mediation to draft a parenting plan that will assist them to become co-parents to the minor children.

[23] I turn then to some general principles applicable to the variation of a court order pertaining to minor children. Although there is no onus in the usual sense, a Court will not vary the provisions of a divorce order unless satisfied that the child's interests require the variation sought. See Stock v Stock 1981 (3) SA 1280; Johnson v Johnson 1963 (1) SA 162 (T); McCall v
McCall 1994 (3) SA 201 (C); Jackson v Jackson 2002 (2) SA 303 (SCA); P v .E [2007] 3 All SA 9 (SCA). Variation would be granted in circumstances where it is shown that the original arrangements are not in the child's best interest or that there has been a substantial change in circumstances. See Edge v Murray 1962 (3) SA 603 (W).

[24] Section 9 of the Children's Act 38 of 2005 provides that in all matters concerning the care, protection and well-being of a child, the standard the child's best interest is of paramount importance, must be applied. This section echoes section 28 (2) of the Constitution and endorses the paramountcy of this standard.

[25] Section 7 of the Children's Act requires a number of factors to be taken into consideration when the best interest standard is applied in any matter governed by the Act. Included amongst those factors are the capacity of the parents, or any specific parent, to provide for the needs of the child, including emotional and intellectual needs, the likely effect on the child of any separation from both or either of the parents or any brother or sister, 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, or any specific parent, on a regular basis and the need for the child to be brought up in a stable family environment, and where this is not possible, in an environment resembling as closely as possible a caring family environment. See the relevant subsections of the Children's Act in section 7.

[26] Section 10 of the Children's Act provides:
"Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning the child has the right to participate in an appropriate way and views expressed by the child must be given due consideration".

[27] It is evident that the child's wishes are not the primary consideration or at all decisive in determining his or her best interest. The court must only give "due consideration" to whatever views the child expresses. It does not require deference to the child's expressed wishes: the duty of the court is to establish what is best for the child, and this may require the court to reach a decision that is different from what the child wants. The child's wishes must however be ascertained and considered. See Schaffer, Child Law in South Africa, 2011, p 166.

[28] B. has not, it would seem, expressed a clear desire to leave her mother and live with the applicant on the basis that she is unhappy with living with her mother. There may have been what I would call incidents of friction between her and her mother which is to be expected in any family unit. In my view, bearing in mind that B. has lived with her mother in terms of the settlement agreement agreed to between the parents and has been living in Potchefstroom for the past seven years or so, she has no doubt established relationships with students at her school and has lived in a familiar environment since the age of approximately 6 until now. It would also seem that she has progressed well at school. As I said the applicant's persistence with the application is primarily based upon B.'s professed desire to return to Pretoria and reside with him; she has been undecided in this regard. It is also apparent that the applicant's application is not premised upon any intolerable situation or changed circumstances in relation to the children.

[29] Much emphasis has been placed on the wishes of B. whilst R. has remained in the background. From the papers it is apparent that R. has a close relationship with B.. Cilliers says R. is happy at school in Potchefstroom and that he loves the respondent. Cilliers did not identify any

problems in the relationship between R. and the respondent's new husband. She said R. is not happy when he is with the applicant's new wife. R. is happy in the company of his half-brother Hein. According to Cilliers, R. showed a stronger bond with the respondent's new husband than with the applicant's new wife. She also says that he does not want to choose between the applicant and the respondent.

[30] In contrast Venter, the social worker appointed by the applicant, apparently assessed the minor children in the company of the applicant. She did not receive any input from the respondent. The minor children were thus not left to express themselves as freely as during the sessions with Cilliers who saw them independently of the parties. There is clearly a conflict between what the minor children conveyed to Cilliers and Venter, especially with reference to their feelings for the respondent and their attitude towards her new husband. R., seemingly suddenly also wanted to reside with the applicant, which was not the case during the assessment by Cilliers. Venter, however, recorded that both minor children have a close and loving relationship with both the applicant and the respondent. I am of the view that Cilliers has presented a much more comprehensive, balanced and objective assessment than that done by Venter.

[31] I turn again to the report by the curatrix ad litem. She says:
"The parties were also not sent for assessment as for me the question in this matter, is not who is the best parent but what are the wishes of the minor children."

[32] It is apparent from the Curatrix's report that the only issue she sought to look at and on which the report was based was the wishes of the minor children. As I said, the wishes of the minor children are but one aspect to be considered in arriving at a decision on what is in the best interest of the children. Unfortunately, the Curatrix misconceived the true nature of her role. She should have conducted her investigations on a wider basis instead of only focusing on what the wishes of the children were. She apparently consulted with the respondent and the minor children at a restaurant in

Potchefstroom. That consultation lasted only between 20 and 25 minutes. She also only briefly met with the respondent's new husband and had no discussion or consultation with him. She was thus unable to independently assess the relationship between him and the minor children. She did not consult with Hein, the half-brother of the minor children. The minor children lived with Heim since his birth and he forms part of the support structure at the respondent's residence. The Curatrix apparently also did not visit the residence of the applicant prior to compiling a report. She also did not consult with the applicant's new wife. Nor did she consult with any of the teachers at the school attended by the minor children. She also did not investigate the financial position of the respondent and her husband in order to satisfy herself that they would be able to travel from Potchefstroom and fetch the minor children every alternative weekends in Pretoria. The respondent has alleged in the papers that they simply cannot afford this.

[33] The Curatrix also did not did not investigate the stability of the relationship between the applicant and his new wife at present. The applicant and his new wife, it appears, were separated for a period of two out of the six years of their marriage. Cilliers had highlighted the importance of an investigation into this issue. She also did not deal with the issue as to whether any negative consequences would flow if the present status quo was preserved. It would appear that no investigation was made about what arrangements will be made in Pretoria to take care of the minor children after school. Finally, the curatrix did not deal at all with the benefits that a move to Pretoria would have for the minor children in contrast to the fact that they have been residing in Potchefstroom with the respondent for the past approximately 7 years. Having said that, the following is apparent from the report of the curatrix: Both minor children said that their parents, that is the applicant and the respondent, make them happy. B. indicated that the respondent is a good mother because she can talk to her about "girl things", is always there for her and can assist her with "things". The applicant is a good father because he buys food and looks after them. It is in my view clear that this is an indication of a stronger emotional connection between B. and

the respondent, particularly at a time when B. is at the beginning of her teenage years – a rather tumultuous period in the lives of many teenagers.

[34] The applicant contends that he has a good support system in place, which consists of his wife, his parents and his sister. However, both the applicant and his new wife are working and it is by no means clear what arrangements would be made for the children after-school. The applicant is a medical product consultant and often works late. He is even called out during the night. As I said there is no independent evidence before me in order to assess the stability of the relationship between the applicant and his new wife in view of the relatively long period of separation that had taken place between them whereafter they appear to have reunited.

[35] The respondent on the other hand seems to have a proper support system in place in the new husband, who is a pensioner at present and is able to cater for the children's needs when necessary, as he has done over the past years. The children's schools are near their home and they can be assisted with homework and extramural activities by the respondent and her new husband. There is no evidence to indicate that the respondent and her new husband are not involved in a sound and stable relationship.

[36] The applicant refers to what appears to be one incident where the respondent hit B.. There is nothing to indicate that it was of an abusive nature. In my view the discipline meted out by the respondent does not amount to child abuse. The respondent says she also disciplined the minor children when she and the children were still living with the applicant. The applicant has not alleged that the respondent abused the children during that time.

[37] Finally, I should state that from the papers there appears to be no evidence to show that B. suffered any emotional or psychological trauma or damage as a result of her wish not been granted or that she would be better off in Pretoria than she was in Potchefstroom over the past almost 7 years. In my view, there is no need to upset the sense of stability, security

and continuity and the corresponding desirability of not disrupting the existing environment. See French v French 1971 (4) SA 298 (W) where this was considered to be the primary consideration.

[38] The minor children have been unfortunately subjected to the litigation between their parents and several assessments over the past six years, which have no doubt taken its toll on them. The time has come for the minor children to be allowed to settle down without further influencing, litigation, assessment and investigation. In my view, the correct thing to do in all the circumstances would be to preserve the status quo.

[39] The applicant, in the alternative to a variation of the primary residence of the minor children, seeks defined rights of contact. Save for the relief sought in prayer 3.6 of the notice of motion the respondent says that she is not opposed to the alternative prayer.

[40] Finally, there is the question of costs. Both parties seek costs as against each other. Although the respondent has substantially succeeded in resisting the application, the applicant initiated these proceedings, it appears, after B. initially expressed her desire to live with him. However, he persisted in the application when proper reflection and consideration of all the facts and circumstances should have persuaded him otherwise. In all the circumstances, in my view an appropriate order for costs would be that the applicant pays a portion of the respondent's costs on the party and party scale.

I accordingly make the following order:

1. The primary care and residence of the minor children remains with the respondent.
2. The previous settlement agreement between the parties is varied as follow:

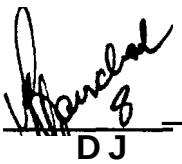
2.1 "The parental responsibilities and rights as set out in section 18(2)(b) of the Children's Act 38 of 2005 is awarded to the applicant in terms of

prayer 3 of the notice of motion dated 11 January 201O more specifically prayers 3.1; 3.2; 3.3; 3.4; 3.5 and 3.7 thereof.

2.2 Prayer 3.6 is specifically excluded.

3. The applicant is ordered to pay 30% of the respondent's agreed or taxed party and party costs of the application.

4. Each party is to bear his or her own costs in relation to the appointment of the curator ad !item.



RAN D J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Mr van Zyl
Instructed by	: G.J Van Zyl Attorneys
Counsel on behalf of Respondent	: Adv Grundlingh
Instructed by	: Willie Jordaan Attorneys
Date heard	: 23 November 2015
Date delivered	: 27 November 2015