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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal No: 30/2019
Case No: 3567/2017

In the matter between:

R[....] B[....]

APPELLANT

and

M[....] B[....]

RESPONDENT

CORAM: NAIDOO, ADJP et REINDERS, J *et* MATHEBULA, J

JUDGMENT BY: REINDERS, J

HEARD ON: 17 MAY 2019

DELIVERED ON: 11 JUNE 2019

- [1] At the heart of this appeal lies the best interest of two minor boys, [J] (born on 8 October 2010) and [A] (born on 25 July 2014). The appeal lies against the entire judgment of a single judge. The appellant was the applicant in the trial court.
- [2] The parties got married in 2010, but the love boat sank in 2015 when the bonds of marriage between the appellant and respondent were dissolved. At that time, the parties concluded a settlement agreement (the deed of settlement), in terms of which the respondent (as defendant) was awarded the rights to primary care and residency in respect of the minor children, whilst the appellant (as plaintiff) was awarded the right to reasonable contact with the children, the terms of which were stipulated in the deed of settlement which was made an order of court.
- [3] On 13 July 2017 the appellant issued an application seeking relief in terms whereof paragraph 1 of the deed of settlement be amended to the extent that he be awarded the primary care and residency of the minors, subject to respondent's rights of contact. A further amendment of paragraph 2 of the deed of settlement was sought to have the respondent pay maintenance in respect of the minors.
- [4] The respondent opposed the relief so claimed, and issued a counter application in terms whereof she requested relief in the following terms:

“ 1. An order to amend paragraph 1 of the Court Order dated 26 March 2015 (hereinafter “the order”) to read as follows: “Die ouerlike verantwoordelikhede en regte ten aansien van die

versorging van die minderjarige kinders soos uiteengesit in Artikel 18(2)(a) van die Kinderwet , Wet 38 van 2005 aan die Verweerderes toegeken word onderhewig daaraan dat die minderjarige kinders by die Verweerderes se ouers, Gert Johannes Muller en Anna Margaretha Susanna Muller sal woon tot en met 31 Augustus 2019 of wanneer die Verweerderes haar studies voltooi of dit beeindig welke ookal eerste gebeur”;

2. An Order directing that the amendment be effective retrospectively and that the status quo with reference to the minors will remain the same;
3. An Order directing that the Application in regards to contact with the minor child [A..] [B...] by the Applicant be dealt with in the Regional Court Free State Division held in Bethlehem.
4. An order that the Applicant pays the costs of this Family Advocate.”

[5] The Family Advocate compiled and filed its report on 19 February 2018. On 11 July 2018 the appellant filed a supplementary affidavit (and condonation therefor). Opposing and replying papers were filed. The application was heard on 16 August 2018 and judgment handed down on 6 December 2018. Leave to appeal was granted by the court a quo on 8 February 2019. Heads of argument were filed on behalf of both parties. Appellant filed supplementary heads in response to respondent’s heads, stating that a new point in law had been raised in the heads. At the hearing before us the latter point was abandoned and the parties agreed that the matter proceed and be finalized in the interest of the minor children.

[7] Having considered the evidence and submissions, the court *a quo* granted the following relief:

“

1. Both parties to be holders of Parental Rights and Responsibilities as contemplated in Section 18 of the Children's Act.
2. That the minor children's primary care, including their residence is to remain with the Respondent.
3. That the maternal grandparents should temporarily continue to reside with the minor children until such time when the Respondent completes her studies.
4. That the Applicant will exercise his contact rights as contemplated in Section 18(2)(b) as follows:
 - 4.1 Reasonable telephone contact with the minor children.
 - 4.2 Contact on alternative weekends with both [J] and [A] (full names omitted), which weekend will commence on a Friday at 15:00 till Sunday 17:00.
 - 4.3 The Applicant is to have contact with the minor children every Wednesday from 15h00 till 18h00.
 - 4.4 Short school holidays to alternate between the parties and long school holidays to be shared equally between the parties.
 - 4.5 Contact on Father's day or on the birthday of both minor children if such a day does not coincide with the usual access weekend.
 - 4.6 Maternal grandmother not to frustrate the above contact between the children and the Applicant.
5. Each party to pay their own costs.”

[8] The appellant relied on various grounds of appeal and stated that the court *a quo* erred in several respects. In my view these can be summarised as follows:

- the court *a quo* erred in preserving the status quo and not awarding the primary care and residency of the minors to the appellant. Included herein is the order that only the maternal grandmother should refrain from frustrating his contacts rights, whilst both grandparents and the respondent should have been ordered to do so.
- the court *a quo* erred in not adjudicating the two points *in limine* taken by appellant in opposing the relief claimed by respondent in her Family Advocate, to wit non-joinder of maternal grandparents and the respondent's lack of *locus standi* to bring the counter application. Furthermore the court *a quo* erred in not adjudicating and making any orders on the counter-application.
- the court *a quo* erred in accepting the recommendations of the Family Advocate as stated in its report. The Family Advocate did not investigate and prepare a report especially in regard to the maternal grandparents.

[9] Mr Peyper, appearing for appellant, submitted that the supplementary affidavit plays a very important role as same introduces new circumstances which should have been investigated by the Family Advocate. These include:

- the maternal grandfather's employment abroad

- leaving the maternal grandmother and the children on the farm which is not a safe environment;
- the non-compliance of the respondent and maternal grandparents with the Family Advocate's recommendations to enrol [A] in a pre-primary school; and
- alleged attempts by respondent and the maternal grandparents to influence appellant to withdraw the application.

[10] Mr Peyper submitted that the court *a quo* erred in not requesting a supplementary report by the Family Advocate which deals with new averments and especially investigating the circumstances at the maternal grandparents' residence. According to Mr Peyper there is no certainty that respondent would finalise her studies at the end of July and she might find employment in Durban, and the trial court should have catered for this in its order to enable the appellant to approach court to reconsider the care of the minor children. There is no merit in this submission. The appellant is at liberty to approach court at any time regarding the care of the minor children, and does not require the leave of this court to do so, provided that a proper case is made out. Mr Peyper insisted that a re-investigation should have been done by the Family Advocate before orders were granted by the court *a quo*, and therefore it is appropriate for this court on appeal to refer the matter back to the Family Advocate and then make a final decision. We were not referred to any case law substantiating this submission, but the submission is without any merit.

[11] The appellant chose the grounds for his application in the founding papers. The proposed re-investigation is based on further grounds that have nothing to do with the original grounds, nor do they

warrant re-investigation. The children have lived almost their entire lives at the maternal grandparents' home, without problems. There is no evidence showing that there is reason to doubt the safety of the farm where the children live. Other than expressing reservations about the employment of the maternal grandfather in the United States of America, there is nothing to indicate that this impacts negatively on the children. The court *a quo* probably for these reasons (in my view, correctly) did not make such an order.

- [12] The respondent was represented by Mr De Beer. He alluded to the common cause fact that respondent, who at divorce was left by the appellant without an income, with [J] who was a toddler and while she was pregnant with [A], moved to her parents home on a farm 15km from Bethlehem. Since that time the children grew up in a loving, caring and stable environment created by the respondent and the maternal grandparents. The investigation by the family counsellor was conducted when all parties were present, including the siblings of the respondent, and she concluded that the minor children were properly nurtured. No issue was taken by the appellant at the time and no complaints were raised about poor family circumstances or the unsuitability of the maternal grandparents to assist in taking care of the minor children. Although [A] was under developed, [J] was raised by the respondent and maternal grandparents, and was well adjusted. Mr De Beer submitted that any re-referral to the Family Advocate is not in the best interests of the children, as it would only lead to prolonged litigation. I am in agreement with him.

- [13] In my view the application for an amendment of the deed was prompted (according to the appellant) by the respondent's

possible relocation to Durban on a permanent basis while leaving the children with her parents on a farm near Bethlehem. This was what the Family Advocate was required to investigate. The respondent explained in her opposing papers that the reason for her temporary residence in Durban is solely for the purpose of improving her chances of employment in the labour market by obtaining a qualification in the hospitality industry. The conclusion of her studies would appear to be in August 2019. In my view this exposition by the respondent could not be gainsaid or found to be false. No other substantial reasons why the primary care and place of residence should be awarded to the appellant were forwarded in the founding papers. The court *a quo* was alive hereto and found that the respondent should not be faulted for having temporarily moved to Durban to advance her career. In so doing the respondent temporarily left the children with her parents where they have been residing for almost all of their lives. The court *a quo* mentioned that this was also to the advantage of the applicant as removing the children to Durban would probably have hindered and complicated appellant's rights to access.

- [14] I am not of the view that the court *a quo* erred in the aforementioned regard and, on the contrary, I approve of the arrangement. The Family Advocate with the assistance of a registered and qualified social worker who was appointed as a family counsellor, Mrs Van der Westhuizen, reports that the assessment of [J] indicates that he has a secure relationship with the maternal grandparents with whom he resides. He shares a close bond with his brother. He has regular contact with both the appellant and the respondent and shares a good relationship with both of them. Mrs Van der Westhuizen observed him to be well

cared for and his general development and progress at school is described as being good. An assessment of the younger brother [A] indicated that he is well cared for physically. Although there are concerns with regard to his development and in particular his speech and language, his developmental challenges are not due neglect or lack of proper care by respondent or the maternal grandparents. He is happy on the farm where he currently resides (at the maternal grandparents). He appeared to be comfortable with the appellant, the respondent and the maternal grandparents. The Family Advocate concluded that the Respondent should retain her parental rights of care and that the children should continue to reside with the maternal grandparents until such a time as the respondent has completed her studies. This is, at present, a mere two months from now.

- [15] Having received the report of the Family Advocate, appellant sought leave to file a supplementary affidavit. The court *a quo* in its judgment does not refer to this application and one of the grounds of appeal suggests that the court *a quo* did not adjudicate or take into account the supplementary affidavit. In my view nothing contained in the supplementary affidavit could have prompted the court *a quo* to request the Family Advocate for a new investigation or would have convinced it to grant the relief sought in the notice of motion, namely an amendment of paragraphs 1 and 2 of the deed of settlement. It is however heartening to read in the supplementary affidavit that the appellant and respondent made arrangements with regard to appellant's access and that the youngest boy [A] will sleep over for two nights every fortnight. In addition appellant avers that he has now taken with him both the children for several weekends without incident. The respondent in

her opposing supplementary affidavit states that the recommendations of the Family Advocate were implemented and both children have adapted well. She further states the emotional security of the arrangement with her parents and regular contact with the appellant is in the children's best interest. None of the information in the supplementary affidavit called for granting of the appellant's application, and for this reason the court *a quo* possibly did not refer thereto in its judgment.

- [16] The court *a quo* made various orders as alluded to above. It is clear therefrom that the relief sought by the appellant was not granted. No reference was made to the counter-application but it seems from paragraph 3 of the order that at least some of the relief sought by the respondent was granted. I point out also that the order in paragraph 3 is one of the recommendations of the Family Advocate. However, in my view, none of the paragraphs in the deed of settlement were deleted or amended, either in terms of the main application, or the counter- application. It is also my view that neither the appellant (in the main application) nor the respondent (in the counter application) made out a case for an amendment of the deed of settlement.
- [17] What the court *a quo* did was to make the Family Advocate's recommendations orders of court. None of the parties moved for such orders. Paragraphs 1 and 2 of the order of the court *a quo* were already granted at the divorce. The remainder of the orders were the recommendations by the Family Advocate. The court *a quo* ought to have dealt with the main application, counter-application and report of the Family Advocate and mentioned that it placed reliance on the Family Advocate's recommendations. I am of the view that its failure to do so should not be interpreted as

a failure to consider the main application and the counter application. I am in agreement with the essence of the orders granted by the court *a quo*. My view is, however, that the order of the court should have been differently worded. This will become apparent from the order below.

[18] The children reside with the respondent even though she may be temporarily absent from time to time. It is true that in her absence her parents take care of the children with her permission and for good reasons. There is therefore no reason to amend the deed of settlement or to grant the order prayed for by the respondent, in the counter-application, that the maternal parents should look after the minors temporarily. The objective facts are that the children reside, to this day, at the same residence where they have been residing even before the birth of [A]. This is the respondent's choice and in line with her parental rights as per the existing divorce order of 26 March 2015. Respondent sees the children regularly and has frequent telephonic contact with them. She has in no way abandoned them. Taking into account the factors mentioned in Section 7 of the Children's Act 38 of 2005, I am satisfied that it is in the best interests of the minor children that they remain in the care of the respondent as was made an order of court on 26th March 2015.

[19] One of the grounds of appeal was that the court *a quo* did not adjudicate and pronounce judgment on the points *in limine* raised by the appellant, namely non-joinder and lack of *locus standi*. In my view this is academic as the counter-application was not granted, and the court seems to have considered unnecessary to deal with points *in limine* in an application that it was not intending

to grant. It would undoubtedly have added greater clarity to the court's intention had it specifically indicated that it did not deem it necessary to deal with these points. This omission does not, in my view, amount to a misdirection warranting the interference of this court.

[20] Although the parties have implemented the suggestions of the Family Advocate in respect of appellant's contact with [A], it is described by the appellant as a temporary arrangement, without giving reasons for this assertion, or fully canvassing the interim arrangement. It would in my view therefore not be appropriate to *mero motu* grant such orders. Likewise, although the Family Advocate reported mild parent alienation, the appellant did not seek relief in terms whereof the court was requested to make orders prohibiting the respondent and her parents from frustrating his rights of contact with the minors. The respondent and maternal grandparents have been warned by the Family Advocate of the seriousness of parental alienation, and there is no reason to believe that they will not take heed of this warning.

[21] The trial court, for sound reasons, ordered each party to pay their own costs in the application. In essence this is based on the principle that parents should not be discouraged to approach court for relief concerning the interest of their children. An adverse costs order might discourage parents. The appellant in this matter was aware of the recommendations of the Family Advocate as well as the approach of the court *a quo*. He decided thereafter to challenge the findings of the court *a quo* and was not successful. In those circumstances there is no reason why the costs should not follow the event on appeal, namely an adverse

costs order against the appellant. However, the court considered, in its discretion, as it was entitled to do, that it would be less harsh on the appellant to order that each party pay his/her own costs.

[22] It would follow that the appeal cannot succeed, or is not substantially successful. In my view, the orders foreshadowed hereunder would have been appropriate.

[23] In the circumstances I make the following orders:

1. The appeal is dismissed.
2. The orders of the trial court are replaced with the following:
 - “1. The main application is dismissed.
 2. The counter-application is dismissed.
 3. Each party is to pay his/her own costs. “

C REINDERS, J

I concur

S NAIDOO, ADJP

I concur

A MATHEBULA, J

On behalf of Appellant:

Mr P Peyper

Instructed by:

Peyper Austen Inc Attorneys
Bloemfontein

On behalf of Respondent:

Mr JF de Beer

Instructed by:

Human, Le Roux & Meyerowitz
c/o Jacobs Fourie Attorneys
Bloemfontein