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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2023-133256

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

DATE: 8/11/2024

SIGNATURE

In the matter between:

F[...], D[...] K[...]

Plaintiff

and

F[...] (born D[...] P[...]), C[...]

Defendant

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. This now unopposed divorce relates to the best interests of a foster child in those divorce proceedings.
2. Although the divorce action instituted by the husband and father against the wife and mother was initially opposed, which included the delivery of

a plea and counterclaim, the wife's attorneys withdrew and after which a settlement agreement was concluded between the parties. The plaintiff husband remained represented in concluding the settlement agreement whereas the defendant wife was not.

3. Although the settlement agreement provides for the position of a minor child born of the marriage, it does not deal with the position of a foster child. Notwithstanding that a primary concern raised by the defendant in her pleadings while she was still defending the matter was that the position of the foster child had been overlooked by the plaintiff, no mention is made of the foster child in the settlement agreement. The defendant's concern with the position of the foster child appears to have fallen by the wayside once her attorneys withdrew, as manifested by the settlement agreement which makes no reference to the foster child.
4. When the matter was called before me on an unopposed basis, I raised my concern with the plaintiff's counsel that the position of the foster child appeared to be unaddressed in the divorce proceedings and so I expressed reluctance as to whether it was appropriate to grant a divorce order.
5. The matter was accordingly stood down for a week to enable the plaintiff to adduce further evidence, if so advised, and for counsel to make submissions in relation to my concerns.
6. A supplementary affidavit by the plaintiff was delivered consisting of some ten paragraphs over five pages that sought to address the position in relation to the foster child.
7. I nonetheless remained concerned as to the position of the foster child. I set out some of those concerns.
8. The plaintiff's particulars of claim make the usual averments as to why the marriage has disintegrated. Nothing is said in relation to spousal

maintenance. The plaintiff pleads, in relation to a minor child born of the marriage, who at the time was 10 years old, that it would be in the minor child's best interest that there be shared primary residency. Also pleaded is provision for contact of both parents with the minor child.

9. What is notable from the particulars of claim is that:

9.1. no mention is made of the foster child. The minor child referred to in the particulars of claim is a minor child born of the marriage and not the foster child;

9.2. nothing is said as to why it would be in the minor child's best interest that there be shared primary residency, rather than primary residency with one or other of the parents;

9.3. although provision is made for payment of the minor child's school fees and related educational requirements and for the minor child's medical needs, nothing is said about general maintenance for the minor child. The particulars of claim conclude with the plaintiff seeking no more than a decree of divorce, i.e. without anything being incorporated by way of relief to address the minor child's interests.¹

10. The defendant approached an attorney and opposed the matter. A plea and counterclaim were delivered. In that plea and counterclaim the defendant admits that the marriage relationship has broken down irretrievably and seeks to blame the plaintiff for that, describing him as *"manipulative, controlling and abusive"*, that he *"always prioritised his own interests, needs and wishes above those of the defendant and the children"* and that throughout the marriage he was *"moody, quarrelsome and acted in a sarcastic, humiliating, disrespectful and intimidating*

¹ As will appear below, with reference to section 6(1) of the Divorce Act, 1979, relief in this form cannot be granted.

manner". The defendant also alleges that the plaintiff evicted her from the former matrimonial home in that he, without her knowledge or agreement, packed up her personal items and effectively forced her to move.

11. The defendant also pleads that the plaintiff had failed to refer to or provide for their foster child, a girl born in October 2018, who was then 5 years old, and who had been placed in the foster care of both the plaintiff and the defendant in terms of an order of the Children's Court in Cullinan. The defendant continues that the parties are in the process of formally adopting the foster child.
12. The defendant pleads that there is a maintenance order that the plaintiff maintain the foster child but that he has failed to abide the terms of the maintenance order.
13. The defendant continues that it is in the best interests of both the minor child and the foster child that the parties be assigned full parental rights and responsibilities in terms of sections 23 and 24 of the Children's Act, 2004. Notably, in this regard, section 188(1)(d) of the Children's Act provides for an order assigning parental responsibilities and rights in terms of section 23 in relation to a foster child.
14. The defendant continues in her pleadings to describe why the plaintiff does not care for the best interests of the children, alleging *inter alia* that he does not understand the emotional, developmental, physical, financial and psychological needs of the minor children, that he does not ensure that the minor children have beds to sleep on, and that he avoids taking the minor children to a doctor when they are ill or to pay adequate attention to their necessary medication. The defendant further pleads that both parties have a duty to support both minor children in accordance with their respective means and that the plaintiff's particulars of claim do not acknowledge this.

15. The defendant counterclaimed for a divorce, that both parties be awarded parental rights and responsibilities and guardianship as envisaged in sections 23 and 24 of the Children's Act in relation to both minor children, that primary residence of the minor children be awarded to her subject to the plaintiff exercising reasonable rights of contact, for detailed relief in relation to rights of contact and, in relation to maintenance, that the plaintiff pay R3 000.00 per month, per child, in addition to provision being made for medical expenses, school fees, and other such items.
16. The plaintiff in this replication joins issues with most of these averments. The plaintiff does admit that there is a foster child, but seeks to explain the omission of the mention of the foster child in his particulars of claim on the basis that "*all adoption proceedings in this matter have been stayed by the agency tasked with same due to the fact that there are divorce proceedings instituted*" and that "*due to the parties currently fostering [the foster child] no order of final care and contact can be granted with regards to [the foster child]*".² The plaintiff continues that the dispute relating to the maintenance order is still pending in the Maintenance Court and so is *lis pendens*.
17. Notable from the replication is the persistence by the plaintiff not to provide for any relief in relation to the foster child or to deal with maintenance generally for the minor child. The plaintiff persists in the replication that judgment be granted in terms of the particulars of claim, i.e. simply for a divorce order without any order relating to the interests of either the minor child or the foster child.³

² It is clear from *R.S v J.S* below, para 33 to 36 that the fact that adoption proceedings have not been finalised does not absolve the foster parents from continuing to support the foster child, and particularly where the foster child has been *de facto* adopted.

³ And which, as indicated above and below, cannot be granted, as per section 6(1) of the Divorce Act.

18. A consideration of these pleadings shows that the position adopted by the plaintiff was and remains, on the pleadings, that the position of the foster child need not be addressed in the divorce proceedings nor, for that matter, maintenance generally for even the minor child born of the marriage.
19. On 7 June 2024, the defendant's attorneys withdrew.
20. Following upon the withdrawal of her attorneys, the defendant, unrepresented, withdrew her defence and counterclaim. The defendant also since her attorney's withdrawal concluded the settlement agreement with the plaintiff.
21. That settlement agreement, which the plaintiff sought be made an order of court, provides that both parents have full parental responsibilities for the minor child born of the marriage, that there be shared primary residency between the parties in respect of the minor child born of the marriage, for contact in relation to the minor child born of the marriage, for the plaintiff to pay that minor child's school and related fees and that it will be for the defendant to maintain that minor child on a medical aid scheme.
22. What is evident is that the concerns that arise from a consideration of the pleadings have not been addressed in the settlement agreement. For example:
 - 22.1. there is no mention of the foster child in any respect. This is concerning particularly as the foster child and her best interests featured prominently in the defendant's plea and counterclaim.
 - 22.2. no provision is made for payment of maintenance generally for the minor child born of the marriage;.

- 22.3. the settlement agreement provides for shared primary residency in circumstances where the defendant sought primary residency as the mother.
23. Whilst it may be that it is not for the court to interrogate a settlement agreement as between spouses, the position is different when it comes to the interests of the minor children, in this instance, both the minor child born of the marriage and the foster child. My concern, as expressed to the plaintiff's counsel, is that once the defendant became unrepresented, her concerns as to the best interests of the children appear to have dissipated as the settlement agreement which she concluded effectively concedes the position of the plaintiff.
24. The evidence affidavit filed by the plaintiff in terms of the prevailing practice directives does not address any of these concerns. It is a perfunctory document that contains no evidence as to why what is provided for in the settlement agreement is in the minor child's best interests. For example, there is no evidence in the affidavit as to why shared primary residency is appropriate or why no provision is made for maintenance generally, particularly in the context of still pending disputes in relation to maintenance in the Maintenance Court. I refer to the recent comprehensive judgment by Haupt AJ in *P.V.Z v L.V.Z*⁴ where the court details the importance of evidence being placed before the court to enable the court to discharge its duty to act in the best interests of the minor children when granting divorce orders, particularly where a court is asked to grant an order for shared residency rather than primary residency being given to one or other of the parties.⁵
25. This is so in relation to the minor child born of the marriage. The position is exacerbated when it comes to the foster child as no mention at all is made of the foster child in the evidence affidavit.

⁴ [2024] ZAGPPHC 1046 (10 October 2024).

⁵ *P.V.Z v L.V.Z* above, para 49 to 51, and the various judgments cited in those paragraphs.

26. It is therefore hardly surprising that when the matter was first called before me on the unopposed divorce roll, I raised the concerns that I did and afforded the plaintiff an opportunity to return a few days later to court with supplementary evidence. This also afforded the plaintiff's legal representatives an opportunity to consider their position in relation to my concerns.
27. As already stated, what the plaintiff would then do is deliver the short supplementary affidavit to which I have already referred.
28. Unfortunately, that affidavit does not do much to address my concerns. The supplementary affidavit now does contain an acknowledgement by the plaintiff that the foster child is in the care of both parents pursuant to the order granted by the children's court in Cullinan on 15 February 2019 in terms of section 156 of the Children's Act. A copy of the order is attached to the affidavit.⁶ The supplementary affidavit also describes the shared residency that is in place in relation to the foster child. As it would transpire, this is the same arrangement that is in place for the minor child born of the marriage. The supplementary affidavit though does not adduce any evidence as to why it is in the best interests of the foster child, and for that matter the minor child born of the marriage, that shared residency is in the best interests of the children.
29. What persists in the supplementary affidavit is that the plaintiff does not commit to making payment of an amount for maintenance generally, restricting what will be paid by him to the foster child's school fees and sharing medical expenses equally that are not paid by the defendant's medical aid.

⁶ There may *ex facie* the order be an annexe to the order but which has not been provided to the court.

30. The supplementary affidavit describes what is set out therein as to the continued shared residency of the foster child and his limited maintenance of the foster child as being a "*informal arrangement*".
31. The plaintiff's counsel did submit that the plaintiff was nonetheless agreeable to that "*informal arrangement*" being formalised in the divorce order. The difficulty that will remain that no evidence has been placed before the court as to why shared residency is appropriate and in the best interests of the children or why no provision is made for maintenance generally for the children, especially in the context of still pending maintenance disputes in the Maintenance Court.
32. A further difficulty is that although the plaintiff may be willing to incorporate what is an informal arrangement into a court order, the defendant who is unrepresented is not necessarily agreeable to that informal arrangement. The defendant delivered a confirmatory affidavit to the supplementary affidavit but that supplementary affidavit referred only to 'an informal arrangement'.
33. What also remains unaddressed from this minimal evidence placed before the court is what is to be done in relation to the various allegations made by the defendant in her pleadings of the plaintiff's failings as a father. Whilst the defendant may have withdrawn her plea and counterclaim, those allegations remain and presumably were made on her behalf in her pleadings on her instructions, and so with a factual basis. No evidence is placed before the court as to why notwithstanding those serious allegations as to the plaintiff's failings as a father, the relief that is sought in the settlement agreement in relation to the minor child born of the marriage, and as is proposed in relation to the foster child in the supplementary affidavit, is in the best interests of the children.
34. I also raised with the plaintiff's counsel that there was no Family Advocate's endorsement of the proposed arrangement in relation to the foster child or any report or evidence from the social worker charged

with supervision of the foster care of the foster child in terms of the order of the Children's Court.

35. The role of the designated social worker appears inter alia from section 155 of the Children's Act and Regulation 65 of the General Regulations regarding Children, 2010. The order granted by the children's court in February 2019 expressly refers to the foster care of the foster child being under the supervision of a social worker in the service of the Department of Social Development, Johannesburg.
36. Regulation 65(4) provides that *"[a] foster parent must notify the designated social worker or designated child protection organisation, as the case may be, within 14 days, of any material change in his or her living circumstances, which are likely to have a material effect on the foster placement."* Undoubtedly that the foster parents have separated and that there are pending divorce proceedings would constitute a material change in living circumstances. More so, where shared residency is agreed in a settlement agreement and is to be made an order of court, and where the designated social worker will play a vital role as to assisting the divorce court as to the suitability of that order in the best interests of the foster child.
37. The plaintiff's counsel to his credit readily acknowledged that the absence of the views of the family advocate and of the designated social worker was problematic and should be addressed to enable the court to be in a position to grant a divorce order.
38. I raised with the plaintiff's counsel whether it was appropriate for me, as these were now unopposed divorce proceedings where the parties had concluded a settlement agreement, to be taking these concerns into account, or whether I was overstepping the mark in doing so
39. Of course, these concerns must be taken into account in relation to the minor child born of the marriage. Section 6(1) of the Divorce Act

expressly provides that a decree of divorce shall not be granted until the court “*is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances*”.⁷ But as a foster child would not be a child born of the marriage, section 6(1) does not appear to be expressly applicable.

40. The plaintiff’s counsel readily accepted that nonetheless the court as the upper guardian of all minor children, which would include a foster child, must take into account the best interests of not only the minor child born of the marriage, but also the foster child. Apart from the common law recognising that the court is the upper guardian for all minor children, section 28 of the Constitution expressly provides *inter alia* for a child’s best interests to be of paramount importance in every matter concerning the child. So too does the Children’s Act provide that the best interests of a child are paramount. Section 9 of the Children’s Act provides that “*[i]n all matters concerning the care, protection and well-being of a child the standard that the child’s best interests is of paramount importance, must be applied*”.
41. Although Chapter 12 of the Children’s Act, which deals with foster care, does not specifically deal with the position of a divorce court in considering the best interests of a foster child in divorce proceedings, there does not appear to be anything in the Chapter that precludes a divorce court from considering the best interests of a foster child when those interests arise before it in the context of divorce proceedings. As already stated, section 188(1)(d) of the Children’s Act in the chapter dealing with foster care expressly provides for an order of court assigning parental responsibilities and rights in terms of section 23. Section 23(1) in turn expressly refers *inter alia* to a divorce court in divorce matters.

⁷ *P.V.Z v L.V.Z* above, para 8 and 9.

42. As to the need for the court to be alive to the needs of a foster child in the context of a duty of support in relation to a foster child, see the recent decision of *R.S v J.S.*⁸ A reading of *R.S v J.S.* reinforces the concerns I have expressed in this judgment as to the inadequate measures taken by the parties to ensure that the best interests of the foster child, along with those of the minor child born of the marriage, are provided for in the settlement agreement and the relief that is sought in these divorce proceedings.
43. In the circumstances, there does not appear to be any reason why the court is not required to consider the best interests of the foster child and ensure that they are adequately provided for before granting a divorce order.
44. It is plain why I have concerns that inadequate provision has been made for the bests interests of the minor children, such as such as in relation to whether it is in the best interests of the children that there be shared primary residency and the absence of any firm commitment by the plaintiff to maintenance generally for the children). This is both in relation to the minor child born of the marriage and the foster child.
45. The plaintiff's counsel, again, admirably, readily accepted that in light of these concerns it may be appropriate that the matter be removed from the roll to enable the plaintiff, hopefully with the cooperation of the defendant, to address these concerns. It is not for this court to be prescriptive as to how these concerns would be appropriately addressed. These concerns, of course, will need to be addressed and so it is appropriate that the divorce proceedings not be re-enrolled until these issues have been addressed and whereupon the court hearing the divorce action can decide whether or not to grant a divorce order and on what terms.

⁸ [2024] ZAWCHC 154 (3 June 2024),.

46. The plaintiff gave short oral evidence before me that he, supported by the defendant (who was also present in court), will continue to look after both children pending the finalisation of the divorce proceedings, with both the minor child born of the marriage and the foster child being adequately looked after way of the same arrangements.
47. An order is granted:
- 47.1. removing the matter from the roll, with no order as to costs;
 - 47.2. directing that the matter is not to be re-enrolled until the concerns as have been raised in this judgment have been addressed;
 - 47.3. granting the plaintiff leave to supplement its papers, insofar as necessary;
 - 47.4. directing that the plaintiff and/or defendant, as the case may be, is to bring this judgment to the attention of any subsequent court who may hear the divorce proceedings between the parties, whether under this case number or otherwise.

Gilbert AJ

Date of hearing: 25, 31 October 2024

Date of judgment: 8 November 2024

Counsel for the Plaintiff: Adv R Smith

Instructed by: Strydom M & Associates, Edenvale

Counsel for the Defendant: No appearance – unrepresented