OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION, MIDDELBURG

(LOCAL SEAT)

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

CASE NO: 2710/2019

In the matter between:

W B APPLICANT

and

C A RESPONDENT

JUDGEMENT

BRAUCKMANN AJ

INTRODUCTION

[1] This is an urgent application in terms whereof the applicant seeks the following relief:

Part A

[1.1] The non-compliance with the uniform rules of the above court, including Rule 6 (12) is condoned;

[1.2] The respondent is ordered to return the minor child, W B ("B") to the care of the applicant with immediate effect;

[1.3] The Honourable Court is to appoint a social worker or psychologists to launch an investigation into the best interest of the minor children, W B and L B and specifically the parental responsibilities and rights to be exercised by the parties to the minor children respectively, and to report thereon to this Honourable Court;

[1.4] The family advocate to be requested to launch an investigation into the best interest of the minor children, W B and L B, and specifically the parental responsibilities and the rights to be exercised by the parties to the minor children respectively, and after having had insight to the report issued by the social worker or psychologists, report thereon to this Honourable Court;

[1.5] Both parties to be responsible for the payment of the costs pertaining to the investigation and report of the social worker or psychologists on an equal basis;

[1.6] Part B is postponed *sine die;*

[1.7] The parties hereto are granted leave to supplement their papers for final adjudication of Part B of the notice of motion;

[1.8] Costs of the application;

[1.9] Further and/or alternative relief.

[2] The relief is sought pending the finalisation of Part B of the notice of motion in terms whereof the applicant basically seeks that the primary residence of the both minor children be awarded to him subject to the rights of contact with the minor children for the respondent as recommended by the family advocate.

URGENCY

[3] The court found that the application is urgent and enrolled the matter accordingly.

BACKGROUND

[4] The parties were married to each other and the bond of marriage was dissolved on 31 May 2013 by the "North Gauteng" division of the High Court (as it was then known).

[5] A deed of settlement was incorporated in the court order in terms whereof the primary care of the minor children was awarded to the

respondent[1] subject to applicant's rights of contact as set out in clause 7.3 of the said agreement.[2]

[6] During 2015 the applicant referred a dispute about the primary care and residence of the minor children to the Children's Court in Delmas. The matter was finally decided by the Magistrate on 8 January 2018 and it was ordered that both minor children shall continue to be in the primary care of the respondent.[3] Applicant retained full parental responsibilities and contact with the children. The applicant filed a notice of appeal against the Children's Court's judgment, but failed to prosecute the appeal and the appeal accordingly lapsed.

[7] During April 2018 the parties agreed to vary the *de facto* position of B, and it was agreed that he would have his primary residence with the applicant, subject to the respondent's rights of contact as set out in Annexure BB 8.1 of the founding affidavit ("**the agreement**"). In terms of the agreement, which agreement was never made an order of any court, the parties agreed that:

1 Page 43, Paragraph 7.1
2 Page 44 of the bundle
3 Page 70 of the bundle

"*Indien W B junior besluit om terug te keer na Mev. C B se woning, sal dit bespreek word tussen beide ouers en beide ouers sal dan W B junior se wense nakom. Die skriftelike ooreenkoms sal dan versuim en alle reëlings sal terugkeer na die egskeidingsbevel van die Hooggeregshof op 31 Mei 2013*."

[8] I pause to mention that the divorce order's stipulation in respect of the primary care and residence of the minor children was varied by the Children's Court order in January 2018 ("The Court Order").

[9] B moved to the applicant and visited the respondent according to the agreement. During the March 2019 holiday B indicated to the respondent that he would want to reside with her again. Respondent arranged a "family meeting" to discuss B's wishes at which meeting B then indicated that he reconsidered his decision and wished to remain with the applicant. B was returned to the applicant after the holidays.

[10] During the July 2019 school holidays B once again visited the respondent, but with a friend.

[11] He once again indicated to the respondent that he does not want to stay with the applicant, but with the respondent. On 24 June 2019 respondent, via a Whatsapp message, informed applicant that B does not want to return to him after the school holidays, and that applicant must arrange for the B's friend to be collected and B's possessions, which she will inform him about, to be sent to Dundee (where the respondent resides). The applicant did not deny the fact that B wanted to remain with the respondent, but insisted that: "*hy gaan sy jaar klaar maak by my*".

[12] Subsequent to this the parties' legal representatives started corresponding and this application was launched on 6 July 2019.

THE *DE IURE* POSITION

[13] The *de iure* position of the minor children is regulated by the Court order. In terms of the order, both the minor children shall continue to be in the primary care /residence of the respondent.[4]

[14] The court order cannot be varied by agreement between the parties and is valid until it has been set aside by a competent court.[5] By not

[4] Page 70 of the bundle

complying with the terms of the court order the parties are both basically in contempt of the court order. I do not have to decide on that aspect.

[15] Although the parties entered into the agreement in terms whereof B will be residing with the applicant, the agreement was never made an order of court.

THE DE FACTO POSITION

[16] Although B had been residing with the respondent since the July school holidays he factually resided with, and was ordinarily resident with the applicant within the jurisdiction of this court as provided for in Section 29 of the Children's Act, Act 38 of 2005 ("**the Act**"). This court accordingly has jurisdiction to hear this application.

[17] Whether the parties could legally have agreed to such an arrangement is irrelevant. Fact remains that applicant had an expectation that the respondent would honour the terms of the agreement and return B after the school holidays, alternatively comply with the agreement and, at least, discuss B's wishes with him. I pause to

[5] **Oudekraal Estates (Pty) Ltd. v. City of Cape Town & Others**, 2004 (6) SA 222 (SCA) at paragraph 26

mention that the Whatsapp notification by the respondent of B's wishes, and her decision not to return B to the applicant after the July school holidays, does not amount to a discussion (bespreek word tussen beide ouers) as provided for in the agreement at all. The Whatsapp notification was a notification and not a discussion. It is important to note that the respondent did not at any stage, allege that the circumstances at the applicant is of such nature that it is not in B's best interest to remain there, or that he should immediately be removed from the care of the applicant.

[18] The unilateral removal of the child from the care of the applicant amounts to a breach of the applicant's right to have B with him, as agreed between the parties in the agreement.[6]

THE BEST INTEREST OF THE CHILD IS PARAMOUNT

[19] In every matter in which the interests of a child are at stake the Constitution demands that the child's interests be paramount.[7] The Children's Act was enacted to give expression to this constitutional imperative. In Section 9 of the Act it is stated that all matters

[6] **Van Tonder v. Van Tonder** 2000 (1) SA 529 (O) at page 533 A to J and Superior Court's Act 2013. Section 19

[7] Section 28 (2) of the Constitution of South Africa 1996; **Minister of Welfare and Population Development v. Fitzpatrick** 2000 (3) SA 422 (CC) at 428 C-D; and **P v. P** 2007 (5) SA 94 (SCA) at 98 J-99 B, paragraph 13

concerning the well-being and protection of a child, the best interest standard must be applied. Without quoting all the relevant sections dealing with the factors to be taken into account by the court when dealing with children (and I must mention by the parents as well, before taking decisions about the child or children) in arriving at decisions in this regard, the following factors are important before a child is simply dealt with as a possession:

[19.1] The nature of the personal relationship between the child and the parents, or any specific parent and the child and any other care giver or person relevant in those circumstances;

[19.2] The attitude of the parents, or any specific parent towards the child and the exercise of parental responsibilities in respect of the child;

[19.3] The capacity of the parents, or any specific parent, or of any other person to provide for the needs of the child, including emotional and intellectual needs;

[19.4] The likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from:

[19.4.1] Both or either of the parents;

[19.4.2] Any brother or sister or other child or person with whom the child has been living;

[19.5] A practical difficulty and expense of a child having contact with parents or any specific parent;

[19.6] The need for the child to remain in the care of his or her parent, family and extended family, and to maintain a connection with his or her family;

[19.7] The Child's age, maturity and stage of development, gender, background and any other relevant characteristics of the child;

[19.8] The child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

[19.9] The need for the child to be brought up within a stable family environment, and where this is not possible, in an environment resembling as closely as possible a caring family environment;

[20] In terms of Section 10 of the Act, every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by that child must be given due consideration. The court will not hesitate to act to safeguard the best interests of a child, including if the action taken for the benefit of the child cut's across the parents' rights and responsibilities.[8]

DISCUSSION

[21] In this matter the parties agreed to amend, although unlawfully, the court order with an agreement *inter se*. The agreement was complied with by the parties for almost 14 months.

[8] **Laerskool Middelburg v. Departementshoof, Mpumalanga Departement van Onderwys** 2003 (4) SA 160 (T) at 178 C

[22] Before B was allowed to live with the applicant, the parties discussed it amongst themselves and came to the conclusion that it would serve the best interest of the B (and apparently L) to reside with the applicant. No attention was paid by the parties to the fact that their decision would fly in the face of the Children's Court finding that it is not in the best interest of the children to be separated. No wonder that, if it is true, L at a stage expressed her wish to live with the applicant because, during a divorce, the children's bond with each other strengthens as they have to fend off the parent's acrimonious altitudes. They have to fend for themselves and in the process grow closer to one another.

[23] As I understand it, the respondent could not cope with B and the applicant jumped at the opportunity to have at least one of the children to stay with him. It is further also of concern that the applicant did not approach a court at that stage, as he is doing now, to have L placed in his care if he was serious about her well-being, as alleged. That is also not relevant at this stage.

[24] I have come to the conclusion that the parties in this matter does not have the best interest of the children at heart, but their own selfish interests. The children are used as "pawns" in this constant "battle"

between the parties, and to make things worse, the children are drawn into the "battle" between applicant and respondent. Children are not supposed to be drawn into such battles. They were not parties to the divorce and are the unfortunate collateral damage thereof. The acrimonious relationship between the parents is glaring from the Whatsapp messages attached to the respondent's opposing affidavit, as well as the litigation history between them. It is however not my function to decide upon the final placement of B or L, but only to decide on Part A of the application.

[25] Both parties allege that it is B's wish to reside with him / her. Neither applicant, nor respondent alleges that the other party is incapable to take care of the children, nor that the other party is not a good and caring parent. Most of the complaints are about the parties' life partners and family, but none of the complaints are of such a nature that this court should at his stage take drastic steps to ensure the safety of B.

[26] The court is however faced with a *de facto* situation where B was ordinarily resident with the applicant. He attended Delmas school until the July holidays when he went to visit the respondent, as agreed. Further, he has his "roots" in Delmas at this stage. There was no

discussion between applicant and respondent as to the relocation of B after the July school holidays at all.

[27] One would have expected the parties, as responsible parents, to discuss B's wish to reside with respondent, the effects thereof, as well as the timing. That is also what is expected from the parties by the Children's Act. It is not proper, nor legitimate, for one of the parties to make an important, and life-changing decision about B, without consulting the other party.

[28] B has changed his preference of primary residence in the past. He is 11 years old, and although one should take his wishes into account, that is not the only factor that is determinative. The parties were well aware of the fact that B, during March 2018 expressed the wish to reside with the respondent, but changed tune in the presence of the applicant.

[29] Children should not be uprooted excepting for sound reasons.[9]

[30] B is a young child who does not know what he wants. He is torn between his parents. From the papers it appears as if he acts: "*When*

[9] **Cook v. Cook** 1937 A. D.; and
French v. French 1971 (4) SA 298 (W) at page 298 H

in Rome you must do as the Romans do." In Afrikaans there is a similar saying: "*Wie's brood mens eet, die's woord mens spreek*." B does not take into account that it is costly for his parents to buy new school clothes and to have him registered in a new school. It pleasant for him at the parent that accommodates his whims and wishes. Unfortunately the parties are led by the noses by a young child's preferences and an emotional situation. This court, as the upper guardian of all minor children, cannot allow this to continue.

[31] The respondent's conduct by not allowing the child to return to the applicant was not correct, although she *bona fide* believed that it is what B wished. B did it once, and he was allowed (after discussions between the applicant and respondent) to live with the applicant, as they deemed it in the best interest of B at that stage, ignoring the best interest of L. The respondent may be criticised for her conduct by not returning B to the applicant after the school holiday, but as a mother, although not correct, she acted on her *bona fide* feelings of the best interest of B.

[32] Apart from B's wish to remain with the respondent, there is no indication in the affidavits that the agreement is not in B's best interest, or that there has been a substantial change in circumstances at the applicant, or with B. The court cannot see why the agreement (and status quo)

should not remain in place until Part B is heard, and finally adjudicated upon. Although there is no onus in the usual sense, a court will not vary or remove a child unless satisfied that the child's interest require it. More specifically so, if there are no scientific evidence before the court indicating the best interest of the child cries out for such action.[10]

[33] The social worker in Dundee's report, annexed to the Respondent's opposing affidavit, is also a source of concern to this court. It seems that B initially did not want to discuss his wish to relocate to his mother with the social worker, and eventually, only after the respondent was present, expressed his wish to reside with the her. The fact that he then became too emotional to continue with the discussion is of concern to the court. If it was B's heart's wish to reside with the respondent, why did he act in that way and why did he not tell the social worker, in the absence of the respondent, of his burning desire to live with the respondent?[11]

[34] It also seems as if the applicant's only objection to B's wish to reside with the respondent is that it is not "*in the best interest to move in the middle of the year and his school progress is going to be disrupted*". So

[10] **McCall v. Mc Call** 1994 (3) SA 201 (C); and
P v. E [2007] 3 All SA 9 (SCA)
[11] Pages 249 to 250 of the bundle

too in the Whatsapp messages as referred to *supra*.[12] To allow B to remain with the respondent, only to move him back to applicant, should the recommendations be accordingly, is to substitute certainty with uncertainty. The Court is not prepared to allow that.

[35] The court is therefore of the opinion that the *status quo* must be maintained pending the outcome of the investigation that this court will order. B must therefore be forthwith be returned to the applicant pending the outcome of the adjudication of Part B of this application.

THE PROPOSED INVESTIGATION

[36] Both parties are *ad idem* that a proper investigation must be conducted in respect of both children's primary care and residence.

[37] The court is also of the opinion that the uncertainty for the children must be brought to an end in the best interest of the children.

[38] Although the applicant does not agree with report and recommendations of the family advocate prior to the Children's Court

[12] Bundle Page 50 and CA 4, page 258 of the bundle

proceedings, he wishes the family advocate to become involved again.

[39] It seems as if the applicant is not going to accept any recommendation, or court order, unless such is substantiated by proper expert advice to this court.

[40] I was requested by respondent's counsel, Adv. Keijzer, to make an order directing a pro-rata division of the costs of the expert reports amongst the parties. The respondent states that she earns approximately R 7 500.00 per month and cannot afford to pay for these reports. This court does not have sufficient information to make such an order as the applicant did not disclose his financial position to the court, despite being aware of the fact that he was asking the court for an order in that regard.

[41] This court will however make an order to the effect that the family advocate should appoint a social worker or psychologists to investigate the best interest of the minor children and to mediate the division of the costs of such expert amongst the parties, and if such mediation is not successful to immediately report to this court.

COSTS

[42] The applicant, represented by Adv. R Ferreira, conceded that the costs in this matter should be costs in the cause, but in reply retracted this concession and referred this Court to a judgment by the Witwatersrand Local Division (as it was then known).[13] Advocate Ferreira, submitted that costs should follow the event and that in this matter the respondent was warned by the applicant that this application would follow should she not return the minor child to the applicant after the July holidays.

[43] On a reading of the papers it is however this court's opinion that the respondent should not be discouraged for putting up a case which she, on broadly reasonable grounds, thinks to be in the interest of B for fear of having costs awarded against her if unsuccessful.

[45] This court is of the opinion that the respondent was *bona fide* in opposing this application at this stage and will not make an adverse costs order against any of the parties. The parties and their legal representatives are however reminded that mediation is

[13] **Bethell v. Bland & Others** 1996 (4) SA 472 (W)

recommended in family disputes. Should the legal representatives not actively engage to settle the disputes in the best interest of the children or refer the matter for mediation, the court may make an adverse finding in respect of costs.[14] Any cost order this court may make against any of the parties will not be conducive to the future relationship between applicant and respondent. They must get along for the sake of their children. Neither have the best interest of B at heart at this stage.

[46] I accordingly order that:

[46.1] The respondent is ordered to return the minor child, W B, to the care of the applicant with immediate effect;

[46.2] Part B of the application is case managed according to the case management order marked "X" with date for hearing on the opposed roll 28 January 2020;

[46.3] The family advocate is hereby directed to:

[46.3.1] Do an investigation into the best interest of the minor children W B and L B and specifically the parental

[14] MB v NB 2010(3) SA 220 (GJS) paras 53 to 61 as well as FS v JJ & Another 2011(3) SA 126 (SCA)

responsibilities and rights (including the primary residence and care) of the minor children respectively and to report to this court within **90 days** of date of this order;

[46.3.2] For the purpose of making a recommendation to this court as provided in [46.3.1] hereof, to instruct a psychologists or social worker nominated by the family advocate to investigate and inquire into the best interest of the above minor children, including the compilation of a parenting plan;

[46.3.3] Prior to appointing the phycologists or social worker, to mediate between the applicant and respondent; the pro-rata share / contribution towards the costs of such expert to be paid by the applicant and the respondent respectively as well as the date of payment of such contribution;

[46.3.4] Should the family advocate fail to mediate the payment and terms as in paragraph [46.3.3] herein within a reasonable time, the family advocate must forthwith report it to the Registrar of this Court;

[46.4] The contact arrangements as set out in Annexure BB 8.1 to 8.3 to the applicant's founding affidavit will remain in place pending the final adjudication and judgment, alternatively settlement, of Part B of this application;

[46.5] The applicant's attorney must serve this order on the relevant Family Advocate's office on or before 23 July 2019, and file the return of service on the Court file;

[46.6] Both parties are granted leave to supplement their papers on receipt of the reports in [46.3.1].

[46.7] In respect of Part A of this application, no order as to costs is made.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANT: **Advocate R. Ferreira**

INSTRUCTED BY: **Riëtte Oosthuizen Attorneys**

REPRESENTATIVE FOR THE RESPONDENT: **Advocate L. Keijzer**

INSTRUCTED BY: **Waldick Jansen van Rensburg Inc.**

DATE OF HEARING: **16 JULY 2019**

DATE OF JUDGMENT: **18 JULY 2019**