

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No.: 4274/2003

In the matter between:

RODERICK SEAN MACRAE

Applicant

and

SUZETTE HEYNS

Respondent

CORAM:

MALHERBE J.P.

HEARD ON:

25 MARCH 2004

DELIVERED ON:

1 APRIL 2004

The parties to this application were previously married to one another. A girl, D, was born from this marriage on 10 November 1995. The marriage was dissolved by this Court on 9 October 1997 and her custody was granted to respondent. In the Deed of Settlement that was made an order of Court the parties agreed

“Dat die Eiser geregtig sal wees om die minderjarige dogter, benewens sy reg op redelike toegang te alle redelike tye, by hom te neem vir een naweek per maand asook alternatiewe lang en kort skoolvakansies per jaar sodra die kind skoolgaande ouderdom bereik, met dien verstande dat die dogter die

IN THE HIGH COURT OF SOUTH AFRICA

Kersvakansies om die beurt by die onderskeie partye sal deurbring.”

Both parties have remarried since their divorce. Applicant works and lives in Sasolburg while respondent resides in Welkom.

Applicant sets out his case as follows:

“ 9.

For the ensuing couple of years, (i.e. after the divorce) and until the end of 2002, I exercised unhindered access to my daughter in terms of the Order of Court. My right of access was extended to include alternate school holidays in 2002 when D started school. She would on occasion also spend two weekends in a month with me.

13.

Due to the nature of my employment as Branch Manager of Lubners Furnishers, I am required to attend work every Saturday from 08:00 to 13:00.

14.

My daughter has often accompanied me to work on a Saturday morning, where she is well liked by the personnel who dote over her on each occasion. I am nonetheless constantly in close proximity of her all the time.

15.

The love and affection that my wife and personnel share with D is reciprocated by her and she is most comfortable in the company of both parties. The Respondent has at all times been aware of these arrangements.

16.

During November 2002, the Respondent unexpectedly changed her stance

IN THE HIGH COURT OF SOUTH AFRICA

and insisted that if I wanted to exercise access to D I was not to work over weekends.

17.

Although the Respondent can give no justification for this sudden and unreasonable change in attitude, it is my respectful submission that her conduct is motivated by capriciousness towards my wife for the reasons set out here below.

28.

The Respondent continues to deny me access to D unless I refrain from working over the weekend on which access is to be exercised.

30.

I respectfully submit that the Respondent's demands are not in the best interest of D and constitute contempt of Court."

He seeks the following relief in his notice of motion:

- "1) That the Respondent be held in contempt of the order of the above Honourable Court granted on 9 October 1997 under Case Number 3543/97, a copy of which is annexed hereto marked Annexure "RM1".
- 2) That the Respondent be committed to imprisonment due to her contempt for a period of seven (7) days, or such period as the above Honourable Court may deem fit, suspended on condition that the Respondent forthwith complies with the aforestated Order of Court referred to in prayer 1 upon service of the present application.

IN THE HIGH COURT OF SOUTH AFRICA

3) Cost of suit.”

There are many disputes of fact between the parties about the detail of events over the last number of years. It is common cause, however, that respondent does not want D to visit applicant on Saturdays when he has to work. I quote from the answering affidavit:

“ 3.

Ek wil ook daarop wys dat ek nooit bedoel het om ‘n hofbevel doelbewus te verontagsaam nie en ontken dat ek die opset gehad het om ‘n misdryf soos beweer in die aansoek, te pleeg. Ek het slegs as moeder in belang van my minderjarige kindjie opgetree en versoek die hof om my optrede in daardie lig te oordeel.

6.4.2 Ek weier Applikant nie toegang nie. Om redes wat hieronder blyk, het ek versoek dat hy sy toegangsregte uitoefen op naweke wat hy nie werk nie of na werk op Saterdag.

6.4.3 Ek weier Applikant nie toegang nie. Hy het vrye telefoniese kontak met ons kind en was sy onlangs saam met hom na sy ouerhuis. Ons dogter D het by haar grootouers gekuier waar hy haar gekry het. Dit was tydens die Desember 2003 vakansie.

13.2 D het ‘n tyd gelede gekla dat as Applikant op ‘n Saterdagoggend werk, mev. Macrae tot so laat as 11h00 slaap en dat sy wat D is, nie toegelaat word om vir haarself kos te neem nie.

IN THE HIGH COURT OF SOUTH AFRICA

13.3 D het dus gekla dat sy dikwels op 'n Saterdagoggend honger moet bly totdat mev. Macrae uiteindelik opstaan en vir haar kos gee. Ek het nie twyfel dat D die waarheid praat nie en is sodanige optrede nie in belang van my kind nie.

13.4 D het my verder meegedeel dat sy te voet en sonder toesig vanaf Applikant se woonhuis na Applikant se werk geloop het.

Dit is nie in belang van D nie. Dit het daartoe gelei dat ek Applikant versoek het en ook aangedring het dat hy sy toegangsregte uitoefen wanneer hy die betrokke naweek nie werk nie.

13.5 Applikant kan selfs reëlins tref om na werk op 'n Saterdag vir D te kry.

13.6 Ek het mev. Macrae se optrede en die klagtes van D met Applikant opgeneem. Sy antwoord was dat ek dit maar met mev. Macrae moet uitklaar.

14.1 Ek glo dat Applikant nie alle Saterdag werk nie. Ek glo dat hy minstens een Saterdag per maand af het omrede hy al teen 12h00 op 'n Saterdag by my in die Goudveld aangekom het om D te sien wat beteken dat hy al veel vroeër uit Sasolburg moes vertrek het.

14.2 Ek is heeltemal bereid dat Applikant se toegangsregte uitgeoefen

IN THE HIGH COURT OF SOUTH AFRICA

word om hom byvoorbeeld lang naweke te gun. Ek is ook bereid, soos reeds gesê, dat hy haar op Saterdag na werk hom haal.

15.1 Hy kan ook sekere Saterdag verlof neem en daardie tyd aan sy kind spandeer.

15.2 Ek weier gevolglik nie Applikant om toegang tot D te hê nie.

15.3 Ek het vir Applikant gesê dat hy ander reëlins moet tref en dat ek weier dat my kind blootgestel word om alleen in Sasolburg se strate te loop. Ek het geen versekering van Respondent gekry dat hy sal toesien dat sy nie weer te voet van sy huis na sy werk moet loop nie. Hierdie lakse houding van hom om nie vir my die versekering te kan gee dat my kind veilig is nie, het my genoop om in belang van my kind te weier dat hy haar kry as hy nie daar is om toesig te hou nie.”

Already on 25 November 2002 respondent’s attorneys said virtually the same to applicant’s attorneys in a letter of that date:

“Dit is ten slotte ook ons instruksies van ons kliënt om aan u te berig, soos ons hiermee doen, dat ons kliënt van mening is dat dit nie in die belang is van die minderjarige kind om naweke na u kliënt toe te gaan indien u kliënt die betrokke naweek werk nie.

Dit is ons instruksies van ons kliënt dat u kliënt se eggenote nie die nodige aandag en sorg aan die betrokke minderjarige kind verleen indien u kliënt nie teenwoordig is by die huishouding nie. In die verband sal ons dit op prys stel

IN THE HIGH COURT OF SOUTH AFRICA

indien u kliënt vir ons kliënt in die toekoms ‘n aanduiding kan gee van welke naweke hy nie werk nie en kan daar dan met ‘n geruste hart ‘n reëling getref word dat die minderjarige kind na u kliënt gaan op sodanige naweke.

Ons plaas op rekord dat dit geensins ons kliënt se begeerte is om u kliënt se toegangsregte tot die minderjarige kind te frustreer nie, maar dat voormelde versoek gerig word in belang van die minderjarige kind en is dit ons respekvolle submitisie dat sodanige versoek geensins onredelik is nie.

In die lig van voorafgaande, verneem ons graag dringend van u.”

On 23 January 2003 applicant’s attorneys threatened with an application in the following words:

- “2. In the circumstances, we have been instructed to demand from you, as we hereby do, that you immediately allow our client his reasonable rights of access to the minor child as directed by the Order of Court.
3. We advise that should you fail to do so, our client will be necessitated to make the necessary application to the High Court of the Orange Free State Provincial Division in regard to your failure thereto, and will furthermore hold you liable for all costs incurred in regard to the same.”

However, the application was only launched on 19 December 2003.

Applicant’s explanation for this delay is as follows:

IN THE HIGH COURT OF SOUTH AFRICA

“31.3 The reason for the twelve (12) month delay was due to the fact that I wished to firstly reach an agreement with the Respondent before approaching the High Court.”

On behalf of applicant Mr Daffue conceded that this explanation does not sound very convincing because there is no reference in the papers to any further correspondence between the attorneys of the parties. They were clearly then at arms' length and would probably not have communicated otherwise than through their respective attorneys.

Apart from the dispute about access to D, the amount of maintenance that applicant has to pay for her, is also a bone of contention between the parties. In the Consent Paper applicant undertook to pay R250,00 per month as maintenance for her. She was then almost 2 years old. This amount was increased to R400,00 per month since, apparently by agreement between the parties. D is now 8 years old. The papers strongly suggest that respondent is contemplating an application in the Maintenance Court for an increase of the maintenance while applicant apparently thinks that he is paying too much. The question of maintenance seems to have driven the parties further apart.

Contempt of court is the wilful and *mala fide* refusal or failure to comply with an order of court. (**The Law of South Africa**, First Re-issue, Vol.3 par 354). Although it is clear on the papers that respondent took a considered decision not to allow D to visit applicant while he was working on Saturdays, I cannot find that she acted *mala fide*. On the contrary, I am convinced that was *bona fide* and was throughout acting on

IN THE HIGH COURT OF SOUTH AFRICA

advice from her attorneys. The applicant can, therefore, not succeed.

In my view a custodian parent has the duty to seek the best interests of the child or children in his or her custody. In the present case it is obvious that applicant insists that D visits him on Saturdays even though he cannot personally take care of her. On the other hand respondent is not satisfied with such a situation. I can only appeal to the parties and their attorneys to try and solve their problems amicably because neither party can afford this litigation.

There remains the question of costs. I have no doubt that both parties acted throughout on the advice of their respective attorneys and that they both *bona fide* believed that their cause was just. Not one of them should be penalised with an adverse costs order.

In the premises I make the following order:

1. The application is dismissed.
2. Each party to pay his or her own costs.

J.P. MALHERBE J.P.

On behalf of Applicant:

Adv. J.P. Daffue
Instructed by
Van der Merwe & Sorour,
Bloemfontein

On behalf of Respondent:

Adv. P.J. Heymans
Instructed by
Lovius-Block

IN THE HIGH COURT OF SOUTH AFRICA

Bloemfontein

/scd