W v F

High Court, Natal Provincial Division

Judgment date : 19/06/1998 *Case No* : 1509/98

Before : B Pillay, Acting Judge

Child *– illegitimate child – rights of natural father – natural father of illegitimate child seeking to prevent removal of child from jurisdiction by applying for interdict against mother pending finalisation of action to determine to whom custody to be awarded – natural father at common law having no parental authority nor the incidents thereof over an illegitimate child – common law not according father of an illegitimate child an inherent right of access – law recognising, however, that child's welfare central to the matter of access – access thus always available to a natural father if in child's best interests – Court finding that child's best interests served* in casu *by granting the interdict sought.*

Child *– illegitimate child – rights of natural father – the enactment of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 underscores the shift in the common law regarding the respective rights of a parent of a child be the child legitimate or illegitimate, or the parent the custodian or non-custodian parent – there has been a move away from the strict application of the principle that the natural father of an illegitimate child has no parental authority and none of the incidents of parental authority – modern trend in custody and access issues relating to illegitimate children according rights to the father of an illegitimate child which are not recognised at common law – Court finding that although the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 has not yet come into effect, its powers as upper guardian of all minors entitling it to grant the relief sought by the natural father of an illegitimate child – mother of child interdicted from removing child from the jurisdiction pending the finalisation of an action to determine to whom custody should be awarded.*

Editor's Summary

Applicant was the natural father of an illegitimate child. Respondent, the mother of the child, had evinced an intention to depart for the United Kingdom in order to take up an offer of employment there. It was her intention to take the child with her. Applicant sought an interdict restraining Respondent from removing the child from the jurisdiction pending the finalisation of an action to determine to whom custody of the child should be awarded.

At common law the natural father of an illegitimate child has no parental authority over the child, and none of the incidents of parental authority attach to the natural father. Access and custody are incidents of parental authority. The father of an illegitimate child has no parental authority in the eyes of the common law and therefore has no inherent

right to access or custody. Accordingly, he cannot claim an interdict against the mother of the child to enforce custody or access. The Appellate Division had held in *B v S* 1995 (3) SA 571 (A) that it is actually inappropriate to talk of a parent having a legal right at all in this context: No parental right, privilege or claim will have any substance or meaning if access will be inimical to the welfare of the child. The child's welfare is central to the matter, and it is therefore always available to the father if it is in the best interests of the child to grant the father access. This includes the father of an illegitimate child.

The Court pointed out that the statement that there was no inherent right was not the same as saying that there was no right. Issues of custody and access were determined by what was in the best interests of the child. Counsel for Applicant had urged the Court to have regard to the provisions of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. This statute had been enacted but its date of commencement had not yet been promulgated. The statute was therefore not yet in force. Nevertheless, the Court could have regard to it to the extent that its enactment underscored the shift in the common law regarding the respective rights of the parents of a child. The modern trend in custody and access issues relating to illegitimate children was to accord rights to the father of an illegitimate child which were not recognised at common law. The Constitutional Court had identified the predicament of the unmarried father in respect of access to or custody of his child in its judgment in *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 153 (CC). Although the Court had a duty to develop the common law in accordance with the objects of the fundamental rights provisions of the Constitution and to promote such objects – including the rights of fathers of children born out of wedlock – the Court found that it was unnecessary to go that far in determining whether it could interdict the mother from removing the child from the jurisdiction on the application of the child's natural father. At common law the Court in any event, as the upper guardian of all minors, had the power to deprive the natural guardian of custody where special grounds existed relating to the health, safety and welfare the child. The Appellate Division had held in *Calitz v Calitz* 1939 AD 56 that if the upper guardian of all minors had the power to deprive the natural guardian of custody in special circumstances in the case of legitimate children, there was no reason why it should not act similarly in the case of illegitimate children. The Court, accordingly, had the power to grant the relief that was sought.

On a consideration of all the circumstances of the case, and especially the interests of the child in question, the Court came to the conclusion that it should grant the relief sought. It confirmed the rule *nisi* which it had earlier issued.

Judgment

Pillay AJ: Ideally, I would have preferred to take more time in writing this judgment, but as it involves a matter of some urgency I will give as much detail as time permits. As background, the applicant and Respondent are 23 years. Both are trained croupiers. During the course of 1993/1994, when they would have been about 18 years old, they entered into a relationship and out of this relationship a child, Calvin Fisher was born on 4 September 1994. From all accounts it was not a stable relationship, having been effectively terminated, except for short interludes before the birth and after the birth of the child. There is no dispute that the applicant is the biological father of the child. After the birth of the child, the applicant paid maintenance for the child, although there is some dispute as to the regularity of the payment.

When the child was just about six months old, the applicant and Respondent left for Israel on 11 March 1995 in search of employment. The Applicant returned to South Africa within one month and continued to exercise the access to Calvin which he previously had enjoyed.

The Respondent returned to South Africa in June 1995, some two months after the applicant, and while in Israel she met one Hugo, about whom I shall make reference later in this judgement.

On 6 October 1996, after having spent some one year and four months in South Africa at her parents' home with Calvin, the respondent left for the United Kingdom. I might mention that during her stay here in South Africa, and after her return from Israel, she worked as a croupier. I pause here to record that during the absence of either the applicant or the respondent from South Africa, Calvin was always in the custody of his maternal grandparents who live in Amanzimtoti. In April 1997, and September 1997, ie during the respondent's stay in the United Kingdom, she made two 10-day visits to South Africa. During her stay in the United Kingdom, she worked and eventually obtained what she calls an ancestry visa, which allowed her to reside there with the object of obtaining permanent residency. By this time, the respondent had already formed a relationship with Hugo Mersey who was also in the United Kingdom. During Christmas 1997, Calvin, with his maternal grandmother, spent a 3-week vacation with the respondent in the United Kingdom. The Respondent returned to South Africa on the 30 April 1998, and on her version, with the intention of taking the child permanently to the United Kingdom where she had secured lucrative employment, and where she intended to settle. I hasten to add, as is usual in cases of this nature, the affidavits are replete with attacks on the accuracy of various averments by either party and I propose to deal with them only in so far as they may be relevant to this application. So much for the brief background. On the 12 May 1998, the applicant obtained an interim order against the respondent in terms of which she was restrained from removing the minor child, Calvin Fisher, from the Republic of South Africa pending the institution by him of an action for the custody of the child, within one month of the granting of such order.

I heard argument on 12 June 1998 and the Rule was extended to 19 June 1998, on which date I undertook to give judgment.

The effect of the Rule granted on 12 May 1998 was that on that very day, the respondent and the minor child were restrained from leaving South Africa for the United Kingdom.

The difficulty in matters of this nature where, in order to arrive at a decision on the relief sought, ie interim relief pending the institution of an action, the Court has to be particularly careful that no pronouncement or finding is made reflecting on the suitability of either parent to the custody of the child. That issue, in the event that the applicant succeeds in persuading this Court to grant final relief, will have to be decided by the Court which is eventually seized of the custody matter.

The papers before me unfortunately cover extensively the very issues upon which I have to refrain from making a finding which may embarrass or fetter the hands of the Court which will make the final determination on the suitability

A or otherwise of either parent to the custody of Calvin. I am mindful of these limitations or restrictions and will be circumspect, save where it may become necessary for me to do so in determining whether I should confirm the Rule or not.

It is quite clear that the applicant, as the natural father, has a right to claim custody if it is proved that the custodian parent is not a fit and proper person to
B exercise custody, bearing in mind always that any decision in this regard will involve also what is in the best interest of the child. In this regard I make reference to the case of *Douglas v Mayers* 1997 (1) SA 910 (Z) and the case of *B v S* 1995 (3) SA at 571 (A). An extract from the head note in *Douglas v Mayers* is illustrative of the point. It reads as follows:

C > "There is no inherent right of access or custody for the father of any illegitimate child but the father, in the same way as third parties, has a right to claim and will be granted these if he can satisfy the Court that it is in the best interests of the child . . ."

What is quite clear is that there is no inherent right. That is not the same as saying no right. The Children's Status Act 82 of 1987 recognises this principle
D although the provision is primarily aimed at mothers who are themselves minors. The issue of custody, it has been said and repeated in a number of cases (for instance *T v M* 1997 (1) SA 54 (A)) that the approach in matters of custody should not be guided by the usual approach in opposed motion proceedings, but what is necessary is a *judicial investigation* into what is in the best interest of
E the child. Although what is before me is not an application for custody, I propose to bear that principle in mind although what I have to decide is whether the applicant has satisfied the requisites for obtaining the order which he seeks. It is worth mentioning at this stage that apart from other factors, it is also in Calvin's interests to have access to his father unless there are very cogent reasons why this should not be so. Once a material bond has been established, which I
F believe to be so in the present case, it is in the interests of the child that it be maintained (see *T v M* quoted above).

The real issue is really whether Calvin should be allowed to proceed with the respondent (as his natural mother and custodian parent) to the United Kingdom
G which she wishes to make her permanent home where she has secured lucrative employment and hopes thereby to provide a stable environment for Calvin.

Were I to discharge the Rule, I would in effect be ousting the jurisdiction of the South African courts over Calvin, in the sense that the applicant will not be able to institute custody proceedings using these courts as a forum, as the child would be in the jurisdiction of a foreign court (see in this regard *Handford v*
H *Handford* 1958 (3) SA 378 (SR) at 379F.)

If, on the other hand, I were to confirm the Rule, I would effectively be depriving the custodian parent of her well-established right to choose her domicile and have her child with her. While I must have regard to the rules and the law which govern interdict proceedings, I have also to weigh up as against such
I considerations what I consider to be in the best interests of the child.

Various allegations and counter-allegations have been made regarding the conduct, suitability and indeed the *bona fides* of each of the parties to the application. A great deal is irrelevant to the issue before me and one may conjecture, only relevant to the issue of custody. Having said that, it would have
J taken somewhat of a superhuman effort to have refrained from commenting on

them, simply because the issues on the two legs, ie the preliminary restraining order *pendente lite* and the institution of the action for custody, more or less involve the canvassing of the same facts.

It is clear from the papers that the respondent had not enjoyed stable employment, having worked at one time or other as a croupier at the Wild Coast, a casino in Chatsworth, a casino in Tel Aviv in Israel, the Golden Court Casino and the Millionaire's in Durban. This is to some extent, on the available evidence, also true of the applicant. The Respondent has now found employment in a casino in England and the salary which she is to receive, by South African standards anyway, is fairly lucrative. She sees for herself some future for making the United Kingdom her permanent home. I will return to this aspect later on in this judgment. That she wishes to have her child with her is consistent with her actions in the past when she made frequent visits to South Africa to be with the child, albeit for short periods, but obviously at considerable expense. The child is now just about 3 years and 8 months old and there is at least one continuous period which she spent with Calvin amounting to something like 1 year and 4 months, not much when one considers that he is of tender age and at the most formative years of his life. Much dependence for Calvin's welfare was placed on family support of both Applicant and Respondent.

Confirmation of the Rule will leave the respondent with two choices; either she gives up the job which awaits her in England and remains with the child pending finalisation of the custody application, or take up the job and commute as she has done in the past to keep in touch with the child, which she may well be able to afford in her new employment. The advantage to the applicant, were I to confirm the Rule, would be obvious. He has access which he presently exercises and the desired opportunity to press on with his application for custody.

Discharge of the Rule means that the respondent can leave South Africa with Calvin and take up her job in the United Kingdom and pursue all her other plans. Such plans include her intention to marry Hugo Mersey. That leaves the applicant effectively with no basis for claiming, through the South African courts anyway, for custody or access, as Calvin would not be within the court's jurisdiction. The Respondent, in her papers, says that even if she were in the United Kingdom, she would be prepared to submit herself and the child to the Court's jurisdiction and suggests her attorneys' address for service of all documents on her. This is a gesture, however well-intentioned, with no substance in law. Given the obvious animosity that exists between the parties, as is patently apparent from the papers filed, the undertaking is somewhat tenuous. Once she leaves the shores of this country, one can hardly realistically expect her to subject herself to the ordeal of a court action which has every prospect of culminating in a bitter duel between the parties, with the attendant risk of possibly losing custody of the child.

It is evident, as one pages through the application, that Calvin enjoys the love and affection of the families of both the applicant and Respondent. It is not only the rights of the parties which are in issue in this case, it is also Calvin's rights which need to be given consideration, as for instance his right of access to both parents. The antagonism between the applicant and the respondent through allegations and counter-allegations of impropriety, untruths, lack of interest in the child, have been aired voluminously and in great detail in the papers. They

may be of considerable relevance in the action to be brought by the applicant for custody. What the applicant seeks in the present action is a freezing of the status quo enabling him to exercise the right which he says he has, to bring the custody application.

By her own admission, the respondent concedes that the child enjoys a stable family environment in South Africa and her move to the United Kingdom will involve changes to Calvin's life. That much is obvious. She says that Hugo Mersey with whom she has formed a relationship and intends marrying, and her brother (who will act as an *au pair* for a limited period) and at some stage Hugo's family will assist in taking care of the child. She does not say how all this would be in the best interests of Calvin.

By Christmas 1997, she was still unsettled as to whether she wished to settle in the United Kingdom, although she had by then secured employment with Cromwell Mind Casino in London. She had originally intended taking Calvin to the United Kingdom in September 1998, only after she had made up her mind to stay permanently and establish herself there. Her precipitous action in deciding to take Calvin in May 1998 (which incidentally gave rise to these proceedings for interim relief) was as a result of certain negative developments which she attributed to the applicant. There is some degree of indecisiveness as to whether she wishes to make the United Kingdom her permanent home. If this should result in Calvin spending time in England in a strange and new environment, and then uprooting him again if things don't quite work out as anticipate, it could have an unsettling effect on him. By all accounts he is happy in his present environment with access to all the people who share a meaningful relationship with him. This is not to say that there may arise circumstances when these considerations will have to give way to more compelling reasons as to why it would be in his interests to accept a change, difficult as it may turn out to be. The Respondent has filed papers in this matter anticipating the return date hoping that a speedy resolution will enable her to take up her new job offer which she says she is likely to lose if further delayed in South Africa. That she may indeed lose this opportunity is very real but it is not a consideration which must weigh above Calvin's interests. It is a temporary injustice which she might have to endure until the end of the trial. If the action for custody is concluded with expedition, it will have the effect of finally resolving the dispute between Applicant and Respondent. That would ensure stability for all concerned, more especially for Calvin. Whilst I am mindful of the fact that a custodian parent has rights which prevail over those of a non-custodian parent, especially in respect of a child born out of wedlock, and I have been reminded that the modern trend is to move away from this concept, I am satisfied that even if I err in this regard, and I do not believe that I have, the interests of the child are of overriding importance. (See Section 28(2) of the Constitution Act 108 of 1996.) Applicant's counsel, in his heads of argument, stated that I should have regard to the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, assented to on 26 November 1997, but still without effect as its date of commencement has not yet been authorised by the State President. As I have said, I am mindful of the modern trend in custody and access issues relating to illegitimate children, according rights to the father of an illegitimate child not recognised at common law. However, I am enjoined in terms of our Constitution to develop the com-

mon law to promote the objects of the Bill of Rights. The rights of fathers of children born out of wedlock is given recognition in the case of *Fraser v The Children's Court, Pretoria North & Others*[1] recorded in 1997 (2) SA 261 (CC).

Whether I take account of the Natural Fathers of Children Born out of Wedlock Act, I am still, by precedent entitled to the view that in an appropriate case, the Court, as the upper guardian of all minors, can deprive the natural guardian of custody. See in this regard *Calitz v Calitz* 1939 AD 56 where Gardiner JP said:

> "The Court's powers to deprive the natural guardian of custody are those of upper guardian of all minors, and seems to be confined to 'special grounds, such for example, as danger to a child's life, health or morals' . . . so that the Court having these powers to act on special grounds in the case of legitimate children, there appears to be no reason why the Court should not act similarly in the case of illegitimates". (My underlining.)

See also the case of *Coetzee v Singh* 1996 (3) SA 153 (D) and the cases quoted therein. I mention these cases only in the context of answering the question as to whether the applicant has established a *prima facie* right. In addition, counsel for the applicant has referred me to a number of cases which show a shift in public policy dealing with the rights of natural fathers (see eg *Van Erk v Holmer* 1992 (2) SA at 636 (W) and *B v S* 1995 (3) SA 571 (A) and *M v T* 1997 (1) SA 54 (A). Counsel for the respondent has argued that I should ignore the provisions of Act 86 of 1997 which has not yet come into operation. It seems to me that he has misconceived the position. The Applicant does not entirely rely on the provisions of that Act. It was referred to, as I understand it, merely to underscore Applicant's argument asserting a shift in the common law. He further argued that it was incumbent upon the applicant to show that he has some prospect of success. In my view, it is in Calvin's best interests that custody should be resolved. Whilst I make no finding on the suitability of either parent, both the applicant and Respondent are young and obviously imbued with a spirit of adventure which may not in itself be bad for them, but not necessarily good for Calvin. It is important that at the appropriate time, the Family Advocate's report be obtained canvassing the issues which are likely to impact on Calvin's future welfare and development and indeed it is vital that Calvin be represented by a *curator ad litem* who is customarily appointed in proceedings of this nature.

In my view, the applicant has established a *prima facie* right to apply for custody and therefore a *prima facie* right to the relief claimed. Whether he succeeds or not in the custody action, will depend on the court which is eventually seized of the matter. He has placed sufficient facts before the Court to show that he has reasonable prospects of success. I am satisfied too, that if the respondent were to leave the Republic with the child, the applicant will suffer hardship which will be considerable if weighed against that which the respondent will no doubt also suffer. The balance of convenience however favours the applicant. It also favours the minor child. The Applicant has no alternative remedy but to approach this Court for the relief by way of interdict. Had he not done so he would have been left with no effective remedy.

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1 Also reported at 1997 (2) BCLR 153 (CC) – Ed

A Even if the requirements for the interdict fall somewhat short of what is required for the granting thereof, and I do not believe that they have, the interests of the child weigh heavily in influencing me in the order which I propose making.

In all the circumstances of this case, justice will best be served by confirmation of the Rule. Insofar as costs are concerned, it would seem to me that no such order should be made at this stage. If the applicant is serious, and I have no doubt that he is, he should proceed with due expedition in launching the application for custody.

The order which I make is that the Rule *nisi* issued on the 12 May 1998 be and is hereby confirmed and that the costs of this application should follow the result of the application for custody.

For the applicant:
CJ Van Schalkwyk instructed by *Badenhorst and Olivier*, Pietermaritzburg

For the respondent:
SR Mullins instructed by *Austen Smith*, Pietermaritzburg

The following cases were referred to in the above judgment: