

SOUTH AFRICA / JUDGMENT

D W v D W [2004] ZAFSHC 75 (29 July 2004)**[2004] ZAFSHC 75**

COURT

Free State High Court, Bloemfontein

BEFORE

Ebrahim

CASE / FILE NUMBER

117/2003

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IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 117/2003

In the matter between:

M D W.....Plaintiff

and

I DWDefendant

CORAM: EBRAHIM, J

DELIVERED ON: 29 JULY 2004

[1] It is common cause that the parties herein were married out of community of property and with the exclusion of the accrual system on 20 February 2000 at Bloemfontein. At the time the parties got married, the defendant was a general medical practitioner and the plaintiff a medical sales representative. During the subsistence of the marriage, the plaintiff terminated her employment and became a housewife for a short period. A child was born from this marriage, namely M on 24 May 2001.

[2] On 26 April 2001 the plaintiff issued summons against the defendant for the following relief:

“1. ‘n Bevel van egskeiding;

2. Bewaring van die minderjarige kind gebore te word;

3. Onderhoud vir die minderjarige kind gebore te word, in die bedrag van R1 000,00 per maand, die eerste onderhoudbetaling te wees op die laaste dag van die maand wat volg na geboorte en daarna voor of op die 1ste van elke daaropvolgende maand;
4. 'n Bevel waarkragtings verweerder aanspreeklik sal wees vir alle redelike mediese-, tandheelkundige-, en oogkundige koste van die gemelde minderjarige kind gebore te word;
5. 'n Bevel waarkragtens verweerder aanspreeklik sal wees vir die betaling van die voorskoolse fooie, bewaringsfooie en skoolfooie van die minderjarige kind asook die minderjarige kind se naskoolse opleidingskoste;
6. Koste van die geding;
7. Verdere en/of alternatiewe regshulp.”

[3] When the matter came before Court on 17 November 2003 the plaintiff had amended her summons to claim the following relief:

“1. A decree of divorce;

2. That custody of the minor child be awarded to the plaintiff subject to the reasonable rights of access of the defendant as amplified in the Family Advocate’s report of the 18th June 2003;
3. Maintenance for the child in the amount of R1 000,00 per month;
4. An order in terms whereof defendant would be liable for the reasonable medical, dental and eye costs of the said child;
5. A further order in terms whereof defendant will be liable for the school fees of the minor child;
6. Maintenance for plaintiff in the amount of R2 000,00 per month for a period of twelve months;
7. Costs of suit.”

[4] The defendant counter-claimed for an order of:

“1. Divorce;

2. That the custody of the minor child be awarded to plaintiff subject to certain rights of access to the;
3. That defendant pays maintenance for the child in the amount of R800,00 per month;
4. Costs of suit.”

- [5] From the foregoing it is clear that the main areas of contention between the parties right from inception of the action was that relating to custody and access of the minor child, maintenance for the minor child, maintenance for the plaintiff and the question of costs. In this regard it is important to mention that the Family Advocate, in an endeavour to assist with the issues

relating to custody access of the minor child of the marriage, prepared two different reports, the first report dated 18 June 2003

and the second report dated 13 November 2003.

- [6] It is common cause between the parties that the reason for the preparation of a second report by the Family Advocate was that the first report dated 18 June 2003 was not acceptable to the plaintiff for certain reasons, inter alia, that the Family Advocate who had prepared the report was married to a medical doctor and it was feared by the plaintiff that the defendant might have some connection with the said doctor. This created the perception in the mind of the plaintiff that the Family Advocate concerned would not be completely unbiased in the matter. At any rate, the Family Advocate who prepared the second report dated 13 November 2003 thereafter prepared further written recommendations at the request of both parties who were haggling over the issue of joint supervision which formed an aspect of the second report.

The second report was acceptable to the defendant but not to the plaintiff. This caused further haggling between the parties until, by agreement, the issue relating to joint decision making was abandoned by the defendant.

- [7] At some point during the trial the defendant formally handed in a written offer in terms of section 34 of the Rules of Court (Exhibit "I"). In terms of this written settlement the defendant offered to pay an amount of R1 000,00 in respect of the maintenance of the minor child and an amount of R1 000,00 maintenance in respect of the plaintiff for a period of six months. The first payment to be made on or before the 7th of the month following a final order of this Court. The defendant also undertook to be responsible for the medical costs of the minor child by placing her on his medical aid scheme which only covered hospital expenses. In terms of the settlement it was suggested that each party pay his or her own legal costs.
- [8] The settlement was not acceptable to the plaintiff who insisted on maintenance for herself in the amount of R2 000,00 per month for a period of 12 months and an order in terms of which the defendant would also be liable for the reasonable medical, dental and eye costs of the minor child as well as the costs of this entire action.
- [9] An assessment of the dispute in relation to the Family Advocate's report between the parties reveals the following:

9.1 The Plaintiff made all effort to frustrate the Defendant's rights to access of M. The Plaintiff further conceded that she was not satisfied with the rights of access recommended by the Family Advocate in the first report and accordingly requested a further report. The Family Advocate only issued the second report after consultation and re-evaluation [of the parties as well as M], by herself and a clinical psychologist, Dr Luttig. This report granted even more access rights to the Defendant and the Plaintiff "felt that this was not right".

9.2 The Plaintiff testified that the Defendant was a good father, but the child was in her opinion too young to be left with him for weekends or overnight. Apart from the age of the child the Plaintiff was not able to give any other reason why she was of the opinion that the rights of access the Family Advocate recommended for the Defendant should not be granted. The Plaintiff conceded,

under cross-examination, that the Defendant has the child on alternative weekends with him and that there was never any need to

worry about the safety or well-being of M. The Plaintiff could not advance any reason why the situation should not continue after a decree of divorce was granted, especially in view of the fact that the Defendant's undisputed evidence was that he is properly

trained as a doctor to look after small children.

9.3 In my view the Plaintiff had no reasonable dispute with the Defendant in relation to the rights of access he claimed and acceded to, and her objections in this regard were based solely on her desire to make access to M as difficult as possible for the Defendant.

Counsel for the Plaintiff went to great pains in an endeavour to indicate and/or create the impression that the report of the family advocate, as well as that of the clinical psychologist was vague, because it contained not only recommendations but also discussions.

9.4 It was only at the penultimate stages of the trial and during an application for amendment of the Defendant's counter-claim, that it came to light that the Plaintiff's real objection against the second report was that it recommended joint decision making, which she admitted she foresaw as a major problem. Solely in an attempt to settle the matter, the moment the Defendant

learned what the Plaintiff's objection was, he waived his claim in this regard. Even if I assume in plaintiff's favour that her objections were well-founded, she kept the reason therefore hidden until such a late stage it resulted in the lengthening of the trial unnecessarily and an escalation in the legal costs incurred by both parties.

[10] On the other hand, the defendant's attitude in resisting the amount of the claim for maintenance in respect of the minor child by offering a reduced amount and by disputing his duty to pay the medical, dental, eye costs and school fees of the minor child was, in my view, extremely unreasonable. The defendant is a general practitioner in stable employment and there is no reason

whatsoever why he adopted the stance that he was not under any obligation to pay the amount claimed by the plaintiff which, all

things considered, was not an exorbitant amount and a certain amount, if not all, of the medical, dental and eye costs and all school fees of the minor child. The defendant's unreasonable attitude stretched to the extent that no offer of whatever nature was forthcoming in respect of payment of any of the medical, dental, eye costs and school fees of the minor child. These expenses were completely ignored by the defendant in his counter-claim and plea to the plaintiff's summons and even at the very last stages of the trial when the offer to settle was made.

- [11] The question of reasonable access to the minor child and that of payment of the medical, dental, eye costs and school fees of the minor child were the two main issues which bogged this trial down and turned the trial into a protracted one unnecessarily. In the circumstances I am not convinced that either party is entitled to any payment of any costs.
- [12] In regard to the issue of bridging maintenance, the evidence was that although the plaintiff was a housewife for a certain period during the subsistence of the marriage, at the time she instituted the summons for divorce she was already in stable employment. From 28 January 2003 the plaintiff was in full-time employment as a medical sales representative. She received a certain income which included a company car and other fringe benefits. Although shortly thereafter the plaintiff did terminate this employment, it was her evidence that she had thereafter commenced her own business selling cosmetics, that she was earning an income sufficient to look after her needs. However, she required the financial assistance from the defendant in the sum of R2 000,00 per month in order to get herself settled in her business as she had the additional expense of all the attendant costs of starting a new venture. Although she earned a sum of money which was on the face of it sufficient to support herself and take care of her share of the minor child's expenses, this income was not sufficient for use to set up the new business. I am of the view that the plaintiff has not proved that she is in need of maintenance or that she is in any event entitled to bridging maintenance. There is no evidence that she contributed in any manner to the upkeep of the joint household or to the defendant's estate, whilst the contrary is true. The very fact that the defendant is or must be in a stronger financial position than plaintiff because of his professional and academic qualifications is no basis in law for an order that the defendant pay to the plaintiff bridging maintenance as claimed.
- [13] In the result I find that neither party has been substantially successful in the prosecution of their respective claims. Accordingly I make the following order:
1. A decree of divorce is granted.
 2. The care and custody of the minor child, M, born from the marriage relationship between the parties, is awarded to the plaintiff.

3. The defendant shall have right of access to the minor child, M, at all reasonable times, provided reasonable notice is given. Such right of access shall include the right to have the said minor child with him as follows:
- (i) The defendant may take the minor child, M, one afternoon per week with him, from 15h00 – 18h00.
 - (ii) Every alternative weekend from 16h00 on a Friday to Sunday 18h00, on condition that when the defendant takes up residence away from Bloemfontein, the minor child will be allowed to travel by airplane to the defendant, and that the defendant accompany the said minor child on the first five flights.
 - (iii) Once the child is 4 years of age, the defendant shall be entitled to have her for half of every holiday, on a yearly rotating basis and every alternate Christmas and New Year, with him.
 - (iv) The defendant shall be entitled to have the minor child each alternate Easter and long weekend with him. A long weekend will commence from 16h00 one day prior to the day the start of the long weekend, and will terminate at 18h00 on the last day of the holiday.
 - (v) The defendant shall be entitled to take the minor child on the defendant's birthday, each Fathers day, and each alternative birthday of the said child with him.
 - (vi) Once the child is 4 years of age, the defendant shall be entitled to adjust the duration of weekends in accordance with airplane flight schedules.
 - (vii) Once the child is 6 years of age the defendant will be entitled to provide the minor child with a cellular telephone and the expenses in respect of the maintenance of the said phone and the phone calls the said child may make shall be for the account of defendant.
4. The defendant is ordered to pay the amount of R1 000,00 (One Thousand Rand per month) to the plaintiff in respect of the maintenance of the minor child, the first payment to be made on or before the 7th day of the month following this Court Order, and thereafter on or before the 7th day of each consecutive month.
5. The defendant is ordered to maintain the said minor child as a beneficiary of his medical aid scheme and shall pay half of all the reasonable other dental, medical or related expenses, as well as half of all the primary secondary or tertiary education fees of the minor child.
6. Each party is ordered to pay his or her own legal costs.

S. EBRAHIM, J

On behalf of Plaintiff: Adv. S.J. Reinders

instructed by

Honey Attorneys

On behalf of Defendant: Adv. J. Strydom

McIntyre & Van der Post

/scd

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