

SOUTH AFRICA / JUDGMENT

Higgs v Lombard (1004/07) [2008]

ZAECHC 149 (22 August 2008)

[2008] ZAECHC 149

COURT

High Courts - Eastern Cape

CASE / FILE NUMBER

1004/07

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PARTIES :

JAMES HIGGS

APPLICANT

WALDETTE LOMBARD

RESPONDENT

Appearances:

Instructing attorneys:

IN THE HIGH COURT OF SOUTH AFRICA

CASE NO: 1004/07

NOT REPORTABLE

- [1] The marriage of the applicant and the respondent was dissolved by a decree of divorce made in the Transvaal Provincial Division of the High Court on 4 October 2002. Two children, James (born on 30 December 1995) and Dawné (born on 23 March 1999) were born of the marriage. Their best interests are the central issue in this application.
- [2] Some time after the respondent, her second husband and the children moved from Pretoria to Kenton-on-sea, the applicant launched these proceedings. He sought an order varying the order regulating custody of and access to the children and substituting it with relief in two parts: first, that he be granted access to the children on terms specified in the Notice of Motion and that the Family Advocate be ordered to 'conduct an enquiry to determine whether it would be in the best interest of the minor children concerned that custody be awarded to the applicant, and to report back to the court as soon as possible'; and secondly, that he be awarded custody of the children subject to such rights of the respondent to reasonable access to them as may be recommended by the Family Advocate.

[3] As a result of the report and recommendation of the Family Advocate, the applicant decided to no longer seek the custody of the children. The relief he then claimed took the form of a draft order that was attached to the heads of argument of his counsel, Ms Bosman. It is to the following effect:

‘ 1. The Order granted in the Transvaal Provincial Division of the High Court of South Africa is varied to read as follows:

- [4] The issues to be decided by me are threefold. They are: first, whether the applicant has made out a case for the children to be re-assessed by Dr Swanepoel a year from the date of this judgment; secondly, what access arrangements serve the best interests of the children; and thirdly which of the parties should be liable for costs.
- [5] I do not intend dealing with the evidence in detail save to the extent that it is necessary for purposes of determining the issues that I have identified. Suffice it to say, however, that on an application of the test for determining the facts in motion proceedings – the Plascon Evans test – precious little of the many hurtful allegations made by the applicant against the respondent remain. No purpose would be served by a detailed analysis of these allegations and their refutation.

[B] THE FIRST ISSUE: ASSESSMENT BY DR. SWANEPOEL

- [6] In my view, there are at least three reasons why I should not order that the children be assessed by Dr Swanepoel a year after this

judgment.

- [7] The first is procedural. It was not an order that was sought in the Notice of Motion so it was not an issue that the respondent was required to deal with specifically in her answering affidavit. It was first raised after the Family Advocate had reported and the applicant decided to change tack. The first notice that the respondent had that the applicant would apply for such an order was when the applicant's heads of argument were received – which was after the respondent's heads had been filed – as part of a draft order attached to those heads. It is not an issue properly before me.
- [8] Secondly, the reason for the applicant wanting this relief has to do, not with what is in the best interests of the children, but with an assessment, primarily, of his own condition. For that he needs no order. He is free to consult with Dr Swanepoel whenever he wants to.
- [9] Thirdly, it is not – even tangentially – in the best interests of the children that they be assessed by Dr Swanepoel. The emotional state of the children was assessed by Dr De Wit, who was appointed by the Family Advocate, as the applicant wished. When her assessment did not suit him, he endeavoured to have the matter re-opened. As a result, the children were interviewed by Dr De Wit again. Her second report makes most disturbing and sad reading. It shows James being placed in the most invidious position and being manipulated by the applicant in a most disgraceful way. Despite this, James and Dawné, on all the

acceptable evidence before me, have settled well in their new environment both domestic and scholastic. There is thus no need for a re-assessment, and in the considered opinion of Dr De Wit, which I accept, they should be left alone: in respect of James in particular, she stated that he 'should not be exposed to any further psychological evaluations and that he should not be placed in a position where he has to keep "secrets" or nurture his father emotionally'.

- [10] It is certainly not in the best interests of the children to have the spectre of a re-assessment by their father's appointed psychologist hanging over their heads for another year. This is made abundantly clear in poignant terms in Dr De Wit's supplementary report in which she wrote of her interview with James:

'He stated that he did not want to tell his father that there were flights available as Mr Higgs stated that he wanted to take him to another psychologist so that he could tell the "truth". He did not want to be re-assessed by another psychologist ("pappa het gesê as ek die naweek kom, gaan hy my vat na ? tannie ... Elsabe iemand ... ek onthou nie haar van nie ... sodat sy vir hom ? brief kan skryf om te sê ek wil by hom bly. Ek is moeg vir al die goed. Hy het gesê as ek nie die naweek kom nie, moet ek ? paar dae vroeër kom in die Desember vakansie, sodat hy my dan na haar toe kan vat. Ek wil nie gaan nie. Pappa het gesê ek mag vir niemand sê nie").'

- [11] Even if there had been any doubt as to whether a re-assessment by Dr Swanepoel would be in the best interests of the children, James himself has provided a categorical answer in the quotation above. I do not intend granting the order sought in paragraph 2 of the draft order.

[C] ACCESS

- [12] The starting point of the applicant's case for an amendment of his rights of access to his children appears to be his belief that the respondent's move from Pretoria to Kenton-on-Sea was a deliberately intended 'to alienate the children from me'. This has been denied by the respondent and her denial must be accepted on the usual principles relating to determining the facts in motion proceedings. On a reading of the papers as a whole there is not a jot of acceptable evidence to suggest that the applicant may be correct.
- [13] It must be noted that shortly before the respondent left Pretoria in September 2006 her attorneys informed the applicant of her move and her new address and invited him to make proposals regarding his right of access to the children. He made no proposals and his efforts thereafter so see his children were erratic to say the least. The respondent stated that '[s]ave for his seeking specific access during July 2007 and December 2007-January 2008, applicant made no proposals before May 2007 ... and chose to launch this application'.
- [14] The applicant's allegations that his rights of access to the children are being persistently and deliberately frustrated are not borne out by the objective evidence. The respondent attached to her answering affidavit correspondence between her attorneys and the applicant's attorneys that paints a very different picture. She expresses surprise – with some justification – that the applicant did not see fit to attach this correspondence to his founding

affidavit. If he had done so, of course, it would have undermined his attack on the integrity of the respondent.

[15] In essence, in terms of the draft order, the applicant seeks reasonable telephonic access to his children; the right to have them stay with him over mid-term breaks 'as well as one weekend per month from Friday afternoon after school until Sunday evening, subject to their social, cultural and school activities in such a manner, and that the children spend the weekend of Father's Day and the weekend closest to the applicant's birthday with the applicant'; in the event of their school, social and cultural activities precluding them from going to the applicant, that he be entitled to visit them 'in Grahamstown and/or Kenton-on-Sea or in the area on prior arrangement once per month'; and that he is entitled to 'have the children with him half of every school holiday' subject to certain practical conditions. In addition, he applies for an order that would require the respondent to deliver the children to, and fetch them from, the Port Elizabeth airport when they travel to and from the applicant.

[16] This access regime is opposed by the respondent and is not viewed positively by the Family Advocate. The main point of difference is that part of paragraph 1.2.2 of the draft order that contemplates the children spending one weekend a month in Pretoria. For the rest, the respondent and the Family Advocate do not oppose the applicant having reasonable telephonic access to the children but given his unreasonable communication with James, Dr De Wit has made a point of stating that this form of communication should be stringently monitored. She stated in her supplementary report:

'I am of the opinion that telephonic access should be far more stringently monitored between James jnr. and Mr Higgs. James mentioned on a number of occasions that his father phones him four to eight times a day and more so when he is upset. James stated that he is often upset. He worries about missing a call from him as he thinks his father will be upset. He worries during the school day, feels distracted and is not able to stand up to his father. One telephone call per day is sufficient. I would like to suggest that James jnr. arranges a specific time with his dad every day during which they can then talk and discuss the events of the day. Mr Higgs should also refrain from talking to James jnr. when he feels emotional and/or upset, as James jnr. feels responsible for his father's emotional well-being.'

[17] The respondent and the Family Advocate are also not opposed to the children spending mid-term breaks with the applicant and half of every school holiday structured in such a way that they will spend every second Christmas and every alternate Easter with him. As indicated above, the respondent also opposes her being ordered to fetch and carry them from and to the airport.

[18] The primary issue that must be decided is this: Is it in the best interests of the children that, in addition to the access that is conceded by the respondent and the Family Advocate, they also spend one weekend a month with the applicant in Pretoria?

- [19] I am of the view that this is not in the best interests of the children. The first reason why this is so is a practical, geographical, one. They live in Kenton-on-Sea. They attend school in Grahamstown. The nearest airport to both is Port Elizabeth, about 140 kilometres from Grahamstown. Requiring them to make a weekend trip to Pretoria and back once a month would, in my view, place undue strain on them.
- [20] Secondly, the indications are that both children are well-settled in the Eastern Cape, both within their family and within their school environment. In my view, it would not be in their best interests to upset their equilibrium by requiring them, once a month, to travel to and from Pretoria.
- [21] Thirdly, the respondent has set out the children's school program. It is full and involves sport over weekends. This is part and parcel of their attendance at school and an integral part of their educational environment. It would be contrary to the best interests of the children to interfere with this regime by requiring them to travel to and from Pretoria once a month: even if the trip takes place when the children do not have school activities, such a trip would place pressure on them in the sense that their free weekends would not be spent at home.
- [22] One point needs to be made with some force. It was suggested in Ms Bosman's heads of argument that the children's school activities were a myth: they were described as 'alleged school activities', and it was submitted that 'the averment that the children at their young ages and being in primary school are involved in school activities every weekend does not ring true'. She stated further that 'it is far-fetched that a young boy of James' age should actively take part in rugby, tennis, swimming, cricket, golf, squash, volleyball, hockey etc at the expense of building a strong bond with his father'.
- [23] These submissions have no foundation and ought not to have been made. If the applicant had reason to believe that the respondent's allegations were false, he could have applied for the matter to be referred to oral evidence. He did not do so. I consider it to verge on irresponsible to make these allegations – particularly in a matter such as this that of necessity is sensitive – when the affidavit of the principal of the Kingswood Junior School has explained the school's requirements and the children's commitments. Mr Derek Braans stated the following:
- ‘
4. The school expects the children to fulfil their commitments towards the school. With regard to boys, there are two compulsory sports in summer being cricket and tennis and compulsory sports in winter are rugby and hockey. It is expected of children to participate in those sporting activities. It is also considered in the children's best interests to participate in school activities, including sporting activities. ...
 7. I also know Dawné Higgs. She attends Kingswood Junior School. Apart from other activities, she is very involved with swimming and participated in the school gala and was also chosen to attend the Albany Schools trials for under 9 swimmers.’

[24] The views of Mr Braans are strengthened by a short report of Mr Johan Rademeyer, the school's educational psychologist, which he attached to his affidavit. Mr Rademeyer stated the following:

'I endorse the understanding that, while we all agree that dad should have access to James (and his sister, Donne), that the practicalities around James' program at school, especially around sporting activities, should ideally not be compromised. My understanding is that James' father expressed the willingness to come down here to visit (such suggestion which Waldette endorses) – this may be a good idea as dad can then see his son play sport and have the benefit of seeing his children as he wishes.'

[25] These views are, in turn, consistent with the considered opinion of Ms H.E. Retief, the Family Counsellor appointed by the Family Advocate. She, at the time that the issue of custody was still a live issue, said the following about access to the children by the applicant;

'Should the children remain living with the respondent, their contact with the applicant should be structured as to meet their practical circumstances. Kingswood College's academic year is divided into three trimesters, with a mid-term break (long weekend) every term. It should be more practical that the children visit the applicant during such weekends in Pretoria. This will still provide them with the freedom to spend the other weekends with the respondent and/or friends, whilst being in a position to attend extra-mural activities. The school holidays, which are all fairly long, can still be divided amongst the parties.'

[26] Ms Retief's recommendation was that the children should continue to live with the respondent and that they should 'have regular, reasonable contact with the applicant every mid-term break (long weekend), as well as half of every school holiday'. This recommendation enjoys the support of the Family Advocate.

[28] In the result, I shall make an order along the lines suggested by the Family Advocate and Ms Retief. It is, to a large extent, an order that the parties agree on, except for one or two aspects.

[D] COSTS

[30] The position, as far as costs are concerned, in cases of this nature was summarised by Wunsh J in *Bethell v Bland and others* 1996 (4) SA 472 (W). He held that there is no rule that each party bears their own costs. Indeed, the starting point is the usual rule that the successful party is entitled to his or her costs. It is only if sufficiently weighty factors are present that a departure from the rule may be justified.

[31] In this matter, the applicant launched an application in which the principal relief that he applied for was an order awarding him custody of the children. That application failed, as faced with the adverse findings of Dr De Wit, he capitulated on this issue, but not before insisting that that James be re-assessed by Dr De Wit because, his attorney stated, the applicant believed that the views that James had expressed – that he did not want to live with his father in Pretoria – was 'as a result of possible intimidatory actions of the mother'. The

application for custody, based as it was on both flimsy and spurious grounds, was doomed to fail from the start. To launch it and to persist with it to the extent that he did was unreasonable on the part of the applicant.

[32] Even on the ancillary issue of access to the children, the applicant's conduct was unreasonable. He did not take up the respondent's invitation, made in September 2006, to make proposals concerning his access to the children, when she moved from Pretoria to Kenton-on-Sea. He did nothing until May 2007 when he launched this application. Finally, his belated attempt to have the children assessed by Dr Swanepoel a year from the date of this judgment was also misconceived.

[E] THE ORDER

1. The order granted in the Transvaal Provincial Division of the High Court in case number 13638/04 dated 11 May 2006 is varied to read as follows.
 - (a) Subject to the terms of this order that follow, the applicant and the respondent shall enjoy full parental rights and responsibilities in respect of their minor children, James and Dawné Higgs (the children), as defined in section 18 of the Children's Act 38 of 2005.
 - (c) The applicant shall have the following rights of contact with the children:
 - (i) the right to reasonable telephonic contact;
2. The applicant is directed to pay the respondent's costs of this application, which shall include the costs of two counsel.

For the applicant: Ms F. Bosman, instructed by G.J. Van Zyl Attorneys, Pretoria and Neville Borman and Botha, Grahamstown

For the respondent: Mr J. Eksteen S.C. and Mr L. Schubart, instructed by De Villiers and Partners, Port Elizabeth and Whitesides, Grahamstown

For the Family Advocate: Ms J. Urban

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