

SOUTH AFRICA / JUDGMENT

Van Rensburg v Van Rensburg (14664/2007) [2008]

ZAWCHC 218 (10 June 2008)

[2008] ZAWCHC 218

COURT

Western Cape High Court, Cape Town

BEFORE

Desai

CASE / FILE NUMBER

14664/2007

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION) CASE NO: 14664/2007 DATE: 10 JUNE 2008

In the matter between: MARIUS DIRK JANSE VAN RENSBURG Applicant

and RIKI JANSE VAN RENSBURG Respondent

DESAI, J:

- [1] In this matter there is no appearance on behalf of the applicant, although extensive papers have been filed on his behalf. Mr van Embden, who appears on behalf of the respondent, has indicated that his attorney has been in contact with the applicant who informs her that Advocate Bartman has been instructed to appear on his behalf in this matter.
- [2] Mr van Embden's attorney then contacted Ms Bartman who informed him that she was not briefed to act in this matter. In fact there are no attorneys acting on behalf of the applicant as his previous attorneys withdrew. I instructed my registrar to contact both Ms Bartman and the applicant and this was confirmed. The applicant indicated that he wished to have a postponement. Mr van Embden informs the Court that he spoke to the applicant on the telephone and indicated to him that he (Mr van Embden) was opposing the application for a postponement. The applicant indicated that if a postponement was not granted, he would resort to other avenues. Mr van Embden further indicated that he told the applicant that he would place this remark on record in open court. The applicant did not object.

- [3] I have perused these papers, I have read the heads of argument filed by Mr van Embden and by his predecessor and also the heads of argument filed on applicant's behalf by his previous counsel. I do not think that any purpose would be served in further postponing this matter. I propose giving reasons for this order.
- [4] The parties to these proceedings are the divorced parents of the minor child Rikus. When the divorce order was granted it included a consent paper signed by both parties. In terms of the said consent paper, the respondent herein (the mother) was granted custody of Rikus, subject to the applicant's rights of access which were specified in the order. The divorce was granted on 12 August 2005 which is almost three years ago and Rikus is now 12 years old.
- [5] This is an application for the variation of the custody order. In effect the applicant wants the minor child to reside with him in Gauteng. It appears that the applicant relocated to Gauteng in about May 2006. Besides the criticism levelled at the respondent for the manner in which she allegedly treats the child, applicant contends the child wishes to reside with him.
- [6] In terms of section 8(1) of the Divorce Act, 70 of 1979 (as amended), the custody of a child may be varied only if this Court finds that there is sufficient reason therefor. The onus is on the applicant to show that since the divorce order was granted, good cause exists for the variation of the said order and that such variation would be in the child's best interest. Moreover, as these are motion proceedings, the applicant would only be entitled to the relief - if there are serious disputes of facts on the papers - if the facts stated on the affidavit by the respondent, together with the admitted facts in the applicant's affidavits, justify such relief.
- [7] It seems that the applicant has failed to discharge its onus. Most of the issues now being raised by the applicant were dealt with at the time of the divorce. The matter was investigated by a Family Advocate and the applicant took it into account when consenting to the custody order granted by the Court hearing the divorce.
- [8] The only important new factor which features at this stage is the relocation of the applicant to Gauteng. Applicant voluntarily relocated, despite it being to the obvious disadvantage of the child to have his father living some distance away. He chose to relocate and this alone does not amount to sufficient reason for the variation of the custody order. Moving the child at this stage to Gauteng will fundamentally and detrimentally alter his primary relationship with his mother. Regular access will become extremely difficult and the respondent will not be able to afford the costs involved.
- [9] Applicant's expert, a social worker, Ms M Oosthuizen, relies heavily upon the respondent's stress and emotional condition for the purposes of her proposition that the child's best interests will be served if his primary residence was shifted to the applicant. The respondent's own doctor, Dr Schronen, described it as "mild generalised anxiety disorder" which does not presently warrant any treatment. In my view, this does not give rise to any concern in respect of the child's custody.

- [10] Ms Oosthuizen loses sight of the fact that the status quo is working well, precisely because of the mother's parenting. She has also raised two other children who are high achievers. Moreover, Ms Ootshuizen ignores the potential adverse effect upon the child's relationship with the mother if there is to be a change in custody. A court will be especially reluctant to interfere with the current custody arrangement if, as in this instance, the child is doing well at school.
- [11] The applicant's conduct, as Mr van Emden, who appeared on behalf of the respondent has described, has been disquieting in several respects. Reference in this regard was made to the child being kept in Gauteng, contrary to the provisions of a Court order; the unnecessary litigation; the attempt to have respondent declared a patient of the State, and his so called degrees which I do not intend commenting on any further.
- [12] The child has a positive attitude towards his father and this is perhaps to the credit of the applicant. He is also too young and too immature to appreciate the emotional stability being provided by the respondent. It is not unusual for him to miss his father or to strongly identify with him, as Dr Schronen points out. This does not constitute a basis upon which to vary a custody order.
- [13] In the result I am unpersuaded that there is sufficient reason to depart from the custody as set out in the consent paper. The application is accordingly dismissed with costs, including the costs incurred by the respondent on 15 November 2007 and 8 January
2008. The applicant is also ordered to pay respondent's costs in respect of case number 845/2008. (In the latter case Mr M D J van Rensburg is to pay the costs of R J van Rensburg).

DESAI, J

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