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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 12933/02

DATE:2002-10-30

In the matter between

B, P P

Applicant

and

B, S L

Respondent

JUDGMENT

WILLIS, J: This matter began as an application to vary a custody order which was granted as part of a settlement between the parties in a divorce action many years ago. The matter was referred to the Family Advocate and the Family Advocate recommended in a comprehensive and well drawn report that custody should not be varied but recommended that rights of

access be defined as follows, such that the applicant {the father of the minor child) should have:-

1. Access on alternative weekends from Friday to Sunday, times and dates to be arranged between the applicant and respondent and not respondent's friend or her minor child;
2. Alternate short school holidays and long school holidays to be equally shared;
3. Christmas and New Year to alternate between the parties;
4. At least three hours access on the birthday of the minor child and on that of the non-custodian parent;
5. Access on Fathers Day from 14:00 on the day prior to Fathers Day up till 17:00 on the day, if this does not fall during a normal access weekend;
6. Reasonable telephonic access.

The recommendations of the Family Advocate have been accepted by the respondent subject to the objection that it is unreasonable in the respondent's submission that the minor child who is based in Cape Town should have to fly twice a month to Johannesburg to visit his father in order that rights of access may be exercised. The complaint is that this would be disruptive to the child and to the custodian parent.

During the course of argument before me it became apparent that the respondent does not have difficulties with there being a right of access on alternate weekends from Friday to Sunday provided, however, that only one weekend a month is to be used for access to be exercised in the manner of the minor child flying from Cape Town to Johannesburg.

The arrangement that parents should alternate rights of access with succeeding weekends is standard practice and is repeatedly endorsed in this division of the High Court. Nevertheless I am of the view that given the fact that the two parents live in two different cities,

approximately 1 600 kilometres apart, there is merit in the objection of the respondent to the minor child having to travel in effect twice a month to Johannesburg for rights of access to be exercised. In my view, it would be fair that although the applicant should have a right of access on alternative weekends, that that right be circumscribed such as it may be exercised in Johannesburg only once a month. In other words, it would be open for the applicant, should he wish to exercise rights of access on other weekends, to travel to Cape Town to do so or, I may say, to negotiate with the respondent to some alternative arrangement. I would wish to emphasise that all that one is dealing with here are defined rights of access by reason of the fact that the parties are not able to agree with one another as to how that right of access should be exercised. The parties are always free to negotiate and to enter into a sensible and fair arrangement with regard to access outside of the court order and I hope that the parties will bear this in mind.

The respondent by way of a letter sent to the applicant's attorneys by her attorneys on 2 August 2002 tendered substantially, although not completely, the relief which I propose to make. This will have a bearing on costs and I shall address that concern a little later. The respondent has also asked that I incorporate in my order a specific directive that the attendant costs of flying the minor child to Johannesburg, i.e. costs such as the flight, airport costs and taxi fares, transport costs to and returning from the airport be paid for by the applicant. It is clear that the financial circumstances of the applicant are very much more comfortable than those of the respondent and therefore I consider it fair to accede to that particular request. There is no dispute between the parties that the rights of access with regard to birthdays and Fathers Day should have a similar stipulation, that they are not to be exercised as of right in Johannesburg.

On the question of costs I would note that ordinarily in matters of this nature a court is disinclined to make a costs order. The reason for this is that it is in the interests of minor children that parties should feel free to ventilate issues affecting minor children before the courts and should not be unduly anxious of being penalised by a costs order. It is clear that the applicant's rights of access earlier in this year were frustrated. It is also clear that he was sorely provoked by one Mr Plunkett, described in the papers as "the live-in lover" of the respondent. Nevertheless, it is significant and different from the usual case such as this that the applicant sought to vary an agreed order with regard to custody and access (in particular custody); that he was tendered substantially the relief that he will succeed in obtaining on 2 August 2002 and that the Family Advocate did not support varying the custody order. A further factor, as I have already indicated, is the financial circumstances of the applicant are more comfortable than those of respondent. This is a factor which has weighed with me although it was not decisive with regard to the question of costs.

I also think it would not be inappropriate for me to observe that much time is being wasted in these courts with frivolous applications to vary custody orders. These applications dissipate assets, create huge tensions between the parties and cannot be in the interests of minor children. I think it would not be inappropriate for me to signal, however mildly, that more caution is required before parties seek to take such radical steps as varying custody orders. In my view it would accordingly be fair to award the respondent costs as from 2 August 2002, that being the date upon which the tender to which I have referred was made.

The following order is made:

The applicant's rights of reasonable access to the minor child born of his former marriage to the respondent are defined as follows:

1. He has to have access on alternate weekends from Friday to Sunday, the times and dates to be arranged between the applicant and the respondent and not respondent's friend or her minor child;
2. In addition, he has to have access on alternate short school holidays and long school holidays which are to be equally shared between the parties;
3. The applicant shall enjoy access on alternate Christmas and New Year;
4. Three hours' access is to be enjoyed by the applicant on the birthday of the minor child and on his own birthday;
5. The applicant is to enjoy access on Fathers Day from 14:00 on the day prior to Fathers Day until 17:00 on the day, if this does not fall during a normal access weekend;
6. The applicant is to have reasonable telephonic access.
7. Save for one weekend a month and the alternate Christmas and New Year period and the school holidays referred to above, which access is to be exercised by the minor child visiting the applicant in Johannesburg, all rights of access at other times shall not as a matter of right be exercised in Johannesburg. (In other words, the applicant's rights of access remain intact but should he wish to exercise them at these other times, he is to do so by visiting the child in Cape Town unless he and the respondent otherwise agree);
8. The applicant is to pay all reasonable costs, such as air ticket costs, transport costs, airport duties, taxi fares etcetera that are entailed in transporting the minor child from Cape Town to Johannesburg in order to enable him to enjoy rights of access.
9. The applicant is to pay the respondent's costs of this application from 2 August 2002.
10. The aforesaid costs order shall not include the cost of the supplementary affidavit.