

**IN THE CENTRAL DIVORCE COURT
HELD AT JOHANNESBURG**

CASE NO : A4563/98

IN THE MATTER BETWEEN:

L.M.

APPLICANT

AND

D. M.

RESPONDENT

BEFORE: Z. MOLETSANE, PRESIDENT

ON 28 SEPTEMBER 1999

BEST INTERESTS OF THE CHILD.

CAN A PARENT (FATHER) RENOUNCE HIS OBLIGATION AS A PARENT FOR PURPOSES OF EVADING HIS DUTY TO SUPPORT A MINOR CHILD.

CAN GUARDIANSHIP OVER A MINOR CHILD BE RENOUNCED BY A NATURAL PARENT.

SECTION 28 OF THE CONSTITUTION ACT, 1996

ARTICLE 18 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD.

APPLICANT (PLAINTIFF) AND RESPONDENT (DEFENDANT) WERE MARRIED INCOMMUNITY OF PROPERTY ON 28 AUGUST 1985. ONE MINOR CHILD, A DAUGHTER NAMED D. WAS BORN OF THE MARRIAGE ON 19 OCTOBER 1995.

APPLICANT INSTITUTED AN ACTION FOR DIVORCE DURING SEPTEMBER 1998 WHEREIN HE DESIRED A DIVORCE DECREE, DIVISION OF THE JOINT ESTATE, CONCEDED CUSTODY OF THE MINOR CHILD TO DEFENDANT SUBJECT TO APPLICANT (PLAINTIFF)'S RIGHTS OF ACCESS TO THE MINOR CHILD AT ALL REASONABLE TIMES AND OFFERED MAINTENANCE OF R300 PER MONTH IN RESPECT OF THE MINOR CHILD.

RESPONDENT (DEFENDANT) DID NOT CONTEST THE DIVORCE ACTION AND INDEED A DECREE OF DIVORCE WAS GRANTED ON 15 DECEMBER 1998 INCORPORATING APPLICANT (PLAINTIFF)'S PRAYERS.

DURING JANUARY 1999 APPLICANT FILED AN APPLICATION FOR VARIATION OF THE DIVORCE DECREE IN TERMS OF RULE 39 OF THE DIVORCE COURT RULES WHEREIN HE REQUIRED THE COURT TO SPECIFY HIS RIGHTS OF ACCESS TO THE MINOR CHILD. RESPONDENT ACCORDING TO THE NOTICE OF MOTION AND APPLICANT'S FOUNDING AFFIDAVIT DENIED APPLICANT REASONABLE ACCESS TO THE MINOR CHILD. IN RESPONDENT'S REPLYING AFFIDAVIT SHE DENIED ALLEGATIONS MADE BY THE APPLICANT AND INDICATED THAT THE CHILD IS ONLY 3 YEARS AND 7 MONTHS OLD AND

IS RESISTIVE TO ACCOMPANY APPLICANT TO HIS HOME DURING ALTERNATE WEEKENDS. SHE, RESPONDENT, ENDEAVOURED TO ENCOURAGE THE MINOR CHILD TO ACCOMPANY APPLICANT TO HIS HOME BUT TO NO AVAIL.

THE COURT REFERRED THE MATTER TO THE FAMILY ADVOCATE FOR AN INVESTIGATION. THE FAMILY ADVOCATE'S REPORT, SUPPLEMENTED BY A REPORT COMPILED BY A TEAM OF SOCIAL WORKERS AND PSYCHOLOGISTS RECOMMENDED HOW APPLICANT WOULD EXERCISE HIS RIGHT OF ACCESS OVER THE MINOR CHILD. THE REPORT FURTHER EMPHASIZED IN DETAIL THAT THE CHILD HAS NOT BONDED WITH THE APPLICANT DUE TO MARITAL ALTERCATIONS WHICH THE CHILD WITNESSED WHILST APPLICANT WAS STILL RESIDING AT THE MATRIMONIAL HOME. THE CHILD IS THUS APPREHENSIVE TO BE ALONE WITH THE APPLICANT, HOWEVER IF THE APPLICANT CAN VISIT THE CHILD AND EXERCISE HIS RIGHT OF ACCESS IN THE PRESENCE OF A SOCIAL WORKER AND LATER OF THE RESPONDENT, THE CHILD WOULD EVENTUALLY BOND WITH THE APPLICANT. THE BONDING PERIOD WOULD REQUIRE A PROCESS WHICH WOULD LAST APPROXIMATELY 5 YEARS.

APPLICANT AND RESPONDENT ALSO ATTENDED A NUMBER OF MEDIATION SESSIONS TO DEAL WITH THEIR EMOTIONS TO FACILITATE BONDING BETWEEN THE MINOR CHILD AND THE APPLICANT.

APPLICANT WAS DISCONCERTED BY THE RECOMMENDATIONS MADE BY THE FAMILY ADVOCATE IN THE REPORT AND CONTENDED THAT HE CAN EASILY BOND WITH HIS DAUGHTER WHEN HE SPENDS ALTERNATIVE WEEKENDS AND ALTERNATIVE SCHOOL HOLIDAYS WITH THE MINOR CHILD AT HIS HOUSE. THE EVIDENCE OF PSYCHOLOGISTS AND SOCIAL WORKERS WHO ASSESSED THE APPLICANT, RESPONDENT AND MINOR CHILD WAS LED AND THE COURT WAS PERSUADED THAT THEIR RECOMMENDATIONS ARE IN THE BEST INTEREST OF THE MINOR CHILD.

THE COURT THEN GRANTED AN ORDER VARYING THE DIVORCE DECREE INCORPORATING THE RECOMMENDATIONS OF THE FAMILY ADVOCATE'S MULTI DISCIPLINARY TEAM. THAT IS, DEFINING THE APPLICANT'S RIGHT OF ACCESS OVER THE MINOR CHILD. THE COURT ORDER IS AS FOLLOWS:

APPLICANT IS TO HAVE SUPERVISED ACCESS TO THE MINOR CHILD AT REASONABLE TIMES AND THE FIRST FIVE SESSIONS MUST BE UNDER THE SUPER VISION OF A SOCIAL WORKE; DURING ALTERNATIVE SUNDAYS FROM 3 OCTOBER 1999 AND CULMINATING ON 21 NOVEMBER 1999.

AFTER 21 NOVEMBER 1999 THE RIGHT OF ACCESS WOULD BE UNDER THE SUPERVISION OF THE RESPONDENT OR ANY SUITABLE ADULT FOR FIVE SESSIONS ON ALTERNATE SUNDAYS. A SOCIAL WORKER WOULD MONITOR SUCH ACCESS UNTIL 19 OCTOBER 2003.

DEPENDING ON THE MATURITY OF THE MINOR CHILD AND WILLINGNESS OF THE CHILD, APPLICANT WOULD HAVE UNSUPERVISED ACCESS TO TIE MINOR CHILD DURING ALTERNATE WEEKENDS AND SCHOOL HOLIDAYS.

THE COURT CONSIDERED *MC CALL V. MC CALL 1994 (3) SA 188* AND TOOK INTO ACCOUNT THE FOLLOWING:

- LOVE AND AFFECTION AND OTHER EMOTIONAL TIES WHICH EXIST BETWEEN PARENT AND CHILD AND THE COMPATIBILITY WITH THE CHILD.
- ABILITY OF PARENT TO COMMUNICATE WITH THE CHILD AND PARENT'S INSIGHT INTO UNDERSTANDING OF AND SENSITIVITY TO CHILD'S FEELINGS.

- CHILD'S PREFERENCE (ALTHOUGH THE MINOR CHILD IS 3 YEARS OLD SHE EXPRESSED HER PREFERENCE TO THE FAMILY ADVOCATE'S TEAM THAT SHE DOES NOT WISH TO SPEND TIME ALONE WITH THE FATHER (APPLICANT)).

UPON HEARING THE COURT ORDER APPLICANT DIRECTED A FURTHER APPLICATION TO COURT INDICATING THAT HE WISHES TO "WRITE THE CHILD OFF" BECAUSE IF HE CANNOT HAVE UNSUPERVISED ACCESS OVER THE MINOR CHILD HE WILL NOT PAY MAINTENANCE FOR THE MINOR CHILD.

RESPONDENT CONFIRMED THAT SHE AND APPLICANT HAD SIGNED A DOCUMENT WHEREIN APPLICANT UNDERTAKES TO "WRITE OFF" THE CHILD AND NOT PAY MAINTENANCE. THE DOCUMENT IN QUESTION WAS BROUGHT BEFORE COURT, SIGNED BY BOTH PARTIES.

THE ESSENCE OF THE DOCUMENT CAPTURED THE FOLLOWING:

"THAT THE APPLICANT GIVES UP ALL RIGHTS TO THE MINOR CHILD AND WILL NO LONGER PAY MAINTENANCE. THAT THE RESPONDENT WILL BE CUSTODIAN AND GUARDIAN OF THE MINOR CHILD AND WILL NOT CLAIM MAINTENANCE FROM THE APPLICANT IN RESPECT OF THEM/NOR CHILD".

IT IS TRITE LAW THAT MAINTENANCE IS IN THE BEST INTEREST OF THE CHILD AND PARENTS ARE LIABLE TO SUPPORT THE MINOR CHILD. IF BOTH PARENTS ARE EMPLOYED OR GENERATE AN INCOME THEIR CONTRIBUTIONS TOWARDS CHILD SUPPORT WILL BE *PRO RATA*, IF HOWEVER ONE PARENT DOES NOT HAVE AN INCOME THE ONE PARENT CARRIES THE WHOLE RESPONSIBILITY TO MAINTAIN THE CHILD. THIS IS A COMMON LAW AS WELL AS STATUTORY DUTY (*MAINTENANCE ACT, 1963 AND MAINTENANCE ACT 1998*).

MAINTENANCE IS A CHILD'S RIGHT, NOT A PARENT'S RIGHT. CONVERSELY IT IS A PARENT'S RESPONSIBILITY TOWARDS A CHILD. **SECTION 28 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT NO 108 OF 1996** ALSO PROVIDES AS FOLLOWS:

- "(1) *EVERY CHILD HAS THE RIGHT*
- a)...
 - b) *To family care or parental care, or to appropriate alternative care when removed from the family environment.*
 - c) *To basic nutrition, shelter, basic health care services and social services...*

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD WHICH WAS RATIFIED WITHOUT RESERVATIONS ON 16 JUNE 1995 BY SOUTH AFRICA PROVIDES IN **ARTICLE 18 (1)**;

"States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

THE "AGREEMENT" ENTERED INTO BETWEEN THE PARTIES REGARDING THE APPLICANT'S LEGAL OBLIGATIONS TOWARDS THE MINOR CHILD IS NOT ONLY MORALLY REPREHENSIBLE, IT IS ALSO NOT LEGAL.

THE APPLICANT IS ALSO NOT IN A POSITION TO ABDICATE GUARDIANSHIP OVER THE

MINOR CHILD BECAUSE IN TERMS OF THE **GUARDIANSHIP ACT, 1993** BOTH PARENTS ARE CO-GUARDIANS TO MINOR CHILDREN. IT IS COMMON CAUSE THAT GUARDIANSHIP IS ALL ABOUT ASSISTING MINOR CHILDREN IN ENTERING INTO LEGAL TRANSACTIONS, WHILST CUSTODY IS ALL ABOUT A PARENT EXERCISING DAY TO DAY CARE OVER A CHILD. THEREFORE CUSTODY REMAINS WITH THE MOTHER AND GUARDIANSHIP VESTS WITH BOTH PARENTS.

ORDER

- THE DIVORCE DECREE ISSUED AND GRANTED BY THE CENTRAL DIVORCE COURT ON 15 DECEMBER 1998 IS VARIED TO DEFINE ACCESS AS RECOMMENDED BY THE FAMILY ADVOCATE'S REPORT.
- APPLICANT IS ORDERED TO PAY MAINTENANCE AS STIPULATED IN THE DIVORCE DECREE.

FOR APPLICANT:
FOR RESPONDENT:

ADV MILES
IN PERSON

BY ORDER OF COURT
REGISTRAR