WICKS v FISHER 1999 (2) SA 504 (N)

Citation	1999 (2) SA 504 (N)
Case No	1509/98
Court	Natal Provincial Division
Judge	Pillay AJ
Heard	June 12, 1998
Judgment	June 19, 1998
Counsel	CJ Van Schalkwyk for the applicant SR Mullins for the respondent
Annotations	None

Flynote : Sleutelwoorde

Minor - Illegitimate child - Custody - Custody by natural father - Father of illegitimate child having no inherent right of access or custody, but having right to be granted such if Court satisfied that it is in child's best interests - Modern trend being to move away from idea that custodian parent having rights which prevail over those of non-custodian parent - Interests of child of overriding importance - In appropriate case Court as upper guardian of all minors can deprive natural guardian of custody.

Minor - Illegitimate child - Custody - Interim interdict pending determination of - To restrain natural guardian (mother) from removing child from South Africa, pending action by father for custody - Whether father has established prima facie right entitling him to interim relief - Court to bear in mind that, although father of illegitimate child having no inherent right of access or custody, he has right to be granted such if Court satisfied it is in child's best interests - Interests of child of overriding importance - In appropriate case Court as upper guardian of all minors can deprive natural guardian of custody - Applicant furnishing sufficient facts, upon application of above principles, to establish prima facie right - Interdict granted.

Headnote : KopnotaThe applicant had obtained a rule *nisi*, operating as an interim order, restraining the respondent from removing their illegitimate, minor child from the Republic of South Africa, pending the institution by him of an action for custody of the child. On the return day of the rule *nisi*,
Held, that, where, in matters of this nature, interim relief was sought pending the institution of an action, the Court had to be particularly careful to make no finding or pronouncement reflecting on the suitability of either parent for custody of the child, as that issue would have to be decided by the Court which eventually became seized of the custody matter. (At 507D--E.)
Held, further, that the Court had nonetheless to be guided by the principle that in custody matters the usual approach in opposed motion proceedings should not be adopted, but that it was necessary to embark upon a judicial investigation into what the best interests of the child were. (At 507I/J--508A.) *Held*, further, as to the requirement for interim interdicts that the applicant must establish a *prima facie* right, that one had to be mindful of the modern trend in custody and access issues relating to illegitimate children, which moved away from the concept that a custodian parent had rights which prevailed over those of a non-custodian parent, and which accorded the father rights not recognised at common law. The interests of the child were always of overriding importance. Although the father had no inherent right of access or custody, he had the right to claim and to be granted these if he could satisfy the Court that it was in the best interests of the child. In appropriate cases the Court, as upper guardian, could deprive the natural guardian of custody. (At 510E--F, 510G--H, 507H--H/I and 510I.) *Held*, further, on the facts, that the applicant had placed sufficient facts before the Court to show that he had a reasonable prospect of success in the proposed action. He had established a *prima facie* right to apply for custody, and therefore a *prima facie* right to the relief claimed. (At 511E/F--F/G.)
Held, further, on the facts, as to the requirement that the balance of convenience should favour

the applicant, that the hardship suffered by the applicant, if the respondent were permitted to leave the Republic with the child, would be considerable when weighed against the hardship suffered by the respondent, if she were precluded from removing the child. (At 511F/G--G/H.) *Held*, further, on the facts, as to the requirement that the applicant must have no alternative remedy, that the applicant indeed had no alternative remedy but to approach the Court for relief by way of interdict. Had he not done so he would have been left with no effective remedy. (At 511G/H.) Rule *nisi* confirmed.

Cases Considered

Annotations

Reported cases

B v S 1995 (3) SA 571 (A): applied *Coetzee v Singh* 1996 (3) SA 153 (D): referred to
Douglas v Mayers 1987 (1) SA 910 (ZH): applied *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC): referred to
Handford v Handford 1958 (3) SA 378 (SR): referred to
Rowan v Faifer 1953 (2) SA 705 (E): dictum at 711C--E applied
T v M 1997 (1) SA 54 (A): applied *Van Erk v Holmer* 1992 (2) SA 636 (W): referred to

Case Information

Return day of a rule *nisi*. The facts appear from the reasons for judgment.
C J van Schalkwyk for the applicant .
S R Mullins for the respondent.
Cur adv vult.
Postea (June 19).

Judgment

Pillay AJ : Ideally, I would have preferred to take more time in writing this judgment, but as it involves a matter of some urgency I will give as much detail as time permits. As background, the applicant and respondent are 23 years of age. Both are trained croupiers. During the course of 1993/1994, when they would have been about 18 years old, they entered into a relationship and out of this relationship a child, Calvin Fisher, was born on 4 September 1994. From all accounts it was not a stable relationship, having been effectively terminated, except for short interludes before the birth and after the birth of the child. There is no dispute that the applicant is the biological father of the child. After the birth of the child, the applicant paid maintenance for the child, although there is some dispute as to the regularity of the payment.

When the child was just about six months old, the applicant and respondent left for Israel on 11 March 1995 in search of employment. The applicant returned to South Africa within one month and continued to exercise the access to Calvin which he previously had enjoyed.

The respondent returned to South Africa in June 1995, some two months after the applicant, and while in Israel she met one Hugo, about whom I shall make reference later in this judgment.

On 6 October 1996, after having spent about one year and four months in South Africa at her parent's home with Calvin, the respondent left for the United Kingdom. I might mention that during her stay here in South Africa, and after her return from Israel, she worked as a croupier. I pause here to record that during the absence of either the applicant or the respondent from South Africa, Calvin was always in the custody of his maternal grandparents who live in Amanzimtoti. In April 1997, and September 1997, ie during the respondent's stay in the United Kingdom, she made two 10-day visits to South Africa. During her stay in the United Kingdom, she worked and eventually obtained what she calls an ancestry visa, which allowed her to reside there with the object of obtaining permanent residency. By this time, the respondent had already formed a relationship with Hugo Mersey, who was also in the United Kingdom. During Christmas 1997, Calvin, with his maternal grandmother, spent a three-week vacation with the respondent in the United Kingdom.

The respondent returned to South Africa on 30 April 1998 and, on her version, with the intention of taking the child permanently to the United Kingdom where she had secured lucrative employment, and where she intended to settle. I hasten to add, as is usual in cases of this nature, the affidavits are replete with attacks on the accuracy of various averments by either party and I propose to deal with them only insofar as they may be relevant to this application. So much for

the brief background. On 12 May 1998 the applicant obtained an interim order against the respondent in terms of which she was restrained from removing the minor child, Calvin Fisher, from the Republic of South Africa pending the institution by him of an action for the custody of the child, within one month of the granting of such order. I heard argument on 12 June 1998 and the rule was extended to 19 June 1998, on which date I undertook to give judgment.

The effect of the rule granted on 12 May 1998 was that on that very day the respondent and the minor child were restrained from leaving South Africa for the United Kingdom. The difficulty in matters of this nature where, in order to arrive at a decision on the relief sought, ie interim relief pending the institution of an action, the Court has to be particularly careful that no pronouncement or finding is made reflecting on the suitability of either parent to the custody of the child. That issue, in the event that the applicant succeeds in persuading this Court to grant final relief, will have to be decided by the Court which is eventually seized of the custody matter.

The papers before me unfortunately cover extensively the very issues upon which I have to refrain from making a finding which may embarrass or fetter the hands of the Court which will make the final determination on the suitability or otherwise of either parent to the custody of Calvin. I am mindful of these limitations or restrictions and will be circumspect, save where it may become necessary for me to do so in determining whether I should confirm the rule or not.

It is quite clear that the applicant, as the natural father, has a right to claim custody if it is proved that the custodian parent is not a fit and proper person to exercise custody, bearing in mind always that any decision in this regard will involve also what is in the best interests of the child. In this regard I make reference to the case of *Douglas v Mayers* 1987 (1) SA 910 (ZH) and the case of *B v S* 1995 (3) SA 571 (A). An extract from the headnote in *Douglas v Mayers* is illustrative of the point. It reads as follows: 'There is no inherent right of access or custody for the father of an illegitimate child but the father, in the same way as third parties, has a right to claim and will be granted these if he can satisfy the Court that it is in the best interest of the child.'What is quite clear is that there is no inherent right. That is not the same as saying no right. The Children's Status Act 82 of 1987 recognises this principle, although the provision is primarily aimed at mothers who are themselves minors. It has been said and repeated in a number of cases (for instance *T v M* 1997 (1) SA 54 (A)) that the approach in matters of custody should not be guided by the usual approach in opposed motion proceedings, but what is necessary is a *judicial investigation* into what is in the best interests of the child. Although what is before me is not an application for custody, I propose to bear that principle in mind although what I have to decide is whether the applicant has satisfied the requisites for obtaining the order which he seeks. It is worth mentioning at this stage that, apart from other factors, it is also in Calvin's interests to have access to his father unless there are very cogent reasons why this should not be so. Once a material bond has been established, which I believe to be so in the present case, it is in the interests of the child that it be maintained. (See *T v M* quoted above.)

The real issue is really whether Calvin should be allowed to proceed with the respondent (as his natural mother and custodian parent) to the United Kingdom, which she wishes to make her permanent home, where she has secured lucrative employment and hopes thereby to provide a stable environment for Calvin.

Were I to discharge the rule, I would in effect be ousting the jurisdiction of the South African Courts over Calvin, in the sense that the applicant will not be able to institute custody proceedings using these Courts as a forum, as the child would be in the jurisdiction of a foreign Court. (See in this regard *Handford v Handford* 1958 (3) SA 378 (SR) at 379F.)

If, on the other hand, I were to confirm the rule, I would effectively be depriving the custodian parent of her well-established right to choose her domicile and have her child with her. While I must have regard to the rules and the law which govern interdict proceedings, I have also to weigh up as against such considerations what I consider to be in the best interests of the child. Various allegations and counter-allegations have been made regarding the conduct, suitability and indeed the *bona fides* of each of the parties to the application. A great deal is irrelevant to the issue before me and, one may conjecture, only relevant to the issue of custody. Having said that, it would have taken somewhat of a superhuman effort to have refrained from commenting on them, simply because the issues on the two legs, ie the preliminary restraining order *pendente lite* and the institution of the action for custody, more or less involve the canvassing of the same facts.It is clear from the papers that the respondent has not enjoyed stable employment, having

worked at one time or other as a croupier at the Wild Coast, a casino in Chatsworth, a casino in Tel Aviv in Israel, the Golden Court Casino and the Millionaire's in Durban. This is to some extent, on the available evidence, also true of the applicant. The respondent has now found employment in a casino in England and the salary which she is to receive, by South African standards anyway, is fairly lucrative. She sees for herself some future for making the United Kingdom her permanent home. I will return to this aspect later on in this judgment. That she wishes to have her child with her is consistent with her actions in the past when she made frequent visits to South Africa to be with the child, albeit for short periods, but obviously at considerable expense. The child is now just about three years and eight months old and there is at least one continuous period which she spent with Calvin amounting to something like one year and four months, not much when one considers that he is of tender age and at the most formative years of his life. Much dependence for Calvin's welfare was placed on family support of both applicant and respondent. Confirmation of the rule will leave the respondent with two choices - either she gives up the job which awaits her in England and remains with the child pending finalisation of the custody application, or take up the job and commute as she has done in the past to keep in touch with the child, which she may well be able to afford in her new employment. The advantage to the applicant, were I to confirm the rule, would be obvious. He has access which he presently exercises and the desired opportunity to press on with his application for custody.

Discharge of the rule means that the respondent can leave South Africa with Calvin and take up her job in the United Kingdom and pursue all her other plans. Such plans include her intention to marry Hugo Mersey. That leaves the applicant effectively with no basis for claiming, through the South African Courts anyway, for custody or access, as Calvin would not be within the Court's jurisdiction. The respondent, in her papers, says that, even if she were in the United Kingdom, she would be prepared to submit herself and the child to the Court's jurisdiction and suggests her attorneys' address for service of all documents on her. This is a gesture, however well-intentioned, with no substance in law. Given the obvious animosity that exists between the parties, as is patently apparent from the papers filed, the undertaking is somewhat tenuous. Once she leaves the shores of this country, one can hardly realistically expect her to subject herself to the ordeal of a Court action which has every prospect of culminating in a bitter duel between the parties, with the attendant risk of possibly losing custody of the child.

It is evident, as one pages through the application, that Calvin enjoys the love and affection of the families of both the applicant and respondent. It is not only the rights of the parties which are in issue in this case, it is also Calvin's rights which need to be given consideration, as for instance his right of access to both parents. The antagonism between the applicant and the respondent through allegations and counter-allegations of impropriety, untruths, lack of interest in the child have been aired voluminously and in great detail in the papers. They may be of considerable relevance in the action to be brought by the applicant for custody. What the applicant seeks in the present action is a freezing of the *status quo* enabling him to exercise the right which he says he has to bring the custody application.

By her own admission, the respondent concedes that the child enjoys a stable family environment in South Africa and her move to the United Kingdom will involve changes to Calvin's life. That much is obvious. She says that Hugo Mersey, with whom she has formed a relationship and intends marrying, and her brother (who will act as an *au pair* for a limited period) and at some stage Hugo's family will assist in taking care of the child. She does not say how all this would be in the best interests of Calvin.By Christmas 1997 she was still unsettled as to whether she wished to settle in the United Kingdom, although she had by then secured employment with Cromwell Mint Casino in London. She had originally intended taking Calvin to the United Kingdom in September 1998, only after she had made up her mind to stay permanently and establish herself there. Her precipitous action in deciding to take Calvin in May 1998 (which incidentally gave rise to these proceedings for interim relief) was as a result of certain negative developments which she attributed to the applicant. There is some degree of indecisiveness as to whether she wishes to make the United Kingdom her permanent home. If this should result in Calvin spending time in England in a strange and new environment, and then uprooting him again if things don't quite work out as anticipated, it could have an unsettling effect on him. By all accounts he is happy in his present environment with access to all the people who share a meaningful

relationship with him. This is not to say that there may arise circumstances when these considerations will have to give way to more compelling reasons as to why it would be in his interests to accept a change, difficult as it may turn out to be. The respondent has filed papers in this matter anticipating the return date hoping that a speedy resolution will enable her to take up her new job offer which she says she is likely to lose if further delayed in South Africa. That she may indeed lose this opportunity is very real but it is not a consideration which must weigh above Calvin's interests. It is a temporary injustice which she might have to endure until the end of the trial. If the action for custody is concluded with expedition, it will have the effect of finally resolving the dispute between applicant and respondent. That would ensure stability for all concerned, more especially for Calvin. Whilst I am mindful of the fact that a custodian parent has rights which prevail over those of a non-custodian parent, especially in respect of a child born out of wedlock, and I have been reminded that the modern trend is to move away from this concept, I am satisfied that, even if I err in this regard, and I do not believe that I have, the interests of the child are of overriding importance. (See s 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996.) Applicant's counsel, in his heads of argument, stated that I should have regard to the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, assented to on 26 November 1997, but still without effect as its date of commencement has not yet been authorised by the State President. As I have said, I am mindful of the modern trend in custody and access issues relating to illegitimate children, according rights to the father of an illegitimate child not recognised at common law. However, I am enjoined in terms of our Constitution to develop the common law to promote the objects of the Bill of Rights. The rights of fathers of children born out of wedlock is given recognition in the case of *Fraser v Children's Court, Pretoria North, and Others*, 1997 (2) SA 261 (CC).

Whether I take account of the Natural Fathers of Children Born out of Wedlock Act, I am still, by precedent, entitled to the view that in an appropriate case the Court, as the upper guardian of all minors, can deprive the natural guardian of custody. See in this regard *Rowan v Faifer* 1953 (2) SA 705 (E) were Gardner JP said at 711C--E:

'. . . (T)he Court's powers to deprive the natural guardian of custody are those as Upper Guardian of *all minors*, and seems to be confined to "special grounds, such, for example, as danger to a child's life, health or morals". . . . So, the Court having the power to act on special grounds in the case of legitimate children, *there appears to be no reason why the Court should not act similarly in the case of illegitimates*.' (My emphasis.) See also the case of *Coetzee v Singh* 1996 (3) SA 153 (D) and the cases quoted therein. I mention these cases only in the context of answering the question as to whether the applicant has established a *prima facie* right. In addition, counsel for the applicant has referred me to a number of cases which show a shift in public policy dealing with the rights of natural fathers (see, for example, *Van Erk v Holmer* 1992 (2) SA 636 (W) and *B v S (supra)*; *T v M (supra)*). Counsel for the respondent has argued that I should ignore the provisions of Act 86 of 1997 which has not yet come into operation. It seems to me that he has misconceived the position. The applicant does not entirely rely on the provisions of that Act. It was referred to, as I understand it, merely to underscore applicant's argument asserting a shift in the common law. He further argued that it was incumbent upon the applicant to show that he has some prospect of success. In my view, it is in Calvin's best interests that custody should be resolved. Whilst I make no finding on the suitability of either parent, both the applicant and respondent are young and obviously imbued with a spirit of adventure which may not in itself be bad for them, but not necessarily good for Calvin. It is important that, at the appropriate time, the Family Advocate's report be obtained canvassing the issues which are likely to impact on Calvin's future welfare and development and indeed it is vital that Calvin be represented by a *curator ad litem* who is customarily appointed in proceedings of this nature. In my view, the applicant has established a *prima facie* right to apply for custody and therefore a *prima facie* right to the relief claimed. Whether he succeeds or not in the custody action will depend on the Court which is eventually seized of the matter. He has placed sufficient facts before the Court to show that he has reasonable prospects of success. I am satisfied too that, if the respondent were to leave the Republic with the child, the applicant will suffer hardship which will be considerable if weighed against that which the respondent will no doubt also suffer. The balance of convenience, however, favours the applicant. It also favours the minor child. The applicant has no alternative remedy but to approach this Court for relief by way of interdict. Had

he not done so he would have been left with no effective remedy.
Even if the requirements for the interdict fall somewhat short of what is required for the granting thereof, and I do not believe that they have, the interests of the child weigh heavily in influencing me in the order which I propose making.
In all the circumstances of this case, justice will best be served by confirmation of the rule. Insofar as costs are concerned, it would seem to me that no such order should be made at this stage. If the applicant is serious, and I have no doubt that he is, he should proceed with due expedition in launching the application for custody.The order which I make is that the rule *nisi* issued on the 12 May 1998 be and is hereby confirmed and that the costs of this application should follow the result of the application for custody.
Applicant's Attorneys: *Badenhorst & Olivier*. Respondent's Attorneys: *Austen Smith*.