REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: 4195/07 & 3138/10

In the matter between

Kwanele Gumbi **Plaintiff**

and

Thuthukile Immaculate Goba **Defendant**

JUDGMENT

Delivered on: 13 December 2010

STEYN J

[1] On 11 November 2010[1] I made an order in favour of the

1 The terms of the order were:

> *"1. The final divorce order issued by the Honourable Mr Justice Mnguni AJ, as he then was, is hereby varied:*
>
> *2.1 It is in the interests of the minor children K G, a girl born on the 11 December 2004, and Z G, a girl born on 8 May 2006, that both parties be awarded full parental responsibilities and rights in terms of sections 18, 19 and 20 of the Children's Act, 38 of 2005 in respect of the said minor children; and*
>
> *2.2 That the primary residence be shared equally between the parties and with the children to reside with one parent from after school on the Monday and to be returned to school on the following Monday with the other parent to have the children from after school on that Monday and return to school on the following Monday; and*
>
> *2.3 It is ordered that the shared residence principle be implemented from Monday 15 November 2010, i.e. the children will reside with the plaintiff Mr Gumbi from 15 November 2010 and on 22 November 2010, they will reside with the defendant Dr T Goba and thereafter it will proceed as stipulated in paragraph 2.2; and*

plaintiff and I indicated that my reasons would follow.

[2] The plaintiff and the defendant were once married to each other, which marriage no longer subsists. At the time the action was heard, it could hardly be believed that the parties could ever have expressed any desire to be with each other, much less share a life together. The acrimony that allegedly existed at the time of their divorce two years prior to this trial was still tangible in court when they testified in this action. The litigation that persisted after the divorce reflects a sorry state of affairs, especially for the two children involved.

[3] Mr Gumbi, the father of the two girls, was forced to approach the High Court not once but thrice to enforce his right of access. At the time of the trial there were three such applications before the Court and they resulted in two orders

---

2.4 The parties shall proceed to make joint decisions in relation to the following aspects of the children's lives:

(a) major decisions about their schooling and tertiary education;

(b) major decisions about their mental health care and medical care.

2.5 Any school which the children attend should be informed that the parties are co-holders of parental rights and therefore jointly involved in all educational issues concerning the children and that each party is entitled to discuss issues relating to the children directly with the teacher concerned and shall be entitled to receive school reports and assessments and notices, and attend school related events.

2. The words under 4 of the aforementioned order are hereby deleted.

3. Defendant is directed to pay the costs of this action."

against the defendant for contempt of court. The following orders were granted: on 16 February 2009, thirty days' imprisonment was imposed yet suspended on condition that the defendant is not convicted of contempt of court in the time of suspension, and on 3 March 2009, another thirty days' were imposed suspended for 2 years on the same conditions. The suspended terms of imprisonment had no effect or impact on the defendant's conduct and she persisted in her attempts to frustrate the terms of the divorce order.

[4] The plaintiff approached this court by way of action, presumably to claim what is rightfully his, and in doing so sought the following relief:

> *"1. that the words in paragraph 2 of the divorce order 'the parties jointly', with 'their primary residence to be with the defendant';*
>
> *2. substituting therefore the words 'the plaintiff and with the minor children to reside with the plaintiff; and*
>
> *3. directing the defendant to pay the plaintiff's costs of suit."*

It is generally accepted that an applicant needs to show "good cause" for variation of a Court's order. In *Simleit v Cunliffe*[2] it was stated that the Court might interfere with the custodian

2 1940 TPD 67.

parent's decision if satisfied "that in all the circumstances the interests of the children make interference necessary or desirable." (At 79)

[5] In *McCall v McCall*[3] it was confirmed that the *onus* of proving a variation of the custody to be in the child's interest rests upon the non-custodial parent.[4] Parenthood in a civilised society is generally accepted to mean the exclusive privilege of ordering, within the family, the upbringing of children of tender age and all that that entails.[5] South African law has kept abreast with international changes and was dramatically changed by the Children's Act 38 of 2005. The norms and principles expressed in *B v S*[6] henceforth no longer apply. Today, the rights of fathers are properly recognised and they are now seen, correctly in my view, as equal caregivers. It is evident from the conduct of the father in *casu* that he is devoted to his children and wants to know and spend time with his daughters.

---

3 1994 (3) SA 201 (C).

4 *Supra* at 204I.

5 See *Re KD (a minor) (ward: termination of access)* [1988] I All ER 577 (HL) at 588g-j. Also see *B v S* 1995 (3) SA 571 (A) at 580-582.

6 *Supra* note 5.

[6] The plaintiff in his evidence-in-chief chronicled the series of incidents when he was denied unsupervised access to his two minor daughters. This court is the upper guardian of children and will be mindful of their best interests, since this court has a duty to uphold the Constitution, which provides for the rights of children.[7]

[7] I will now apply the aforesaid principles to the current situation

---

7 See s 28 of the Constitution, 1996 which provides as follows:

> *"**28.** **Children** –*
> *(1) Every child has the right –*
> *a) to a name and a nationality from birth;*
> *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;*
> *d) to be protected form maltreatment, neglect, abuse or degradation;*
> *e) to be protected from exploitative labour practices;*
> *f) not to be required or permitted to perform work or provide services that –*
> *(i) are inappropriate for a person of that child's age; or*
> *(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;*
> *g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –*
> *(i) kept separately from detained persons over the age of 18 years; and*
> *(ii) treated in a manner, and kept in conditions, that take account of the child's age;*
> *h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and*
> *i) not to be used directly in armed conflict, and to be protected in times of armed conflict.*
> *2) A child's best interests are of paramount importance in every matter concerning the child.*
> *3) In this section "child" means a person under the age of 18 years."*

and in so doing I will consider the documents filed on behalf of the plaintiff, the objections against the order prayed for, as stated by the mother, and all the evidence adduced on behalf of the plaintiff and on behalf of the defendant. After an evaluation of the evidence, I shall consider the proposals in support, and the objections against, the prayed order and I shall take into account the welfare of K and Z, as the paramount consideration, and then decide whether the prayed order sufficiently takes care of the interests of the children. This will be done without losing sight of the father's right to take care of the children as a joint custodian.

[8] There is no doubt in my mind that in a perfect world the interests of these two girls would be best served by being brought up in a happy and secure family home,[8] but since their parents decided to divorce, one has to consider the second best option and that is to establish some secure family bond with each parent in which the children will develop and flourish. So far these two girls were deprived of establishing such a family bond with their father. There are many reasons for this state of affairs. The evidence before me, however, has

8 Griffiths LJ in *Chamberlain v De la Mare* (1983) 4 FLR 434 at 445.

shown, that the mother failed to accept the terms of the divorce order and persisted in introducing her own rules and practices.

[9] Having considered all the legal principles and norms, I am of the view that ultimately the children's welfare and interests should be paramount in deciding the matter. In *Du Preez v Du Preez,*[9] Miller J stated as follows:

> *"[B]ut when the paramountcy of the child's welfare in such a conflict between the parents is borne in mind, it is obvious that the burden upon the applicant dare not be magnified. She may be held to have shown good cause for variation of the order even if no new facts or circumstances have arisen in the interim, provided it appears clearly to the Court that the child's interests would be better served by varying the order than by maintaining the status quo."*

In *Jooste v Terblanche*[10] Botha J, as he then was, stated:

> *"It would be wrong to allow a condition of things to continue under which the children might become estranged from either the one or the other of their parents."*

[10] On an international level the principle of children's welfare being paramount is also recognised in the United Nations Declaration of the Rights of the Child, 1959 and has been given effect to by the European Court of Human Rights.[11]

9 1969 (3) SA 529 (D) at 532C - D.
10 1957 (1) PH B4.
11 See *Johansen v Norway* (1996) 23 EHRR 33.

Plaintiff's case

[11] The first witness to testify on the plaintiff's behalf was Zelna Pretorius, a candidate attorney, employed by the firm Shepstone & Wylie. Her evidence was that she was asked to go and observe the access as exercised by the plaintiff at the Durban Country Club. Ms Pretorius explained that when she was talking to Mr Gumbi, the defendant had arrived with the two girls. Thereafter she and her partner went to the restaurant and sat at a table close enough to the plaintiff so as to observe the interaction between the plaintiff and his children. The plaintiff sat at an adjoining table so that Ms Pretorius could see and hear what was happening.

[12] Her evidence was that Mr Gumbi suggested to the kids that they go outside to the golf course but the defendant interfered and said "No you are not taking them there". She relayed how Mr Gumbi nevertheless took the kids outside. She had noticed that the defendant followed the plaintiff and the two girls and a short while later she decided to go outside. She found the parties at the boom gate of the club, the defendant

screaming and in a state of hysteria. She decided to go to the security guard and introduce herself and explain the reason for her being there. In short, allegations were made that the plaintiff wanted to kidnap the children. The defendant became upset and almost pushed her cell phone into the witness' face. At this stage the plaintiff intervened and tried to get between the two women.

[13] Ms Pretorius heard the defendant shouting 'he hit me', which was not what had happened. She tried to calm the defendant and asked her not to cause such a commotion for the sake of the children. The defendant, however, responded by making some derogatory comments about Ms Pretorius. The manager of the country club came to the scene and asked her to sort out the situation. She, in turn, asked the plaintiff to accompany her to the police station in order to sort out what had happened. She further stated that Mr Gumbi was concerned and kept on saying 'the kids are upset, the kids are upset'. The two of them left the country club and went to the police station where they made affidavits detailing what had happened. The witness was cross-examined and it was put to her that the defendant denies either using or uttering such

derogatory terms or that she ever behaved in a hysterical state. The witness persistently denied this submission. Ms Pretorius never deviated from her evidence-in-chief and made a good impression on the court.

[14] The plaintiff's evidence was that the defendant persistently refused to give him unsupervised access to his children and through her conduct she prevented him from exercising his rights. He listed the occasions on which she obstructed and interfered with his actions so much so that on several occasions the police had to be called to intervene. He also stated that she constantly made allegations that he was trying to kidnap his children.

[15] The plaintiff's version was straightforward. In short he has never had any unsupervised access as stipulated by the order. He listed various dates and incidents which show that at times when he tried to exercise his access he was not only frustrated but the police were called to attend and investigate the incidents. If he was not accused of stealing his own children he was accused of kidnapping them. I don't intend listing these incidents for the purposes of this judgment. It will

become apparent from the summary of the defendant's evidence that the order was never adhered to as it should have been.

The correspondence bundle, which contains letters filed by Mr Gumbi's law firm as well as the defendant's firm, shows the level of frustration caused by the defendant. The plaintiff was consistent in his evidence and confirmed the real evidence contained in Exhibits "A" – "C".

Defendant's case

[16] The defendant contradicted herself on numerous aspects such as the question as to why she denied the plaintiff access on 23 December 2008. She, at first, indicated to this court that she needed to take the child to a doctor. An earlier affidavit filed by her states that she needed to consult with a doctor or a psychologist. She had great difficulty during cross-examination in explaining why a psychologist would be needed if the child was supposedly treated for flu. She failed to explain the urgency of taking the child to a doctor at the

very time when an order stipulated that the child should be with the father. She was furthermore not truthful when she informed Adv Mkhize, from the office of the Family Advocate, that she was unaware of the recommendations contained in the office's interim report. She struggled to give a logical reason for her conduct, especially in circumstances wherein two judges had urged her to comply with the final divorce order.

[17] Ms Nhlanhla Mhlongo, a private social worker, testified on behalf of the defendant. She explained that her involvement with the family was based on a request from the defendant to facilitate the plaintiff's access. She gave evidence of about 4 incidents: (i) at the office of the attorney Hadebe; (ii) At the Musgrave Spur; (iii) At McDonald's, Pinetown; and (iv) At the Musgrave Spur.

[18] During cross-examination the witness was asked to explain why she and the defendant would remain in the shopping mall, bearing in mind that the plaintiff was entitled to have the children for the whole day. The witness later agreed that her role was merely to facilitate, observe, and report back about

access. The witness also conceded that there was a real likelihood that the children might have noticed the presence of the mother and the attorney at the access sessions at the Spur restaurant. Ms Mhlongo also made a good impression on the court. She conceded that she was asked to fulfil a task and that she did what she was asked to do.

[19] I am mindful that a joint custody order has the danger of forcing two parties, who have demonstrated that they wish to be apart, to be together. However the court in 2008, despite the differences between the parties, considered such order to be in the interests of the children.[12] In light thereof I called upon the family advocate to give testimony and explain the recommendations made in the report filed. After hearing the evidence of Adv Mkhize, I was satisfied that the parents should remain joint custodians but that the primary residence could no longer remain with the mother.

[20] In view of the defendant's conduct, I consider it necessary to re-emphasise the seriousness of disobeying a court order. It

12 See *Pinion v Pinion* 1994 (2) SA 725 (D) and the comments by J Klaaren *Annual Survey of Law* (1994) at 121 – 122. See also *Venton v Venton* 1993 (1) SA 763 (D).

has always been viewed in a serious light and it is no less serious when it relates to wilful disobedience of a custody order.[13] In *Hadkinson v Hadkinson*[14] it was stated as follows:

> *"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged."*

[21] There are no other circumstances present in this matter except the psychological well-being of these two daughters and their interest in the relief sought. The evidence of the defendant overwhelmingly showed that she has no respect for justice in general or the orders issued by courts and accordingly did everything possible to obstruct the plaintiff's access to his children.

Evaluation

[22] The plaintiff was not only consistent in his evidence throughout the trial, but he remained unshaken during cross-examination. He is an intelligent person with a good memory for detail and made concessions when it was required. I found

13 See *DI Bona v DI Bona and Another* 1993 (2) SA 682 (C) at 688D – E; *Kotze v Kotze* 1953 (2) SA 184 (C) at 187.

14 [1952] 2 All ER 567 (CA) at 569C.

him to be a reliable and credible witness. The same, however, cannot be said for the defendant.

The defendant has throughout these proceedings been argumentative and at times failed to explain or answer simple questions. The record shows that she was obsessed with the idea that she would be tricked into saying something that she did not intend saying. She tried to shy away from straightforward questions by bolting in any irrelevant direction. She gave nonsensical explanations for disregarding orders, especially when such orders were made plain to her in court by the judges presiding in those matters.

I agree with Lopes AJ, as he then was, with the sentiments expressed about the attitude of the defendant in deliberately flouting the order by Swain J:

> *"I am of the view that the respondent acted in contempt of the order of Mnguni AJ by refusing to allow the applicant unsupervised access to their children, and that she acted both wilfully and* mala fides*. The denials of the respondent that she was in contempt of the order of Mnguni AJ as re-enforced by Swain J are so far fetched and undeniable that I am of the view that they can be rejected . . ."*[15]

15 See unreported judgment Case No. 4195/07, delivered 23 February 2009, at page 7.

(My emphasis)

The reasons for disregarding the order of Swain J still lacks persuasion even after hearing her *viva voce* explanation and is once more rejected. The defendant is a well educated person with above average intelligence, yet when cross-examined questions had to be repeated for no apparent reason. In my view she failed to impress as a reliable and credible witness. It is to be expected that a trial of this nature is a traumatic experience and highly emotional, since it involves the custody of ones' children. The process however is fair and the same for both parents, and I have kept this in mind in evaluating the evidence of both the plaintiff and the defendant.

[23] In the light of all the evidence heard, I am convinced that the defendant deliberately obstructed and interfered with the plaintiff's right of access. Despite him being appointed as a joint custodian, she unilaterally decided on the schools that the kids would attend, where they would live, and the nature of access that should be exercised by him. This kind of conduct could only result in alienating the children from their father.

[24] The evidence has shown that the children suffered undue emotional and mental stress as a result of the defendant's actions. The defendant persisted in causing drama and chaos, by involving the South African Police in matters that did not concern them.

[25] I have no hesitation in finding that the plaintiff succeeded in discharging the *onus* that rested upon him. On the strength of the evidence I am satisfied that the order needs to be varied.

[26] As has been alluded to earlier in this judgement, I am duty bound to consider the welfare of the children as paramount in granting relief. In my view the order prayed for is drastic and severe in its consequences. It has the potential to deprive the two daughters of the love and care of their biological mother. Insofar as the mother had tried through her conduct to alienate the children from the father, this court cannot ignore the need of the children to bond with both parents. After hearing the evidence of the family advocate, I had considered it necessary to follow a *via media* approach that would ultimately be in the interests of the children. Accordingly, for

these reasons I gave the order dated 11 November 2010.

_____

Steyn, J

Date of Hearing:	29 October 2010
Date of Judgment:	13 December 2010
Counsel for the plaintiff:	Adv B Skinner SC
Instructed by:	Shepstone & Wylie
Counsel for the defendant:	Adv R Singh
Instructed by:	Nompumelelo Radebe Inc.