26/1/54

G.P.-S.918—1950-1—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
(Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

H. C. FORTUNE — *Appellant,*

versus

H. P FORTUNE — *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* Godlonton & Co
Respondent's Attorney / *Prokureur vir Respondent* Marais & du V.

Appellant's Advocate / *Advokaat vir Appellant* E. Kellaway
Respondent's Advocate / *Advokaat vir Respondent* G. Gerrans QC

Set down for hearing on / *Op die rol geplaas vir verhoor op* Friday, ~~27th~~ 20th May, 1955.

(2nd Div.)
2, 4, 6

9.45 - 12.50
2.15 - 3.50

Van Adams

J. A. C.

Judgment:

Appeal dismissed with costs.

Schreiner,
~~Hoexter~~
Steyn, J.J.A.

Registrar
26/5/55

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

HAMISH CAMPBELL FORTUNE Appellant

and

HAZEL PHOEBE FORTUNE (Born Whitley) Respondent

Coram: Schreiner, Hoexter et Steyn, JJ.A.

Heard: 20th. May, 1955. Delivered: 26th May 1955

J U D G M E N T

SCHREINER J.A. :- The respondent wife, whom I shall call "the plaintiff", served a summons on the 4th.September 1953 in an action against her husband, the appellant, whom I shall call "the defendant", claiming judicial separation, custody of the minor son of the marriage, maintenance and costs; by an amendment a claim for sole guardianship of the child was added. The defendant, on the 6th.November 1953, filed a plea denying the plaintiff's allegations and a counterclaim asking for restitution of conjugal rights, failing which divorce, custody and costs. The trial Judge, OGILVIE THOMPSON J., made the following order on the 29th.

November/.....

November 1954.

"(1) In convention,Plaintiff's claim for a judicial separation and maintenance for herself are dismissed.

(2) In reconvention, Plaintiff(as Defendant in reconvention)is ordered to return to and restore conjugal rights to Defendant(as Plaintiff in reconvention) on or before the 11th December 1954, failing which to show case on 22nd December 1954 why :

(a) There shall not be a decree of divorce; why

(b) Custody and sole guardianship of the minor child of the marriage shall not be awarded to Plaintiff, with reasonable access reserved to Defendant; why

(c) Defendant should not be ordered to pay as and for the maintenance of the said child the sum of £7. 10. 0. per month until it shall attain the age of six years and thereafter the sum of £12. 10. 0. per month until the said child shall attain the age of eighteen years; why

(d) Leave should not be reserved to Defendant to apply, on good cause shown, for a variation of the above order as to custody and sole guardianship; and why

(e) Plaintiff should not be directed to pay Defendant one quarter of his taxed costs of suit.

(3) Leave is reserved to Plaintiff, should she not comply with the above order for Restitution of Conjugal Rights, and should Defendant, notwithstanding such non-compliance, thereafter not move for a decree of divorce in terms of the said order, to apply on due notice to Defendant for such relief in relation to custody or otherwise as she may be advised. "

On the 13th. December 1954, that

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is before the arrival of the return day, the defendant noted an appeal against so much of the judgment as awarded the custody and guardianship to the plaintiff. On the return day a decree of divorce was granted and the restitution order was made final. Though the appeal was noted against part of the restitution order the parties concurred in asking this Court to treat the appeal as being one from the corresponding part of the final order granted on the return day and this request was acceded to.

It has at no stage been in dispute between the parties that if the custody of the child was to be given to the plaintiff the circumstances of the case made it manifestly convenient that the sole guardianship should also be granted to her, as may be done under the provisions of section 5 of the Matrimonial Affairs Act (No. 37 of 1953).

The parties, both of whom were born in England, were married at Wynberg, Cape, on the 30th October 1952; she was a spinster while he had been previously married and divorced, and had two young children by his first marriage, who were living in England. The son of the plaintiff and the defendant was born in a maternity home on the 4th July 1953. In April 1953 the plaintiff's

mother arrived from England and stayed with the parties in their home at Fish Hoek. The plaintiff returned to the marital dwelling from the maternity home at the end of July. On the 22nd August 1953 the plaintiff and her mother left the house taking the baby with them. This constituted the desertion on which the defendant obtained his restitution order. The plaintiff justified her departure by alleging various forms of conduct on the part of the defendant which, she claimed, amounted to cruelty entitling her to an order of separation.

The lengthy trial revealed considerable conflict of evidence. In the result OGILVIE THOMPSON J. for the most part accepted the evidence of the defendant and rejected that of the plaintiff and her mother, and dealt with the main claims of the parties accordingly. In regard to the custody, however, the learned Judge after a very thorough examination of the facts came to the conclusion that in the interests of the child he should award the custody to the plaintiff, although she was the one who had been found guilty of the matrimonial offence, malicious desertion, which had led to the termination of the marriage and although, since she was

planning/.....

planning, if awarded the custody, to take the child to live with her in England, the practical effect of the order would be to make it extremely difficult for the defendant ever to avail himself of the right of reasonable access, which is his/at common law and was expressly reserved to him in terms of the court's order.

The law which OGILVIE THOMPSON J. applied he found, on the authority of Fletcher v. Fletcher (1948 (1) S.A.130 (A.D.)), to be that the paramount consideration is the interests of the child. While accepting the general proposition that a parent's right of access should not be rendered nugatory, he held that, " the "circumstances of a particular case may be such that the "interests of the child must take precedence over the "interests of the parent if the former are to be promoted "by a removal from the jurisdiction."

In the course of the argument on appeal the question was raised by the Court whether, in view of section 5 of Act 37 of 1953, the learned Judge was not entitled, even if he was not obliged, to go further and treat the interests of the child as the sole and not merely the dominant consideration. The section, so far

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as relevant, reads :-

"5 (1) Any provincial or local division of the Supreme Court or any judge thereof may -

(a) on the application of either parent of a minor in proceedings for divorce or judicial separation in which an order for divorce or judicial separation is granted; or

(b) on the application of either parent of a minor whose parents are divorced or are living apart,

if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship.....or sole custody of the minor....."

More than one problem of interpretation presents itself in connection with this provision. "Proceedings for divorce" must, I think, be taken to include "proceedings for restitution of conjugal "rights"; the result otherwise would be absurd. The power to grant the sole guardianship "or" the sole custody to either parent must include the right to grant both to one parent. "Sole" guardianship may be used in contrast with such joint guardianship as is mentioned in section 5 (3) (b). The use of the word "sole" before "custody" -

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is less easy to explain. Possibly it was introduced simply to contrast the effect of the order with the position while the parents were living together.

But more important is the question what is meant by saying that a judge may grant the custody to either parent "if it is proved that it would be in the "interests of the minor to do so." If it were inferred that the object of the legislature was to state the whole of the law on the subject of grants of custody it would seem to follow that the only consideration which a judge might ever take into consideration in making such a grant would be the interests of the minor. But on that view it would apparently be impossible to grant an order of custody in favour of either parent where the factors bearing on the minor's interests are more or less equally balanced and where it is consequently not proved to be in his or her interests to give the custody to the one parent or the other. Such a result could hardly have been intended by the legislature. Another possible view is that, although the word "may" is used, once it is proved that it would be in the interests of the minor to award the custody to a particular one of the parents, the judge would have no option but to make an order accordingly. But the present does not appear to be a case

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where the grant of a power is coupled with an obligation to exercise it. The courts have always had power to give the custody to one or other parent; the principles on which such orders should be made have come to us from the Roman-Dutch authorities and been developed in modern decisions. The section was apparently designed to free the courts from limitations, which might even at the present time be thought to exist at common law, on ~~the~~ their freedom to ~~have regard to~~ treat the interests of the minor as the sole factor. But there is no clear indication that the legislature intended to compel the judge to give effect to the preponderance of benefit to the minor's interests, once that is established. The preponderance, though sufficient to justify an order where the interests of the minor alone are regarded, may yet be slight enough to make it reasonable to take account of the guilt or innocence of the respective parents or the degrees of hardship that would be involved in an order granted one way or the other. It is possible that the legislature intended that in such cases considerations other than the interests of the minor should be disregarded, but it has not said so. Although the result may in some respects be awkward, the correct interpretation appears to be that which treats the section as simply empowering the judge to make a grant of custody in

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favour of either parent if it is proved to his satisfaction that it would be in the interests of the minor to do so, so that there could be no valid criticism of his treatment of the matter if he declined to pay any regard to other considerations; if, however, he should consider that the case before him is not one in which he should rule out such other factors as have been held to be relevant, he would not be wrong in doing so, although, of course, he would be obliged to observe the established principle that the interests of the minor are paramount. In the case suggested above, where there is an approximately even balance of the factors relating to the minor's interests, the judge would be obliged to add the other considerations to one scale or the other and so reach his conclusion.

If I am right in this view as to the effect of section 5 there is clearly no room for criticism of the judgment under appeal on the ground that OGILVIE THOMPSON J. treated the interests of the child as paramount, for he might have gone further and treated them as the only factor which he would take into account.

Counsel for the defendant contended that there is a rule of law that, save in exceptional cases which do not apply, the non-custodian parent has a

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right to reasonable access, and that as the order appealed from, though it purports to protect the defendant in his right, allows the plaintiff to remove the child beyond the effective range of the exercise of that right, there arose in effect a conflict between two principles which the learned judge should have resolved so as to give some effect to both. I do not agree. In terms of section 5, as I have indicated, the learned judge might, if he was satisfied where the interests of the child lay, have expressly disregarded what counsel called the legal right of the defendant to reasonable access. But the learned judge did not go so far; he did not rely upon the section but dealt with the matter simply on the basis of the decisions that had been given before the Act. So approaching the problem he took full account of the defendant's claim to reasonable access and appreciated that if custody were given to the plaintiff and if, as was her expressed resolve, she took the child to England, the only access the defendant would have would hardly be reasonable looked at from his point of view, though it might be called reasonable in the light of all the circumstances. The learned judge appreciated the difficulties of the problem and weighed with great care the factors of hardship to the defendant and the disadvantage of giving

custody/.....

custody to the unsuccessful, untruthful plaintiff against the factors pointing to the interests of the child being best served by leaving him with the plaintiff. Of the latter factors the most obvious was the child's extreme youth, but the learned judge also examined carefully the evidence regarding the means of the parties and the ~~alter-~~ ~~native~~ prospects of the child if he were to be brought up by the defendant in South Africa as compared with his prospects if he were brought up by the plaintiff in England. The learned Judge considered the possibility of awarding custody to the plaintiff ~~upon terms prohibiting the minor's removal from~~ on condition that the minor remained in South Africa, but was satisfied that this did not provide a practicable solution. Although in his argument for the defendant on appeal counsel again contended that such a modification of the order should be introduced, I see no reason to disagree with the conclusion reached by the learned Judge that in the circumstances of the case the choice must ~~be~~ lie between giving the custody to the defendant or giving it, without restriction as to residence, to the plaintiff.

Counsel for the defendant, though he criticised the judgment in regard to the learned Judge's comments on his client was unable to point to any wrong

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finding of fact. Bearing in mind the difficulty which this Court finds in departing from the conclusions of the trial court in cases of this kind (see Fletcher v. Fletcher supra, at page 138), especially where the matter is one of discretion (see Goodrich v. Botha, 1954(2) S.A.540 at page 546), I am satisfied that the decision of OGILVIE THOMPSON J. cannot be disturbed.

The appeal is dismissed with costs.

26.5.55

Hoexter, J.A.) Concur.
Steyn, J.A.)