

## LUBBE v DU PLESSIS 2001 (4) SA 57 (C)

### Headnote : Kopnota

The applicant and respondent had married each other in 1987. Three sons, aged between 10 and 6 years at the time of the application, had been born to the parties before they divorced in 1995. In terms of the settlement agreement incorporated into the divorce order, the respondent mother was granted custody of the children while the applicant father's rights of reasonable access were spelt out in great detail. In April 1997, the respondent remarried and she and her present husband had a young daughter. The applicant went to live with his parents in Still Bay. On 23 July 2000, the respondent and her four children also moved to Still Bay and took up residence in the applicant's parent's home. The reason for the move had been that the respondent's husband's business plans required him to spend two years in Mozambique, which would leave the respondent with no real support structure where the couple were staying in Pretoria.

The respondent and her daughter rejoined the respondent's husband in Pretoria in October 2000 as his contract in Mozambique had been postponed for a period of six months. The three boys, however, remained in Still Bay to finish the school year. The respondent alleged that it had been agreed that she would fetch the boys in Still Bay on 1 December 2000 when the schools closed. On 15 November 2000, however, the applicant launched a successful urgent ex parte application for a rule nisi to amend the settlement agreement to grant custody to the applicant and refer the matter to the Family Advocate for a report. The respondent in turn applied to have the return day of the rule nisi brought forward to 20 December 2001; to have the rule nisi set aside; and to have the three boys returned to her. Such application being successful, the respondent, accompanied by the Sheriff, attended at the applicant's home on 21 December 2000 to fetch the boys. The matter was, however, still referred to the Family Advocate. The applicant accordingly launched the present application for the amendment of the settlement agreement, seeking an order that custody of the three boys be awarded to him instead of to the respondent.

*Held*, that the best interests of the child were the paramount consideration in deciding any dispute between parents regarding the custody of their minor child or children. What was in fact in the best interests of a particular child or children was a question of fact in each specific case. (At 66B/C - C and E - E/F.)

*Held*, further, that the comprehensive list of criteria according to which courts could determine, on the facts of each individual case, what custody arrangement or order would best serve the interests of the child/ren concerned formulated in *McCall v McCall* 1994 (3) SA 201 (C) was to be applied to the circumstances of the present matter. In addition to such list of criteria, recognition also had to be given to the rights of the particular child/ren and a parent's willingness to recognise such rights would have to be

considered, especially in respect of children old enough to form informed opinions in that regard. (At 66F/G - G/H and 67E/F - F/G.)

*Held*, further, that the Family Advocate had done a thorough investigation in the matter and compiled a comprehensive and objective report. While the love expressed by both parties for the children could not be questioned, it appeared that the children had formed a stronger emotional bond with their father than with their mother. Concern was expressed about the emotional distance between the boys and the respondent's husband and the lack of insight he displayed with regard to the boys' emotional needs. The Family Advocate further noted that the children had experienced emotional distance between themselves and their mother as a result of her relationship with her daughter. (At 67J - 68A and 68C/D - E.)

*Held*, further, that the Family Advocate had done a detailed analysis of the parties' characters, personalities and social functioning. It had been found that, despite considerable restlessness and instability in the past, the applicant now maintained a happy and settled lifestyle in Still Bay. While the respondent's marriage to her present husband appeared committed and stable, their lives together had been marked by serious financial problems and constant moves occasioned by work circumstances. (At 68I - J and 69E/F - F/G.)

*Held*, further, that although there was no doubt whatsoever about the respondent's competence as a mother, the relationship between her and the boys had been negatively impacted on by the boys' experience of the respondent's husband as being unduly authoritarian and aggressive. On the other hand, the boys' relationship with their paternal grandparents was a close and caring one. The grandparents were both extremely capable and willing to assist the applicant, emotionally and materially, in bringing up and caring for the boys and would form an important part of the support structure available to the applicant should the three boys be placed in his custody. (At 69G/H - H/I and 69J - 70A/B.)

*Held*, further, that the youngest child displayed serious developmental difficulties and required occupational therapy. The difficulties had been highlighted by the child's nursery school teacher in Still Bay, whereafter the applicant had taken him to an occupational therapist for evaluation. Should the child remain with his father, he would continue to visit the occupational therapist and be provided with the necessary therapy on an ongoing basis. (At 70D - D/E, E/F - F and F/G - G.)

*Held*, further, that there was nothing to suggest that the respondent lacked the capacity or disposition to give the boys the guidance they required. She and her husband had in the past provided the children with a fixed routine and consistent discipline. The applicant in the interim had become very involved with his sons' education and appeared quite capable of maintaining discipline and giving them the necessary guidance. (At 70G/H - I and 71B.)

*Held*, further, with regard to the ability to provide economic security for the children, that despite allegations that the applicant had previously been unemployed and totally financially dependent on his parents, it appeared from the Family Advocate's report that the applicant earned an income by panelbeating and spraypainting cars and would in the near future be managing the panelbeating section at a garage in Still Bay. Therefore, while acknowledging that the applicant's financial position was not very strong, it could be concluded that the applicant, with the assistance of his parents, was able to provide adequately for the material needs of the three boys. The respondent, on the other hand, had not worked since she had married her new husband and, while he had allegedly been a successful businessman prior to the marriage, he had since then suffered numerous financial setbacks and problems. Because of the failure of the respondent's husband's various business ventures, he and the respondent (and the children) had moved four times since their marriage. There also seemed to be a great deal of uncertainty regarding the realisation of the projects he had presently become involved with. The respondent's financial security and her ability to provide for the future material needs of the boys were accordingly uncertain. (At 71G/H - H, 71I - 72B and 72E - E/F.)

*Held*, further, that both parties appeared to wish to ensure that their sons received a good education. However, because of the frequent moves undertaken by the respondent and her husband since their marriage, the boys had been subjected to frequent changes of school. These constant changes of school and residence were not desirable for the educational well-being and security of the children and there was no indication that the boys would not in future be subjected to further changes with regard to school and home should the respondent's husband's business ventures require relocation. Should the children stay with their father, they would be able to continue to attend the school they had attended before being removed by their mother; a school where they had adjusted well and were achieving good academic results. In addition, the youngest child would also be able to attend the same school and receive the occupational therapy he needed. (At 72G and 72I - 73A/B.)

*Held*, further, that both the applicant and respondent were perfectly capable of ensuring the healthy development of their sons. However, the type of development which the boys would increasingly need as they grew older could in all probability be better provided by the applicant, with the support and input of his parents. This conclusion was not to be seen as reflecting any doubt on the respondent's suitability as parent. Nevertheless, the boys' existing environment (with the respondent and her husband) did not appear to be providing the children with the emotional and other stability which they required. (At 73B/C - E.)

*Held*, further, that, with regard to the preferences of the boys themselves, to the extent that weight could be attached to such preferences, the three boys preferred to live with their father although they wanted to have as much contact with their mother as possible. The boys also had strong bonds with each other and it was of cardinal importance that they not be separated from each other. (At 73E/F - F and 73I/J - 74A.)

*Held*, accordingly, that it would be in the children's best interests to be placed in the custody of their father. However, it was of the utmost importance that the strong and positive emotional bonds between the boys and their mother be maintained and there was to be as much contact and communication between them as possible. (At 74B - C.) Application granted.