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Citation 2007 (5) SA 559 (T)
Case No 19224/06
Court Transvaal Provincial Division
Judge Mavundla J
Heard October 12, 2006
Judgment November 1, 2006
Counsel L Swart for the applicant
G J van Zyl (attorney) for the respondents
Annotations Link to Case Annotations

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[zFNz]Flynote : Sleutelwoorde
Minor - Access - By non-custodian grandparent - Grandparent having locus standi to apply for access to minor grandchild - Grandparent not having inherent right of access - Court may as upper guardian intervene to grant access where special grounds indicate in H child's best interests - Court slow to substitute itself as parents of child where nothing indicates parents not exercising parental rights in child's best interests.
[zHNz]Headnote : Kopnota
A grandparent has locus standi to apply for access to his or her minor grandchild, but he or she does not have an inherent right of access. A court may, as upper guardian of the child, intervene I to grant such access where special grounds indicate that it is in the best interests of the child. However, courts should be slow to substitute themselves as the parents of a child, especially where nothing indicates that the parents are not exercising their parental rights over the child in the child's best interests. (Paragraphs [10] and [11] at 563D - E.) J
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[zCAz]Cases Considered
Annotations
Reported cases
B v S 1995 (3) SA 571 (A): applied
Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A): referred to
Short v Naisby 1955 (3) SA 572 (D): dictum at 575B applied B
Townsend-Turner and Another v Morrow 2004 (2) SA 32 (C) ([2004] 1 All SA 235): dictum at 41C (SA) applied.
[zCIz]Case Information
Application by grandparent for access rights to minor children. The facts appear from the reasons for judgment.
L Swart for the applicant.
G J van Zyl (attorney) for the respondents. C
Cur adv vult.
Postea (November 1).
[zJDz]Judgment
Mavundla J:
[1] The purpose of this application is to obtain access rights to the grandchildren of the maternal grandfather who is the applicant D herein. The relevant access sought is to be exercised every alternative weekend for two to three hours, during which period the applicant can remove the

children. It is further prayed that the Family Advocate be directed to an investigation and to make a recommendation. Needless to E say that costs are sought against the first and the second respondents. The matter is being opposed by the parents of the relevant grandchildren.
[2] The relevant grandchildren are both girls who are respectively seven years and four years old. The applicant states that he would like to exercise his right of access, but such rights are F being frustrated by the first respondent. He says further that it is not in the best interest of the minor children that they be kept away from him. His relationship with the first respondent has become strained as the result of his divorce from her mother and that this is the only reason that she is refusing him access to the minor G children. In his papers he has also stated that if he is denied access to these minor children this might result in a situation where he would not leave these minor children any inheritance.
[3] The respondents in resisting the application have taken the point of locus standi of the applicant. They further state that only the biological parents of children have rights over H their children. The first respondent has also stated that the main reason why she refuses that the applicant should have access to the minor children is that when she was young she was subjected to the autocratic tendencies of the applicant who is very temperamental and very strict. She says that the applicant would give her lashes for every little mistake that she did as a child and that she would not I want to expose her children to such a situation. I do not propose to traverse all the merits related aspects. This is a matter that must be decided on principle.
[4] It has been submitted on behalf of the respondents that only the biological parents have inherent rights over their children to the exclusion J

of everyone else including the applicant or the grandparents vis-à-vis the minor children. It is further A submitted that the applicant has not made a case to show that it is in the best interest of the minor children that he should be given that right of access.
[5] Mr Swart on behalf of the applicant concedes that the grandparents do not have an inherent right to access over their grandchildren. He, however, submits that the grandparents do have B locus standi, just like the father of the child born out of wedlock, to approach the Court to be granted the right of access to the grandchild. Since he has prepared comprehensive heads of argument in which he has referred to various authorities, I do not intend to repeat, for purposes of this judgment, the relevant authorities cited. C It suffices to state that the said authorities principally deal with the question of access of the father of the child born outside wedlock and not with that of the grandparents. I shall nonetheless bear in mind the said authorities.

[6] In the matter of B v S 1995 (3) SA 571 (A) at 575D - E Howie JA says that: D

'Access, like custody, is an incident of parental authority: see Boberg The Law of Persons and the Family at 459 - 60 and cases cited there. Consequently, if access is the father's entitlement as a matter of inherent legal right, it can only stem from his parental authority. The duty of support and the marriage impediment in no E measure imply the existence of any parental authority from which the supposed right of access could have been derived.'

The Court went further at 585B - C.
[7] In the matter of Short v Naisby 1955 (3) SA 572 (D) where the paternal grandmother brought an application against the mother of the children for an order that the children be handed over F to her and that she be given the custody of the children, the Court held that the interests of the children were of paramount importance, that when there were allegations making a prima facie case, it was the duty of the Court hearing the matter to decide for itself what was in the best interest of the children. G

At 575B the Court said that it had no jurisdiction to deprive a surviving parent of her custody at the instance of third parties, except under its power as the upper guardian of minors to interfere with their custody, but only on special grounds. Such grounds include danger to the child's life, health or morals, but those are not the only grounds on which the Court will interfere. H
[8] In Townsend-Turner and Another v Morrow 2004 (2) SA 32 (C) ([2004] 1 All SA 235) the question of access by the grandparents to their grandchildren engaged the mind of the Court. At 41C - 42C (SA) the Court said that: I

'There is currently nothing to be found in the South African common law which indicates that anyone has the ''right'' of access to a minor child, other than the parents of children born of a marriage. This principle is expressed in the decision of the then Appellate Division when considering the rights of a natural father of an illegitimate child to access as follows:

''According to the law as it is, the right to access depends for its existence . J
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on parental authority. A father such as the appellant does not have that in the eyes of the law. But he may be granted access if A that is in the best interests of his child.''

(B v S 1995 (3) SA 571 (A) at 579H.)

Howie JA, as he then was, writing for the full Court in B v S (supra), summarised the position in South African law with regard to fathers of illegitimate children to be the following, at 583G: B

''(C)urrent South African law does not accord a father an inherent right of access to his illegitimate child. It recognises that the child's welfare is central to the matter of such access and that access is therefore always available to the father if that is in the child's best interests.''

The learned Judge of Appeal expressed the view that, if there were sound sociological and policy reasons for affording such fathers an inherent right, the matter must be dealt with legislatively. C

On 4 September 1998, the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 (the Act) commenced. Section 2 of the Act regulates the position of such a father, granting a court, on that father's application, the power to ''make an order granting the natural father access rights to . . . the child on conditions determined by the court.'' Furthermore, in terms of s 2(2), such D order can be made only if the Court is satisfied that it is in the best interests of the child.

These legislative provisions accord with the common law as set out in B v S (supra). . . . In B v S (supra) at 581J - 582A the then Appellate Division expressed the view: E

''N(o) parental right, privilege or claim as regards access will have substance or meaning if access will be inimical to the child's welfare. Only if access is in the child's best interests can access be granted. The child's welfare is thus the central, constant factor in every instance. On that, access is wholly dependent. It is thus the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one is to speak of an inherent F entitlement at all, it is that of the child, not the parent.''

The South African Commission, in its Working Paper 62, project 100, investigated the granting of visitation rights to grandparents of minor children.

At the outset, the Commission points out that parental authority (insofar as it is relevant to this case) is vested in the mother and father of a child born in wedlock and, on the death of one of the parents, it then vests solely in the surviving parent.' G

At 43H - 44C the Court proceeded to say:

'The South African Law Commission Report (supra at p (iii)), recommended legislation to the effect that (a) if a grandparent of a minor child is denied access to the child by the H person who has parental authority over that child, such grandparent may apply to Court for an order granting him or her access to the child and the Court may grant the application on such conditions as the Court may think fit; (b) the Court shall not grant access to a minor child unless it is satisfied that it is in the best interests of the child; and (c) the Family Advocate be involved in such cases. The Commission held the opinion that the present common-law position, in terms of which the parents have the exclusive right to I decide to whom and under what circumstances to grant access rights or visitation rights, does not, in all cases, meet the current needs of society and that adjustment of our law by way of legislation regarding this matter is necessary. The matter of B v S (supra) was decided after the publication of the Law Commission Report. Although dealing specifically with the rights of a father to access to his illegitimate child, in my view the effect of this decision J

is that any third party may approach the Court to have rights of access granted to him or her if such rights of access are in the A best interests of the child. In common law, apart from the direct blood relationship between the father and child, the father of an illegitimate child is in no different to any third party seeking access to a child. He has no inherent rights to access, any more than a grandparent does.'

[9] The Court in the said matter of Townsend-Turner and Another v Morrow (supra) went on to point out that no B legislation has as yet been passed to follow the recommendation of the Law Commission as pointed out herein above, insofar as the grandparent access issue. It further pointed out that the common law must prevail under the circumstances guided by the interest of the child. It further pointed out that the Court in the B v S matter C (supra) at 584I was of the view that where the interest of a minor is at stake, the Court must be slow to determine the facts by way of the usual opposed motion approach, ie in accordance with the principles set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A). I align myself with the above stated view. D

[10] In this matter it is a fact that the applicant is the grandparent of the minor children of the respondents. All he needs to allege to establish locus standi is the very fact that he is the grandparent of the relevant children. So the contention that he does not have locus standi, is in my view unfounded. E

[11] * It is clear from the aforesaid authorities that the applicant does not have an inherent right to access to his grandchildren. He must therefore convince the Court that it is in the best interest of the grandchildren that the Court must grant him access. In casu it is conceded by Mr Swart that the relationship between the applicant and the respondents is strained. This is so, in F particular between the applicant and his daughter, who is the first respondent and the mother of the relevant children. Save for having stated that he wants to exercise his rights of access to his grandchildren, he has in no way alleged facts on the basis of which this Court can come to the conclusion that it is in the best interest of his grandchildren that he should be granted the right of access, since he does not, as a matter of law, have an inherent right of G access. The fact that he might decide not to leave his grandchildren any inheritance when access is refused to him, is neither here nor there, nor a factor that is relevant in determining the question of the best interest of the children. The parents of the children are quite entitled to decide who should or should not visit their children. The H Court can only intervene where it is shown that it is not in the best interest of the children that such refusal is made, alternatively

that it is not in the best interest of the children that such access is being allowed by the parents of the children. The intervention of the Court would be on the basis that the Court as the upper guardian of I the children, because of special grounds, which grounds must be set out in detail in the founding affidavit, must intervene in the best interest of the children. In casu, the Court is not J

requested to intervene as the upper guardian of the minor children. The Court is requested to grant the applicant 'his right' A of access. The applicant does not have an inherent right of access.

[12] In the light of the above views expressed, I find it not necessary to deal with the trite issues pertaining to the requisite of a final relief. It suffices to state that the applicant does not have B an inherent right to access. The courts must be slow in substituting themselves as the parents of the children, especially where the parents are still alive and are staying with their children and there is nothing before the court placed that shows that the parents are not exercising their parental rights over the children in the best interest of the said minor children. C

[13] In the premises the application must fail. With regard to the question of costs it is common cause that, costs follow the event.

[14] Consequently the following order is made:

1. The application is dismissed with costs. D

Applicant's Attorney: T van der Walt. Respondents' Attorney: G J van Zyl. E