THOMAS DOMBOKA
versus
ESNATH MADHAMU

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 1 and 10 November 2004

Opposed Application

Mr *Muringi* for applicant.
Mr *Chakwizira* for respondent.

MAKARAU J: This is an application for variation of custody of A and R, two minor children aged 10 and 6 respectively. A is a girl and R is a boy.

The applicant and the respondent were divorced by this court on 7 March 2002. It was a term of the divorce order that custody of A and R be awarded to the respondent, their mother with reasonable rights of access in favour of the applicant.

In or about May 2002, the respondent left Zimbabwe for the United Kingdom where she is currently resident. Upon her departure, she gave custody of the minor children to her mother. She has not indicated any intention of taking the children out of the jurisdiction and into her custody in the United Kingdom nor of returning to Zimbabwe to resume custody of A and R.

On 30 October 2003, the applicant filed the above application seeking an order granting him the custody and affording reasonable rights of access to the respondent. In his application, he raised three broad grounds for seeking the variation. Firstly, he alleged that the respondent has abandoned the children. Secondly, he alleged that he has been denied access to the minor children by the grandmother in whose custody the children are and thirdly, that the living conditions of the children have deteriorated to such an extent that it is now affecting A's performance at school.

The application was opposed. It is pertinent in my view at this stage to deal with the issue of the opposing affidavit purportedly filed on behalf of the respondent. The affidavit was deposed to by the respondent's erstwhile legal practitioner on the premise that when the application was served, the respondent was already in the United Kingdom and could not depose to the affidavit herself. She then gave instructions to her legal practitioner to

depose to the affidavit in opposition to the application. With the technological advances made in the world of communication, it is hard to believe that the respondent failed to depose to an affidavit for filing with this court within the time stipulated in the rules or within such other extended time as her legal practitioner could have requested from the applicant and the court. Further and in any event, having put her foot in the door by filing a notice of opposition and an affidavit from her legal practitioner, the respondent could have then filed her own affidavit in replacement of that of the legal practitioner as was indicated in the affidavit of the legal practitioner would be done. This was not to be. The position at the hearing of this matter then remains that a person, who could not positively swear to the facts contained therein, deposed to the opposing affidavit, seeking to place before me facts in competition to those contained in the founding affidavit. I accordingly placed little probative value on the facts alleged in the opposing affidavit.

Returning to the merits of the application, it is in my view beyond dispute that the respondent has given up custody of the minor children in favour of her mother. The situation that the minor children have been placed is different from that obtaining in *Johnson v Johnson 1963 (1) SA 162* where the limited right of a custodian parent to leave the children with a grandparent was upheld not to be a delegation of the rights of the custodian parent. In useful dicta by KUPER J, it was observed at page 166 that:

> "Where as in the present case the children are placed with the parents of the custodian spouse, and where the custodian spouse visits the children regularly and where she is satisfied that they are being well cared for and where she is able to remove them whenever she thinks it is advisable to do so, it cannot be said that she has given up any of her rights and obligations and that she has deprived herself of association with the children to which she was entitled."

In recognizing the rights of the custodian parent to temporarily part with the physical caring of the children, KUPER J was heavily influenced by the remarks of VAN DER HEEVER J in *Stapelberg v Stapelberg* 1939 OPD 129 where a custodian parent of precarious circumstances had placed the minor child in her custody with an institution and VAN DER HEEVER J held that she had not thereby deprived herself of the association with the child that had been granted her by the order of court.

It is apparent that in both cases, the court placed emphasis on the temporary nature of the arrangements and on the fact that both custodian parents maintained regular contact with the children and were free at any time to terminate the arrangements.

The soundness of the *ratio decidendi* by VAN DER HEEVER J and the dicta by KUPER J is easy to appreciate when one recognises the wide discretionary powers that a custodian parent has in bringing up the children entrusted to their custody by the court. The scope of this power was discussed by GOWORA J in *Chikuni v Chikuni* 2001 (1) ZLR 189 (H) who upheld the decision by the custodian parent to set up home with the children outside this jurisdiction.

In *casu*, the respondent, as custodian parent has abdicated her responsibilities and rights that the court order granted her. Her surrender of the custody of the minor children to her mother appears permanent. While she may be in regular contact with the children by way of telephone calls, she has clearly divested herself of the right to associate with the children that the court order awarded her. She has given up the right to bring up the children and has given this responsibility to her mother, outside of the court order.

The fact that the respondent has given up custody of the minor children is not however the end of the matter.

The applicant has approached this court for an order of custody in his favour on the incorrect premise that once it is shown that the respondent has given up custody, then he is entitled to be granted custody of the children. The role of this court in matters relating to the custody of minor children is more responsible than the applicant would want it to be. This court does not sit to determine who between the two feuding parents is to be awarded custody of the children of the failed union. The best interests of the parents do not enter the fray. (See *Routledge v Heinz* 1988 (1) ZLR 252 where MUCHECHETERE J (as he then was) refused to vary access rights granted the applicant who had moved from Bulawayo where the children lived with their father, to Victoria Falls, a distance that she found inconvenient and expensive to travel.)

The approach that this court in considering an application for variation of custody of minor children is well settled. (See *Hackim v Hackim* 1988 (2) ZLR 61; *Makuni v Makuni* (supra) and *Routlegde v Heinz* (supra)). The best interests of the children are paramount. As observed by DUMBUTSCHENA CJ in the *Hackim* case, in case involving the custody of minor children, the court must approach the issue of onus from a broad and wide angle. The

onus should be discharged if it is at the end of the day the court is satisfied that the best interests of the minor children dictate that it makes the order sought. The learned judge of appeal cautioned against magnifying the onus on the parent seeking variation but maintained that the best interests of the minor children should remain paramount.

It appears to me that while the accepted position is that a parent seeking variation of the custody order has to show on a balance of probabilities that it is in the best interest of the children that the existing order be varied, in cases where the variation is sought on the basis of changed circumstances, the onus is to be discharged in a two prong attack. In my view, such a parent must show that it is not in the best interest of the children that they remain in the custody of the custodian parent and further that it is the best interest of the children that custody is awarded to them. It is insufficient in my view to merely show a change of circumstances for the worse on the part of the custodian parent. It is not difficult to envisage a situation where although the circumstances of the custodian parent have deteriorated from the date of the granting of the order, the court still finds that it is in the best interests of the children that they remain in the custody of the parent whose fortunes are waning. It is the role of the court to interrogate the circumstances of both parents to establish where the best interests of the minor children lie.

In *casu*, the applicant consented to custody being awarded to the respondent. His circumstances were therefore not interrogated by the court to establish whether the best interest of the children could be furthered in his care. It therefore behoved the applicant to lay his circumstances before this court before an award could be made in his favour. It is not the correct position at law that in all instances where the custodian parent has surrendered custody to a third party, the non-custodian parent can have custody for the mere asking. I raise this issue because the applicant in this matter only indicated in his answering affidavit that if granted custody, he intends to take the children with him to the United Kingdom where he has also established residence. His status in the United Kingdom has not been revealed. It is not indicated in his application whether he is employed and is in a financial position to look after the children. His domestic arrangements are not disclosed and while he is concerned about the schooling of the children, he has not taken this court into his confidence by advising what arrangements he has made for the children to attend

school. Before varying its previous order, the court has to be satisfied that adequate and appropriate arrangements have been made for the care and welfare of the children.

On the basis of the foregoing, while the applicant has succeeded in showing that the custodian parent has surrendered custody of the minor children, he has not shown that it is in the best interests of the children that custody be awarded to him. The net effect of the facts revealed by this application are to leave me with the most unsatisfying position of knowing that the person to whom this court entrusted the custody of the children has surrendered that trust but there is no one to whom the court may immediately entrust the welfare of the children. It is my view that the facts of this application underscore the need for this court to be equipped to effectively deal with the interests of minor children that the law entrusts to its care as upper guardian. Courts in this jurisdiction remain with the unenviable and blindfold task of determining the interests of parties who are not before it. The minor children have no voice before this court yet it is their welfare that is being discussed and determined. It is hoped that the need to do justice to minor children will move for reform in this area of the law. The best interests of A and R will remain unknown as they have been lost in the dust created by the fight between their parents where the father has been so consumed with showing how deficient the mother is he forgot to show how he can best serve the interests of the minor children. Likewise, the mother has been at pains to protect her integrity and overlooked informing the court why the best interests of the children will suffer if their custody is granted to their father.

In the result, the application is dismissed with no order as to costs.

Kantor & Immerman, applicant's legal practitioners.
Sinyoro Muunganirwa & Co, respondent's legal practitioners.