Judgment No. HB 166/04
Case No. HC 2541/03
X Ref: HC 1898/03

JOANNA JENNY DALY (NEE CHADWICK)

versus

STEPHEN JOHN DALY

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 4 OCTOBER 2004 & 20 JANUARY 2005

Adv. L Nkomo for applicant
Adv. Fitchies for respondent

Judgment

CHEDA J: This is an application for the restoration of custody of four minor children and the children's passports to applicant as per the consent paper entered into by the parties on their divorce on 26 July 1996.

The parties were married to each other and the union was blessed with four children (sons). The marriage encountered problems which resulted in its dissolution at the behest of the applicant. In addition to the custodianship of the minor children having been awarded to her, she had a right to remain in the matrimonial home, while respondent took occupation of a converted storeroom on the same premises. He remained in occupation until November 1999 when he moved out to his own house.

Applicant later suffered a nervous breakdown resulting in her voluntary surrender of the minor children to respondent in July 2002. In May 2003 she left the country for the United Kingdom. While there, she, in agreement with her relations in the United Kingdom decided to take the children with her to the United Kingdom as she then intended to settle there.

Initially respondent agreed to this arrangement. However, applicant later changed her mind about relocating to the United Kingdom. It is undisputed that

applicant has a long history of psychological problems which culminated in her numerous attendance to a general practitioner and a psychologist. She, at one time, attempted to commit suicide. On 5 July 2002 after she literally dumped the children at respondent's house and told them that she was going to bed and would never get up again. The police at Hillside were advised of her behaviour and they attended to her. The Samaritans, (a counselling organisation) was also involved in trying to help her out of her problems. She informed the police that she had decided her destiny and that in order to achieve this objective she had starved herself for 14 days in an attempt to kill herself.

She, however, argued that all these problems were caused by respondent who did not let go of her and that the children were always complaining about her spanking them.

Respondent on the other hand stated that, indeed, he used to stay at the converted storeroom but eventually moved to a new house. He, therefore, denies causing applicant's nervous breakdown. It is his observation that applicant does not have the interest of the children at heart, in that among other things she dumped them at his house and threatened to commit suicide. At one time she wanted to take them outside the country but has now changed her mind. It is his further argument that applicant has no regard for the children's educational requirements in that at one stage she caused one of the children to miss a Grade 7 examination and when asked why the child had missed the said examination she responded by saying "Oh its only Ndebele."

It is note worthy that, in her submissions through her legal practitioner *Adv. L Nkomo* she no longer wants to relocate to the United Kingdom. Therefore the

question to remove the children outside the country is no longer an issue.

On 17 December 2003 respondent filed a supplementary affidavit to applicant's counter application. This procedure which was being queried by applicant is in fact the correct procedure as laid down by SMITH J in *Paterson* v *Winterton Holmes & Hall* HC-113-93.

There are two prominent issues which must be determined in this matter. Firstly, whether or not respondent is in contempt of a divorce order which was issued as a result of a consent paper signed by the parties for the regulation of their conduct after divorce, namely with regard to the custody of the minor children. It is clear that custody of the minor children was awarded to applicant by consent of the parties. However, this arrangement was mutually changed resulting in respondent having a *de facto* custody of the children due to applicant's mental instability resulting from her attempted suicide.

While there is indeed a court order which should be complied with to the letter. The said order should be interpreted with a view of all the relevant circumstances surrounding the mutual consent of the parties concerned to vary the said order. It is my opinion that a broader approach should be adopted. In determining the varied consent in matrimonial matters more particularly if the variation affects the interest of the children the interest of the children must be a paramount determining factor, see *ex parte Boshi* 1978 RLR 382. The point was further buttressed in R*eith* v *Antao* SC-212-91 where the Supreme Court went further and emphasised the power of the court as the upper guardian of minors therefore making it clear that there is a need to disregard technicalities which tend to prevent the courts from looking at real situations and real dangers involved in custodial issues.

Matrimonial matters are highly emotional and as such parties more often than not tend to consent to situations while their judgments are clouded by emotions thus depriving them of free and informed consent. It is as a result of such actions that, parties thereafter vary their previous consent from time to time in order to suit their changed circumstances. The court, therefore should accede to such variations only if such variations are in the best interest of the children. Therefore, such variations as is in *casu* should not be regarded as contempt of the operating order *per se* as it would have been the parties desire to vary such orders to meet their practical situations at the time. It is therefore not proper for a party who after obtaining a court order based on consent subsequently agrees to a variation of the said order, but only to come back to court in an attempt to fall back on the court order whenever it suits her. As long as the variation is arrived at by further consent, it is my opinion that the courts should ratify such situation as long as it is in the best interest of the children to do so.

The second issue is to determine who between the parties is a suitable parent. Evidence before the court is that applicant has suicidal tendencies. She told children that she was going to commit suicide and went to an extent of dumping them at their father's house and bid them farewell. This type of behaviour, is in my mind, harmful to the welfare of the minor children. It is no exaggeration that they experienced mental trauma having to live with the idea of contemplating their mother's imminent demise, despite the fact that it did not take place.

Applicant suffered from mental instability which is confirmed by Mrs Anna Szewczyk who in her report of 17 September 2003 chronicled her psychological problems dating back to 1995 and she concluded as follows:

> "Mrs Daly went through severe emotional turmoil a short time ago. <u>Although she claims to be over the depression there is no guarantee that the relapse will</u>

> not occur when she finds herself under stress. She is not strong enough to cope with the situation yet. It would be suggested that Mrs Daly re-adjust slowly to her past responsibilities before going for the new challenges." (the underlining is my own)

An attempt by Dr Chanabhai to play down applicant's illness is rejected as it is from a mere general practitioner and it contradicts that of Mrs Anna Szewczyk a specialist in her own field. Doctors like all professionals should confine themselves to the area and scope of their practice and avoid purporting to extend their knowledge to other fields which they know very little about. This will help in ensuring their professional respect by members of the public. Their opinions should be professional opinion and be completely divorced from their patient's influence to the report required by other professionals.

Applicant's attitude towards the welfare and future of the children cannot escape my attention. She allowed one of her sons to miss a landmark grade seven examination for the reason that it was "only Ndebele". This she says with disdain. This to me, is an irresponsible statement by a custodian parent. It shows that her main focus is on her personal interests alone and only pays lip service to those of the minor children. Applicant's clear racial prejudice can not find home in our society. I am of the view that in that respect she is not a safe parent at all as it is evident that she regards her race as superior to others and therefore there is a danger of her sowing her racial hatred and prejudice to the children, much to their detriment.

Children are very vulnerable and a delicate lot to an extent that their custody should only be entrusted to a parent who is capable of both rational thinking certainly not one who is capable of taking a giant step of self extermination by threatening to

commit suicide. Medical evidence before the court clearly shows that there is a danger of relapse on applicant's past which makes it unsafe to give her custody of the children. A parent whose mental instability is of such character that it will give rise to a real likelihood of militating against the interest of the minor children should not be granted custody of the said children.

The children are boys who are approaching adolescent stage which on its own requires not only a reasonable but also a responsible parent to handle. Applicant's mental instability and racial prejudice is certainly not suited for such a task if she has to take it single handedly. Her negative attitude towards the future of the children's welfare in relation to their involvement in the national educational programmes by allowing her racial prejudices to play havoc in her mind is detrimental to the children's welfare. The fact that the children are presently in the custody of their father who in the absence of any adverse report against him is in my view the best suitable parent and it is in the best interest of the children that he be awarded custody of the same.

Costs

The general rule is that costs follow the event but in view of the fact that it is the welfare of the children at the centre of this disputed litigation it will be unfair to visit applicant with costs. More so, that her unreasonable insistence on this application was no doubt propelled by her mental instability which resulted in her erroneous belief that she must take custody irrespective of her mental make up.

Adv. Fitchies referred me to the case of *Lamb* v *Stander* HC-71-82; *B* v *K* 1983(1) ZLR 212 where SQUIRE J held that although it is unusual in this country in matters involving the welfare of children to award costs against the unsuccessful party

where both parents are *bona fide,* costs should follow the event if it could be shown that either party was unreasonable. *Adv Fitchies* therefore has urged me to order costs against applicant because of her unreasonableness. While I agree with the learned judge's reasoning, I am of the opinion that the question of reasonableness must be determined after taking into consideration all the circumstances of the case. Matrimonial matters as pointed out

supra are highly emotional issues and as such room must be given for the expression of such emotions. Unfortunately it is during those expressions that an element of unreasonableness crips in. In *casu* it is both the question of emotions and mental instability which has had a bearing on applicant. It will be unfair and unjust to further punish applicant with costs when it is clear that there is an element of involuntariness in some of her actions. I believe that this is one of those cases where an exception to this rule of unreasonableness can be made.

This application is accordingly dismissed with each party paying its own costs.

Lazarus & Sarif applicant's legal practitioners
Coghlan & Welsh respondent's legal practitioners