Judgment No. HB 9/05
Case No. HC 889/04

DEBBIE JONES

Versus

EDMONDO RAIMONDI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 3 JANUARY & 3 FEBRUARY 2005

J Tshuma for applicant
Ms A Masawi for the respondent

Opposed Application

NDOU J: The brief facts of this mater are that the applicant (mother) and the respondent (father), have a minor child of their co-habitation, born on 19 February 1994. The child is illegitimate. During the proceedings in case number HC 839/03, the minor child was residing with the respondent and consequent to those proceedings the applicant, who had applied for access to the child, was granted such access which was, however, restricted. At some stage the child was removed at the instance of the respondent, from Zimbabwe and taken to Lebanon where he resided in an institution or with some third party. The child was, during the period of absence, enrolled at a so-called American School in Lebanon. The child is now back in the jurisdiction of this court. The parties are in agreement that the child should go to Cape Town and stay with the applicant. The child will then be enrolled at a school in Cape Town. The child's passport is in the family name of the respondent courtesy of the co-operation of the parties. An element of distrust between the parties has resulted in the diminishing of the co-operation. In fact this distrust has almost extinguished the co-operation of the parties on fundamental issues involving their child. This is

unfortunate. It has, however, resulted in these proceedings. In this application an order is sought by the applicant in the following terms:

> "It is ordered that:-
>
> 1. Debbie Jones be and is hereby declared the sole guardian and sole custodian of R … R… Raimondi (born on 19 February 1994).
> 2. Respondent pays the costs of suit."

The gravaman of the respondent's opposition is articulated in paragraphs 8, 9 and 29 of his affidavit which states:

> "8. I confirm that although the child was born out of wedlock applicant and I agreed that he should carry my name and the child is in fact an Italian citizen.
> 9. I am advised that in terms of the Zimbabwean law the mother of an illegitimate child is the sole guardian and custodian of the child. Since the situation is given I am further advised that there is no need for a declaratory order to that effect as is being sought by the applicant …
> 29. She is seeking this declaratory order so that when the time is ripe she will snatch the child up and go. Armed with the declaratory order, even though the child is a Raimondi, the immigration authorities would not require my affidavit confirming that she has the right to take the child out of this jurisdiction. Applicant has used me and is using the child as a weapon."

In Zimbabwe it is trite that under both common and customary law all rights in respect of a child born out of wedlock are vested in the mother and she has the same rights as those of the parents of a legitimate child. The father of a child born out of wedlock has no rights at all in relation to the child. Such a father is in the same situation as a third party in relation to the child. To hold that the father of a child born out of wedlock has rights in respect of the child would be to elevate the legal status of the father of such a child to that of a spouse in a divorce and allow unwarranted interference in the mother's rights over the child. This may seem a bad law to a loving and responsible father in the position of the respondent, but that is the law.

There is however, an exception to this rule. The Supreme Court has aptly laid down the test or approach in such matters – *Cruth* v *Manuel* 1999(1) ZLR 7 (S). Delivering the majority decision MUCHECHETERE JA, with the concurrence of EBRAHIM JA, said at page 14E-G and 15A:-

> "The rights of legitimate parents and therefore those of the mother of a child born out of wedlock cannot be interfered with ordinarily. Third parties, and the father of a child born out of wedlock is placed in the same category, can only interfere with those rights in the interests of the child when they are not being exercised properly. In my view, it should first be appreciated here that it is the rights of the parents and the mother which third parties would seek to interfere with. And one cannot interfere with another's rights if the other person is exercising them properly. The trigger that warrants any interference must therefore be an allegation that the rights are not being exercised properly and that it is therefore in the interests of the child that those rights be interfered with. The welfare of the child in cases of this nature only becomes an issue where there is an allegation that the exercise by the mother of her rights causes some concern. It therefore follows, in my view, that a father of a child born out of wedlock cannot come to court and simply allege that because he is the father of the child, or he is richer than the mother, or he pays maintenance etc, it is in interests of the child that the rights of the mother should be interfered with …
> This would, in my view, be elevating the legal status of an illegitimate father to that of a spouse in a divorce situation … and negating the accepted principle of law that he has no inherent rights in the child born out of wedlock. There must therefore be some allegation that the mother is not exercising her rights properly." See also *Douglas* v *Meyers* 1991(2) ZLR 1 (H); 1987 (1) SA 910 (ZH) at pages 165-168; *F* v *B* 1988(3) SA 948 (D); *S* v *S* 1993 (2) 200 WLD; *F* v *L and Anor* 1987 (4) SA 525(W); *Zwani* v *Dhlamini* 1951 NAC 353 (NE) and *Tiwandire* v *Chipanda* HB-12-04.

Further at page 16A-C EBRAHIM JA amplified –

> "The court is being asked to substitute its own decision for that of a person in whom the parental authority of the minor concerned vests where such person has not been shown to be incompetent to make such a decision. I do not believe that the function of the court as an upper guardian of all minors embraces the right to assume such a role. The mere fact that the court may reach a different conclusion as to where the best interests of the minor lie does not automatically make it the best arbiter of such an issue. Accordingly, it is my view that the starting point in conducting an inquiry of this nature is whether the third party instituting the inquiry has provided some basis on which a finding could be made that the court is more competent than the person having parental authority to make the decision. If no basis exists, the

> inquiry can proceed no further, whether the third party is the father of a minor born out of wedlock or otherwise. If the law is to be changed with regard to such fathers the decision must be that of the legislature not the court."

Our august legislature has not deemed it necessary to intervene statutorily like their counter parts did in neighbouring South Africa. In South Africa the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 has amended the common law and makes provision for the possibility that such fathers of children born out of wedlock may approach the superior court to obtain guardianship or custody. Members of Parliament in our jurisdiction are obviously presumed to be alive to the position of such fathers and will act accordingly when a case is made out for legislative intervention.

Coming to the facts of this I hold the view that both parties have the necessary competence to look after the minor. In view of the approach enunciated in *Cruth* v *Manual, supra*, this inquiry can go no further because the mother is competent. The father's competence is no longer relevant because interference with her rights over the minor depends on her own competence or lack of it. In passing I should also address another issue that arises from the respondent's case i.e. in 2001 she left the minor with him when she went to South Africa. It is evident from the papers that in 2001 the applicant secured a modelling job contract in South Africa with Tribe Model Management. She left the minor child with the respondent so as to enable her to settle in her new job and also to enable the minor to continue with his schooling in Zimbabwe. This act on her part does not render her an unsuitable mother so as to justify depriving her of the guardianship and custody of the child. This does not evince that she was not exercising her custodial or guardianship rights properly. In this regard I refer to what GOLDIN AJA said in *W* v *W* 1981 ZLR 243 at 248B-

> "I do not agree that her conduct in handing over the child to his grandmother under strained economic and emotional situation in which she found herself has rendered her an unsuitable person so as to justify depriving her of the custody of the child. It only shows that she was concerned for the child and in circumstances considered that it would be to his advantage to be with his grandmother until she surmounted her problems."

That is what happened in *casu* – see also *Makumbe* v *Chikwenhere* HB-42-03; *Short* v *Naisby* 1953(3) SA 572 (D); *Calitz* v *Calitz* 1939 AD 5; *Ex parte Walton* 1969(2) RLR 133; *Petersen and Anor* v *Kruger and Anor* 1975(4) SA 171 (C) and *Kuperman* v *Posen* 2001(1) ZLR 208.

This application also seeks to confirm the domicile of the minor. Even though the child was at one stage removed from Zimbabwe, he is still domiciled in Zimbabwe by virtue of the mother being a Zimbabwean citizen who is domiciled in Zimbabwe – *Fervante* v *Fervante* 1951 SR 95.

This application is merely about the applicant asserting her rights over the child. From the foregoing she has made out a case for the declaratur that she seeks.

Accordingly, the application is granted in terms of the above-mentioned draft.

Webb, Law & Barry, applicant's legal practitioners
Masawi & Associates, respondent's legal practitioners