CHRISTINA ERASMUS
versus
DANIEL ERASMUS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 30 JANUARY 2007

Opposed

Mrs *Wood,* for the applicant
Mr *Zhou,* for the respondent

MAKONI J: The applicant seeks an order in the following terms:

"1. That the High Court Order of divorce in case No HC 9097/99 dated 23 May 2001 be and is hereby varied by the deletion of paragraph 2 and the substitution in its place of the following:

2. That plaintiff shall be sole guardian and sole custodian of the minor child Tina Erasmus (born on 10 February 1999)"

The application is opposed.

The background to the matter is that the parties were divorced by an order of this court on 23 May 2001. The applicant was granted custody of the minor child of the marriage with the respondent being entitled to reasonable access. On 11 September 2003 the applicant filed the present application on the basis that the respondent has shown no interest in the child since November 2000 and that he left the country in January 2001 without informing the applicant of his departure or leaving his contact details. In addition the respondent has not been paying maintenance for the child for the past three years. The applicant had great difficulty in ascertaining the respondent's whereabouts and is concerned about such problems arising should she need his consent to any action that has to be taken regarding the child. Due to the problems that the applicant encountered in ascertaining the respondent's whereabouts, the application was only served in 2005 in Botswana. It is not clear from the papers before me the exact date when it was served.

The respondent field a Notice of Opposition with an affidavit which was sworn to at Francistown Botswana on 5 August 2005. The applicant filed an answering affidavit which was sworn at Est court South Africa on the 21 of October 2005. The parties filed heads of argument and the matter was set down for hearing on 20 January 2007.

Three legal issues arise in this matter. These are;

1. The removal of children from the jurisdiction of the court without the consent of the guardian
2. Whether a prayer for sole custody and sole guardianship where these were not dealt with in the trial are new issues or a variation of the court order
3. The jurisdiction of this court to vary its own orders- exclusive and common cause

I will deal with them in seritarium

On the day of hearing Mr *Zhou* raised a point *in limine* that the child in issue had been removed from the jurisdiction of this court. He submitted that the respondent was not consulted and it was difficult to know how the child was removed from the courts' jurisdiction without the knowledge or consent of the guardian. He further submitted that the applicant should explain her conduct to the court before she can be heard. What she did was an apparent breach of the law. It was not mentioned which law the applicant breached.

Mrs *Wood* responded by submitting that the respondent left the country without informing the applicant. It should be noted that the applicant issued the present application in 2003 and it could not be served until 2005. How was the applicant expected to seek his consent when she was not aware of his whereabouts? She further submitted that the applicant was the custodian parent and Annexure A, the divorce order, did not state that the applicant needed the consent of the respondent to remove the child from the jurisdiction of the court.

The point raised by Mr *Zhou* is that the applicant had removed the child from the jurisdiction without the consent of the guardian. In this respect, he presumably was referring to the general position in this jurisdiction that the non-custodian parent can refuse to have the minor child removed from the jurisdiction if this will adversely affect his or her rights of access to the child. (See *Hakim v Hakim* 1988(2) ZLR 61(SC)

There is no legal principle barring a custodian parent from removing a child from the jurisdiction unless it is shown that this will not be in the best interests of the minor child. *Hakim v Hakim* (supra). In casu, no such averment appears to have been made that the removal of the child from the jurisdiction was not in its best interests. It is simply stated that the applicant had unlawfully removed the child from the jurisdiction. As a custodian parent, the applicant can do so in my view. See *Routledge v Hertz* 1988(1) ZLR 252 (HC) where the judge had this to say;

"I also consider that, in the absence of an express stipulation that the children be kept at a particular place or were to be brought to the non-custodian parent , it is incumbent upon the non- custodian parent to go to exercise her rights of access at her own expense wherever the children may be , provided of course the custodian parent does not purposely put the children away from the other parent's reach (by moving the children out of the jurisdiction), to frustrate that other parent's right of access." (The portion in brackets is my own addition).

Further, there is no indication on record that the removal of the child from the jurisdiction was with the intention of frustrating the respondent's rights of access to the child. He was no where to be seen, suggesting that even when the child was within the jurisdiction, he was not exercising his right of access.

I then raised with Mrs *Wood* whether this court still had jurisdiction to deal with the matter when all the parties are outside the jurisdiction of the court. The applicant and the child have been in South Africa from October

2005 and the respondent is currently in Botswana. He left the country in November 2003.

She submitted that this court still has jurisdiction in this matter as the applicant sought a variation of a divorce order granted by this court. Only this court can vary the order.

Mr *Zhou* contended that it was not an application for variation of the divorce order. The issue of guardianship was not dealt with in the divorce order. Paragraph 2 of the order dealt with the issue of custody and access. It did not deal with guardianship. It is a common law position that the respondent is the guardian. He further submitted that by making an application for sole guardianship, the applicant is not seeking to vary the order which was granted by the High Court. It is a completely different cause of action.

In reply Mrs *Wood* argued that paragraph two of the divorce order dealt with the issue of access and that this is missing from the order being sought by the applicant in the present matter. She seeks to deny the respondent access to the child.

Paragraph 2 of the divorce order in case No, HC 9097/99 reads as follows:

> "That the plaintiff is awarded custody of the minor child, TINA ERASMUS (born 10 February 1999) to whom defendant shall be entitled to reasonable access."

It dealt with the issue of custody and access.

In the present application, the applicant seeks to be declared the <u>sole guardian</u> (my own underlining) and the sole custodian of the minor child. The new order is silent on the issue of access. Therefore the applicant also seeks to remove the respondent's right of access.

It is my view that what the applicant seeks, i.e. sole guardianship, is a new cause of action. The divorce order dealt with the issue of custody and did not make an order as to guardianship. The father was left with the guardianship in terms of common law which right he must exercise in

terms of section 3 of the Guardianship of Minors Act [C*hapter 5:08*] (the Act).

To me the concept of guardianship and sole guardianship are two different issues. That is why they are governed by different sections under the Act. Guardianship *per se* is the paramount right exercised by the father of a legitimate child in terms of common law. This right is subject to section 3 of the Act and the power of the court as the upper guardian of children. Sole guardianship is provided for in terms of section 4 of the Act. Either parent may on an application to the High Court be appointed a sole guardian to a minor child provided it would be in the best interests of the minor to do so. He is appointed to act alone without consultation with the mother as is provided for in section 3 of the Act.

A parent granted sole guardianship may, unless the court has ordered otherwise, by testamentary disposition appoint any person to succeed him as a sole guardian. A parent granted guardianship is not entitled to appoint, by testamentary disposition, any person as a guardian of a minor. Sole guardianship also includes the power to consent to a marriage of a minor without the concurrence of the other parent.

It is clear from the above that what the applicant seeks is not a variation of the divorce order but a new cause of action. The issue of sole guardianship was not dealt with at the divorce. If it was a variation then the court would have dealt with the matter. The position is trite. See *Hakim v Hakim* (supra) *Routledge v Hertz* (supra).

Both parties are now outside the jurisdiction of the court. The child into whose welfare the court is being asked to inquire is outside the jurisdiction of the court. Both parents who are to be bound by the order of the court are outside the jurisdiction of the court. There is therefore no basis upon which this court can exercise jurisdiction over this matter.

In any event Section 13 of the High Court Act which confers jurisdiction in civil matters reads:

> "Section 13 Subject to the Act and any other law, the High Court shall have full original jurisdiction over all persons and over all matters within Zimbabwe." (My own underlining).

The parties have removed themselves from within Zimbabwe therefore this court no longer has jurisdiction to determine the issue of sole guardianship.

The applicant was advised that she can still pursue the issue of sole custody and access but her counsel advised that it was not necessary as the applicant already had custody. I would have held that the court had jurisdiction to hear the application as it involved the variation of the order as it related to the issues of custody and access. By electing to abandon these at the hearing, the applicant took away the basis upon which the court had jurisdiction.

In the result, the application is dismissed with costs.

Messrs Atherstone & Cook, applicant's legal practitioners.

Messrs Takundwa & Company, respondent's legal practitioners.