BERLY-LYNN SURTEE
versus
MAHOMMED HASSIN SURTEE

HIGH COURT OF ZIMBABWE
MAKARAU JP and MAVANGIRA J
Harare 7 and 13 February 2008

Civil appeal

Adv R Fitches for appellant
Adv E Matinenga for respondent.

MAKARAU JP: The parties are parents to three minor children, two daughters and a son. They were divorced by an order of this court under case no HC 9397/05. In terms of the order of this court divorcing the parties, matters relating to the custody, access to and maintenance of the minor children were to be governed by the provisions of a consent paper entered into by the parties prior to the granting of the divorce. In terms of the consent paper, custody was awarded to the respondent.

In April 2006, the appellant approached the Juvenile Court for an order varying the custody order in relation to the two daughters only. In the application, the appellant acknowledged that the order of this court granted custody of the minor children to the respondent in terms of a consent paper jointly filed by the parties. She specifically requested the juvenile court to vary the terms of that consent paper on the basis that it is in the best interest of the minor children that there be such a variation. She further alleged that there had been a change in the circumstances of the parties warranting the variation sought. She also explained in detail the reasons why she consented to the respondent having custody of the minor children after this court had initially given her interim custody, pending the determination of the divorce proceedings. She pleaded lack of accommodation, an insufficient income and the toll that the legal battle was taking on her as reasons why she consented to the respondent having custody of the minor children.

The application for variation was duly set down for hearing before the juvenile court. On the appointed day, the respondent's legal practitioner was late in arriving at court. The application was dealt with as an unopposed application and a default judgment was entered for the appellant. The respondent then filed an application seeking the setting aside of the default

judgment. The matter was argued before the trial court which dismissed the application for variation of the custody order and granted the application for rescission of judgment, in that order as the appeal record indicates.

In my view, it is pertinent at this stage that I remark in passing on the procedure adopted by the trial court in this matter. The record indicates that what was before the trial court was an application for rescission of default judgment. She proceeded to determine the merits of the application for variation although the respondent had not filed a substantive opposing affidavit to that application. She then gave her reasons for dismissing the application first before she gave her reasons for granting the application for rescission of judgment all in one breath.

I hasten to observe that no prejudice was occasioned by the order in which the trial court dealt with the matter and that no issue has been raised by either party in this regard. I simply point it out for the benefit of the trial court and to remark that while expediency and speed in the resolution of disputes is to be encouraged and commended, where trial courts use their discretion to depart from the rules of the court, such departure must be recorded and the reasons for so departing must be stated for the benefit of the appeal court. Where the consent of both parties has been obtained for such departure, it must also be recorded not only to prevent either of the parties from taking that departure as a ground of appeal or review but as an indication that the trial court is aware of the issues before it and has deliberately decided to take a shorter and more robust approach to the resolution of the dispute.

The appellant was dissatisfied with the judgment of the court. She noted an appeal to this court. In the notice of appeal, she argued in the main that the trial court erred in finding that it was in the best interests of the minor children that their custody be awarded to the respondent and in failing to find that her circumstances had changed such that it was now in the best interests of the two girls that their custody be awarded to her. Like the trial magistrate, the appellant also dealt with the application for rescission of default judgment last. In the final paragraph of her notice of appeal, she attacked the granting of the application for rescission of judgment by arguing that the court erred in holding that the respondent was not in willful default when the default judgment was granted against him.

At the hearing of the matter in the trial court, the issue of the jurisdiction of that court to vary an order of this court was not raised either by the court mero motu or by the legal practitioner representing the respondent then. The point would have remained unearthed were it not for the professionalism of *Advocate Fitches* who, in line with his duty to cite adverse

authority (a rare occurrence in our courts and so rare an occurrence that GILLESPIE J likened it to hen's teeth[1]), conceded that the determination by the trial court on both applications were a nullity as the approach to the Juvenile Court to vary an order of this court was incompetent and did not bring about anything of value.

In this regard, *Advocate Fitches* cited the case *Raath v Carikas* 1996 (1) SA 756 (W), where the court relied on the ordinary rule of law that an order made by a court can (except only by way of appeal or review in a higher court) not be varied except by the court itself.

In my view, the issue takes on a broader jurisprudential dimension as it deals with the relationship between two courts both having jurisdiction over the same matter, the situation that obtains between the High Court and the Juvenile Court and other lower courts. The point was made with much clarity and simplicity by McNALLY J (as he then was) in *Kunz v Pretorius* 1982 (2) ZLR 24 (HC) where after making reference to *Raath v Carikas* (supra), he opined at page 27 A that:

> "It seems to me that the question here is not which Court is the senior, but which course is more conducive to stability of administration. It is clearly undesirable that I should interfere with an order made by the Juvenile Court. Indeed, since I have no power to intervene by way of appeal, and since I have already confirmed the order by way of review, it would be quite wrong in my view for this Court now to make an order in conflict with the existing order of the Juvenile Court."

The learned judge went on to remark that a similar view had been taken by VAN DEN HEEVER, J, in *Walkinshaw v Walkinshaw*, 1971 (1) SA 148 (NC) and that he found the approach to be both sensible and practical.

It would appear to me that this court has over the years adopted the approach that where there is an existing order by a court of competent jurisdiction, another court cannot make an order competing with or overriding it even if the court making the original order is inferior to the High Court.[2] By the same token, and in reverse order, the position in my view is that where there is an order of this court regulating custody of minor children, the lower court cannot make an order seeking to compete or vary such order. The issue is not that the Juvenile Courtt is an inferior court, but as pointed out by McNALLY J (as he then was) the courts have to adopt a sensible and practical approach to the matter and avoid dealing with orders that are properly before another court of competent jurisdiction save as is provided for under the procedure of review.

[1] See Vengesai & ors v Zimbabwe Glass industries Ltd 1998 (2) ZLR 593 (H) at 596 D.
[2] See de Klerk v de Klerk, G-S-180-80

I am much persuaded by the reasoning that having made the original order of custody with the unstated but undisputable condition that such is subject to variation on changed circumstances, this court was seized with the custody issue and in the circumstances, the juvenile court could not exercise its parallel jurisdiction in the matter at first instance nor could it purport to vary the order in a matter before this court.

Thus, applying the general rule in *Raath v Carikas* (supra) and the approach adopted by this court over the years, the Juvenile Court had no jurisdiction to vary the order of this court as it purported to do and the resultant judgment and ruling were a nullity. The natural consequence of so ruling is that there was no appeal before us.

In a bid to save the day for the appellant, *Advocate Fitches* urged us to use our role as upper guardian of all minors to refer the matter to oral evidence.

Two issues immediately present themselves in the wake of this submission. The first one is that, having ruled that there is no appeal before us as the judgment and ruling appealed against were a nullity, we should immediately rise as there is no issue properly before us. To refer the matter to oral evidence in the same breath or to give any other directions in the matter will be to negate what we have just ourselves said. We cannot give directions in a non-matter.

It my view, the role of the court as upper guardian is to be used to protect the best interests of minor children. It is not a principle that can be used to grant validity to invalid proceedings all in the name of protecting the best interests of minor children.

Advocate Fitches referred us to the unreported judgment of the Supreme Court in *Reith v Antao* SC 212/91 where the Supreme Court used its role as upper guardian of minor children to examine the issue of access to the minor child by the non-custodian parent by making reference to events that had occurred after the granting of the original order. As such the court looked at the original order as if it had been varied by the interim order that was to hold until the determination of the appeal. It was in that regard that the learned judge justified the approach of the court by making reference to its role as the upper guardian of minor children and by invoking its powers to *"take any other course that which may lead to the just and inexpensive settlement of the case."*

In my view, the approach by the Supreme Court in the *Reith* case was to use its role and other powers not to deal with a matter that was improperly before it but to expeditiously deal with the real issues in an appeal properly before the court. On that basis, I would distinguish the judgment.

It is my further view that to purport to give directions in this matter may have the adverse effect of delaying the proper ventilation of issues in the matter while the parties argue over procedure. No averment has been made in any of the papers filed of record that there is immediate danger to the life or morals of the children such that the immediate intervention of the court becomes imperative. To the extent that one can refer to custody matters as ordinary, this appears to me to be an ordinary application for variation of a custody order made some three years ago.

The second issue that arises is to which court will we refer the matter for oral evidence? Sitting as an appeal court, it is most unusual that we would then sit as a court of first instance to hear evidence in the matter. While two judges of this court may sit as a court of first instance, it is unnecessary that we do so in this matter as the matter is not properly before us and in any event, the appellant can bring a properly framed application for variation of the custody order in this court at any time.

In view of the fact that the appeal has turned on a point that was raised by appellant's counsel and in which a concession was properly made, we shall not make an order of costs in favour of the respondent.

In the result, we make the following order:

1. The appeal is dismissed
2. Each party shall bear its own costs.

MAVANGIRA J agrees.

TK Hove and Partners, appellant's legal practitioners.
Mhiribidi, Ngarava and Moyo, respondent's legal practitioners.