JENNIFER ANNE CORMICK
and
BRETT JOHN CORMICK

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 9 and 16 February and 21 March 2007

Opposed Application

Adv *Fitches* for the Applicant
Respondent in default

GUVAVA J: The applicant in this matter filed this application seeking the following relief:

"1. The respondent effect payment of the children's school fees and all school expenses inclusive of the cost of school uniforms, school equipment and sporting equipment and all extra mural activities.

2. Respondent effect payment of US$150.00 by way of rental for the immovable property occupied by Applicant and the minor children.

3. Respondent effect payment of all medical aid subscriptions in respect of the children in Zimbabwe and medical shortfalls and ensure that the children are members of the BUPA Medical Aid Scheme.

4. Respondent effect payment of all cell phone charges incurred by Jordan Grace Cormick.

5. Respondent effect payment of the cost of one tank of fuel per month for the motor vehicle driven by Applicant.

6. Until such time as the Respondent effect payment of the items detailed in paragraph 1 to 5 above that his right to have the children with him be exercised in Zimbabwe only."

The facts which have given rise to this application are basically common cause and may be summarized thus. The applicant and the respondent were married and had three minor children. They subsequently divorced in this court on

24 November 2005. At the time that the parties divorced they entered into a consent paper which governed their rights in respect to custody, access and maintenance of the parties' minor children amongst other things. In accordance with the terms of the agreement, the respondent would not pay any maintenance or school fees for the minor children until his circumstances had changed as he was unemployed and had no savings. Soon after the divorce the respondent advised that he wished to exercise his rights of access to the minor children during the December school holidays. The respondent supplied a detailed itinerary outlining how the children would spend their vacation. The children were to spend a week in London, shopping, going to shows and sight seeing. Thereafter they were to go to Euro Disney Paris and then on to Austria or Italy or Switzerland or France for skiing. The children would be away for a period of four weeks in the United Kingdom and Europe. The children did go on holiday and spent the four weeks with the respondent visiting the places stated.

The applicant on 16 January 2006 caused a letter to be written by her legal practitioners querying the apparent contradiction with respect to the respondents stated means. The response by the respondent was to the effect that he had been able to pay for the children's holiday from money borrowed from friends. The respondent reiterated that he was unemployed, had no income and no savings of his own. Following this holiday the respondent again asked to exercise his rights of access over the April school holidays. He once again took them to the United Kingdom. They spent three weeks in an apartment in London and traveled by Eurostar to Euro Disney for a week.

The applicant has submitted in her founding affidavit that the lifestyle, as exhibited by the respondent, when he has the children on holiday is not that of an indigent person and that he is therefore merely evading his obligations to pay maintenance. It is on this basis that she seeks the above order.

The respondent opposed the application. He stated in his opposing affidavit that he has been trying to obtain employment without success. To this end he attached a number of applications which he had made in the United Kingdom for

employment and to which he has not yet received a favorable response. He reiterated what has been stated in correspondence between the parties that he is relying on handouts from his friends. In support of this the respondent filed a supporting affidavit from one Richard Cook who is the headmaster of Bishopslea Primary School in Harare. He stated that the respondent was his friend and was currently residing at his home as he has no where else to stay. He also stated that he was paying for respondent's upkeep.

At the initial hearing of the matter the respondent was in default. However as I was not satisfied on the papers that the applicant was entitled to the relief sought, I postponed the matter to 16 February 2007 to enable applicant to file further heads of argument.

At the resumed hearing the counsel for the applicant conceded that, on the papers before the court, it would not be possible for the court to make an award of maintenance as there was insufficient proof of the respondent's means. The concession in my view was well made as this case can be clearly distinguished from that of *Lindsay v Lindsay* 1993 (1) ZLR 195 where there was evidence that the respondent in that matter had impoverished himself by divesting himself of all his assets and donating them to a separate legal entity. In this case the applicant herself accepted at divorce that the respondent was unemployed and was without means of support. Had the respondent any savings anywhere outside the country one would have expected that the applicant would have known. With the applicants acceptance that the respondent has no employment or savings this court cannot order maintenance on the basis that the applicant should borrow money from his friends in order to meet his obligations in respect to maintenance.

Advocate *Fitches* however submitted in argument that, even if the court could not make an award of maintenance, it should make an order denying the respondent access to the minor children outside the country as it has the effect of alienating the children from their mother. He relied on the case of *Galante v Galante* HH 177/02 in which SMITH J described the conduct, of one parent alienating the

children's affection from the other parent, as the Parental Alienation Syndrome. It was argued that the court should intervene where parental power was being exercised to the detriment of the minor children.

I was however not persuaded that this was an appropriate case for the court to make such an order. Firstly in the case of *Galante v Galante supra,* there was evidence that the mother of the children was actively inciting them to have ill-feelings against their father. Secondly there was evidence from child psychologists who had found that the children were indeed affected. In this case no such evidence has been placed before me. It is merely assumed that the children will be alienated from their mother because of the luxurious lifestyle they lead with their father when he has access. In any event, I take the view that applicant is the custodian parent and is empowered to make decisions on behalf of the minor children on a day to day basis. In the case of *Makuni v Makuni* 2001 (1) ZLR 189 at 191B GOWORA J quoted the following passage from "*Boberg on Family Law*" at page 460:

> *"*An award of custody to a mother entails to her all that is meant by the nurture and upbringing of the minor child … A custodian parent has therefore the right to regulate the life of the child, determining with whom he should or should not associate, how he should be educated, what religious training he should receive and how his health should be cared for."

(See also *Mavarschalk v Maarschalk* 1994 (2) ZLR 116).

In the same vein should she consider that it would not be in the best interest of the children that the respondent exercise his rights of access outside Zimbabwe she may decline to allow the respondent such access. An examination of the consent paper signed by the parties' shows that it was not part of the consent order that the access should be exercised outside the country. Therefore where and how it is exercised is at her discretion.

On the question of costs, it seems to me that if the respondent had wished to claim his costs he would have appeared for the hearing. As he was in default I take the view that he did not wish to claim the costs for opposing the application.

For these reasons I would decline to grant the relief sought. The application is hereby dismissed with no order as to costs.

Gill, Godlonton & Gerrans, Applicants Legal Practitioners