RENEE ANNE HALE (NEE SWANEPOEL)
versus
MARCUS HAMILTON HALE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 28 March & 5 June 2014

**Opposed Application**

*Advocate Ochieng,* for the applicant
*Mr. I Mureriwa,* for the respondent

TSANGA J: Custody involving three minor currently aged 11, 6 and 4 years informs the dispute that surrounds this application. The dispute centres on custody temporarily lost by the applicant (wife) through a court order granting the respondent (husband) this custody. Custody was regained again by the applicant as a result of a now disputed privately brokered Interim Access Agreement (hereinafter referred to as the Agreement), subsequently signed by the parties that gave the applicant custody. The applicant argues that by signing the 'Agreement', the respondent effectively abandoned the court order. She also argues that withdrawal of the order was done within the ambit of the Magistrate's Court Rules. Stemming from her resumption of custody, what she seeks is an order to shift the children to a school in proximity to where she resides. Two of the children attend boarding school at Lilfordia in Nyabira while the youngest attends Rug Rats nursery school in Harare. The applicant wishes all children to attend school at Lomagundi Primary School in Chinhoyi where she lives. It caters for pre-school.

The respondent opposes the application on the grounds that the court order granting him custody remains extant. He also says the 'Agreement' was obtained under undue pressure brought to bear upon him. He further argues that as the order that granted him

custody has been appealed against by applicant, this application cannot be brought pending this appeal. It is the status of that court order as contrasted with the 'Agreement' that this court has to decide on in order to determine whether applicant's quest is legitimately before this court and additionally whether given the circumstances under which the applicant lost custody to the respondent, the full merits can be determined without the setting aside of that court order.

The fuller context of the above issues is as follows. The applicant initially had custody of the two minor children from the marriage pending divorce in terms s 5 (1) of the Guardianship of Minors Act [*Cap 5:08*] since the parties were living separately from October 2010. Additionally she had full custody over the oldest child born from a prior union. As such, all three children were in her custody. However, as a result of Applicant's history of substance and alcohol abuse that necessitated a period of treatment at a rehabilitation clinic in South Africa in August 2011, the respondent stepped in as the custodial parent. The parties are in agreement that definitely during this period leading to the applicant's rehabilitation, her addiction problems had affected her custodial role. The children were virtually in the respondent's custody. She describes this period as a time when she *"fell off the rails"*.

Upon the applicant's return from her rehabilitation on November 11 2011, she insisted on resuming custody on learning that the respondent had launched an application for full custody. She filed a notice of opposition to his claim. The respondent's application for custody of all three children was on the strength of a negative letter from the Addiction Counsellor sent to him on November 8 shortly before the applicant's return. The letter highlighted applicant's denial of her addiction problem and that she needed to 'experience and acknowledge the consequences of her behaviour and addiction'. The letter recommended as many Alcoholic Anonymous (AA) meetings as possible on her part as well as the need for her to engage a counsellor.

The respondent obtained an order of custody of the children through an order of the Juvenile Court on 6 December 2011. The order was however a result of a default judgment. Although applicant engaged lawyers to represent her, on the day in question they did not turn up. The applicant immediately applied for rescission and stay of execution the following day, 7 December, on learning of the Court order. She also at the same time appealed against the default judgment. The rescission and stay of execution were subsequently dismissed on January 2012 again in default of appearance by the applicant's lawyers. The applicant had nonetheless by this time taken custody of the children on the strength that the law recognised

her custodial rights given the parties' separation pending divorce. Moreover, the oldest child being from a former union, her argument was that the respondent in any event had no rights over this child.

The parties signed the 'Agreement' in February 2012. It effectively recognised the applicant's rights as custodian, following a period of intense disagreement on the custodial arrangement. The 'Agreement' states that it is to terminate upon a decree of divorce being granted dealing with issues of access custody, guardianship and maintenance. Following this 'Agreement' it appears that the applicant effectively abandoned her appeal of the default judgement (H CIV A651/11). Her position is that the 'Agreement" disposes with the need to pursue it. The respondent does not dispute signing this agreement but says it was signed by him out of desperation following arm twisting tactics by the applicant. In particular he avers that applicant was being difficult regarding him accessing the children and was also making exorbitant financial demands. He says the relationship with regard to access, was at least smoother following the 'Agreement'. Moreover he argues that the 'Agreement' is a clear interim agreement pending the appeal. His erstwhile position is that the judgment of the Juvenile Court has not been reversed and remains of full legal force.

The applicant's quest to shift the children from the schools that they were placed has re-ignited the flames and calls for the court's intervention. The oldest child was already at Lilfordia boarding School at the time of the applicant's rehabilitation. She has since been followed by her younger sister and both are weekly boarders. The youngest remains at Nursery School in Harare and is therefore largely in the respondent's custody during term time.

The order sought by the Applicant is in the following terms:

1. (a) That the Respondent be and is hereby required to place the minor children Teya Sandra Benade (born 12th April 2003) and Kodie Courtney Hale ( born 12th August 2007) and Oscar Brain Hale (born 30 November 2009) with the applicant, who has sole custody in terms of section 5 of the Guardianship of Minors Act (Chapter 5:08), failing which the Deputy Sherriff, (if necessary with the assistance of members of the Zimbabwe Republic Police ) is hereby authorised to remove the said minor children from the Respondent or anyone keeping the said minor children and to deliver them to the Applicant.
   (b)That the Respondent will have, at all reasonable times with prior arrangement with the Applicant, access to the minor children.
2. That the minor children will attend Lomagundi College Primary School in Chinhoyi as soon as practicable and following the date of this order.

3. In the event of an appeal being noted against this order, notwithstanding such noting of appeal, this order be and is hereby declared operative and in effect and shall not be suspended.
4. The respondent shall bear the costs of these proceedings

The applicant emphasises that she is a fully recovered alcoholic, who has not touched a drink since her rehabilitation. On her return she says she attended AA meetings and also asserts in her founding affidavit that her sobriety has been buoyed by her Christian faith and desire to adhere to strict moral values. Her argument is that she should not be judged by her past but by her present circumstances. What she would like is to have full custody of her children to enable her to play her motherly role instead of having her children thrust to the care of a boarding school at what she considers to be of very tender ages. She states that she has all the time in the world and that it would ultimately be in their best interests that they reside fully with her under her capable, loving and responsible care as day scholars at Lomagundi College Primary School in Chinhoyi which is where she lives. With regards to the youngest child, she says that he too would benefit greatly from having not only his mother care for him, but seeing and interacting with his sisters on a daily basis. She argues that Respondent is too busy with his work to give the children the same kind of attention that she would avail. She states that they in fact spent considerable periods with their paternal grandparents during the period that she was away. She also says that they spend more time with their aunt the Respondent's sister rather than with the respondent or are left in the custody of domestic workers. The two older children are weekly boarders and the parents alternate seeing them each weekend.

Mr *Mureriwa* raised a point *in limine* regarding the validity of the order sought. In brief, his objection was that this application cannot stand as it is not an appeal of the juvenile court order and nor is it an application for revocation or setting aside this order. Were it to be granted his argument is that it would effectively result in two orders affecting the children. Advocate *Ochieng* for the applicant asserted that this argument would be valid in the Magistrate's Court but that the High Court trumps the children's court no matter what the sequence. He relied on s 5 (7) (a) (1) of the Guardianship of Minors Act as the basis for seeking custody as this provision permits a quest for sole custody in circumstances such as this.

That the High Court is upper Guardian of all minor children is a constitutionally enshrined principle. Children have a right to be protected by the High Court as their upper

guardian. (See s 81(3) of the Constitution). Having heard and examined this case fully, in light of this provision my conclusion was that it would be very difficult to address the point *in limine* outside the full context of the points raised in the application. As such I start by examining the law regarding the custody rights in question in the context of the applicant's quest. I also examine the application and the objections raised within the framework of the best interests of the child and then finally address the impact of the existing order as raised by the respondent. Hopefully this will do justice to the case.

**Custody rights and circumstances allowing for modification under the law**

Section 5 (1) of the Guardianship of Minors Act is the law that accords a mother custody when parents commence living apart. It is worded as follows:

> 5 (1) Where either of the parents of a minor leaves the other and such persons commence to live apart the ***mother*** of that minor shall have sole custody of that minor until an order regulating the custody of that minor is made under section four or this section or by a superior court such as is referred to in subparagraph (ii) of paragraph (a) of subsection (7).

Courts will award custody to the father if it is shown that it is detrimental to the interests of the minors for them to be in her custody. Section 5(3) (b) in particular reads as follows:

> 5 (3) Where the mother of minor has the sole custody of that minor in terms of subsection (1), a children's court may at any time upon the application
>
> a)……
> b) of the father, make an order depriving the mother of the sole custody of the minor and granting the sole custody to the father ***if the court is satisfied that it is in the best interests of that minor that the father be granted sole custody*** and, further make such order relating to the payment of maintenance by the mother and the right of the mother to have access to the minor as the court thinks fit.

The applicant's right to custody under s 5 (1) was therefore altered by the respondent's application for custody under s 5 (3).

Section 5 (7) (a) states as follows with regard to such order made in terms of s 5 (2) & (3)

> "An order of a children's court made in terms of subsection (2) or (3) shall cease to be of effect
> a) if and when any order regulating the custody of the minor concerned is made-
> (i) in terms of section four".

The applicant therefore seeks to rely on s 4 (1) (b) of the Guardianship of Minors Act in support of her application. This section provides that the High Court may on application of

the estranged parents of a minor, make an order granting one of them sole custody of the minor.

Advocate *Ochieng* argued in relation to the oldest child Teya, who is from another union that she can only be removed from her mother's custody where there is harm or danger to her welfare. (*Hardy* v *Skaramangas* 2001) ZLR 196 (H) at 199 is cited in support of this contention). He also argued that it is not for the applicant to show grounds that she be awarded custody but for Respondent to show grounds for her to be refused such custody. *Lothian* v *Valentine* 2007 (2) 168 (H) was cited in support of the court leaning in favour of the child's guardian even where the parent battles an addiction. The important thing is that the addiction must impact on the children if an argument is to be made for their removal. In that case the mother admitted to doing drugs but had started counselling sessions at the time of the application. Counsel's argument was that *in casu* the applicant is already a well-adjusted member of society.

Despite the fairly common occurrence in our context of children being looked after by non-biological parents in one guise or another ranging from grandparents, relatives, to step parents, our legislature has still not seen fit to extend parental rights to *de facto* or psychological parents as in this case. Whilst indeed the legal relationship between the respondent and Teya excludes him as parent, it would amount to taking a very pedantic approach to the law to ignore the circumstances that triggered the application for custody of all three children into respondent's care. It is a vital fact that what motivated the application for modification of custody was the fear of harm and neglect of the children in light of the experience that had led to the applicant's rehabilitation. More importantly it was stimulated by the rather grim prognosis about her acceptance of her condition given by her counsellor at the time of her imminent return.

Protection of children from harm or neglect is a constitutional guarantee. (See s 81 (e) of the Constitution). It is also expressed in legislation such as the Children's Act [*Cap 5:06*] in s 7. Furthermore, this was not a case of a stranger seeking to impose himself as custodian inclusive of one of the children who is not his. There is a parent like relationship with the child. Moreover the respondent has been in the child's life as a *de-facto* parent since the child was three years and eight months old and he has lived with the child since. He has also taken care of the child although it is conceded that her father now meets her schooling costs. That a parental bond exists between the respondent and Teya is not disputed. His quest for custody in the court below, has to be understood in this context. Although the respondent may indeed

not have any recognised legal right over the child, it is clear that the order was deemed warranted and was granted in his favour on the basis of the best interest of the child to be protected from potential neglect.

While the applicant contends that it was astonishing that the respondent should have also applied for the custody of Teya who is not his biological child, the reality is that it would have been far from realistic for him not to have done so. It would have been undesirable to try and separate the children who are siblings. It was even more important not to add any further stress to the children lives by introducing a 'yours and ours' approach.

As explained in Van Der Linde V Van Der Linde 1996 (3) SA 509 (O) at p 510,

> "…..all being equal, siblings should not be unnecessarily separated from each other. The reason being that siblings experiencing the trauma of a divorce tend to form a bond with each other. A bond which to a great extent gives them a feeling of security against the 'onslaught from outside". (per Hattingh J)

In the case of the two younger children, Advocate *Ochieng*'s argument was that the best interests of the children dictate that because of their tender ages their interests are best served by being with their mother. Reference was made to *Goba* v *Muradzikwa* 1992 (1) ZLR 212 (S) at 214 C-G and *Mutetwa* v *Mutetwa* 1993 (1) ZLR 176 (h) at 183A-F.

Mr *Mureriwa* on the other hand, argued that the criteria to be used in assessing the best interests of the child are, which parent is better able to promote and ensure the physical, emotional and spiritual welfare of the children. The criteria laid down in *McCall* v *McCall* 1994 (3) SA 2001(C) was referred to for guidelines that courts generally take into account in determining 'best interests'. He also emphasised in his argument that a professional evaluation of the current position of the applicant with regards to her stability to look after the children is imperative. Also a professional social welfare officer's report on the applicant's suitability as parent is deemed necessary.

The applicant's averment that it is necessary for her to play her maternal role given the children's tender ages also needs scrutiny. For while comparatively speaking, it remains the reality that women still find themselves saddled with the child caring and roles, child rearing is no longer seen as a naturally exclusive domain for women only. Indeed our Constitution espouses equality and non-discrimination as the guiding standard in parental roles. Breaking down stereotypes about gendered roles is also what State parties undertake to work towards in terms of article 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which we are also a party.

In *P* v *P* 2007 (5) SA 94 (SCA) at p 102 VAN HEERDEN JA commented as follows regarding the 'tender years and maternal preference' principle within the context of the South African Constitution which likewise embraces equality and non-discrimination in parental roles for men and women:

> "In more recent cases, the value systems and societal beliefs underpinning maternal preference or tender years principle have been challenged and courts have emphasised that parenting is a gender neutral function and that the mother is necessarily in a better position to care for a child than the father belongs to a past era".

He also further suggested at p 102 of that judgment that:

> "in determining what custody arrangement will best serve the children's interest in a case such as the present , a Court is not looking for the 'perfect parent' - doubtless there is no such being. The court's quest is to find what has been called 'the least detrimental available alternative for safe guarding the child's growth and development".

In *casu* the court cannot go on to make a determination on the applicant's suitability or otherwise on all the pertinent matters raised, outside of a professional report on her recovery. In a case such as this where a link between the addiction and failure to play a custodial role has been previously made, it is vital before an applicant can resume custody which has been taken away for a professional evaluation to be availed to the court. A self-assessed declaration of recovery is clearly not adequate especially where children's lives and welfare is involved as in this case. It is in all probability necessary for a clinical psychologist to provide a report on the children involved since the applicant re-assumed custody in spite of the court order.

**The best interests of the children**

In any event it would also seem to me that this issue regarding the children's schooling cannot be dealt with satisfactorily without hearing the views of the children themselves, especially the two older children who are already at the boarding school in question. I say this because a particularly noteworthy aspect of the new Constitution is that it grants both parents and children rights. Parents for instance can expect in terms of s 25 that the State and all its institutions will protect and foster the institution of the family. This provision can be said to protect parents in the upbringing of children within the family context. They can also expect the State to take measures to ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution in terms of s 26 (b). For women in particular, s 80 (2) guarantees women the same rights as men regarding

custody and guardianship although an Act of Parliament may regulate the exercise of those rights. The right to privacy is guaranteed through s 57. Yet all these rights that undoubtedly impact on parents now have to be balanced against those which our Constitution also gives to children. This is even more so where parents as in this case, are not in agreement as to what is best for the child. Constitutionally, as of right, children are no more at the margins and periphery of decisions affecting them. They effectively have a right to be part of those decisions. I say this in light of s 81(1) (a) which grants children the right to be heard. It is framed as follows:

> 81(1) every child, that is to say every boy and girl under the age of 18 years has the right:
>
> a) To equal treatment before the law, including ***the right to be heard.***

This section effectively gives a "voice" to children on matters that concern them. The provision is also effectively an incorporation in our domestic setting of the spirit of Article 12 of the UN Convention the Rights of the child which advances this notion of their participation and inclusion. Article 12 explains this rights thus:

> " a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of that child being given due weight in accordance with the age and maturity of the child".

The best interest principle which has also been the criteria used by our courts in matters concerning children now not only finds constitutional expression but also exists amidst certain rights given to children by the Constitution. Thus the principle of the best interests of the child, said to be paramount in every matter concerning the child under s 81(2) of the Constitution is now also better placed to take its specific character and meaning from the rights that are accorded children by our Constitution. Pertaining to this case, it is their best interests that they be heard, especially for the older children who are in boarding school and have an appreciation of the issue. Their views are necessary to obtain in order for the court to make an informed decision that takes into account their experiences with boarding school. My assumption here is that having already spent time at the boarding school they are able to comprehend the issue at stake and exercise their right to be heard on what they think is best for them. Given that participation has to be age appropriate, in practice courts have often achieved participation through a judge or judicial officer speaking to the children themselves or where it is not practical through child welfare professionals giving their report. The

youngest child Oscar may not be able to exercise this right due to his age, thus a welfare report that is done in consultation with those at his nursery would fulfil the purpose.

**The status of the appeal**

The order obtained by the respondent may according to the law, be varied, suspended, or rescinded upon application by a children's court upon affording the other parent an opportunity to oppose the application.

Section 5(10) in this regard puts it thus:

Any person who is aggrieved by

a) An order of a children's court in terms of subsection (2) or (3) or the variation, suspension, rescission or revival thereof or
b) The refusal of the children's court to grant an application in terms of this section may appeal against such order, variation, suspension, rescission revival or refusal to a judge of the High Court who may refer the matter to the High Court for argument.

The applicant, as stated, did apply to rescind the order and rescission was refused in default. She also filed an appeal. The applicant's argument that the 'Agreement' dispensed with the need to pursue her appeal is based on her reliance on order 31 Rule 6 of the Magistrates' Court (Civil) Rules 1980. This provision states as follows regarding abandonment of the whole or part of a judgment by a respondent:

> 6. "A respondent desiring to abandon the whole or any part of a judgment appealed against may do so by the delivery of a notice in writing stating whether he abandons the whole or , if part only, what part of such judgment."

There is no evidence of any notice in writing to the effect that the respondent explicitly abandoned the whole or any part of the magistrate's ruling. The argument by the applicant's counsel that the provision does not state the format which this notice is supposed to take is not sustainable. Given that a judgment is an order of the court, I cannot see how such a notice can evade proper notification of the court that granted it. The reality is that there is no such notification by the respondent. As such the order of the Magistrate court that the application for stay of execution and rescission of the default judgment be dismissed, still stands. This order granting the respondent custody of the children is valid until it has been successfully appealed against.

**Whether the order is suspended by the appeal**

The application for rescission of the default judgement was made in terms of s 39 (1) (a) of the Magistrates' Court Act. This provision permits the court to rescind or vary a judgment granted in the absence of the other party. In terms of s 39 (3), such an application to rescind, correct, or vary may further direct that the judgment be carried into execution, or that execution be suspended pending decision on the application. *In casu*, the court below ordered a dismissal of the application for rescission and for stay of execution.

Section 40(3) which deals with appeals, is also a subsection that addresses suspension or execution of a judgment pending the hearing of an appeal. In terms of this subsection, where an appeal has been noted, the court may direct that the judgment be carried into execution or that it be suspended.

However, for the court to make a decision either way, it must be approached specifically with a request. This provision was unpacked in the case of *Ritenote Printers (Pvt) Ltd* v *A Adams and Company & Anor* 2011 (1) ZLR 521. At page 524C of that judgment, CHIDYAUSIKU CJ opined as follows with regards to this section:

> 'In my view, the wording of s40(3) of the Act leaves a lot to be desired, but a proper reading of the section reveals that it confers on the magistrate the power to stay execution despite the noting of an appeal. The section also confers on the magistrate the power to order execution despite the noting of appeal. It follows therefore that for the magistrate to exercise the discretion in terms of s40 (3) of the Act, the party seeking to have the discretion exercised in its favour has to make an application. Upon the making of such application the magistrate exercises the judicial discretion and makes a proper determination."

(See also *Sub Saharan Mgmt Consultants (Pvt Ltd)* v *Sirituta Invstms (Private Ltd & Ors* 2012 (1) ZLR 462(H) at 470 A-D where the above reasoning is also followed).

*In casu*, the decision of the court below in terms of s 39 (3) already addressed the issue of stay of execution. The judgment was in the respondent's favour so he would not have needed to approach the court for a determination in terms of s 40(3). On the applicant's part, it would have made no sense for her to re-approach the same court to make yet another determination on the very point it had already canvassed. This would have been tantamount to asking it to reverse its decision. Consequently, the appeal that the applicant lodged in the High Court did not suspend execution of judgment. That aspect had already been addressed within the ambit of the powers granted to the court below to do so.

The option of pursuing the appeal lodged with the High Court, to its logical conclusion, remains open to the applicant. Her quest to have sole custody involves the

welfare of children especially given the realities that led to the loss of custody to the respondent, albeit by default. In light of these circumstances, I cannot see how the order granted can simply be dispensed with by an agreement without the involvement of a court specifically setting aside the existing order. This remains to be done.

The respondent sought the dismissal of this application with costs on a higher scale. However, in my view, these are not justified because his signing of the so called 'Interim Access Agreement,' in the face of an existing court order, has partly contributed to the confusion.

In the circumstances, this application is hereby dismissed with costs on an ordinary scale.

*Atherstone & Cook,* applicant's legal practitioners
*Scanlen & Holderness,* respondent's legal practitioners