MARION LYNDA RALPH
versus
CHRISTIAN HENDRICK VAN VUUREN

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 22 January 2009

Family Law Court-Unopposed Application

N.R. Mutasa, for the applicant
Respondent in default

KUDYA J: The applicant seeks appointment as the sole guardian of the minor child Roxanne Chantal Van Vuuren, born 1 December 1994. She is the mother of the child. Her marriage to the girl's father was terminated by consent by order of this Court on 7 August 2002 in case number HC 2367/2002. The order adopted the detailed consent paper that was executed by the applicant and her former husband in Harare and Johannesburg, respectively.

This Court assumed jurisdiction on the basis of the additional grounds found in s 3 (1) (c) of the Matrimonial Causes Act [*Cap 5:13*]. Apparently, as appears in his affidavit of waiver that was executed in Johannesburg, he was not domiciled in Zimbabwe, a country he had left in 1998. She was, *inter alia*, awarded custody of the minor child.

She launched the present application on 1 April 2008. She provided the address of service of the respondent as 127 Enterprise Road, Highlands in Harare. On 23 June 2008, she obtained an order to serve the application by edictal citation once in the Herald newspaper and in the Government Gazette, which she duly did in both medium on 14 November 2008.

Paragraphs 11 and 13 of her founding affidavit are the mainstay of her application. I reproduce them hereunder:

11. It has become necessary that I apply for the minor child's passport and get her a Visa so that she can pursue her education outside Zimbabwe and have the benefit of better educational facilities. However, to be able to apply for the minor child's passport and Visa, respondent will be required to sign the application forms. This has proved to be

extremely difficult, as I do not have any contact or communication with him. Without the respondent's signature, the immigration authorities demand that I furnish them with legal documentation to prove that I am the minor child's guardian, or to get the respondent to sign up the documents.

13. I submit that it is in the best interest of the minor child if sole guardianship is awarded to me in that:

13.1. it will be easy to obtain her student permit in the United Kingdom where she can have access to better living and educational facilities and conditions.

13.2 it will remove the barrier of having to trace the respondent's whereabouts so as to make joint decisions regarding the child, a situation that is not expedient in cases of emergency or ordinary course of the child's livelihood. In any event, respondent having deserted the matrimonial home and having shown no indication of seeking to re-establish any connection with the minor child there is doubt that the respondent will be agreeable to make joint decisions with me.

13.3 the respondent has not involved himself in any way, in any decisions regarding the up bringing or nurturing of the child and has no contact with the child or myself

13.4 notwithstanding the existence of a court order for maintenance respondent never paid maintenance for the minor child

13.5. At this age, the child cannot identify her father let alone identify with him.

13.6. respondent has elected to abandon his right of guardianship over the child.

As framed by the applicant, these two paragraphs seek to cast the burden of proof on the respondent by blaming him for failing to firstly, communicate with her and secondly, exercise his guardianship role. It also emerges from the other clauses in her founding affidavit that she remarried on 8 March 2003. Further, that the respondent also remarried. Her founding

affidavit is silent on the steps that she took to notify the respondent of the need for him to exercise his role as a guardian.

In my view, the application betrayed a failure by the applicant to appreciate the fine distinction between custody and guardianship. Had she done so, her application would have been structured differently. It is necessary that I set out what the two concepts entail. Textbook writers have attempted to define both concepts. HR Hahlo in the *South African Law of Husband and Wife* 5th edition at 394 wrote:

> "Custody is but one incident or sector of natural guardianship. Where as happens in most cases, custody is awarded to the mother and no order is made as to guardianship, the father is left with guardianship minus custody. The mother as the custodian parent is entitled to have the child with her, to control its daily life, to decide all questions relating to its education, training, religious upbringing and to determine what homes or houses the child may or may not enter and with whom it may or may not associate. In cases of urgency she can supply the necessary consent to a surgical operation on the child."

See also Boberg in *The Law of Persons and Family* 2nd edition at p 661-664.

VAN HEERDEN J in *Governing Body, Gene Louw Primary School v Roodtman* 2004 (1) SA 45 (C) at 51H- 52B set out the rights and duties of the custodian parent in terms similar to those outlined above by Hahlo in these terms:

> "At common law a parent (or other person) who has the custody of a minor child is entrusted with the care of the child's person and the decision-making power in respect of the child's day-to-day life, upbringing and education. A useful description of the position of the custodian parent is given by Gubbay J in *Matthee v MacGregor Auld and Another* 1981 (4) SA 637 (Z) at 640D - F:
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> > '(T)he custodian parent has, therefore, the right and duty to regulate the life of the child; to choose and establish his residence (*Landmann v Mienie* 1944 OPD 59 at 65); to resolve with whom he should be allowed to associate (*Wolfson v Wolfson* 1962 (1) SA 34 (SR) at 37C - H); to direct the lines on which his secular education should proceed (*Simleit v Cunliffe* 1940 TPD 67 at 76; *Scott v Scott* 1946 WLD 399 at 401), including the choice of the school (*Martin v Mason* 1949 (1) PH B9 (N)); to devise upon his religious instruction (*Ryan v Ryan 1*963 R & N 356 (SR) at 368A); to determine what medical advice, supervision or assistance should be sought in the event of his becoming ill or sustaining an injury (*Oosthuizen v Rix* 1948 (2) PH B65 (W); *Custner v Hughes* 1970 (3) SA 622 (W) at 625B). The . . . non-custodian has no right of interference in these matters.'"

Hahlo, *supra,* at page388-9 further states that:

> "At common law, guardianship in its widest sense includes custody, and embraces the care and control of the minor's person as well as the administration of his property and business affairs. Where custody and guardianship are separated, the custodian parent has the care and control of the minor's person, while the guardian parent administers his property and business affairs ('guardianship' in the narrower sense)."

The learned author proceeds to define guardianship in the narrower sense at page 395 in these terms:

> "By virtue of his guardianship, it is the father's right and duty to take charge of and administer the property of the minor; invest his moneys; pay his debts; and contract on his behalf in business matters. In legal proceedings the minor must be represented or assisted by the father, unless the mother obtains leave from the court to bring or defend an action on the minor's behalf. The right to alter the child's name, too, vests in the guardian and not in the custodian spouse.
> For marriage, the minor requires the consent of both parents, unless one of them has been awarded the sole guardianship of the minor, in which case that parent's consent is necessary and sufficient. For an antenuptial contract, the consent of the father as guardian is necessary and sufficient, unless he has been deprived of the guardianship of the minor, or his parental powers have been overridden."

The factors that the applicant used in her founding affidavit to portray the respondent as a disinterested parent all fall in the category of those that are exercisable by a custodian parent. She was awarded custody and she alone has the legal obligation to exercise those rights. She cannot use the non-interference of the respondent in the exercise of her rights as demonstrative of his ineligibility as a guardian.

It seems to me that she bears the onus of proving on a balance of probabilities that the respondent as the guardian has refused to perform the functions of guardianship or has, in his role as a guardian, been irresponsible and neglectful of the child's interests. See *Ryan v Ryan, supra,* at p 367E and Ncube in *Family Law in Zimbabwe* at 115.

Mr. *Mutasa,* for the applicant, submitted written heads at my instance. He contended that the s 4 (1) of the Guardianship of Minors Act [*Cap 5:08*] enjoins the High Court as the upper guardian of all minors to wrestle guardianship from the father and grant it to the mother where the mother has proved that he has refused or discarded the duties of guardianship. He correctly submitted that it was not the duty of the Court, in these circumstances, to protect a 'natural' or 'God given' right of guardianship vested in the father. His submission resonates with the sentiments expressed by GIBSON J in *Pinto v Benjamin* HH 292/1986 at p 3 of the cyclostyled judgment. The learned judge stated as follows:

> "Under the Guardianship of Minors Act, CAP 34, unlike the common law, the father and mother have equal standing, and either is eligible on merits to be considered for guardianship of minor children of the parties. Under this statute the primary consideration to be borne in mind in determining the issues by the court is what is in the best interests of the minor; the *pater familias* no longer has that easy ascendancy over the mother, to be displaced only where there is good reason, such as refusal or neglect. This list is not exhaustive.
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> It is clear from various past authorities that what is in the best interests of a minor can be arrived at after looking at a wide variety of factors, such as the sex, age, and health of the minor child. Apart from that the ability of either parent to safeguard the moral wellbeing and financial needs of the child must bear a decisive influence on the entitlement of either parent."

GIBSON J did not in her judgment identify the various past authorities. She may have had in mind the sentiments of SQUIRES J in *van Rensburg v van Rensburg* GS 177/1981 at page 2-3 of the cyclostyled judgment where it is stated thus:

> "Now, although the Guardianship of Minors Act provides that the best interests of a minor is the primary consideration in awarding guardianship of a child to one or other of divorced parents, and although the wife and mother now occupies a position of equality in such choices as distinct from the common law, in practice the courts are still reluctant to appoint a mother as the guardian of a minor to the complete exclusion of the father unless there are some good grounds for so doing. The reason for this, it would seem, is that since guardianship imposes duties as much as, or even more than, it confers rights, it is normally not in the best interests of a minor child to deprive the father of guardianship unless he refuses to perform the function of a guardian or is sufficiently irresponsible or neglectful of the child's interest as to amount to such a refusal; or is physically so far from the child as to be unable to do so, or some circumstances of a similar nature and effect can be identified."

A full reading of the *Pinto* case, however, shows that GIBSON J was influenced by the fact that Mr. Benjamin was an incorrigible criminal who relished going in and out of prison and who was serving a three year prison sentence. He had had no contact with the children since his divorce from their mother in 1981, had not exercised his right of access nor paid maintenance despite her best endeavours to obtain his cooperation in these respects. His explanations were dismissed and it was held that he was both irresponsible and thoroughly neglectful of his duty. It seemed to me that the factors that were listed by GIBSON J fall into the realm of custody rather than guardianship in the narrower sense. To the extent that she was influenced by these custodian factors in her decision to grant Mrs. Pinto sole guardianship of the parties' three minor children, I would respectful disagree with her decision.

In the *van Rensburg* case, *supra*, despite the fact that the father had refused to sign documents that would enable the minor to obtain a passport and had an erratic record of maintenance payments, SQUIRES J declined to award sole guardianship to the mother. Rather, he extended her custodian powers to cover those specific areas that the father had refused or neglected to exercise guardianship.

Both the *Pinto* and *van Rensburg* cases, *supra*, are distinguishable to the present case in one major respect, that is, that the respondents opposed the application. Again, in the *van Rensburg* case the mother had made a diligent search for the father. In the present matter, the respondent did not oppose the application. He was not personally served with the application which was served by edictal citation through a local newspaper and the Government Gazette. It was not clear to me why the applicant chose to do this when the divorce proceedings showed that the respondent was domiciled outside Zimbabwe since 1998 and lived in Johannesburg. No diligent search for him was ever conducted by the applicant. Mr. *Mutasa* intimated from the bar that he had been instructed by the applicant that the respondent had at the time the application was instituted been residing at a house in Harare. In my view, even if that instruction was correct, the applicant did not aver what steps she took to bring to the respondent's attention her decision to remove the child from Zimbabwe to the United Kingdom that appears to have triggered the need for her to obtain a passport some six years after the divorce. She did not state what measures she took to either trace his whereabouts or to enforce the maintenance order. She appeared to have been content with his alleged disinterest in the affairs of his child. I found her affidavit lacking in candor. In one vein she appeared to be ignorant of the happenings in the respondent's life since his desertion and in another she was aware that he had remarried just as she had done. I had the distinct impression that she was snatching at sole guardianship.

It was clear from her affidavit that the respondent had not refused to exercise any of his powers of guardianship. The factor which necessitated the application arose from the applicant's unilateral decision to remove the child from Zimbabwe, which decision she did not communicate to the respondent. When he allegedly came to Zimbabwe, she did not advise him of her intentions. It does not appear to me that he was aware that there was a need for him to exercise his guardianship powers. He is not aware of the application. I do not know whether the allegations of neglect in the general custodian welfare of the child are true. Because he has

not had notice of the application, I cannot hold that he has deliberately refused to come to court. It appears to me that the applicant is snatching at sole guardianship.

In these circumstances, it would be remiss of me to exercise my discretion in depriving him of guardianship. The applicant has failed to discharge the onus on her to show that he has been neglectful of his duties as a guardian in the narrower sense.

Accordingly, her application for sole guardianship is dismissed with no order as to costs.

Costa and Madzonga, applicant's legal practitioners.