GILBERT CHINYA HUNGWE

versus

HANDINA FAITH HUNGWE

HIGH COURT OF ZIMBABWE

MAWADZE J

HARARE, 29 October 2014 and 8 May 2014

**Opposed application**

*T. R Mugabe*, for the applicant

*Ms M. Gwaunza*, for the respondent

 MAWADZE J: This is an opposed application for variation of a court order in respect of custody of one of the minor children and a maintenance order in respect of the other minor child in the following terms,

 “IT IS ORDERED THAT:-

1. Custody of the minor child D (born on 11th November 2003) be and is hereby awarded to the applicant.
2. Applicant be and is hereby granted leave to remove the child D (born on 11th November 2003) from Zimbabwe to the jurisdiction of the Republic of Botswana for the duration of his primary education.
3. Respondent shall have reasonable access to the minor child D (born on 11th November 2003).
4. Applicant shall contribute fifty percent (50%) towards the tuition for the minor child F (born 13 October 1998) and
5. Each party shall bear its own costs.”

The background facts in a nutshell are as follows;

The applicant and respondent were married in terms of the Marriage Act [*Cap* 5:11]. The applicant approached the court seeking a decree of divorce and ancillary relief and on 2 February 2009 the applicant was granted a decree of divorce and ancillary relief in unopposed proceedings by my sister GUVAVA J ( as she then was).

The following order was granted;

 “IT IS ORDERED THAT;

1. A decree of divorce is hereby granted.
2. The custody of the minor children F (born 13 October 1998) and D (born on 11th November 2003) is hereby awarded to the defendant.
3. The consent paper signed by the parties marked exhibit 2 shall govern the issues of access and maintenance to the minor children and the division of the parties matrimonial assets.
4. There shall be no order as to costs.”

In terms of para 2 of the consent paper custody of both minor children F (born 13 October 1998) (herein after F) and D born on 11 November 2003) (herein after D) was awarded to the respondent. At the time of hearing of the matter F was in form 3 at Arundel School and D at Primary school at Hartman House also in Harare. As at now F is 151/2 years old and D 10 years old. In terms of para 2.2 and 2.3 of the consent paper applicant was granted reasonable access rights in respect of both minor children during every alternate school holidays at all times when he is in Zimbabwe. In terms of para 2.3 of the consent paper neither party should remove the children from Zimbabwe without the consent of the other.

In terms of para 2.4 of the consent paper it was ordered that both minor children shall attend such private schools as may be agreed in writing by the parties.

Lastly in terms of para 3 of the consent paper dealing with the welfare of both minor children applicant is to pay the full school account in respect of both minor children, buy clothes twice a year whereas respondent shall be responsible for the day to day upkeep of the children including provision of food and necessary care.

The applicant although a Zimbabwean citizen, is an expatriate medical doctor for a well to do diamond mining company in Botswana where he resides. He has since remarried although it is said there are no children born out of that marriage. The respondent is a senior bank manager with Stanbic Bank in Zimbabwe and has not remarried after the divorce. The parties were so employed at the time of the divorce.

The applicant seeks variation of the custody order and that the custody of D be awarded to him and that he is allowed to remove D from Zimbabwe to Botswana for the duration of his primary school education with the respondent enjoying unspecified reasonable access rights. In respect of F the applicant who has been paying the full school account seeks an order compelling the respondent to pay fifty percent (50%) towards tuition of F for an unspecified period. However in the founding affidavit the applicant seems to suggest that F be transferred from her current school to other schools like St Faith School, Marist Brothers, Bonda Girls, Christ Mambo School or St Dominic’s where he says the tuition fees are within his means.

The basis for the application as stated in his founding affidavit is that applicant alleges that he is no longer able to afford the tuition fees for both minor children. The applicant’s position is that in order to solve this problem he should be given custody of D and that respondent contributes half of F’s tuition fees.

The applicant explained his predicament as follows:-

According to the applicant, when the current order was granted on 2 February 2009, it was at the height of hyper inflation environment in Zimbabwe. The applicant who was (and still is) employed in Botswana was earning salary in foreign currency which was then scarce in Zimbabwe. The appellant said he was able to buy cheaply Zimbabwean currency and meet easily all the maintenance requirements of both children. According to the applicant the situation has since changed as a multi currency regime was introduced in Zimbabwe. It is pertinent to not that applicant does not state when the multi currency system was introduced in Zimbabwe *vis-a-vis* the current order. Judicial notice can be taken that the milti currency was introduced in Zimbabwe in February 2009 the same month the current order was made and by then the Zimbabwean currency had become moribund. It is applicant’s case that the introduction of the multi currency regime has massively eroded his ability to provide for the minor children in respect of the tuition fees and purchase of clothes twice a year. According to the applicant the Botswana Pula has since taken a severe knock in terms of value against the United States dollar. The applicant did not state when this actually happened nor are comparative figures given for the relevant period.

 The applicant explained in his founding affidavit that he is now paying school fees in Zimbabwe for both minor children in United States dollars. The applicant then explained how this has proved almost impossible for him to achieve.

The applicant states that his salary is BWP 24 323-65 per month which translates to US$2 900-00 per month. The school fees for D per term is US$2 090-00 or BWP 17 416-17 which if my calculation is correct translates to US$522-50 or BWP 4 354-17 per month.

In respect of F the tuition fees is US$2 690-00 or BWP 22 416-17 per term which translates to US$ 672-50 or BWP5 604-17 per month. Again if my calculations are correct this would leave the applicant with a disposable income of US$ 1 705-31 or BWP 14 367-31 per month after paying or budgeting for school fees for both minor children.

It is upon this basis that applicant indicates that he is unable to pay the tuition fees for the minor children and that respondent should either contribute half of F’s tuition fees or agree to have her transferred to the schools I have already mentioned. Applicant said he failed to convince the respondent either way hence this court application.

According to the applicant the respondent now has the means to contribute towards F’s tuition fees. However the applicant does not show how, for example by explaining the respondent’s means when the order was made in February 2009 and her means now *vis-a-vis* the obligations she has in terms of para 3.3 of the consent paper which relates to the daily upkeep and food for the children. Instead applicant bemoans his alleged inability to comply with this court order by buying school uniform, his failure to exercise access rights and the alleged unfairness in the sharing of the immovable assets (houses) at the time of the divorce and movable assets like motor vehicles. Applicant raises all these so called grievances despite the fact that the divorce order was by consent! Applicant also refers to his inability to meaningfully maintain his aged mother and to meet the obligations of his new family (wife). All what applicant stated is that respondent is now earning a salary in United States dollars unlike the Zimbabwean dollars when the order was made.

In relation to D applicant proposes that he be awarded custody of D so that D is transferred from Hartman House in Zimbabwe to a unmentioned private school in Botswana where applicant alleges the curriculum is similar to the Zimbabwean one. No evidence to support this is provided. Applicant alleges that his employers would also subsidise D’s education if he is in Botswana.

Lastly the applicant stated that his circumstances have changed since the time the order was made as he has now remarried. The applicant did not however explain how or provide a schedule of his expenses. In fact applicant only attached his salary advise slip to his answering affidavit thus depriving the respondent the opportunity to respond to it in the opposing affidavit.

In her opposing affidavit the respondent states that the current order was made at the time multi currency was introduced in Zimbabwe and that applicant’s alleged inability to purchase foreign currency is irrelevant. The respondent states that the current order was made 4 years ago and the applicant has not sought its variation in 2009 when he started to experience the alleged difficulties. In fact respondent stated that the school fees for both minor children has always been quoted in United States dollars from the time the order was made. The respondent stated that the applicant has always failed to comply with para 3 of the consent order.

The respondent states that she is surprised that applicant is now bemoaning that the minor children are attending private schools when this is what they both agreed not that respondent acted unilaterally. Further respondent explained that she has met her part of the bargain as per para 3.3 of this consent paper as she has ably looked after the day to day needs of the minor children, their upbringing and social activities. To support this respondent attached an Annexture of her expenses in respect of the minor children (Annexure F). The respondent denied that her financial position has changed for the better and attached her pay slips as Annexure G-J for 2013for the court to appreciate her income *vis-a-vis* her expenses. The respondent states that there is no need to transfer F from her current school or to uproot D from Zimbabwe to Botswana. The respondent argued that the application should be dismissed with costs on a higher scale as applicant had no good cause to make this application.

The applicant’s answering affidavit is long, winding and irrelevant as it does not address many of the concerns raised in the opposing affidavit.

Before I deal with the merits of the matter I shall deal first with the two points *in limine* raised by Ms *Gwaunza* for the respondent. I dismissed them and indicated that I will give full reasons in this judgement.

The first point *in limine* taken by the respondent is that the applicant has approached the court with dirty hands as he has consistently and persistently failed to comply with para 3 of the court order which relates to his obligations towards both minor children. Ms *Gwaunza* argued that on that basis alone the applicant should be denied audience by this court until such time he complies with the order. However Ms *Gwaunza* later withdrew this argument hence there is no need for the court to pronounce itself on that aspect.

The second point *in limine* taken by the respondent is that the applicant failed to comply with the pre-emptory provisions of r 249 of the High Court Rules 1971 which provides for the appointment of a *curator ad litem* before an application of this nature can be made. Ms *Gwaunza* for the respondent submitted that such non compliance is fatal to the application.

The relevant provision r 249 (1) of the High Court Rules 1971 provides as follows;

“249 Application involving persons under disability or minors

1. In the case of any application in connection with-
2. ----------
3. a minor

a chamber application annexing the written consent of the person proposed to be so appointed, shall first be made for the appointment of *curator ad litem*”

It is common cause that the provisions of r 249 (1) of the High court Rules 1971 (the Rules) are mandatory. It is also not in issue that in this application two minor children are involved. I however do not share the view that this is an application involving minor children. This application is two pronged. The first aspect relates to variation of a maintenance order in respect of one of the minor children. It is clear to my mind that r 249 (1) (b) of the Rules is irrelevant to such application as a curator *ad litem* is not useful in resolving this dispute as the court simply considers whether there are charged circumstances to warrant variation of the maintenance order. It is also important to note that such an application in the circumstances of this case is made in terms of s 9 of the Matrimonial Causes Act [*Cap 5:13*] which gives an appropriate court, on good cause shown, the power to vary maintenance orders made in respect of s 7 (1) (b) of the same Act [*Cap 5:13*]. It is my considered view that the provisions of r 249 (1) (b) of the Rules are irrelevant in that regard.

The second aspect of this application relates to variation of an existing custody order in relation to one of the minor children. While I agree that an appointment of a *curator ad litem* may be necessary in assisting the court to fully appreciate the circumstances of the minor child – the best interests principle, I do not believe that non compliance with r 249 (1) (b) of the Rules is fatal to such an application. This is so because all what the applicant has to show or prove is that it is in the best interests of the minor child to vary the existing custody order. Further, in an appropriate case where the rights and interests of children are at stake this court may dispose of such a requirement as provided for in r 4C of the Rules. The point *in limine* lacks merit and is therefore dismissed.

I now turn to the merits of the application.

It is trite law that in an application for variation of a custody order the party seeking such variation must show good cause for seeking such an order. See *Hackim* v *Hackim* 1988 (2) ZLR 61 (S). It is also important to note in dealing with the question of custody of minor children the court is always guided by the best interests of the children. In the case of *Makuni* v *Makuni* 2001 (1) ZLR 189(H) at 192 A GOWORA J (as she then was) has this to say on the what to consider in such an application;

“In approaching the problem of this nature, the court is of course primarily concerned with the welfare of the children, that is the paramount consideration. Just as in custody cases, so also in the dispute arising out of custody order, the welfare of the children is the predominate consideration which should weigh with the court *Shazin* v *Laufer* 1968 (4) SA 657 at 662 G-H”

In the case of *Galante* v *Galante* (3) 2002 (2) ZLR 408 (H) SMITH J at 418-19 citing the celebrated case of McCall v McCall 1994 (3) SA 201 at 204-5 outlined in very useful detail what constitutes the best interests of the child.

What is also important to consider or appreciate is that in cases of this nature involving custody disputes the court is primarily concerned with the best interests of the minor child and not the parents. In the case of *Jere* v *Chitsunge* 2003 (1) ZLR 116 (H) at 118 C-E CHEDA J had this to say;

“The interest of the child means therefore that the interests of the parents are secondary. The common practice is that, if all else is equal, especially if the child is young, that the mother is likely to be given custody. The following in my view is what the court should take into consideration in determining the interest of the child. The list is not exhaustive;

1. The fitness or otherwise of the custodian parent
2. The age of the child
3. The sex of the child
4. The length of the time the child has lived with either parent or her relative
5. The degree of emotional stress which the child will suffer in the event of the child being separated from either parent
6. Any risk of ill treatment by either party or member of his or her household.”

In the case of *Domboka* v *Madhamu* 2004 (2) ZLR 287 (H) at 290 H-291 A-C MAKARAU J (as she then was) dealt with the question of the burden of proof in cases involving variation of custody orders. The learned Judge had this to say;

“---In case involving the custody of minor children, the court must approach the issue of onus from a broad and wide angle. The onus is discharged if at the end of the day, the court is satisfied that the best interests of the minor children dictate that it makes the order sought. The learned Judge of appeal cautioned against magnifying the onus on the parent seeking variation but maintained the best interest of the minor children should remain paramount.

It appears to me that while the accepted position is that the parent seeking variation of the custody order has to show on a balance of probabilities that it is in the best interest of the children that the existing order be varied, in cases where variation is sought on the basis of changed circumstances, the onus is to be discharged on a two prong attack. In my view, such a parent must show that it is not in the best interest of the children that they remain in the custody of the custodian parent and further that it is the best interest of the children that the custody is awarded to them. It is insufficient, in my view, to merely show a change of circumstances for the worse on the part of the custodian parent. It is not difficult to envisage a situation where although the circumstances of the custodian parent have deteriorated from the date of the granting of the order, the court still finds that it is in the best interests of the children that they remain in the custody of the parent whose fortunes are waning. It is the role of the court to examine the circumstances of both parents to establish where the best interests of the minor children lie.”

I now proceed to apply these principles to the facts of this case.

I have no doubt in my mind that the tone of this application is all about the applicant’s interests rather than the minor children’s interests which remain in the distant horizon.

The applicant’s case is that the introduction of the multi currency regime in Zimbabwe which occurred at the beginning of 2009 constitute a change of circumstances warranting the variation of the custody order in respect of D. This change of custody is motivated by the need to cut the bill on school fees by the applicant. The applicant has totally failed to consider the interests of D. There is virtually nothing in the founding affidavit that shows that his mind at some point unconsciously drifted towards the welfare of the minor children.

I am not convinced on the facts before me that there are any changed circumstances in this matter, let alone of a nature to warrant the variation of either the custody order in respect of D or maintenance order in respect of F. As has been shown from the facts the applicant remains with a disposable income of US$1705 or BWP 14 367.31 per month. It is clear applicant has the means to meet his financial obligations in respect of the maintenance order granted. The applicant has not explained in what currency he has been paying the tuition fees for the children since February 2009 when the order was granted. The applicant’s salary has not changed since 2009. There is no allegation by the applicant that the tuition fees have been drastically increased since the granting of the order. In the absence of a clear explanation on how the applicant has been able to pay the tuition fees for the past 4 years before making this application it is difficult to comprehend the so called changed circumstances triggered by the introduction of the multi currency regime in Zimbabwe. It is therefore my finding that the applicant has dismally failed to establish a fact that there are changed circumstances in this case.

Even if I was to assume that there are indeed changed circumstances in this case applicant has not shown why it is in the best interests of D to remove him from the custody of respondent and place him in applicant’s custody. The fact that the applicant has since remarried or that he has a moral duty to support his mother are not relevant factors to be considered in assessing D’s best interests. D is a 10 year old boy who has been in respondent’s custody since the granting of the divorce order. He is now used to staying with his sibling and the respondent. He is attending school in Zimbabwe. There is nothing in applicant’s papers to show how it is in D’s interests at his age to uproot him from the environment he is acclimatised to and place him in a foreign country, in a different school environment and where he would be experiencing step mother parenting. The applicant has not considered at all the degree of emotional stress such a change of environment may cause to D. The applicant has not shown that D would be compatible with the stepmother nor has any effort made to assessment of possible risk of the ill treatment by the stepmother. There is even no effort to explain clearly the nature of the environment this ten year old is supposed to live in Botswana. This court would be failing in its duty as the upper guardian of all minor children to grant the order sought in respect of D on the basis of the facts placed before the court by the applicant.

The applicant for variation of the maintenance order in respect of F is doomed to fail for the same reasons. There is nothing to show that the applicant is not able to pay F’s tuition fees in view of his means I have considered. There are therefore no changed circumstance to warrant such a variation. The applicant has not shown why it is in the best interest of F who is in Form 4 to be transferred from her current school to new school, a new environment and possibly a new syllabus. This simply confirms the view that the applicant has not even shown how the respondent’s means has changed from the time the order was granted to warrant to bestow upon her a further burden of paying half of F’s tuition fees in addition to the obligations she already have in terms of para 3.3 of the divorce order.

It is my considered view that the applicant has not made a case for the relief he seeks. The applicant has totally failed to lay the basis for the relief sought and has unnecessarily put the respondent out of pocket. An appropriate order of costs as prayed for by the respondent should be granted.

Accordingly it is ordered that;

1. The application be and is hereby dismissed.
2. The applicant is to pay the costs on a client and legal practitioner scale

*Nyakutobwa Legal Counsel*, applicant’s legal practitioners

*Gwaunza and Mapota Legal Practitioners*, respondent’s legal practitioners