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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA (NORTH GAUTENG, PRETORIA)

CASE NO: 46820/201-

DATE:16/08/2013

In the matter between:

M S

PLAINTIFF

and

N W B

DEFENDANT

JUDGMENT

KUBUSHI, J

[1] The applicant has approached this court on urgency basis for an order to obtain permission to leave the Republic of South Africa on a temporary basis to the UK with a minor child and for the applicant to be granted sole custody of the said minor child. The applicant is the mother of the minor child, a daughter named M B (M) born on 31 August 2005. She is 8 years old. The respondent is the biological father of M. The parties were previously married and were divorced on 8 April 2008. The applicant is presently married

and has been so married since 2009. In terms of the decree of divorce custody of M was awarded to the applicant. The respondent was granted the right to reasonable access to M at all reasonable times.

[2] The respondent appeared in court in person and opposed the application. He did not file any papers and addressed me from the bar.

[3] It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a court will not lightly refuse leave for the child to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if access by the non-custodian parent would be materially affected, it would not be in the best interests of the child that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Each case must be decided on its own particular facts. Past decisions should serve only as a guide. See JACKSON v JACKSON 2002 (2) SA 303 (SCA) para [2] at 318F.

[4] My view is that the applicant's decision to leave the country is bona fide and reasonable. The applicant's case is that due to the liquidation of their company they found employment at Wise Design Africa. Her husband is the managing director of the West Africa Europe division of the company. During 2013 they had to leave South Africa for Ghana on a long term basis. The respondent gave them permission to take M with them. Their company has now instructed them to open an office in London. They have to move to London and they must take M with them. According to the applicant they do not intend to leave South Africa permanently. The visa requirements of the UK allow them only a

period of two years and they will have to come back to South Africa to renew. Since their company headquarters are in South Africa they will have to come back to South Africa at least twice yearly. The move to the UK is not in issue what is in issue is the request by the applicant that the respondent relinquishes his right of custody over M. The authorities in the UK require that whilst M is in the UK with them, the applicant must have sole custody over her. The respondent's concern is that by giving up his right of custody he will lose his daughter.

[5] In terms of section 6 (3) of Act 70 of 1979 a court granting a decree of divorce may, in regard to the custody of the child to the marriage, make any order which it deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either of the parties sole custody of the minor.

[6] It is trite that in matters of this kind the interests of children are the first and paramount consideration. In terms of section 9 of the Child Care Act in all matters concerning the care, protection and well-being of a minor child the standard that the child's best interest is of paramount importance, must be applied. Section 7 thereof sets out the factors which must be taken into consideration whenever the standard of the best interests of the child is applied. Amongst others these factors are: the nature and personal relationship between the child and any specific parent; the attitude of the parent to the child; the exercise of the parental responsibilities and rights in respect of the child; the capacity of any specific parent to provide for the needs of the child, including emotional and intellectual needs; and the practical difficulty and expense of a child having contact with any specific parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with any specific parent.

[7] The following factors are common cause between the parties in this case: that the respondent left the applicant with M in 2007. Since he left, M has been staying with the applicant and the respondent has had very little contact with M. The respondent exercised his right of access only four times since 2007. Two of the visits were occasioned by the applicant. Telephonic communication has been minimal. M has practically been raised by the applicant and her husband.

[8] It is evident from the common cause factors above that it would be in the best interest that M be allowed to move to the UK with her mother and that her mother should have sole custody over her. In any event evidence show that the applicant has since the divorce been the only parent responsible for the day to day care of M. The child has little or no personal relationship with her father. The respondent contended that he has now moved back to Johannesburg and is trying to re-establish the relationship with his daughter. However when considering the rights of children it is the interests of the child and not that of the parent that is considered.

[9] I pause here for the convenience of the respondent to give an explanatory note as to the distinction between sole custody and guardianship. This is to allay the respondent's fears that the applicant may adopt the minor child or change her surname. Custody refers to the physical control over a child and the ability to supervise the child's daily life. During the subsistence of a marriage, both parents have custody of a child. When the parents get divorced, the court may make any order regarding custody that it deems in the best interest of the child. The court can award joint custody - this is when both parents have the day to day control and supervision of the child. Sole custody is when the child's daily life is controlled and supervised by only one of the parents. Guardianship on the other hand, is the capacity of a parent to administer a child's estate on his or her behalf and to assist the

child in juristic acts and in legal proceedings. If no court order has been made regarding guardianship both parents retain equal powers of guardianship after divorce. It means they must act together to assist the minor child. The Guardianship Act establishes the principle of equal guardianship. The Act makes provision for the consent of both parents in the following instances: adoption; marriage of a minor; removal of a minor from the republic; the alienation or encumbrance of immovable property or any right to immovable property belonging to a minor child and an application for a passport.

[10] The respondent must of course still be accorded his right to access. The decree of divorce accorded the respondent the right to access at all reasonable time. It is common cause that the respondent never fully utilised this right. Evidence is that since the divorce he had telephonic contact with M on at most six occasions and direct contact on only four occasions. The applicant undertakes to allow respondent access through Skype where he can do video calls.

[11] To my mind M should be allowed to move to UK with her mother, the decree of divorce should be amended to grant the applicant sole custody whilst she and M will be residing in the UK and the respondent to continue to have access at all reasonable times.

[12] In the premises I make the following order:

- a. The applicant is authorised to remove the minor child, M B, temporarily from the jurisdiction of this court for employment purposes in the United Kingdom.
- b. In so far as it may be necessary, the respondent is directed forthwith to sign all such documents and take all such other steps as are necessary to enable the applicant to lawfully remove the minor child from the Republic of South Africa, failing which the Sheriff of the Court is authorised to take all such steps on his behalf.

- c. The custody provisions awarded to the applicant in terms of the decree of divorce under case number 14963/2007 is varied and the applicant is awarded sole custody of the minor child.
- d. The access provisions pertaining to the minor child contained in the decree of divorce under case number 14963/2007 is varied and substituted by the following:
- i. It is recorded that the minor child will live temporarily with the applicant in the United Kingdom, whilst the applicant is employed there.
 - ii. The respondent shall have reasonable rights of access to the minor child whenever the respondent happens to be in the place where the minor child resides.
 - iii. The respondent shall have regular telephonic and Skype access with the minor child at such reasonable times as the applicant may determine.
- e. The applicant must timeously inform the respondent of any intended visit to South Africa to enable the respondent to visit with the minor child.
- f. Each party to pay their own costs of suit.

E M KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:

HEARD ON THE :14 AUGUST 2013

DATE OF JUDGMENT : 16 AUGUST 2013

APPLICANT'S COUNSEL

APPLICANT'S ATTORNEY :HARTZENBERG INCORPORATED

RESPONDENT : IN PERSON