IN THE HIGH COURT OF SOUTH AFRICA
[TRANSVAAL PROVINCIAL DIVISION]

UNREPORTABLE

Dates: 21 November 2005 **CASE 35849 /2005**

In the matter between:

H., B.S.G. **Applicant**

and

H., A. S. **Respondent**

Custody – child to accompany his mother to Nigeria – Application acceded to subject to conditions – Report from Family Advocate not necessary.

Van Rooyen AJ

[1] The applicant, to whom the custody of a boy of seven was granted in terms of a divorce settlement which was made an order of Court in 2003, applies in terms of s 1(2)(c) of the Guardianship Act 192 of 1993 to remove the son, who will be eight at the end of February 2006, from the Republic for the purposes of relocating temporarily to Nigeria with a Mr Engelbrect, with whom she and the son permamently live. Mr

Engelbrect has been offered the position of General Manager M-WEB Nigeria Ltd. The maximum period will be three years.

[2] The applicant is a legal advisor to Nashua and Mr Engelbrecht is a chartered accountant, who earns R1,4 million a year. For the period in Nigeria, the applicant has made arrangements that she (with the assistance of Mr Engelbrecht) will stand in for the medical expenses of the son (with the aid of a Medical Fund) and will pay for four air-tickets to South Africa per year, so that the son may visit his father, the respondent. Either the applicant or Mr Engelbrecht will accompany the son on these trips. Ms *Haupt*, acting for the applicant, informed me from the bar that if she is not permitted to take the son with her to Nigeria, she will stay in South Africa with the son. Applicant will, initially not be employed in Nigeria and she will, accordingly, essentially be a housewife. D. will be enrolled in the American International School, Victoria Island, Lagos. Applicant has been assured by the headmaster that the son may commence classes on 5 December 2005. He will undergo an assessment and will be placed in an age and education appropriate grade – either grade 1 or 2. The syllabus at the school includes English, French, African studies, mathematics, science and computer literacy as subjects. It has superior facilities and is housed in a secure complex with all extra-mural facilities on site. It is fully air-conditioned, due to the heat and humidity. The school offers numerous extra-mural activities. The fees are USD 11,200 per year and Mr Engelbrecht has offered to pay these fees. There is a registration fee of USD 6000. Their home will be a four bedroom, four bathroom, large and spacious apartment. It is situated in a compound with large tropical gardens, bicycle paths, a large swimming pool, tennis courts, a swimming pool and a gym. The boy would especially enjoy the swimming.

There will be a nanny and cook in their full time employ, who have also served the predecessor of Mr Engelbrecht well. The family will be provided with a driver, vehicle and a security guard. There are numerous other South African families resident in Lagos and their reports were positive to applicant during her visit there.

[3] Respondent is a general manager in the employ of Softcon Software Control Services, Pretoria. He has raised several concerns: Nigeria does not subscribe to the Hague Convention and that this Court order will have no effect there. He also questioned the promise to pay for the air-tickets, the standard of the Medical Scheme which the family will subscribe to and the adaptability of the son to the new school and conditions in Nigeria. Respondent also averred that the claims made by the applicant as to the conditions and benefits in Lagos are unsupported by attested evidence by Mr Engelbrech and, accordingly, not properly before the Court. The applicant's approach to the matter has not been conciliatory and she has approached the matter on the basis that "no-one would stop her" and that she "couldn't care less". Respondent required impartial and professional input on various aspects of the boy's departure and stay in Lagos. It was stressed by counsel for respondent that the matter should be referred to the Family Advocate for a full and proper inquiry. Respondent was concerned that his son was encouraged to play with dolls (Barbie and Ken dolls), that the fun in moving to Nigeria would be getting a dollhouse "with lights on the inside". He avers that the son suffers from Gender Identification Dysfunction whereby he has difficulty in identifying with his male gender. He has received psychological counseling from several practitioners. The statement by applicant's attorney at a meeting with the family advocate that D. was "special" and it was quite in order for his mother to raise the boy permitting such

behaviour, gave rise to such concern for the respondent that he is planning to apply for a variation of the custody order. In the light of the fact that this application was brought on the urgent roll, he has not had time to prepare such papers.

[4] Before going into the merits of the matter, it is important to bear in mind that the custody of the boy was granted to the applicant. She has the right to decide how the boy should be brought up and educated and what his approach to life should be. In a sense, she has taken over the roll of both father and mother. As long as she acts in the best interests of the child – objectively seen – she acts within her rights as custodian parent. Section 28(2) of the Constitution of the Republic provides that "a child's best interests are of paramount importance in every matter concerning the child". In *De Reuck v Director of Public Prosecutions and Others* 2004(1) SA 406(CC) the Constitutional Court confirmed its approach to fundamental rights: a child's rights did not necessarily "trump" other fundamental rights. "This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36."

[5] I have specifically referred to the said rights so as to evaluate the rights of the applicant: to expect of a mother to limit her freedom of movement and choices in life unreasonably, would amount to a stifling of her freedom of choice. Her rights to equality, judged against the backdrop of having been previously disadvantaged as a result of gender (s 9 of the Constitution), should come to full fruition within this new democratic dispensation. It is simply a reality of modern life that as South Africa moves from its

isolated pre-democracy position, that South Africans will also be taking up positions in other countries, business wise, as is the case with Mr Engelbrecht. If I were to expect that the applicant should stay in South Africa simply for the sake of the son, I would be ignoring her rights. Of course, it is her duty to care well for the son. Although the Gender Dysfunction Syndrome of the son is a concern, I do not have the slightest doubt that the applicant, who also happens to be a lawyer, would approach the dysfunction with sensitivity and ensure that it be addressed with the assistance of experts. I am not prepared to draw a negative inference from the son's playing with dolls. As long as a boy is taught to have a loving and caring relationship, it does not matter how he expresses that care, as long as it is within the law. It is, in any case, well known that boys and girls go through different phases and I have no reason to doubt that the applicant and her partner, Mr Engelbrecht, will strive to bring up the boy in such a manner that it will be in his best interests. I am, accordingly, not convinced that the best interests of the boy will not be served if he lives with the applicant in Nigeria for three years. Contact with the father will, of course, be much more limited. This is, however, a reality of modern life. The applicant has taken all reasonable steps to ensure that regular contact will take place and has undertaken to pay the air-tickets to South Africa, place him in a splendid school in Lagos, provide accommodation in what must be splendid surroundings and spend more time with him, especially in the first stages when she will not be employed.

[6] It is true that the applicant has not provided the Court with affidavits from Mr Engelbrecht, the School and the Medical Fund. I am, however, not convinced that this application is a ploy to place the boy out of reach of the respondent and, as it were, kidnap the boy. Why would she do this? She has custody of the child and her very best

intentions appear from the founding affidavit. I do not believe that an inquiry by the Family Advocate is necessary. Why must this child's life be disrupted by such an inquiry? The sooner his life is stabilized, the better for him. I am not convinced that the boy's inability to adapt gender wise is a problem which needs to be addressed by the Family Advocate. This is a problem which many parents who live together have with their children and I have no doubt that the applicant will obtain assistance, if she deems it necessary.

[7] I am stipulating several conditions. Although the applicant has offered to obtain a Court Order in Lagos confirming this order, I do not wish to add this condition. I am not convinced that the applicant is planning to flee the country with the boy and I regard the sojourn in Nigeria as a *bona fide* relocation, which forms part of her right to choose a partner and do her utmost to let the relationship work in the interest of herself and her child. So as to ensure a good relationship with the respondent in the best interests of the child I would, however, *advise* that applicant does obtain such an order in Lagos.

The application is, accordingly, granted. Each party is to pay his or her own costs. The conditions are detailed in the order, which need not be set out in this written judgment. The conditions apply as from the date of this order for three years.

JCW van Rooyen……..

Acting Judge of the High Court

21 November 2005