JADIEL MATSIKIRE
versus
TINASHE ROSEMARY MATSIKIRE nee CHIHWAYI

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 15 February 2023 & 13 April 2023

Urgent Chamber Application

Mr *J Ndlovu*, for the applicant
Mr *T Nyamucherera*, for the respondent

MUCHAWA J: This is an urgent chamber application in which the applicant seeks the following relief:

> "TERMS OF INTERIM RELIEF GRANTED
> IT IS HEREBY ORDERED THAT
> 1. The respondent be and is hereby ordered to forthwith and in any event not later than 24 hours from the date of this order, release the minor child TRM BORN 15 MARCH 2013 to attend boarding school at Littlerock International Boarding School, failing which the Sheriff or his assistant be and is hereby authorized and directed to remove the said minor child from the respondent's control and custody and hand him to school authorities at Littlerock International Boarding School
> 2. Costs of suit
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> SERVICE OF PROVISIONAL ORDER
> The service of the Provisional Order with the supporting urgent chamber application and annexures shall be effected on the respondent or his legal practitioners by the applicant's legal practitioners as follows:
> "By hand delivery"
>
> TERMS OF FINAL ORDER
> That you show cause to the Honourable Court why a final order should not be made in the following terms:
> 1. Pending final determination of the divorce matter under HC 3196/22 dealing with the issue of custody, access and maintenance of the minor child, the respondent be and is hereby barred and interdicted from removing the minor child TRM BORN 15 MARCH 2013 from Little Rock International Boarding School to any other school within or outside of Zimbabwe without the knowledge and consent of the applicant.
> 2. Costs of suit."

The applicant and the respondent are husband and wife having gotten married in terms of the then Marriage Act, [*Chapter 5:11*] on 21 April 2005. Three children were born to the marriage. Two of these are already majors. Only TRM is still a minor and is the subject of

these proceedings. The marriage seems to have reached certain unhappy differences leading to the respondent instituting divorce proceedings under cover of case number HC 3196/22. The parties are on separation and respondent has custody of TRM. The minor child was enrolled at Littlerock International School from ECD to end of grade 4 when the respondent transferred him to Rockville Junior School for grade 5 enrolment. It is this action which prompted this urgent chamber application and the prayer set out above.

I heard the parties as well as invited the minor child for an interview. Thereafter, I gave an order dismissing the application for lack of merit. The applicant has requested reasons for my order. These are they.

Urgency

The respondent raised the issue of lack of urgency in this matter as the applicant had placed this matter three times before the Magistrates Court in which similar relief was sought on 11, 13, and 17 January 2023. All three matters were subsequently withdrawn. Mr *Nyamucherera* submitted that the court declined to give the relief sought as it was not stamped and directed that the matter proceeds on notice. This approaching of the Magistrates Court three times on the same issue was said to point to the matter not being urgent. The court was urged not to override the decision of another court unless provided by statute as per the case of *Nyaguwa* v *Gwinyai* 1981 ZLR 25. On account of the notices of withdrawal filed by the applicant in all three matters before the Magistrates Court, those matters would stand withdrawn, as they do and the *Nyaguwa (supra)* matter would be distinguishable.

It was also submitted that the certificate of urgency which should be a condition precedent to an urgent application was inadequate and incompetent as it did not cover all the factors to be considered in an urgent application reflecting that the certifying legal practitioner had not fully applied his mind. It was averred that the issue of whether any other remedy was available, and the balance of convenience were not covered. This does appear so but because the matter involved the best interests of a minor child, the court exercised its discretion towards delving into the merits on the strength of case law.

The case of *Document Support Centre* v *Mapuvire* 2000 (1) ZLR 232 makes clear that in cases of the interests of minor children, the court should act urgently. It was held as follows:

> "Some actions, by their very nature, demand urgent attention and the law appears to have recognized that position. **Thus, actions to protect life and liberty of the individual or where the interests of minor children are at risk demand that the courts drop everything else and in appropriate cases, grant interim relief protecting the affected rights.** The rationale of the courts acting swiftly where such interests are concerned is in my view clear. **Failure to**

act in these circumstances will result in the loss of life or the liberty of individuals or the infliction of irreversible physical or psychological harm on children." (My emphasis)

I therefore found this matter to be urgent given that it concerns the interests of a minor child as submitted by Mr Ndlovu.

The Merits

Mr *Ndlovu* submitted that transfer of the minor child is not in the child's best interests and listed several reasons for that.

The first reason advanced is that the child has been at Littlerock since 2018 when he was in ECD till end of Grade 4 when he was transferred. Secondly Littlerock is said to offer a Cambridge Syllabus unlike Rockview the new school. The child is said to be in grade 5 now and would have been expected to sit for final exams in 2024 at grade 6 level on the Cambridge syllabus. The transfer was said to imply that the child must now shift to the ZIMSEC syllabus and start doing CALAs and this would disrupt the progress he has made in his studies.

Furthermore, Mr *Ndlovu* submitted that Littlerock is a Seventh Day Adventist school whose Christian values and principles the parties who are Seventh Day Adventists subscribe to and have always wanted the minor child to be infused with the Adventist Education Philosophy which aims to develop the total person, the head, the heart, the hand and the health/lifestyle. The new school is alleged not to have similar values.

It was averred that the applicant had already paid school fees for the minor child at Littlerock, bought uniforms, foodstuffs and bedding for the child's boarding place at Littlerock as he had always been solely responsible for meeting such needs and all costs of utilities and daily needs for the respondent and the minor child. The applicant believes that the respondent does not want to have the child enrolled in boarding school as she would lose her meal ticket.

Additionally, the applicant believes that placing the child in boarding school would be a way of removing the child from the toxic environment created by the divorce.

Mr *Nyamucherera* impugned the applicant's actions for harping on about Cambridge exams and not the interest of the minor child in question without showing whether he intends to send the minor child outside the country on the strength of the external examination. In addressing the child's best interests, Mr *Nyamucherera* pointed out that the minor child is only 9 years old and at this young age he requires more care and supervision from his parents. Littlerock was said to have a day schooling facility in Harare for ECD up to grade 4 and a few of the students who continue would then move to Norton for boarding facilities from grade 5.

It was stated that the minor child would not be the only one not proceeding to the boarding facility as several parents prefer to day school their children at this tender age,

The minor child was alleged to have a health condition which makes him susceptible to viral and other infections leading to his suffering from chronic headaches. The respondent is worried about the child being away from her and not having anyone look out for this. Though all that was attached in support of this was a medical laboratory report of September 2021 and no accompanying doctor's report or follow up reports, my interview with the minor child confirmed that he does sometimes suffer from headaches and painful eyes and his last visit to the doctor for this was in December 2022. Like most children his age, I presume, he also said he has had bouts of flu.

Mr *Nyamucherera* further submitted that the minor child is currently undergoing therapy due to common cause addiction to visiting adult sex sites. This is said to have been reported by the school which recommended that the child undergoes therapy. He is said to be in the process of unlearning the addiction and the respondent says as a result he has not been given any gadget of his own and uses his mother's phone to do homework and this gives her an opportunity to monitor his online activities.

At this stage of the divorce between the parents the minor child was said to need the access and support of his brothers as per the counsellor's recommendations. In my interview with the child, he stated that the divorce makes him very sad and in 2022 he had to go for counselling before Mrs Tsikada who filed a supporting affidavit confirming that she attended to the child in her capacity as a counsellor employed by Musasa Projects. When asked why he needed counselling TRM said it was just about how he felt about the divorce and not about anything he was watching on his phone. The applicant questioned whether the child was undergoing any therapy now and said the child's visit to pornographic sites had happened in September 2021 when the parties were still staying together. The supporting affidavit by Mrs Tsikada was dismissed as not of any value as she is alleged to be a friend of the respondent whom they attend church with and that there is no professional therapy she is giving to the child. Given the child's confirmation that he has been attended to by Mrs Tsikada and the sworn statement from Mrs Tsikada coupled with the fact that the applicant is no longer living with the child, I am inclined to believe that the child has been emotionally affected by the separation and pending divorce between his parents to the extent of requiring some form of counselling. In my opinion, it matters not that the safe environment for the child's counselling

is coming from a known family friend whose services were even sought out earlier and the applicant himself was in communication with Mrs Tsikada.

His preference is to continue staying with his mother and brother. Asked about his friends from Littlerock, he said he had already made new friends. The child confirms his father provides for him but when asked what else he wanted to say, he said sadly, that his father no more lives with him. That seems to be the sore issue with him.

The Honourable CHITAKUNYE J, as he then was, laid out the law in the case of *Berens* v *Berens* HH 28/09 to show that a non-custodial parent can challenge the choice of school by a custodial parent where he believes the choice of school is not in the best interests of the minor child. See below:

> "The parties are agreed that the respondent has sole custody of Matthew in terms of section 5(1) of the Guardian of Minors Act [*Cap 5:08*]. That section provides that:
> "Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the 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)."

There have been amendments to this provision. Section 3(1) and (5) now provide as follows:

> **"3 Exercise of joint guardianship and custody by parents**
> (1) The parents of a minor, whether married or otherwise, shall exercise their rights of guardianship and custody in consultation with each other:
> Provided that where the parents are not living together as man and wife, the custodial parent shall exercise all guardianship rights in relation to the minor in his or her custody, unless the non-custodial parent by virtue of a court order (whether a maintenance order, order of divorce or otherwise) is required to be consulted on any issue in connection with the guardianship of the minor."
> **5 Special provisions relating to custody of minors**
> (1) Where either of the parents of a minor leaves the other and such parents commence to live apart, either of the parents of that minor shall have the 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 para-graph (*a*) of subsection (7).
> [Subsection amended by section 5 of Act 2/2022.]"

The applicant and respondent though still married, are now on separation. The respondent is the custodial parent. This means that for the moment she has sole custody of the minor pending the granting of an order by this Court. The applicant's position is that he is not contesting custody in the divorce matter but wants to be consulted in all decisions to do with the minor child.

Honourable CHITAKUNYE J, as he then was, continued in setting out the law as follows:

"As the custodian parent respondent is given certain rights and powers in the exercise of such custody. In *Makuni v Makuni* 2001 (1) ZLR 189 GOWORA J alluded to the fact that a custodian parent is vested with all the rights that entail the nurturing, shaping and bringing up of the minor children. She quoted with approval from Boberg Family Law at page 460 where in the author stated that:

> ' An award of custody to a mother entrusts to her all that is meant by the nurture and upbringing of the minor children, in this is included all that makes up the ordinary daily life of the child – shelter, nourishment and the training of the mind….The child…passes into the home of the mother, and there it must find all that is necessary to its growth in mind and body…A custodian parent has therefore the right to regulate the life of the child, determining with whom he should or should not associate, how he should be educated, what religious training he should receive and how his health should be cared for. The non-custodian parent has no right to interfere in these matters, though he may petition the court to do so if it appears that the custodian parent has exercised his discretion in a manner contrary to the interests of the child or in conflict with an order of court. Otherwise, he is confined to his right of access to the child.'

It should thus be clear that the custodian parent is empowered to make decisions on the day to day needs of the child without having to refer to the non-custodian parent. One of those decisions is the choice of school for the child. In the exercise of such custody, she may, if she so desires, consult the non-custodian parent. The non-custodian parent can apply for intervention in the choice or decision made by the custodian parent where such decision is not in the best interest of the child or the decision is inimical to the child. In such intervention the applicant needs to establish or show that the choice or decision is unreasonable or irrational or that no reasonable custodian parent can make such a decision and that such a decision is therefore not in the best interest of the child."

The question before me is to determine whether the respondent's decision to transfer the child is unreasonable or irrational and whether it is not in the best interests of the minor child. The adoption of the concept of the best interests of the child as the paramount consideration in all matters concerning the access, guardianship or custody of minor children is now enshrined in s 81(2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. It says the following:

"(2) A child's best interests are paramount in every matter concerning the child."

The broad context of this matter is to be considered. Here is a 9 year old child who has always been day schooling and living with both parents. His world was secure until the problems in the parents' marriage and the father left home and is no longer living with them. A divorce is pending. He is highly saddened by all this to the extent of requiring therapy. The parents do not make it any easier, the applicant was attempting to sell off even the matrimonial properties until the respondent got a court order to stop that. The parents even communicate through the child if the respondent needs anything. Would it be in the minor child's interests to rock his boat further and pluck him from his remaining sense of security, his mother and his

brother, just in the name of writing a Cambridge examination? He is still young and there is a lot of time to enrol for the Cambridge syllabus. Though the respondent said that the child is getting support to still write the Cambridge check off exams in 2024, the minor child said he is learning in line with the ZIMSEC syllabus. In my considered opinion, his emotional and psychological health is more important at this very tender age he is.

The fact that the respondent is prepared to have the child at any other school which would allow the minor to continue day schooling is clear testimony that what she considers detrimental to the best interests of the child is having him in boarding school at the tender age of 9 amid such a tumultuous period in his life. Littlerock as a school does not have day schooling facilities for grade 5 which would enable the respondent to fully exercise her nurturing role on the child. Continuing at Littlerock would have resulted in a major change in the minor child's living environment.

The respondent's desire and right to regulate the life of the child, determining with whom he should or should not associate, how he should be educated, what religious training he should receive and how his health should be cared for, in the circumstances, cannot be said to be unreasonable. She explained that her two older children who had been in boarding school had not necessarily been successful, and she wanted to try a different path for this last child. This stance is understandable.

As I already said, the question of the minor child's health, though unsupported by a doctor's report, was confirmed by the child himself and this court cannot ignore that the child does suffer from headaches.

The applicant and the respondent need to consult better and not use the minor child as a weapon in their dispute. What they are doing was cautioned against by Honourable MUNANGATI-MANONGWA J in the case of *Machacha* v *Mhlanga* HH 185/23 wherein she said that parents should not use their children as pawns in their divorce and marital disputes. The best interests of the children reign supreme over the parties' inclinations. It is up to the parents to create a less toxic environment for the minor child and consult with a view to safeguard the child's best interests rather than aim to score big in the divorce turned fight between them. Such an approach would best serve the interests of the minor child.

Accordingly, there is nothing unreasonable in the decision taken by the respondent as she has adequately shown that her decision was motivated by the need to safeguard TRM's best interests.

It is for these reasons that I ordered that the application be dismissed for lack of merit.

Mtetwa & Nyambirai, applicant's legal practitioners
Lawman Law Chambers, respondent's legal practitioners