

SIZILE DHLAMINI (NEE NYATHI)
versus
MBONGENI DHLAMINI

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 22 May & 9 November 2023

Opposed Matter

J Ndlovu, for the applicant
T Zhuwarara, for the respondent

MAXWELL J: BACKGROUND

Applicant approached the court on an urgent basis seeking restoration of custody in terms of s 5 (2) of the Guardianship of Minors Amendment Act of 2022, pending the finalization of the divorce matter under reference HC 4252/21.

Applicant narrated the background of the matter in her Founding Affidavit. The parties married on 22 December 2008 in terms the then Marriage Act [*Chapter 5:11*] now the Marriages Act [*Chapter 5:17*]. Two minor children were born out of the marriage, Qhawe Dhlamini, born on 19 December 2009 and Mandisi Dhlamini, born on 7 February 2012. Upon the applicant and respondent's separation in October 2020, the applicant and the minor children moved out of the parties' matrimonial home. The parties had agreed that the applicant would have custody of the minor children pending the final resolution of the issue of custody and access. Respondent would exercise rights of access on alternative weekends during the terms and half of the school holiday until the divorce matter is finalized. The agreement was implemented until respondent took the minor children, Qhawe Dhlamini in February 2022 and Mandisi Dhlamini in September 2022. Applicant alleged that respondent unlawfully assumed custody of the minor children, has refused to restore custody to her and has denied her rights of access. Further that he refused or ignored the

invitation to the negotiation table to settle the issues of custody and access pending resolution of the divorce matter. Applicant accused respondent of turning the minor children against her and stated that the minor children have become hostile and very disrespectful towards her. She averred that the restoration of custody sought in this application is in the best interests of the minor children and that the court would have failed its constitutional duty as the upper guardian of the minor children if it dismisses the application and allow respondent to continue enjoying unlawful custody of the children. She prayed for the granting of the application with costs on a legal practitioner and own client scale.

The Respondent opposed the application raising two points *in limine*, that the matter was not urgent and that there were material non-disclosures and falsehoods in the application. On the merits, respondent averred that applicant is not a fit and proper person to have custody of the minor children. He disputed entering into an agreement with the applicant on separation and stated that he just allowed the children to stay with their mother. According to him, upon separation, the children were struggling to understand and cope with the situation given their tender ages. They had difficulties adjusting to their new home, applicant's house. The children were met with excessive beatings to scare them from expressing their desire to stay with him. He narrated a series of incidences in which applicant had a fall out with one or both children and he had to intervene. He assumed custody of the older child after one such incident which resulted in applicant dropping off the older child's bag of clothes at his house. He averred that the relationship between the older child and the applicant has been strained since then to an extent that the older child is timid and refuses to visit her. When the younger child came for half of the school holiday in August 2022 he expressed his desire to move back and stay with respondent permanently. He subsequently went and collected some of his clothes and uniforms from applicant's house. Applicant has tried to woo the children with treats but they refused to go back to her. The younger child visited applicant in October 2022. The following morning he requested that respondent pick him up. He picked him up with all his clothes, books and toys.

Respondent averred that applicant is at liberty to see or communicate with the children. He has put in place a landline through which applicant can call the children and they in turn can call her at any time. The older child suffered a lot of trauma in the hands of applicant and he struggles with trusting and letting her in again. Respondent disputed denying applicant access to the children

and stated that the times she has not been able to see them upon request have been because of the children's reservations and he could not have forced them to do something against their will. He avers that being with him at his home has provided stability and happiness to the children resulting in a marked improvement in their academic and extra-curricular activities. He submitted that it is in the best interest of the children to stay with him and he has been solely responsible for their school expenses as well as their welfare. According to him, applicant in seeking alternative relief for access acknowledged that she is not a fit and proper person to have custody of the children. He prayed for the dismissal of the application with costs on an attorney and client scale.

The application was placed before the HONOURABLE TSANGA J who gave an order to the effect that the matter was not urgent and removed it from the urgent roll.

SUBMISSIONS BY THE PARTIES

Parties filed heads of argument. Applicant started by addressing the issue of the material non-disclosure raised by the respondent in his opposing affidavit. She argued that the issue of material non-disclosure does not arise and if it does, it is not fatal to her case. She submitted that before the court are two competing versions and the court is required to apply the necessary rules pertaining to the discharge of onus and the burden of proof in civil cases. She further submitted that the fact that respondent disputed the applicant's averments does not mean that there was any non-disclosure as alleged by respondent. Reference was made to the case of *ZESA v Dera* 1998 (1) ZLR 500 wherein the court held that in a civil case, the standard of proof is on a balance of probabilities. On the merits of the matter, applicant stated that for her to be entitled to the relief she seeks, she has the onus to prove that she was in custody of the children upon separation and that the children were unlawfully removed from her custody by the respondent without her consent and in the absence of a court order. Further that she requires restoration of custody and that the restoration is in the best interest of the children. She pointed out that the first requirement is common cause and that there was no court order authorizing the children's removal from applicant. She however argued that the older child was taken to respondent for discipline and guidance and the younger child was influenced by the respondent to join him at his residence. According to applicant, respondent assumed unlawful custody of the children and they must be returned to her pending divorce. She submitted that both children require the assistance and presence of their mother in their daily lives.

Respondent in heads of argument argued that applicant approached the wrong court, that she cannot obtain relief in terms of s 5(2) (a) and (b) of the Guardianship of Minors Act which is obtainable from a Children's Court. Further, that the applicant did not divulge a number of material issues such as the circumstances that led him to divest her of custody. Respondent stated that the dispute cannot be resolved on the papers and the issue of custody is better resolved at the divorce trial under HC 4252/21. The respondent in heads of argument points out that by constitutional fiat, men and women have the same rights regarding the custody and guardianship of children and it remains unclear why applicant should be preferred as the custodian parent as respondent currently enjoys custody. He urged the court to take cognizance of the fact that the relationship between the applicant and the children has soured to the point that she has physically fought with the older, let the older beat the younger and assaulted both of them under guise of disciplining them. He submitted that the interests of the children are paramount and ought to be the primary and sole consideration for the court in adjudicating this dispute.

ANALYSIS

There are three issues for consideration.

1. FORUM

Applicant approached the court in terms of s 5(2) of the Guardianship of Minors Amendment Act, 2022. The section relied upon states as follows; -

“.....the custodial parent may apply to a children's court for an order declaring that he or she has the sole custody of that minor in terms of subsection (1) and, upon such application, the children's court may make an order declaring that the custodial parent has the sole custody of that minor and, if necessary, directing the other parent or, as the case may be, the other person to return that minor to the custody of the custodial parent.”. (underlining for emphasis)

Mr *Ndlovu* argued that this court has jurisdiction as the upper guardian of minor children. He also referred to s 81 of the Constitution which dictates that the best interests of the child are paramount in every matter involving a child. He sought to rely on the case of *Chiwenga v Mubaiwa* SC86/20 as authority that this court is empowered to deal with applications in terms of s 5 of the Guardianship of Minors Act [*Chapter 5:08*]. Advocate *Zhuwarara*, submitted that applicant did not approach the court asking it to invoke its inherent power, constitutional power or common law power as the upper guardian of minors. She has activated a statutory power that directs her to the Children's Court. Such court is statutorily defined in terms of s 3 of the Children's Act [*Chapter 5:06*], and a Magistrate is the presiding officer therein. He pointed out that in the

Chiwenga case (*supra*), the Supreme Court stated that where the proceedings before the court are a nullity, the court is stripped of its jurisdiction over the matter. See also *Dangarembizi v Hunda* SC 122/20. I agree with the position of the respondent. The inherent power of this court does not mean that it ignores clear and unambiguous statutory provisions. This is not the Children's Court. Applicant therefore approached the wrong forum.

In addition, Advocate *Zhuwarara* pointed out that the question of custody is also before this court in the divorce matter and on the authority of the *Chiwenga* case (*supra*) the issue of the custody of the children is best left to the divorce court for a substantive determination on the merits after hearing evidence. Mr *Ndlovu* argued that respondent is deliberately stalling the divorce proceedings. He cited the non-cooperation of the respondent for a round table conference to be held. That submission ignored the provisions of r 49 (4) of this court's 2021 rules. The rules have in place a mechanism for ensuring that the non-cooperation of one party does not stall the proceedings. Accordingly there is no reason for not leaving the determination of the issue of custody to the divorce court.

2. MATERIAL NON-DISCLOSURES AND DISPUTES OF FACTS

In *Super Plant Investment (Pvt) Ltd v Chidavaenzi* HH 92/09, MAKARAU J (as she then was) observed that:

“A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

Respondent pointed out that applicant had not divulged a number of material issues in her founding papers, including the fact that she acceded to the eldest child staying with him permanently. Further that while applicant gives the impression that she was forcibly divested of custody, such contention is totally discredited in the opposing papers. As submitted by respondent, applicant ought to have known that there would be a raging dispute as regards her entitlement to regain custody as what is in the best interests of the children is in contention. The court has no ready answer to whether or not applicant was denied custody and access to the children. Applicant says the children were forcibly taken from her. Respondent says she willingly surrendered them to him. Applicant gambled in proceeding by way of motion and the gamble does not pay off. The

factual contestations cannot be resolved on the papers and the application cannot succeed. See *Zimbabwe Power Company v Intrateck (Pvt) Ltd* SC 39/21.

3. WHETHER OR NOT APPLICANT IS ENTITLED TO THE RELIEF SOUGHT

Section 80 (2) of the Constitution states; -

“(2) Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.”

The Guardianship of Minors Act [*Chapter 5:08*] provides that either parent can be the custodial parent pending divorce. Respondent currently enjoys custody. For him to be divested of such custody, it must be established that it is not in the children’s best interest to remain in his custody. Close to a year passed before applicant approached the court to reclaim custody. That passage of time is indicative of the fact that applicant did not see any danger to the children’s welfare posed by their being in respondent’s custody, otherwise she would have approached the court soon after the children went into respondent’s custody. Considering the time that has elapsed since the children left applicant’s custody, I don’t believe it is in their best interest to move them prior to the determination of the custody issue in the divorce proceedings. Counsel for applicant, in response to a question whether it was in the best interest of the children to move them after a year indicated that the parties stay within the same vicinity and the children will not be moving to a different location. He pointed out that they would be attending the same church and same school and their best interest would not be affected. By the same token, since the parties stay within the same vicinity, there is no reason to order that the children’s custody reverts to applicant. Accordingly, I find that the applicant is not entitled to the relief sought.

After considering the above, I make the following order:

The application be and is hereby struck off the roll with costs.

Mtewa & Nyambirai, applicant’s legal practitioners
Atherstone and Cook, respondent’s legal practitioners