DOREEN SEKAI CHICHETU
versus
GILBERT MUZUVA

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE; 16, 24 & 30May 2024 & 11 March 2025

Family Court – Divorce Action

B Mtetwa with *R Sitotombe*, for the plaintiff
H K Muza, for the defendant

WAMAMBO J: This matter is a divorce action wherein the parties are agreed on a number of important issues. To that end they have filed a consent paper dealing with the issues where they are in agreement.

The parties were married on 30 January 2006 under the Marriage Act [*Chapter 5*:*17*]. Two children were born into the marriage namely Tanatswa Muzuva (born on 14 March 2003) and Tinomudaishe Muzuva (born on 31 March 2014).

It turns out that Tanatswa is now a major who is attending University in Poland.

The parties have lived apart for a continuous period in excess of twelve months. There appears no intention or indication of the restoration of a marriage between them. The parties are agreed that there are no reasonable prospects of the restoration of a normal marriage between them in the circumstances. They are therefore agreed to the granting of a decree of divorce by consent.

I find in the circumstances that there is justification for the course they have chosen to take and further find that a decree of divorce should indeed be granted.

In the consent paper the parties have agreed as encapsulated in para(s)2.2 to 2.5 on the distribution of the immovable properties the companies and the mining claims. It is a specific agreement between the parties that save as is recorded in the consent paper, no further proprietary claims shall emanate against each other arising from their marriage and divorce. I shall transfer the agreement by the parties on the proprietary rights as set out in the consent paper as part of the order I shall grant.

The parties are disagreed on custody access and maintenance as pertains the minor child and these were the issues referred for trial. These are the issues I shall determine in this trial.

Both parties are keen to be granted custody of the minor child. Both parties are of the strong view that they deserve to be granted the custody of the minor child. From the evidence led and the submissions made before me the parties are both clear about the considerations and requirements involved in a custody battle. They are both clear that the resounding and outmost consideration is the best interests of the minor child.

As in most custody disputes mud was thrown from plaintiff to defendant and defendant to plaintiff.

Both parties appear candidly and genuinely invested in being awarded custody of their minor child.

The plaintiff's position as I understood it is as follows:

The best interests of the minor child will best be served if custody is granted to her. The minor child at ten years old needs a mother's psychological support.

A reading of the plaintiff's closing submissions reflects that there was an emphasis on demonstrating that the defendant is not fit to be granted custody.

There was a particular emphasis on the fact that the defendant is more often than not ensconced at sea, to use a word that was frequently at use to describe the defendant's sojourns at sea.

The defendant is said to be so ensconced at sea sometimes for periods in excess of six weeks. Use is made of communication from the defendant's legal practitioners whereas in correspondence the defendant's lawyers pointedly wrote as follows:

> "We find it paramount that to echo sentiments which have already been disclosed to yourselves in our various telecoms, being that, our client by the very nature of his job, is often ensconced out at sea for sustainable periods of time when duty calls. When on a mission he is unable to communicate as he will have no access to either his phone or computer for safety reasons."

A meal was made out of the defendant by the reason of being far away at sea that he cannot exercise his custodial powers, will be unreachable and will leave the minor child in the custody of third parties including the maid the aunt or half-brother.

The plaintiff shrugged off suggestions that when she sojourned to United Kingdom from Zimbabwe she abandoned the children and left the defendant to fend for them on many levels as a sole parent.

It was advanced that the defendant's relationship with the older daughter is sour. It was the plaintiff's testimony that when the elder daughter Tanatswa is on holiday she visits the

plaintiff in the United Kingdom. Further that Tanatswa and Tinomudaishe (the minor child) enjoy a very good relationship.

On maintenance the plaintiff claimed US1000 per month for the minor child from the defendant and also claimed 50% towards the minor child's school fees. The plaintiff also claims maintenance for Tanatswa citing s 8(3) of the Matrimonial Causes Act [*Chapter 5:13*].

On the defendant's behalf it was contended as follows:

The defendant disagrees that he being ensconced at sea is a lawful ground to deny him custody.

He attacks the plaintiff for abandoning the minor child when the child was seven years old when she became ensconced in the United Kingdom. The defendant took care of the needs of the minor child in her absence.

He averred that he is contactable even when at sea. The defendant expressed doubt that the plaintiff will be able to grant him access were she to be granted custody.

The defendant is of the view that Tanatswa is now a major and that he has no obligation to look after her. The defendant proposes that he be granted sole custody of the minor child in the circumstances.

The narrow issue to be decided were clearly spelt out by the parties.

I am mindful that s 81 of the Constitution of Zimbabwe, 2013 provides for the right to equal treatment before the law of every boy or girl below 18 years of age, and that the "child's best interests are paramount in every matter concerning the child.

In *Frank Buyanga Sadiqi* v *Chantelle Tatenda Muteswa* HH 249-20 ZHOU J at p 8 said:

> "The best interests of the child requirement enjoins this Court as the upper guardian of all minor children to exercise its authority by giving priority to the interests of the child over the rights interests and entitlement of the parents. In the case of *Fletcher* v *Fletcher* 1948 1 SA 130 long before the advent of democratic institutions in both South Africa and Zimbabwe the appellate division held that the most important consideration in matters of custody and access (and necessarily guardianship) is not the rights of the parents but the best interests of the child."

In this case the father of the minor child, the defendant took care of the minor child when the mother left for the United Kingdom. The manner in which she left was rather abrupt. The father has been able to take care of the child during the four or so year period when the plaintiff was ensconced in the United Kingdom. The minor child is used to the environment wherein the child resides with the defendant and other relatives.

The issue of being ensconced at sea, was delved in extensively by both parties. At first glance the impression gained is that the defendant is permanently at sea. It appears however

that he is summoned for work when the need to act arises. It was demonstrated that he is accessible even if at sea.

The plaintiff's abandonment of the minor child in the circumstances, demonstrated in the proceedings is to me the deciding factor when regard is had to the best interests of the child. The mother's presence is an important factor in the development and upbringing of a child. That presence for a number of years, the minor child missed because the plaintiff prioritised herself over the best interests of the minor child. The minor child is in a familiar environment with the father. After being estranged for years from the mother the bond is not easy to regain. The minor child is going to school and attaining good grades while residing with the father.

Uprooting the minor child to the United Kingdom may be a major change in his life and not in the child's best interests.

In the circumstances I am of the considered view that custody of the minor child should be awarded to the defendant. The defendant does not propose that any maintenance be paid towards the minor child. He has managed to be the custodian of the child without any financial assistance from the plaintiff. No order of maintenance has been claimed and none will be granted. The plaintiff will access the child using her own means. The question of when the defendant can access the minor child, have not been proposed by her. In any case, she was in the best position to propose such considering as she knows her schedule and her financial capability to visit Zimbabwe from the United Kingdom.

The parties having been married for a considerable period of time should be able to agree on the timing and length of the access. The defendant at law has to allow the plaintiff access to the minor child. The access has to be at reasonable hours and periods. As mentioned earlier the challenge emanates from no proposal from the plaintiff herself.

A consideration of the closing submissions reflects no proposal on access.

Section 8(3) of the Matrimonial Cause Act provides as follows:

> "(3) An appropriate Court may direct that the maintenance order referred to in subs (2) shall extend beyond the date when the child attains the age of eighteen years-
>
> (a) If the child is or will be receiving education or training beyond attaining that age, or
> (b) If there are special circumstances which justify which direction."

The defendant sought to resist paying maintenance towards Tanatswa, who is now a major on the basis that he did not choice the institution where she is currently doing her tertiary

education. Further, that he once paid fees for a South African University and she disappointed him when she decided not to attend.

The position of the defendant is understood from a moral point of view. However, at law it is provided for that when the child is receiving tertiary education, maintenance may continue to be paid.

As a parent to Tanatswa defendant who is in a good financial position to contribute to her tertiary education, it is only fair that he contributes to such tertiary fees. The plaintiff has indeed catered for Tanatswa's tertiary needs thus far.

I find it justifiable that the defendant contributes to the tertiary education of Tanatswa on the ratio of 50%.

Accordingly, I order as follows:

1. A decree of divorce be and is hereby granted,
2. The custody of the minor child Tinomudaishe Muzuva (born on 31 March 2014) be and is hereby awarded to the defendant with the plaintiff exercising her access rights by arrangement with the defendant.
3. The defendant shall contribute 50% of Tanatswa Muzuva's tertiary fees.
4. The proprietary rights of the parties shall be regulated by the consent paper executed by the parties on 24 May 2024 and which consent paper will form part of this order.
5. Each party shall pay its own costs.

WAMAMBO J:……..

Mtetwa & Nyambirai, plaintiff's legal practitioners
Manokore Attorneys, defendant's legal practitioners