

MATHIAS MAKUNDE
versus
BRIDGET MAKUNDE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 23 January 2023, 15 February 2023 and 2 March 2023

Custody of Minor Children

Ms *M Karimanzira* assisted by Mrs *M Mandingwa*, for the Plaintiff
Mr *V Mazhetese*, for the Respondent

MUZENDA J: On 5 October 2022 applicant brought an application to this court seeking the following relief:

“IT IS ORDERED THAT

- 1. The applicant be and is hereby granted sole custody of three minor children namely: Anesu Makunde born on 24 April 2014; Anopa Makunde born 25 November 2016 and Anenyasha Makunde born 06 August, 2018.***
- 2. Each party be and is hereby ordered to pay its own costs.”***

Respondent opposed the application and the matter was set down on opposed roll on 23 January 2023.

On 23 January 2023 the parties agreed that an interim order be granted by consent that whilst pending finalisation of the two applications, this one under HC 282/22 and one filed by respondent in Harare under HC 6915/22 custody of the minor children be vested with applicant who had deprived of such illegally by the respondent who removed the minor children from the matrimonial home and left them in the hands of her parents.

It was also agreed by the parties that the outcome of this application would also resolve the one pending in Harare and that parties had to make arrangements with Registrars of Mutare and Harare to transfer the Harare record to Mutare for consolidation, where respondent’s application will form a counter-application to the Mutare matter. It was also agreed on 23 January 2023 that the respondent who was already in the United Kingdom had to return so that the matter proceed into a full enquiry. Hence the full hearing held on 15 February 2023.

Background Facts

Both parties are professional nurses. They were married at Mutare on Africa Day, 25 May 2013 and the marriage still subsists. However on 15 February 2023 applicant served respondent with summons for divorce. The marriage was blessed with three minor children, eldest being a daughter and the remainder being both boys. Eldest daughter and second are both at Chancellor Junior School, Mutare and the youngest is doing ECD at Tiny Tots in Danganvura.

Sometime in 2021 the couple agreed that respondent migrates to Dubai to work as a nurse and help to take care of the family. Applicant remained with all three minor children in Zimbabwe. Respondent would send money to applicant for family upkeep as well as developments with a view of acquiring immovable property in the urban area. According to respondent the couple had agreed that the ideal destination to work is United Kingdom and whilst respondent was in Dubai she pursued her ultimate target and succeeded. She informed applicant and proposed that the whole family migrates to the United Kingdom as previously arranged. Applicant backtracked and refused to go with respondent.

When respondent returned from Dubai enroute to United Kingdom, relations between the two had strained, there were accusations and counter-accusations of infidelity, domestic violence, financial mismanagement and neglect of minor children. There was love lost between the couple and on 7 September 2022 respondent packed her bags, took away the children and moved back to her parents' home.

Before she flew to United Kingdom in October 2022, she filed an application for sole custody in Harare. Meanwhile in October 2022 applicant also filed a similar application in Mutare. Both believe that they are the best placed candidates to be granted sole custody of the minor children. The minor children became the rope between tug-teams and to resolve this a full hearing was held.

Applicant's Evidence

Applicant adhered to his founding affidavit when he gave evidence he virtually reinstated and repeated the contents of his pleadings. He also admitted that he served respondent with summons for divorce. He repeated that when the respondent went to work in Dubai the youngest child was 2 years old and he managed to take care of the 3 minor children. He denied abusing respondent, he denied abusing funds send to him by respondent and was not comfortable to go to United Kingdom and was apprehensive about the whole idea of leaving

Zimbabwe. He also added that the laws of Zimbabwe and United Kingdom may differ on access to the minor children and will not be able to fund travelling costs to the United Kingdom. It was further his testimony that Chancellor Junior Primary School was one of the best for primary level and first and second born children were doing excellently well at the school. He hoped that they remain at that primary school and be joined by the last born later.

Respondent's Evidence

Like applicant, respondent apparently stuck to the contents of her affidavit. She stated that her migration to Dubai was done with the full blessing of applicant, they planned it together and although she was abroad she had her children at heart and periodically sent money to applicant for their upkeep. She resolved to go to United Kingdom because of conducive working environment and good salaries where she gets €1 800 per month. She has a three bedroomed semi-detached house and education is free. She is best placed to look after the children financially and socially. She added too that applicant was abusive and not able to manage resources available to him. Comparatively his salary of ZW690 000 per month is far low as one looks at hers. She insisted that she cannot fund applicant to travel to the United Kingdom to see the children. She dismissed racism in United Kingdom and commented that drug abuse is also rampant in Zimbabwe. She admitted that her in and out of Zimbabwe psychologically affects the minor children.

Probation Officer's Report

At the end of hearing, I directed the parties to go and see a probation officer. I did instruct the deputy registrar to make a follow up since I had requested parties to have submitted it by 17 February 2023. I only received it on 22 February 2023 at 1700 hours. The probation officer's report contains some errors which are of typing nature. It alludes to "a child is also a nurse." She visited both parties and remarked that when she visited applicant, he found the minor children looking happy and in good health in the custody of their father. He added that both parents are morally, physically and mentally fit and proper persons to become custodians of the children. However it was the considered view of the probation officer that given the children's tender age they required maternal love. They also stand to benefit from free and quality education if they are allowed to relocate to United Kingdom with the respondent and that applicant be accorded reasonable access.

The Law

Both counsel for the parties in their heads unanimously agree that the Constitution of Zimbabwe, s 81(2), the Guardianship of Minors Act, [Chapter5:08] as well as case law, all centralise the best interests of the child as profoundly paramount. Applicant's counsel proceeded to cite *Fanny Chipofya (nee Nkwazi) v Messiah Chipofya*¹, *Galante v Galante*², and South African case of *McCall v MaCall*³ which is extensively persuasive in Zimbabwe on the issue of factors a court should look at in custody matters.

Respondent's counsel also cited equally good case law authorities on the same subject. It was also submitted further on behalf of respondent that a court would not lightly refuse the care-giving parents right to migrate with his/her child if the decision to migrate was *bona fide* and reasonable⁴. Counsel also helpfully cited the case of *Minezhi v Boora*⁵ where the court stated that whilst cognisant of the facts that emigration of a child removes her or him from the court's jurisdiction, a court may grant the emigrating parent, custody if it is in the best interests of the child. Conversely a party opposing such relocation must show that it is not in the best interests of the minor child. In *Minezhi v Boora*⁶ the court took into account the gendered nature of parenting as a reality in Zimbabwe and explained the dilemma faced by a mother who is emigrating and in the matter of *Hackim v Hackim*⁷ it was held:

"In a case involving the custody of minor children, the court must approach the issue of onus from a broad and wide angle. The onus should be discharged if it is at the end of the day the court is satisfied that the best interests of the minor children dictate that it makes the order sought."

In the matter of *McCall v McCall*⁸ it was held that

"In determining what is in the best interest of the child the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance:

- a) *The love and affection and other emotional ties which exist between parent and child.*
- b) *The capabilities, character and temperament of the parent.*

¹ HC 3622/07 per Mawadze J

² 2002 (2) ZLR 408(H)

³ 1994 (3) SA 201

⁴ *De montille v De Montille* 2003 (1) ZLR (H) *Ro Dangarembizi v Melisa Hunda* HH 447/18, *Makuni v Makuni* 2001 (2) ZLR 189 etc

⁵ *Jackson v Jackson* 2002 (2) SA 303 (SCA), *FVF* (2006) I ALL SA 377 (SCA)

⁶ *Supra*

⁷ 1988 (2) ZLR 61 per Dumbutshena CJ (as he then was)

⁸ *Supra*

- c) *The ability of the parent to communicate with the child and the parent's insight into understanding of and sensitivity to the child's feelings.*
- d) *The ability and disposition of the parent to give the child the guidance which he requires.*
- e) *The ability of the parents to provide for the basic needs of the child.*
- f) *The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development.*
- g) *The mental physical and mental fitness of the parent.*
- h) *The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo.*
- i) *The desirability or otherwise of keeping siblings together.*
- j) *The child's preferences.*
- k) *The desirability or otherwise of applying the directive of same sex matching and,*
- l) *Any other factor which is relevant to the particular case concerned"*

Applying the Law to the facts.

Has both parties been permanently based in Zimbabwe this is a case that would have qualified to award joint custody to both parents. Both are nurses, both have been assessed by a probation officer to be good custodians. In my view having assessed the circumstances of the parties, they do not show any competitive marked element warranting denial of custody to either parents. Invariably both meet the factors competently spelt out in the *McCall* case (*supra*).

When respondent went to work in Dubai, applicant physically took care of the minor children. Respondent tried to lay out shortcomings in how applicant took care of the children but to me they are minor and created. No doubt the probation officer during a visit found the children happy and in good health. It is palpably true that respondent is earning quite a package as compared to what applicant earns but it is not only money or financial muscle that will add weight to the issue of the best interests of minor children. The parent should in addition show a competitive and comparative edge over the other. Will the emigrating children be able to adapt to cultural values of the receiving state? What challenges are they likely to face? How would- the receiving white community treat the children at school, shops or in the streets? Would the children from a third world country adapt easily or will be fundamentally affected

to such an extent as to affect them psychologically? How would applicant access the minor children, what does the English law say about the respect of access by a non-custodial parent? Why does the English family law rules repose immigrants to have an order of court specially granting sole custody to an immigrant parent? Does the free education system apply only to British citizens or to all including immigrants' children? These questions were not clearly explored by the respondent. I directed respondent to get clarification from the British Embassy in Zimbabwe but by the time I wrote the judgment no information had been availed by the respondent. I am only left with respondent's word. The probation officer did not get confirmation on these aspects and the attractive advantages of respondent viewed from her pleadings is a high salary and the love of the children.

What is the security of children in United Kingdom against a host of questions I posed above? Zimbabwe's education system is built upon the legacy of its colonizers and almost identical. Some of the schools in Zimbabwe are registered with Cambridge Examination Board and I do not buy the probation officer's conclusion that the children will benefit from good educational system abroad. The children need a stable environment, a good school, caring parent and at most to preserve the status *quo*. In terms of religion, cultural values and psychological confidence of the environment they know that it will be in their best interest, in any case home is best.

Applicant has managed to prove on a balance of probabilities that he is a preferable and better placed to have custody of all 3 minor children.

It is ordered as follows

"1. The applicant be and is hereby granted sole custody over the three minor children namely:

- (a) Anesu Makunde (female) (born 24 April 2014)***
- (b) Anopa Makunde (male) (born 25 November 2016)***
- (c) Anenyasha Makunde (male) (born 6 August 2018)***

2. Each party to pay its own costs"

Mhungu & Associates, Applicant's Legal Practitioners
Mazhetese & Partners, Respondent's legal Practitioners