

SILIBAZISO ZIKWATURE

versus

ELLIOT ZIKWATURE

HIGH COURT OF ZIMBABWE

WAMAMBO AND ZISENGWE JJ

MASVINGO, 3 March 2021 and 17 May 2022

### **Civil Appeal**

*W.T. Davira with F. Mrewa*, for the appellant

*T. Kamwemba*, for the respondent

WAMAMBO J: This is an appeal against a judgment by a Magistrate sitting at Gweru Magistrates Court. We dismissed the appeal and gave an ex tempore judgment. Our reasons have been requested and these are they:

In the Court *a quo* appellant applied for custody of two minor children born of her and respondent. The appellant and respondent are husband and wife.

The appellant in her founding affidavit averred as follows:

On 5 November 2020 she left the matrimonial home due to marital difficulties. She sought and obtained a protection order against the respondent. Upon leaving the matrimonial home she left the minor children at the centre of the dispute in the custody of respondent. Since her departure from the matrimonial home respondent has denied her access to the minor children and keeps the gate and house under lock and key. She is a police officer attached to Gweru Central Police.

Respondent opposed the application and averred as follows.

He was never violent towards appellant. After solemnizing his marriage with appellant he discovered that appellant had not disclosed to him that she had two other children. His view is that the application for a protection order was a mechanism by appellant to preempt any violence on his part precipitated by the discovery of her past life.

Appellant left the matrimonial home without making provision for the children. The children and himself do not know where the appellant resides. Appellant habitually deserts the

matrimonial home whenever it suits her. Appellant psychologically and emotionally abuses him and also misappropriates family funds. Respondent further avers that the matrimonial home is open to appellant to come and visit the minor children.

The respondent is supported by his maid Shamiso Gazimbi who deposed to an affidavit Shamiso, among other things, asserts that appellant used to party away from home and would return home in the dead of night.

She further avers that the children prefer the company of the father to that of their mother. In a supporting affidavit she gives details of what she alleges are appellant's misdemeanors.

A probation officer's report was availed to the court *a quo*. In a detailed report the probation officer comes to the supported recommendation that custody of the minor children be granted to the respondent with the appellant being awarded reasonable access.

The court *a quo* in a detailed judgment made a ruling dismissing the appellant's application for custody.

It is this judgment which the appellant is appealing against. In her notice of appeal appellant raises three grounds of appeal.

The grounds can be summarized as follows:

The court *a quo* erred by granting custody of the minor children to respondent whereas custody automatically vests in the mother upon separation. The court *a quo* misdirected itself by depending on the probation officer's report which is flawed and biased against appellant.

Lastly, that the court *a quo* depended on the financial capacity of respondent above the interests of the minor children.

The court *a quo* was alive to the provisions of the Guardianship of Minors Act [*Chapter 5:08*] and the best interests of the minor children. The court *a quo* also considered case law and s 81(1) of the Constitution of Zimbabwe, Act No 20 of 2013.

An application of case law, the provisions of the Constitution and the Guardianship of Minors Act [*Chapter 5:08*] led to the conclusion that it was in the best interest of the minor children that custody be granted to respondent.

We find no fault with the application of the law to the facts of the instant case.

The court *a quo* found the following:

Respondent attended the teacher consultations and has the children's academic welfare at heart. The same cannot be said of appellant.

The minor children are in a stable environment and space promoting privacy and safety.

The bond between the father and the minor children is stronger than that with the mother. Respondent engaged a maid to take care of the children showing commitment to the best interests of the children.

The judgment by the court *a quo* appears balanced and resonates with the law.

There is nothing from the probation officer's report that reflects partiality. We find that it is a balanced report based on information on the ground. It details the reasons for the enquiry, the family composition, the background information, the findings, the present circumstances of appellant and respondent, the present circumstances of the boy child and discussions with the prospective custodian.

There is no evidence whatsoever that the report is flawed. There is further no evidence reflecting any unbalanced or injudicious reliance on the said report by the court *a quo*.

We also find nothing in the judgment of the court *a quo* reflecting that there was an unusual reliance on the comforts offered by respondent. The record is clear that appellant is of unknown and inconsistent abode.

The best interests of the children appear to favour and order that custody be granted to respondent.

In *Munetsi Blessing Masedewe v Manyara Masedewe nee Meya* HH 775-17 CHITAKUNYE J (as he then was) at pp 8-9 said:-

“As aptly noted by TSANGA J in *Katsamba v Katsamba* 2014(1) ZLR 187 (H) at 1959 –H the best interests of the child as a principle, permeates our laws as they relate to children. Our new constitution specifically incorporates children's rights within the thematic framework of the three pillars of protection provision and participation that characterizes the UN Convention on Children's Rights, to which Zimbabwe is a party, Devoting separate provisions on children's rights is a clear indication of the role that the observation of children's rights is expected to have, in building a just society.

*Further it is apposite to note that the African Charter on the Rights and Welfare of the child to which Zimbabwe is a party reiterates the principle of the best interests of the child as a primary consideration in all actions concerning the child.”*

We find that the findings by the court *a quo* resonate with the principles as espoused above.

In the circumstances we made an order as follows:-

The appeal be and is hereby dismissed with costs.

ZISENGWE J..... agrees

*Gudu, Dube & Pamacheche*, appellant's legal practitioners.  
*Tavenhave and Machingauta*, respondent's legal practitioners.