PRECIOUS MBAIMBAI
versus
MASAUKO ALFONSO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 8 July & 15 September 2022

Opposed Matter

L Majogo, for the applicant
K P Kaseke, for the respondent

TSANGA J: Due to the country's economic turmoil there has undoubtedly been a *seismic* shift in how families are having to organise themselves to cope financially. One parent being in the diaspora whilst another remains in the country of origin with the child or children is now a common scenario. Whilst usually the parents are able to agree on arrangements concerning their child or children under such circumstances, increasingly courts are finding themselves faced with contestations between competing parents, one here and the other in the diaspora, on who should have the custody and guardianship of the child or children. In such cases, where the parties are not in agreement as to who should have the child or children, the court is approached to adjudicate, guided by the law and the best interests of the child on who should have custody and guardianship. Such decisions are by no means easily reached. As has been observed "a judge agonizes more about reaching the right result in a contested custody issue than about any other type decision he (*sic*) renders."[1]

This was one such case with a similar fact situation where having heard the parties on the contested concerns as to what is in the best interest of their child, and, having analysed the legal position in addition to giving voice to the child, this court ultimately found that the child's best interests will be served by the child remaining in Zimbabwe at this point with the father exercising both custody and guardianship rights as opposed to relocating the child to the United Kingdom where the mother is and granting her sole guardianship.

[1] Robert E. Shepherd Jr., *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. Rich. L. Rev. 151 (1974).
Available at: http://scholarship.richmond.edu/lawreview/vol8/iss2/3

The facts

The parties married customarily in 2014. In October 2018, the applicant, who is the mother of the minor child, left for the United Kingdom. She averred that she left the child in the care of her parents and that the respondent had taken the child for the Christmas holiday and had not returned her. It was not in dispute that the applicant returned to visit in August 2019 and that she approached the court in the face of difficulties accessing the child. An access order was granted by the Magistrate's Court in terms of which she was to have access to the minor on all school holidays. It was therefore common cause that custody of the child is currently with the father and that the mother resides in the United Kingdom. She averred that the respondent still makes access unreasonably difficult. It is against this background that the order she sought was one compelling the return of the child into her custody as per the legal position in the Guardianship & Minors Act pertaining then when she left which was that custody of a child born out of wedlock is primarily with the mother until a court decides otherwise. She sought sole guardianship on the basis that a court is empowered to grant this where it is in the best interests of the child.

In addition to her legal footing on the custody of a child of born out of wedlock, the main arguments posited by the Applicant as to why it was in the best interests of the child for her to have full custody and guardianship centred on concerns around education, the child's pending adolescence, the need for strong maternal ties. She also pointed to her firm financial capacity in the United Kingdom to look after the child and provide better opportunities. she argued that it is in the best interests of the minor child to be with the mother at this point as she is at a stage where she requires the maternal bond of a mother. Being a female child she also argued that the child will soon be approaching puberty making her better placed to address these challenges. She planned on enrolling the child at a grammar school. She pointed to the economic situation here and the continued threats of strikes by teachers as not conducive to a stable learning environment. The fact that the child is an only child was said to mean that she would therefore not suffer the effects of separation. Equally vital, she pointed out that she had always looked after the child by ensuring that she has access to basic necessities.

The application was opposed. It was said to lack a cause of action. Whilst made as an application for guardianship, it was said to be in fact an application for custody of the minor child. Also in issue was that the founding affidavit made submissions and allegations that unnamed relatives had tried to visit he child without success and that the parties concerned had

not made the submissions themselves. The answering affidavit was also said to raise new issues which the respondent was no longer in a position to respond to.

The respondent also averred that the child was left in his custody from the onset denied that he had refused to return her. The respondent stays with his parents in Kuwadzana here in Zimbabwe together with the minor child and other family members, which web includes his sisters and their children. On the merits, the respondent denied being a neglectful father and stated that there was no proof thereof as no maintenance had been sought.

He averred that the child had been left in his custody at all times and that had it been otherwise applicant's mother would have sworn to a supporting affidavit alleging the terms under which she had been left the custody of the child. As for the court order granting access, this was said to be by consent with a view to effecting what was in the best interests of the child. Having obtained that order that it is when the applicant was said to have left he child with her mother, which child was in the custody of the respondent. He acknowledged staying with his parents, a move he said was done to support he child as he has not remarried. Moreover, the child was said to be staying with other children of a similar age together with paternal grandparents and aunts. As for his own economic position in comparison to the applicant he averred to being a director of two companies from which he derives income.

As for the applicant's quest for sole guardianship, his position was that it had not been shown how he had exercised his rights of guardianship to the detriment of the minor child. As for the argument that the child needs her mother at this stage, the respondent's position was that she needed her more when she was three years old when the mother left for the United Kingdom. The fact that applicant earns more was said to not be a deciding factor since the economically superior parent can always be required to pay maintenance. In any event, he said he had single handed by funded the minor child's needs. As for strikes by teachers, he averred that he had enrolled the child at a private school which was accordingly not affected by strikes in government schools.

On the issue of the application being said to have been made in terms of s 4 (1) of the Guardianship of Minors Act when in fact it addressed issues of custody, I was alive to the dangers of parties having to re-litigate unnecessarily over a formalistic approach to the issues at stake when the order sought was clear that she wanted guardianship as well as a return to custody as separate issues. The argument that the application should be struck off merely because the application stated that it was one for guardianship could not hold. The issue unsupported averments and new issues were also side shows. A judge is strictly speaking not

determining competing rights between parents but rather the predominant concern is what is in the child's best interests. It is important that as courts that we discourage the growing approach to litigation that is based on technicalities at the expense of the real issues before the court which in most cases are easily discernible. I therefore chose not to be hamstrung by technicalities in favour of tackling head on the issue of the best interests of the child and dismissed the points *in limine*.

The issues placed before the court by the applicant for decision were essentially three fold; namely, whether it is in the best interests of the minor child that the applicant be granted sole guardianship of the minor child; secondly, whether the applicant has rights of custody conferred to her by the law; and thirdly who should pay the costs of suit.

THE LAW AND LEGAL ANALYSIS

Whether the applicant has custody conferred on her by the law

Turning to the core issues, I will start with the issue of custody as that was central to the application. At the time that the applicant left for the United Kingdom the law applicable on custody where child is born out of wedlock and parties commence living apart was that custody is with the mother.[2] As such the touch stone upon which the applicant relied with respect to the return of custody was s 5 (1) of the Guardianship of Minors Act *[Chapter 5:08]* which provided as follows:

> **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, the mother[3] 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).

Applicant referred to the case of *Mutetwa* v *Mutetwa* 1983 (1) ZLR 176 (SC) which bolstered this provision that custody was with the mother where parties commence living apart as in case. As the parent with custodial rights she herself had a right to decide whom to leave the child with. In this case, whilst she alleged that she left the child with her mother, and that the respondent did not return the child when he took her for Christmas in December 2018, however, she herself admitted that she allowed him to have custody. In paragraph 10:15 of the applicant's heads of argument she explained thus:

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[2] The Guardianship of Minors Act has since May 2022 been amended and either parent can now have custody of the child where parties are not living together. The law is now gender neutral and no longer leans in favour of mothers.

[3] As of May 2022 the provision has been amended to read either parent instead of the mother.

> "In fact the respondent only has custody of the minor child because applicant allowed him to have it. She had every right conferred to her in terms of s 5 of the Guardianship of Minors Act to retain custody when the respondent took the child from the applicant's grandparents in Masvingo."

The access order subsequently granted to her supports this reality that custody was now with the father as at 2019 when the order was sought. If the child had been forcibly removed, it boggles the mind why an application for return of the child in terms of s 5(2) was not made in 2019 for the return of the child. Instead what was sought was access, which order was granted obviously on the understanding that the parent with custody would grant access to other. These factual circumstances cannot be ignored.

It is not a case of simply going back to the law oblivious of a court order on access. Where a parent with rightful custody has agreed of their own accord agreed to place a child into the custody of the other parent, the modification of any resultant court order, such as access in this case, cannot be granted without the evidence of substantial or material changes of conditions that impact on the best interests of the child. It would need to be shown that the child would be better off if the existing order granting access, which was agreed to by the parties, is modified. In other words, a return of custody is not automatic simply as of right where that right has been modified by consent of the parents resulting in some other court order being granted.

The real issue before me then was therefore whether a case had been sufficiently made for the access order to be replaced with an order returning the child's custody to the mother. The wishes of the parents were conflicting. Both parents clearly want their child to grow up as a healthy adjusted and responsible citizen. However, one sees family ties as important to that growth whilst the other sees economic stability within a more stable western setting as likely foster these ideals given Zimbabwe's economic turmoil. A child's dependence on both parents is very important as highlighted by the applicant with appropriate case law. Applicant cited various case law in which the role of both parents in a child's life was said to be paramount; *Mubaiwa* v *Chiwenga SC 86/20; Rodney Ndangariro* v *Melissa Hunda HH 447/18; JF Potgieter* v *I Potgieter [2007] SCA 47 (RSA)*. Not having been with the child since 2018 applicant's argument was that it is now vital that custody be accorded to her.

In this instance since the parents are living in separate countries. I was alive to the fact that regardless of which parent ultimately has custody, the other parent would inevitably largely have to exercise their parental role remotely, whilst being aided and abetted by appropriate technology as is already the case.

I deemed the child to be of sufficient age with capacity to reason. To assist the court in reaching a more informed decision as to what is her preference on custody arrangements or their modification thereof, I called the child in. The wishes of the child as to what is in her best interests were undoubtedly that she wants to remain with her father and to be in the environment of a wider family setting. Given the argument by the applicant that the child needs her mother to develop crucial emotional ties as she gradually moves towards adolescence, I was interested whether being away from her mother affects her and her response was that she is engaged in video calls with her mother frequently and does not feel short changed from not having her immediately available. Her brothers, sisters also provide support I was also satisfied that that she is well adjusted in her home environment. I was also satisfied from observing the child's interaction with her father that they enjoy a close relationship.

With respect to the child's education, she is well settled in her home and a school environment. The child goes to a private school. I ascertained that the school is not affected by strikes. The learning environment seems more than satisfactory and the child herself is doing extremely well at this school. Indeed she revealed that she had come top of her class of 40 pupils and the report was availed to support this assertion. She is indeed a highly intelligent child with great potential.

Having considered the arguments as a whole, and, having spoken with the child, my conclusion was that severing ties with the parent the child has become accustomed to would be traumatic for the child. A child needs to maintain relations with those with whom she has close emotional ties. Growth develops when conditions are favourable. The child's dependence has been upon the father in the last four years. Whilst the parents are separated, the child has been able to remain in a family set up within her father's family. The kinship web has played a crucial role. The child did confirm the applicant's concerns that her relatives are being denied access alone with the child. The child said that this is because her father fears that she will not be returned. She stated that she sees her mother's relatives in town in the company of her father. It vital that the access order be obeyed so that the child develops solid relations with both sides of the family. No doubt as the child gets older her sentiments on relocating to live in the UK with her mother may change. Whilst the applicant expressed concerns about strikes, paedophiles and poverty in the Zimbabwean context, it would be wrong to see these as uniquely Zimbabwean problems. The child likewise seemed to have heightened fears of travelling and relocating to the United Kingdom because she had watched the news and learnt of a nine year old being shot dead recently which she erroneously attributed to the child having been left

home alone. The father's concerns in his application that the applicant works night shifts and the child would be left home alone seems to have influenced her fears and perceptions of the news incident.

Overall court was therefore satisfied that letting her remain in the custody of her father at this point would be least disruptive of her currently stable environment. That will continue to foster her physical and mental health. If indeed the mother is financially better off compared to the father, there is no reason why she should not be able to support the child financially since the duty rests on both parents

Whether it is in the best interests of the minor child that the applicant be granted sole guardianship of the minor child

As regards sole guardianship s 4 (1) allows the court to make a decision on sole custody where this is deemed to be in the interests of the child. The case of *Kutsanzira* v *The Master of the High Court* 2012 (2) ZLR 91 (H) states that guardianship is divested where it is has been established that to return guardianship in the parent would pose a danger to the child.

Having resolved that the child would be better off remaining with the father the issue of guardianship is self-resolving. This application was lodged on 8 June when the Guardianship of Minors Act had in fact been amended. Guardianship is defined as follows:

> "guardianship" means a legal right allowing either parent to manage a minor's affairs including health, education needs, financial security or any welfare needs."

Guardianship therefore relates to a parent being able to make important decisions such where a child can go to school managing the health issues and financial issues. The *proviso* to section 3 is also important in that it articulates the exercise of guardianship with respect to the custodial parent where the parties are not living together as husband and wife.

> "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".

In other words, where the parents are not living together, the parent with the custody of the child also exercises guardianship rights in relation to the minor in his or her custody. Indeed the exercise of guardianship is best exercised by the parent with custody. I was unable to

conclude that the father exercises his guardianship duties as defined in a manner that is detrimental to the child given the focus of guardianship on issues of education, health and general welfare which have been also canvassed in the custody discussion.

In the ultimate analysis I took into account that the child is living in a wholesome and stable home and has been doing so over the last four years. There was nothing from the child herself to convince me that that it would be detrimental to leave her in the custody of her father. In fact her desire at this point is to be with the father.

On costs there is no reason why the applicant should be lumbered with the costs in this application. As stated, both parents sought to pursue what would be in the best interest of the child.

Accordingly:

The application is dismissed with no order as to costs.

Messrs Mhishi and Nkomo, applicant's legal practitioners
Kanokanga & Parntenrs, respondents legal practitioners