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Judgment No S.C. 51\2002
Civil Appeal No 143\2001

DAVID MAKUNI v MARTHA MAKUNI

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE MARCH 14 & JULY 8, 2002

M. Makonese, for the appellant

E.T. Matinenga, for the respondent

CHIDYAUSIKU CJ: The appellant and the respondent were formerly husband and wife. They were divorced on 19 June 1998. Upon divorce, custody of the four minor children of the parties, two boys and two girls was awarded to the respondent, the wife, with the appellant being granted rights of reasonable access. Since the divorce of the parties, the four minor children have been in the custody of the respondent.

In or around May 2000 the respondent obtained employment as a nurse in the United Kingdom. She wished to take the children with her to the United Kingdom. The appellant was opposed to the removal of the children to the United Kingdom. He, according to the respondent, refused to sign papers for the children to obtain passports to enable the respondent to take the children with her to the United

Kingdom. This prompted the respondent to launch a court application in the High Court in which she sought the following relief:

> "1. The Respondent shall grant his permission for the applicant to obtain passports for the four minor children within seven (7) days of this order.
>
> 2. If the Respondent fails to sign and grant his permission the Registrar-General's office is authorised to issue passports for the children based on the papers signed only by the Applicant.
>
> 3. The Applicant is granted permission to obtain residence, study and work permits for the children in the United Kingdom and to sign all documents pertaining thereto.
>
> 4. Pending the movement of the children to the United Kingdom the Applicant is authorised to decide whether the children be placed at boarding school or not and the authorities at Goldridge Primary School are to accept papers signed by the Applicant and avoid the interference by the Respondent."

The appellant (then respondent) did not only oppose the court application but filed a counter-claim. In the counter-claim the appellant sought the following relief:

> "Custody of the minor children namely:
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> | | |
> |---|---|
> | Simbarashe Makuni | (Born on 15/07/1983) |
> | Tendai Makuni | (Born on 24/09/1985) |
> | Tafara Estelle Makuni | (Born on 12/06/1990) |
> | David Michael Makuni | (Born on 22/05/1992) |
>
> be awarded to Respondent.
>
> Applicant shall pay costs of this Application."

GOWORA J, who heard the matter, granted the court application and dismissed the counter-claim. She issued the following order:

"The applicant succeeds in her application and the counter application is dismissed with costs.

Accordingly there will be an order as follows:

1. Respondent is ordered to sign the necessary consent papers with the Registrar-General's Office to enable the applicant to obtain passports for the four minor children.

2. In the event that the respondent fails to sign and grant his consent, the Registrar-General's Office is authorised to issue passports for the minor children on documents signed only by the applicant.

3. Applicant is hereby granted permission to obtain residence and study permits for the minor children in the United Kingdom and to sign all documents pertaining thereto.

4. Respondent pays applicant's costs.

5. The counter application is dismissed with costs."

The appellant was dissatisfied with the above order and appealed against the whole judgment of GOWORA J. Several grounds of appeal are set out in the notice of appeal. In the notice of appeal the appellant takes issue with several factual conclusions reached by the court *a quo*. In my view it is no longer necessary to consider those challenges in the light of developments since the hearing of his matter. In particular Mr *Matinenga*, for the respondent, in his heads of arguments, made the following submissions:

"1. This appeal may well be an academic exercise. Appellant needs to seriously consider whether the Honourable Court's time needs to be taken up to decide theoretical questions. This point is made arising out of the following:

1.1 Simbarashe, the eldest child of the parties, has now attained majority.

1.2 Tafara Estelle and David Michael have since been removed to the United Kingdom and now attend Sidney Russel School and Valent School respectively.

1.3 Tendai is in Zimbabwe completing writing 'O' level examinations. By the time the appeal is heard, he may well have joined his mother in the United Kingdom."

At the conclusion of submissions by counsel the court enquired where the children were. Neither counsel was able to assist the court in that regard. The court requested counsel to advise it of the present whereabouts of the minor children. The letter from the respondent's legal practitioners in response to the above enquiry reads in part as follows:

> "Our client has advised us that Tendai is due to commence his "A" Level studies in the United Kingdom in September, 2002. Because he had not yet found a school place as at January 2002 he had returned to the country to commence his "A" Levels at Marist Brothers, Nyanga. He is abandoning that and starting his "A" Levels afresh in the United Kingdom.
>
> The other two children Tafara Estelle and David Michael are already learning in the United Kingdom where our client recently purchased a three bedroomed house. The major child Simbarashe is in the United Kingdom though he will do his degree in medicine at the University of Zimbabwe. If you need further clarification please do not hesitate to contact us."

Thus, the situation as of now is that two of the minor children are already settled in the United Kingdom where, from the reports accompanying the above letter, they are doing well. The other minor child, now doing "A" Level will soon join the other siblings in the United Kingdom. If the order of the court *a quo* were to be altered he is the only one who will be affected by such an order being the only one of the minor children still under the jurisdiction of this Court. I see very little merit in such an order as it leads to the separation of the siblings - something that the courts are always anxious to avoid. The eldest child is now a major. Consequently the issue of his custody has fallen away.

Indeed if the respondent were resident in the United Kingdom and the children were resident in Zimbabwe then there would be merit in the appellant's contention that he be awarded custody. That is not the case so there is no basis for interfering with the order of the court *a quo*.

As regards the costs of this appeal there is a basis for departing from the general rule that costs follow the result. The appeal was brought in pursuance of the interests of the minor children of the parties. The result of this appeal was to some extent influenced by factors such as the present location of the children not known by the appellant at the time of launching the appeal. In the circumstances the interests of justice demands that each party pays it own costs.

In the result the appeal is dismissed but there will be no order as to costs.

ZIYAMBI JA: I agree

MALABA JA: I agree

Makonese & Partners, appellant's legal practitioners

Danziger & Partners, respondent's legal practitioners