

**PHOEBEJEAN MASINA on behalf of the  
Minor child Viola Chikowore**

**Versus**

**SAMUEL CHIKOWORE**

**and**

**THE REGISTRAR GENERAL N.O.**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 4 AND 11 OCTOBER 2002

*C Hikwa* for the applicant  
First respondent in person

Opposed Application

**NDOU J:** The applicant is the grand mother of the minor child. She has been staying with the minor child since 1998, when her daughter i.e. the minor's mother passed away. The first respondent, as the surviving parent, should under normal circumstances, have custody of the minor child. However since the death of the minor's mother the first respondent does not seem to have shown any serious interest in exercising the custodial rights due to him over the minor. He has made no serious effort to collect the minor from the time the minor was four years old to date when she is aged 8 years, the applicant has exercised *de facto* custody over the child. The result is that the child is now in grade 3 and although the first respondent has a right over the minor (i.e. *de jure*) he has never exercised such rights. A responsible and caring father does not let his minor child being in the custody of another person for over four years. He does not seem to have bothered to have access to the child from the age of four years to age of eight. He obviously has no bond with the minor

child other than being the natural father. Even if I accepted that the applicant had shouted at him or chased him away for that matter the fact remains that for a period of over four years he did not take any meaningful steps to assert his custodial rights over the child. He has not approached the courts to have custody restored to him. He does not seem to have been paying adequate money for maintenance. He had to be taken to the maintenance court by the applicant to carry out this parental legal obligation.

The applicant and the minor were invited for Easter holidays 2002 by the applicant's daughter (and minor's aunt) to the United States of America for a month long visit. The child has no travel documents to go to the United States. In terms of statutory requirements, the natural father has to sign the passport forms to enable the second respondent, the Registrar General to issue a travel document. The first respondent refuses to sign the necessary forms. He is using this opportunity to state that he wants his child back. This is not a custody application. The applicant merely wants this court to compel the first respondent to sign the necessary forms, failing which the court has to intervene as the upper guardian of minor child.

The intended visit is a short one i.e. for a month. In exercising my powers as upper guardian I have to bear in mind that minors like adults need travel documents to facilitate visits and holidays. The paramount consideration in matters of this kind is the best interests of the child. Is it reasonable for the first respondent to refuse the minor an opportunity to travel outside the country? Put in another way – Is it in the best interests of the child to travel outside the country from time to time? This case does not involve emigration from Zimbabwe.

As alluded to earlier on, the applicant does not have custodial rights over the minor child. She has, in the circumstances, approached this court to intervene as upper guardian of the minor child. In such inventions by the upper guardian the question of the interests of the child is paramount – see *Patricia Jean Dolby v Colin Daniel John Lewis* SC-34-87 at page 14 of the cyclostyled judgment. In this context one asks, “Is the father’s objection unreasonable?” In this regard I find the words of RUMPF JA in *Shawzin v Lawfer* 1968 (4) SA 657 (AD) instructive. At pages 662H to

663A the learned judge commented as follows:

“In my view of the circumstances of this case, I think it necessary to make a few comments on the duty of a court, sitting as upper guardian of minor children, when it has to resolve a dispute concerning custody. To the court, as upper guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to be applied, namely the predominant interests of the child. The singularity of the subject is evidenced by a number of features. An order of the court as to custody and access may at any time be varied by the court for good cause. An agreement relating to custody may be made an order of the court if the court is satisfied that what has been agreed upon is in the best interests of the children, but such order also can be varied by the court for good cause. Also, from the procedural point of view, an application to vary an agreement is different from the ordinary application, in that the court need not consider itself bound by the contention of the parties and may, in suitable cases, notwithstanding the fact that the onus is on the applicant to show good cause, depart from the usual procedure and act *mero motu* in calling evidence, irrespective of the wishes of the parties. In the result, it could be said that, while in form there is an application for variation of the order of court, in substance there is an investigation by the court, acting as upper guardian; cf *Kotze v Grove* 1959 (2) SA 213 (0) at p 215. Also on appeal the court may, in an exceptional case, take cognisance of facts which are by consent admitted or which are unquestionable; cf *Goodrich v Botha and Others* 1954(2) SA 540 (AD) at p 546.”

Although I am not dealing with a custody matter the legal principles stated in these cases are, in my view, equally applicable. The rights of access of the first respondent, as the natural father of the child, will be reduced and possibly jeopardised

if the child is to be removed to a foreign country, albeit for a short period. For that reason alone his consent to the removal is relevant, and if he withholds his consent it becomes necessary to inquire whether he is acting reasonably or unreasonably – see *Stock v Stock* 1981(3) SA 1280 (AD) and also *Bailey v Bailey* 1979(3) SA 128 (AD). In this case the second respondent, as the Registrar General, requires the consent of the parent before issuance of travel documents. The applicant approached the first respondent who declined to give the consent leaving her with no option but to launch this application. The question to be asked is why the applicant wishes to take the child away from the land of her birth to a foreign country. She advanced reasons that show that the proposed steps are not drastic and far-reaching. The intended removal is temporary in nature. It involves taking the child on a month long (or shorter period) holiday in the United States of America. The applicant has a daughter who is married there and also resident there. She contends that she is motivated by the interests of the child. She stays with the child and wishes to take her along when she goes to the United States. A vital factor is the need to cause as little disruption as possible to the child's already disrupted life. The court has to take cognisance of the child's need for stability and continuity, not only in relationships with parents, but also in physical surroundings, school, friends and above all relatives – see *Re C* (a minor) (custody of child) (1980) 2 F.L.R. 163 and *B v B* (custody of children) [1985] F.L.R. 166.

The child has lived with the applicant since the death of the mother in 1998. The applicant was *de facto* her parent. She was there for her when she stated schooling. The child is now in grade 3. Even in his own papers the first respondent

does not pretend to have a father-daughter bond with the child. He does not even allege that he had seen the child in the last three or so years. He is trying to use this consent issue to claim custodial rights over the child. As I indicated earlier on, he did not take any meaningful proactive steps to have custody of the child. He is merely reactive to a situation created by the applicant's desire to have travel documents for the child. His refusal to consent to have the child obtain travel documents is not reasonable. He is not informed by the genuine interests of the child.

It is accordingly ordered as follows:

1. That the first respondent be and is hereby ordered, within seven (7) days of the service of this order upon him, to sign the relevant parts of the passport application form to enable the applicant to proceed to the second respondent's offices in Bulawayo and there to take all the necessary steps to apply for a passport or travel document on behalf of the minor child Viola Chikowore, failing which the Registrar of this court shall sign in place of the first respondent in the relevant parts on the application form, which the second respondent shall take to be the necessary authority and shall proceed to issue a passport or travel document in the name of the said minor child.
2. Before each journey out of the country is undertaken, the first respondent and the Registrar of this court shall be informed in writing.
3. Each party to bear its costs.

*Mabhikwa, Hikwa & Nyathi* applicant's legal practitioners