

**EMMAH MUHAMBI**

**Versus**

**STANLEY MUSENDO**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 30 OCTOBER & 20 NOVEMBER 2003

*Nyathi* applicant's legal practitioner  
*T Moyo* respondent's legal practitioner

Application for custody

**CHEDA J:** On 24 September 2003 applicant through an urgent chamber application applied for custody and the terms of that order are:

1. That custody of the minor child Precious Paidamoyo Musendo be and is hereby granted to the applicant with the respondent being accorded access on prior arrangement with applicant.
2. That the Deputy Sheriff be and is hereby authorised and directed to remove the minor child from respondent's custody and deliver it to the applicant forthwith.
3. That respondent bears the cost of this application at an attorney and client scale.

**Interim Relief Granted**

1. That applicant be and is hereby granted leave to immediately assume custody of the minor child Precious Paidamoyo Musendo.
2. That the Deputy Sheriff be and is hereby directed to uplift the minor child and place it in the custody of the applicant.

I granted the interim order on 25 September 2003. The matter then came for argument on 30 October 2003.

The parties were married under customary law and were blessed with one child Precious Paidamoyo Musendo (female) born on 11 May 2001. In August 2001 applicant secured employment in Bulawayo which necessitated her to move there leaving behind the minor child with its father. The arrangement had been that

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applicant would stay with respondent's uncle which she did but subsequently left due to some family misunderstandings which are irrelevant to the issue at hand.

The parties, however, came to live together. In February 2003 respondent ordered her to move out with the child which she did. On 9 August 2003 respondent approached her seeking custody. The parties would not agree and they ended up at Hillside Police Station. At the police station respondent advised the police that he only wanted to have custody of the child for a few days and this was mutually agreed to by the parties. However, respondent did not return the child as promised but instead approached the Harare Magistrates' Court on 1 September 2003 seeking custody of the said minor child. His application was however dismissed. Applicant then approached this court for the relief referred to *supra*.

Respondent argues that his reason for taking the child is because applicant has denied him access. Further that she is a member of the Apostolic Faith Church whose doctrine does not subscribe to medical treatment. To back up his story he filed a "medical report" from a Dr B Madzima which reads:-

"To whom it may concern

Re: Precious Musendo, 2 ½ years

I can confirm that I am the medical practitioner of the above named since December 2002.

I can confirm that I have seen her in May and in August 2003 with signs and symptoms of malnutrition, social neglect and respiratory tract infection.

I can also confirm that on all occasions the father has been very supportive in terms of buying medication and bringing the baby for review.

To me, as it stands, the child seems to be doing very well in terms of weight for age, height for age etc and would definitely approve of whoever is currently looking after the child, serve for the two incidences mentioned earlier. (my underlining)

I make these statements sorely believing its true.

Yours sincerely

(Signed)  
Dr B Madzima, MBChB.”

I find that the parties were married under customary law and applicant had custody of the child by consent of respondent. Respondent unlawfully and deceitfully took the child from applicant.

Mr *Nyathi* has argued that I ignore Dr Madzima’s letter. I agree with his suggestion because it is clear that it was solicited by respondent in order to strengthen his case. Doctors are professional people who are expected to practice their profession without fear or favour. This is the hallmark of their profession and part of their ethics. A doctor should understand that his observations and opinion in a particular case will go a long way in helping the court in making a proper determination and as such it is important that he remain neutral in his report. He should not be partisan to a party that has consulted him. This practice by some doctors if allowed to continue will no doubt shake the public’s confidence in them.

It is trite and settled law that in matters of custody the determining factor is the interest of children, see *Fletcher v Fletcher* 1948(1)SA 130. In making a determination the courts should be guided by the following factors among others:

**1. Sex of child**

A girl child is naturally attached to its mother and as such her removal can only be justified if the mother is of such a character that the interest of the child will not be served by the mother’s association with the child.

## 2. Age

The younger the child the more attachment to its mother it becomes and that is a natural bond in my view. In *Stieger v Stieger* 1958(2) PH B24(D) an application for custody for two girls aged 4 years 2 months and 2 years 6 months was made before the court. Their father had claimed their custody it was held that the younger child in the absence of special circumstances should remain in the custody of their mother.

In *Ferguson and Ferguson* 1906 EDC 218 at 227 SHEIT J stated,

“As a general rule no doubt the father is entitled to the custody of his children, but the first duty of the courts, in cases like the present, is to consider the interest of the children, and having regard to their tender ages, one not being two years old, I think the best interests of these children will be safeguarded by giving their custody to their mother, who has not been proved guilty of such moral misconduct as would disentitle her to their custody.” (my emphasise) See also *Shawzin v Laufer* 1968 (4) SA 657

## 3. Character of parents

The way a parent conducts himself should also be taken into consideration for the child is bound to learn a lot from a parent whom it daily associates with.

The parent's character can easily be mirrored through the child see *Milstein v Milstein* 1943 TPD 227 at 230-1 where it was held that the character of the parties had to be taken into account in determining the question of custody.

In the present case respondent took custody of the child in a deceitful manner.

He lied to the police Hillside, Bulawayo and also misrepresented the facts when he sought custody at the Magistrates' Court in Harare. In my view, this type of behaviour is an indication of a dishonesty man which then casts doubt on respondent's *bona fides* in this matter. If this is the kind of life style respondent leads,

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then he is not the kind of a father in whose custody a minor child should be entrusted.

In this case, the child is a little above 2 years and is a girl. For those two reasons alone respondent's chances of succeeding in his endeavour to claim custody are slim, in my view, he will have to prove on a balance of probabilities that in the circumstances applicant is of such a personality that it will not be in the interest of the child that she be granted custody. Applicant is employed and lives with her brother in the leafy suburbs of Hillside which is regarded as a high class area with a sought after postal code.

I accept that fathers naturally would like to associate themselves with their offspring. This is quite proper, as that bond should always be maintained. However, the natural instinct of continuing with the bond should not be allowed to cloud a father's judgment to an extent that prejudices the physical and mental development of the said minor child. The best interest of the child will not be served by granting him custody.

In the light of the above I am convinced that applicant has made out a good case, accordingly the provisional order issued by this court on 25 September 2003 be and is hereby confirmed with costs.

*Messrs Sibusiso Ndlovu* applicant's legal practitioners  
*Messrs Ziweni & Company Associates c/o Messrs Hwalima & Associates*  
respondent's legal practitioners