Judgment No. HB 42/2003
Case No. HC 84/2003

LAWRENCE CANNISIUS MAKUMBE

Versus

JOHN CHIKWENHERE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 20 JANUARY & 20 MARCH 2003

Ms Tsara for the applicant
Respondent in person

Urgent Application

NDOU J: On 20 January 2003 after reading documents filed of record, hearing both *Mrs Tsara* for the applicant and the respondent (in person) and interviewing the children subject matter of this application I made an order in the following terms:

> "1. That for this first term of 2003 the two minor children, Tafadzwa and Tichaona attend Baines School, Northend, Bulawayo and during the said period be in the interim custody of their grandfather John Chikwenhere.
>
> 2. That the Department of Social Welfare, Bulawayo monitors the progress of these minor children and submit a report to this court for review of the order by the end of this school term.
>
> 3. That this order shall be reviewed during the first week after the end of this school term.
>
> 4. That the applicant shall be entitled to access the minor children on weekends on a fortnight basis commencing Friday 31 January 2003.
>
> 5. That there shall be nor order as to costs."

I indicated then that my reasons for making the order will follow. This judgment provides the rational basis for the above order.

The facts of this case are that the applicant is the father of the two minor children. Tafadzwa was born on 7 September 1992 and Tichaona 5 December 1994.

Mirriam Makumbe, the said children's mother, is the respondent's daughter. The applicant and Mirriam Makumbe were married to each other customarily from 1992 to 1997. They separated in 1997 with Mirriam taking the children with her. Until 2002, Mirriam had been staying with the children with the applicant paying maintenance and school fees for the minors. Around the middle of 2002, Mirriam went to work in the United Kingdom. She left the minor children with her younger sister Cathrine. At the time of her departure the applicant was out of the country on military duties at the Democratic Republic of Congo. When the applicant returned he did not find anything "amiss" by this arrangement. When he was free he took time to visit the children at Cathrine's abode. Towards the end of 2002 Cathrine also left for the United Kingdom leaving the children under the care of another sister, Betty. The applicant, due to his present marital circumstances, is unable to stay with the children. This is common cause. He, however, feels that sending the children to boarding school is the solution. He is naturally concerned as a father that the children's performance at school is less than ideal. The school reports filed of record show that they indeed performed badly at school last year. In a nutshell the applicant's intention is that the children will be boarders during term and stay partly with him and partly with his parents during the holidays.

During the December 2002 holidays the children came to Bulawayo to stay with their maternal grandparents. This arrangement was made with the agreement of the applicant. Meanwhile, the applicant had secured boarding places for the children at Selbourne Routledge School in Harare with effect from the first term 2003. He paid the necessary fees for the boarding facility. The children, however, did not

return to Harare. When the applicant investigated the reason he became aware that they had instead been enrolled at Baines School in Bulawayo and were temporarily staying with their grandparents. It also became clear that their mother had in fact purchased them a house in the low density suburbs of Queenspark, Bulawayo. The house was being furnished and they were just about to move into their house. The applicant is not happy at all about this development. He feels that the children were brought to Bulawayo under the guise of holidays for the purpose of frustrating his efforts to have them in boarding. He, consequently launched this application in which he sought:

> **"Terms of Final Order sought**
>
> That you show cause to this honourable court why a final order should not be made in the following terms:
> (a) That the custody of Tafadzwa and Tichaona Makumbe be and is hereby awarded to the applicant.
> (b) That the respondent shall pay the costs of this application.
>
> **Interim Relief granted**
>
> Pending determination of this matter the applicant is granted the following relief:
>
> (a) The respondent is hereby ordered to produce and hand over Tafadzwa and Tichaona Makumbe to the applicant upon being served with a copy of this order.
> (b) The respondent shall allow the applicant to take the aforesaid children with him together with their clothing which he shall surrender to the applicant on service of this order."

It is common cause that Mirriam is the custodian mother and applicant is the non-custodian father of the children. One of the orders sought is the reversal of this position so that applicant becomes the custodian father. Once he is declared the custodian parent, the applicant, according to his evidence, will place the children in boarding during term and with his parents during holidays, with him having access to

them from time to time. As alluded to earlier on, the applicant is not in a position to stay with the children on a full time basis because of a situation created by a subsequent marriage i.e. entered into after separating from the children's mother.

It is trite that this court has the common law power to look after the interests of all minors, and if necessary, interfere with the exercise of parental power. The interests of the minor in such matters are always the decisive factor – see *Fortune* v *Fortune* 1955(3) SA 348(A); *Jeche* v *Mahovo* 1989(1) ZLR 364(S); *Short* v *Naisby* 1953(3) SA 572(D); *September* v *Karrien* 1959 (3) SA 687 (C); *W* v *W* 1981 ZLR 243; *Maluwana* v *Maluwana* HH-155-01 and *De Montille* v *De Montille* HB-6-03. On page 7 of his cyclostyled judgment in the latter case CHEDA J stated:

> "The interest of the child takes precedent over those of its parents. In making a determination the courts should be guided by arrangements and facilities each parent has made for the child."

English authorities and literature refer to this as the welfare principle. In our jurisdiction the courts have qualified this principle by holding that the mother enjoys built-in advantage in such matters. The courts will not readily deprive the mother of lawful custody without good cause shown – see *More* v *Richardson* 1974 (2) RLR 16; *Nugent* v *Nugent* 1978 RLR 6 and *De Montille* v *De Montille* HB-20-03. The applicant seems to be concerned with the schooling side of his children. This is what forms his desire to have these children as boarders. Such parental claims and interests should, however, not overshadow the interests of the children. The question is one of relative weight to be given to the wishes and claims of the father against those of the minor. This involves a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most

in the interests of the child's welfare – see *J* v *C* [1970] A.C. 668. The court has to take into account the child's need for stability and continuity, not only in relationship with parents, but also in physical surroundings, school, friends, brothers and sisters and relatives – see *Re (a minor) (custody of child)* (1980) 2 FLR 163 and *B* and *B (custody of children)*[1985] FLR 166. These principles are all relevant to the present application.

Further, I interviewed both minors separately and in the absence of the parties (and relatives). *In casu*, it appears that the applicant wishes to have the children cared for by their paternal grandparents and the custodian mother wishes them to be cared for by the maternal grandparents. Each parent naturally believes that his or her own parent will properly look after the children.

The custodian mother of the children is working outside the country. She has handed over the children to the grandparents i.e. the respondent. This conduct of the mother has drawn brash criticism from the applicant. Should the mother be deprived of her custody of the children simply because she went to the United Kingdom leaving the children in the care of a third party? I do not think that this is, per se, a sufficient justification to deprive the custodian parent of her or his custodial rights. I am justified by what GOLDIN AJA stated in *W* v *W* case *(supra)* at 248B,

> "I do not agree that her conduct in handing over the child to his grandmother under strained economic and emotional situation in which she found herself has rendered her an unsuitable person so as to justify depriving her of the custody of the child. It only shows that she was concerned for the child and in the circumstances considered that it would be to his advantage to be with his grandmother until she surmounted her problems."

Here the mother of the children has gone outside the country, according to the children themselves, to work in order to improve their lot. The children proudly informed me that their mother has since bought them a house and arrangements are at

an advanced stage for their relocation to a home of their own. The home is close to their maternal grandfather i.e. respondent's house. The house is also close to where the respondent has enrolled them. It is not seriously disputed that the children are happy with their maternal grandparents who are devoted to them. The maternal grandparents are there for them. All this comes from the horses' mouths, as it were. The children feel that this environment is conducive for improvement in their academic work. The children are distressed by the mere mention of the boarding facilities that their father secured for them in Harare. One of the children was, in any event, a boarder at the same school previously and is vigorously opposed to going back there.

There is not much said about the paternal grandparents. The tragedy of this case is that the applicant, who is the children's father, and the only parent living in Zimbabwe, is not able to assume the responsibility of having their custody because of his current family set up. He cannot stay with children at his home. He wants them to shuttle between boarding school and his own parent's home. As the upper guardian of all minors, this court always has the power in a proper case to deprive parents of custody and award this right to a third party, usually a relative – see *W* v *W supra* at pages 246H to 247A; *Short* v *Naisby supra* at page 575. In *W* v *W* at page 247B-G GOLDIN AJA admirably emphasised the point in the following terms:

> "The power to award custody to a third party does not involve or justify the adoption of a test or approach that anybody concerned becomes a candidate or claimant. Compared with parents, grandparents and other many often be able to provide superior material advantages and unlimited time and attention, they may also be endowed with greater wisdom and patience. These attributes and assets would not, however, entitle them to custody in competition with natural parents who may not possess the same advantages. In deciding what is in the best interest of a child the court generally has regard to relative merits only of the parents. Grandparents are considered useful baby-sitters and a source of

> when natural parents or a surviving parent are held not to be proper persons to whom to award custody. The natural affinity and emotional bond and help in times of need or mere convenience. They are also "first reserves" attachment between parent and child are generally irreplaceable and an accepted fact of life. Such as association benefits and promotes a child's emotional security and feeling of normality, whilst the award of a child's custody to a third party places him in a distinctly unusual or abnormal category."

A court will only deprive a natural parent of custody and award it to a third party upon special grounds. Such special grounds include detrimental or undesirable effects or influences upon the physical, moral psychological or educational welfare of a child. The test is still not whether a third party can provide better materially or possesses more desirable attributes, but whether the parent or parents should be deprived of custody for any reason involving harm or danger to the child's welfare as mentioned above (see *Calitz* v *Calitz*, 1939 AD 56; *Short* v *Naisby (supra)* at page 575; *Hossford* v *de Jager and Another* 1959(2() SA 152 (N) at 154; *Petersen and Another* v *Kruger and Another* 1975 (4) SA 171(C) at 174." See also *Ex parte Walton* 1969 (2) RLR 133

As indicated above, the mother is the custodian parent. The applicant is the non-custodian parent. He seeks to reverse this application. As the upper guardian of the two children this court has to rely to the welfare principle in the resolution of this custody dispute. These children are not only enrolled at Baines School in Bulawayo. They have already started attending lessons and this court should be careful not to further disrupt their already disrupted lives. The psychological and educational factors amount to special grounds to award the custodial rights to the respondent. I do not think that it is in the interests of the children to take them from

Baines School and place in the boarding school in Harare. Such an order will be inconsistent with welfare of these children. They will certainly be devastated and their academic performance may deteriorate further. From what the children told me, this may further strain the natural affinity and emotional bond and attachment between them and the applicant. Already the children believe that the applicant does not love them and does not devote sufficient time to them. This may be a wrong perception on their part, but the bottom line is that their father and child relationship is currently less than ideal. This court, as upper guardian, should ensure that they work towards restoration of the harmonious father and child relationship. There is a probability, if this matter is not handled properly, that these children will adopt belief that their real father, the applicant, is an unworthy person who abandoned them without just cause for another woman. Such a scenario is not in the best interest of children in the long run.

Due to time and human resource constraints I was unable to obtain an expert opinion of the social worker on the best interests of these children. My order endeavours to address this. Regard must be had, however, to the right of the applicant to have access to the children, notwithstanding his unfortunate incapacity. This in itself emphasises the importance that has to be attached to the relationship between these children and their natural father, the applicant.

In applying these legal principles to the facts of the case I arrived at the decision referred to in the opening paragraph of this judgment. In the circumstances, these are the reasons for the order that I made on 20 January 2003.

T H Chitapi and Associates applicant's legal practitioners