

PIUS POTSIWA

Versus

PRECIOUS MOYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 16 AND 26 JUNE 2003

Civil Appeal

NDOU J: We made the order on 16 June 2003 and these are the reasons for the said order. The appellant sued the respondent at Bulawayo Magistrates' Court for the custody of the parties two minor children. From the papers in the record it is evident that appellant, hereinafter referred to as Mr Potsiwa, and the respondent, hereinafter referred to as Ms Moyo shared a relationship akin to a marriage. Out of this relationship two children were born. The parties' happy relationship came to an end in May 2001 after Mr Potsiwa found Ms Moyo in their "matrimonial" lodging with another man. We do not think it is necessary to deal with the veracity of this allegation, suffice to say that relationship came to an end as a result thereof. After their separation Ms Moyo successfully sued Mr Potsiwa for maintenance of these two children in case number M 216/01. Mr Potsiwa launched the custody proceedings in the court *a quo*. He was unsuccessful leading to this appeal. One of his major concern is that he was denied a fair trial as the trial magistrate did not allow him to outline and present his case.

Although this was couched as a ground of appeal it is apparent that he alleged that the proceedings in the court *a quo* were tainted with irregularities. In such a case the review procedure as opposed to appeal is applicable. As the parties are self actors we are prepared to use our discretion in the interests of justice. It is trite that not

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every irregularity will necessarily result in the setting aside of the proceedings of the trial court. It must be shown that the irregularity is capable of causing prejudice – See *Abbey Estates and Investments (Pty) v Property Renting Corporation (Pvt) Ltd and Ors* 1981 ZLR 39.

The entire record of the proceedings in the court *a quo* is so scant that we consider it necessary to quote it in its entirety. The full record is –

“Court Proceedings

Are you married (sic) - No
Any lobola paid (sic) - No

He wants custody of the children because he has been charged maintenance in case M 216/01. A man who is not married claim (sic) custody because he is paying maintenance. If this is allowed then all boyfriends would apply for custody of their children to avoid paying maintenance.

(Signed)
PROVINCIAL MAGISTRATE”

The entire record does not indicate the date on which the proceedings were held. It is not clear whether or not the parties testified and if so what they said, the cross examination, re-examination etc. If on the one hand this is indeed the complete record of the proceedings then the proceedings are tainted with irregularity. If, on the other hand, the record is incomplete the result is the same. According to the parties it is common cause that both gave detailed testimony in support of their respective cases. They both submit that the record is definitely incomplete. In light of this inaccurate record we are unable to access the entire evidence led in the court *a quo*. On what basis can we, sitting as an appellate court, determine the issues raised in the appeal? Short of acting as a court of first instance and hearing all the evidence afresh, we are unable to go into the merits of appeal.

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In this matter minor children are involved. The issue before the court *a quo* was one of parental responsibility and as such the welfare principle is applicable. In the circumstances, the interests of the minors are always decisive – see *Fortune v Fortune* 1955 (3) SA 348 (A); *W v W* 1981 ZLR 243; *Makumbe v Chikwenhere* HB-42-03; *De Montille v De Montille* HB-6-03 and *De Montille v De Montille* HB-20-03. In the first *De Montille v De Montille* case (*supra*) on page 7 of his cyclostyled judgment 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.”

See also *Maluwana v Maluwana* HH-155-01. Because of the ages of the children it was desirable for the court *a quo* to interview them. This was not done. The court *a quo* was also enjoined to take into account the children’s need for stability and continuity, not only in relationship with parents, but also in physical surroundings, school, friends and relatives – see *Re (A minor) (Custody of Child)* [1980] 2 FLR and *B and B (Custody of Children)* [1985] FLR 166.

In our jurisdiction the welfare principle is qualified in that the mother enjoys built-in advantage in such matters, and as such will not readily be deprived of the custody of children without good cause shown – see *More v Richardson* 1974(2) RLR 16 and *Nugent v Nugent* 1978 RLR 6. We are of the view that as this matter involves the rights of children, the welfare principle is core to the determination of the merits of the case.

We are, however, not in a position to determine the fate of this appeal due to the irregularities alluded to earlier on. No investigations were carried out during the

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trial on the welfare of the children. Mr Potsiwa, as a non-custodian parent, should have been afforded a fair trial. He should have been allowed an opportunity to testify under oath and adduce whatever evidence in support of his custodial claims. Ms Moyo should, in turn, have been afforded an opportunity to adduce evidence in opposition of the said claims. The judgment of the trial court should have focused on the welfare of the children and not meaningless and speculative utterances by the trial magistrate with no factual basis.

We are of the view that the irregularities in this matter cry out for interference on account of the prejudice occasioned thereby and the welfare of the children. We feel that there is a need for a proper inquiry to be carried out in this matter. We hold the view that remittal to the magistrate is the best course open to us. We will exercise our review powers on account of the irregularities referred to above. In remitting the matter to the court *a quo* the *status quo* will obtain. In passing we should indicate that this matter came before us on the day which the nation and the world (through UNICEF) are commemorating the “Day of the African Child”. Such a commemoration should serve as a reminder to our courts on the need to promote and protect child rights. The rights of these two children, their development and survival is threatened by the unstable family environment that the separation of their parents brings about.

In the circumstances we make the following order –

1. The order of the court *a quo* be and is hereby set aside.
2. The matter be and is hereby remitted to the court *a quo* for a trial *de novo* before a different magistrate within 30 days of this order.
3. No order is made as to costs.

Cheda J I agree