Judgment No. HB 25/05
Case No. HCA 36/03

EZEKIEL SHUMBA

Versus

MBINIRA SUZAN SHUMBA

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 7 JUNE 2004 AND 21 APRIL 2005

Appellant in person
R Nyathi for the respondent

Civil Appeal

NDOU J: The appellant, a Major in the Zimbabwe National Army, based at the Zimbabwe Staff College, filed an application for custody on 23 January 2003. The matter was heard by the Provincial Magistrate on 7 July 2002 and he dismissed the application. The appellant then raised the same application, on a photocopy of an affidavit of the matter previously dismissed on 7 July 2003. This matter was set down for 14 March 2003 before a different Provincial Magistrate. The latter magistrate dismissed the application by reason of the fact that the matter was *res judicata*. The appellant now appeals against the decision of the first Provincial Magistrate. The judgment appealed against was handed down on 7 July 2003. This matter was initially set down for 24 May 2004. The respondent's heads of argument were filed on that day. The appellant did not have his heads of argument ready. We indulged him and postponed the matter to 7 June 2004. On the later date the appellant filed his heads of argument. Generally the appellant did not conduct his case with efficiency and reasonable promptness. As he is a self-actor we allowed him to be heard on the merits.

The background facts of the dispute are the following. The parties have been married to each other for a period in the region of fifteen (15) years. There are children born out of their union. Of their children, only two, *viz* S and K are in the centre of the dispute. The appellant protests that they are not his children. These children were born *stante matrimonio*. By African Law on which the appellant placed reliance the custody and guardianship of such children born in wedlock rests on the father, i.e. the appellant. There is a presumption of legitimacy. There is therefore a presumption that the husband is the father of the children. There is a presumption against bastardising the child – *Kulumo* v *Diyana & Ors* 1944 SRN 35*; Hlale* v *Dziyake* 1938 SRN 34; *Ndoro* v *Mapfumo* 1942 SRN 166 and *Elizabeth & Mzeze* v *Gwandibva* 1941 512 N 121. In other words generally children born of, or conceived by a wife during the course of her customary marriage, whether legitimate or aldutrine, belong to her house, and so to her husband. I think it is high time that we acknowledge the futility and cruelty of penalising children for their parents' sexual misdemeanours. We should regard equality of status as a basic human right – *A Source book of African Customary Law for Southern Africa* by T W Bennett (1995) pages 359-360; United Nations Declaration (1989) 28 ILM 1448; article 25(2) of Universal Declaration of Human Rights 1948; article 10(3) of the International Convention Economic, Social and Cultural rights 1966 and article 2 of the Convention on the Rights of the Child 1989. In *casu*, the appellant is heavily focused on the Shona customary rules of affiliation with a correspondingly disregard of the welfare and interests of two children, S and K, born *stante matrimonio*. But even under Shona law because the respondent was married to the appellant any children she bore in wedlock are automatically affiliated to the appellant's family. This rule is

ascribed to the payment of "roora" bride wealth, which operates to transfer the woman's child bearing powers to her husband – *Shona Customary Law, with reference to Kinship, Marriage, the Family and the Estate* by J F Holleman, 1952 OUP (Cape Town) at 242-259 and *A Sourcebook of African Customary Law For Southern Africa supra* at 365.

Notwithstanding his strong belief in customary law, super-nature and black magic, the appellant surprisingly contracted a civil marriage. This fact impacts on the legal consequences of their marriage inclusive of the question under consideration. The drama that is discernible from the appellant's case has, unfortunately, grave consequences of the children concerned. The appellant, in the court *a quo*, disputed paternity. He also alleged that one of the children, with a down syndrome, thus requiring specialised care is a goblin. The challenge resulted in paternity tests being carried out in respect of child S. The blood samples were extracted by the Medical Director of the National Blood Transfusion Services of Zimbabwe. They were sent to the Laboratory for Tissue Immunology at the University of Cape Town in South Africa. The blood samples were tested and analysed at the said institution by Professor E D du Toit. The institution is European Federation accredited. The result of DNA tests according to Professor du Toit, provide evidence whereby the appellant cannot be excluded as possibly being the biological father of child S. The essence of the appeal is that the appellant wants the DNA tests to be carried afresh. He, however, does not challenge the findings of Professor du Toit. His case is that there was magical tampering with the blood samples before they got to Professor du Toit's laboratory. He submits that such tampering was carried out by goblins or other manifestation of the super nature.

His case is that he was denied an opportunity by the trial court of calling a witness to such tampering by goblins with the blood samples between Harare and Cape Town.

Ill-equipped with the capacity to call and hear evidence from goblins or some other super-nature manifestations the court a quo, correctly in my view, dismissed the application. This appeal is, therefore, also based on the appellant's obsessive, and possibly hopelessly distorted belief in the super-nature, goblins and other such manifestations an area any court of law is ill-equipped to determine. The appellant is entitled to believe what he wants to, but that does not translate to anything useful in a court of law. He cannot use such belief in seeking legal remedy. There was overwhelming scientific evidence of paternity at the disposal of the court *a quo*. The trial court arrived at a decision based on all evidence before it inclusive of the scientific medical evidence. Parents of children cannot shun their responsibilities on the basis of evidence which taps into the spiritual, the magical or the super-natural. The courts of law are constrained by principles of practice and good logic developed over centuries to deal with evidence that can only allow for objective assessment. In any event what the appellant is alleging borders on a contravention of the provisions of Witchcraft Suppression Act [Chapter 9:19] whose general objective is to prevent the imputation of witchcraft and the activities in general of the diviner. The Act may have its own shortcomings but it is the law – *Traditional Healers and the Shona Patient* – by G L Chavunduka at page 97. But, the bottom line is that it is the law of land and must be obeyed. The criticisms that the appellant levelled against the Act are purely academic and have no bearing or relevance in court. If the law is bad, it is the legislature that should intervene and not the court – *Gruth* v *Manuel* 1999(1) ZLR 7 (S) at 16B-C and *Tiwandire* v *Chipanda* HB-12-04.

Accordingly, there is no legal basis for reversal of the decision of the court *a quo*. It is therefore ordered that the appeal is dismissed with costs on a legal practitioner and client scale.

Cheda J …….. I agree

Appellant in person
Marondedze, Nyathi, Majome and Partners, respondent's legal practitioners