

FANNY CHIOPOFYA (Nee Nkwazi)
and
MESSIAH CHIPOFYA

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 20 September 2010 & 9 May 2011

**Family Law Court
Trial Cause**

S. Moffat, for plaintiff
M. Baera, for defendant

MAWADZE J: The plaintiff and defendant are wife and husband. They married each other in Harare on 23 September 1994 in terms of the marriage Act [*Cap 5:11*]. The marriage was blessed with two male children Nyasha (born on 12 March 1996) and Hillary (born on 25 October 1998).

On 11 July 2007 the plaintiff issued summons seeking a decree of divorce on the basis of irretrievable breakdown, an order of sharing of matrimonial property, custody of the two minor children, an order of maintenance for the two minor children and that each party bears own costs.

The defendant conceded that the marriage had broken down but countered the distribution of matrimonial property and custody of the two minor children.

At pre-trial conference the parties agreed that the marriage had broken down irretrievably and that there were no prospects of a normal marital relationship being restored. The parties also agreed on the sharing of the matrimonial property. The parties agreed that in respect of all movable property each party should keep whatever property is in his or her possession as his or her sole and exclusive property. Further, in relation to the immovable property being a house in Budiro namely No. 5493, 5th Close Budiro, Harare, the parties agreed that the house be registered in equal shares in the names of their two children and that the defendant exercises a usufruct to the house.

The only issue which was referred for determination at trial is on which of the parties should be awarded custody of the two minor children, the nature of access rights to be

accorded to the non-custodian parent and the quantum of maintenance to be paid for each of the minor children if custody is awarded to the plaintiff.

During the trial both parties remained adamant that each of them is the best custodian parent.

Let me briefly summarise the evidence adduced from each party.

As of now in 2011 Nyasha is in Form 3 and about 15 years old. Hillary is about 13 years old and in Grade 7 at Lonchinvar Primary School in Harare. Nyasha attends school at Glen View 2 High School in Harare.

It is common cause that the parties have been living apart for the past 5 years and that for all that period the defendant had and still has custody of the two minor children. The plaintiff has moved out of the matrimonial house and stays at her late parent's house in Bulawayo. The defendant is now staying with another woman with whom he now has a child.

The defendant stays with the two minor children at the matrimonial house in Budiriro Harare. Initially, soon after separation the plaintiff was denied access to the minor children but this was rectified after the intervention of both counsel and the court at pre-trial conference stage on or about December 2009 or January 2010.

The plaintiff is unemployed although she said she is a qualified pre-school teacher and that she has done a course in cookery. However since her separation from the defendant she has been engaged in cross border trading to South Africa in order to survive and she is still engaged in that activity. She indicated that she was willing to abandon the cross border trading business if she is awarded custody of the two minor children. Instead she would look for another job in Zimbabwe to fend for the children. The plaintiff claims US\$50-00 per child per month as contributory maintenance. In addition to that she would require defendant to pay school fees for the children, buy clothes and provides for other ancillary needs for the children.

In her evidence the plaintiff stated that as the biological mother of the children she loves the children and should be awarded custody. She however conceded that defendant loves the children too but she suspects that the children are being ill-treated by defendant's new wife although she was unable to substantiate those allegations. The plaintiff conceded

that if she is awarded custody the children would need to relocate to Bulawayo and secure places in different schools. She also admitted that the children would have to learn a new language Sindebele which may adversely affect the children's performance in school. Under cross examination the plaintiff conceded that she has no means to look after the children on her own. She was also unable to explain how the children are ill-treated by the step mother who was a former house maid for the defendant.

The defendant submitted that he is a better custodian parent. The defendant indicates that the plaintiff even before their separation in 2005 did not show much interest in the welfare of the children as she would spend long period of time in South Africa. Prior to their separation he said the plaintiff was imprisoned in South Africa and he had to pay a fine for her to secure her freedom. He said he then advised the plaintiff not to engage in the cross border trade business but in 2005 the plaintiff deserted the matrimonial home and was away for eight months and was again imprisoned in South Africa. All this was not refuted by the plaintiff. It is defendant's view that the plaintiff should not be awarded custody of the minor children since she is a cross border trader and would leave the children on their own while in South Africa. In fact the plaintiff conceded that she at times secures piece jobs in South Africa to raise cash hence would have to work illegally in South Africa for a couple of months.

Due to the nature of her cross border business the plaintiff conceded that even after being allowed access to the minor children she has been able to visit the children only three times in ten months while she was coming to attend to this matter at court.

It is defendant's contention that he has a stable job, a conducive environment for the proper upbringing of the children and the means to fend for the children's needs. The defendant refuted suggestions that his new wife ill-treats the children and maintains that he is very close to the children whom he drives to school every day. The defendant indicated that he earns US\$267-00 and would be unable to pay US\$100 per month as contributory maintenance for the two minor children.

It is trite law that in dealing with the question of custody of minor children the court should be guided the best interests of the children. In the case of *Makuni v Makuni* 2001 (1) ZLR 189(H) at 192 A GOWORA J had this to say:

“In approaching a problem of this nature, the court is, of course primarily concerned with the welfare of the children, that is the paramount consideration. Just as in custody cases, so also in dispute arising out of custody orders, the welfare of the children is the predominant consideration which should weigh with the court. (*Shazin v Laufer* 1968(4) SA 657 at 662 G-H)”

A similar view was expressed by SMITH J in *Galante v Galante* (3)2002(2) ZLR 408(H) in which the learned judge cited the celebrated case of *McMall v McCall* 1994(3) SA 201 at 204-205. In *Galante v Galante supra* Smith J considered what constitutes the best interest of a child and the learned judge quoting *McCall v McCall supra* had this to say at 418-419.

“In determining what is in the best interest of the child the court must decide which of the parents is better able to provide and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder not in order of importance and also bearing in mind there is a measure of unavoidable overlapping and that some of the listed criteria may differ only to nuance. The criteria are the following:

- (a) The love, affection or other emotional ties which exist between parent and child and the parent’s compatibility with the child
- (b) The capabilities, character and temperament of the parent and the impact thereof on the children’s needs and desires.
- (c) The ability of the parent to communicate with the child and the parent’s insight into, understanding, and sensitivity to the child’s feelings.
- (d) The capacity and disposition of the parent to give the child guidance he requires.
- (e) The ability of the parent to provide for the basic physical needs of the child, the so called “creature of comfort” such as food, clothing, housing and other material needs – generally speaking, the provision of economic security.
- (f) The ability of the parent to provide for the educational well-being and security of the child both religious and secular.
- (g) The ability for the parent to provide for the child’s emotional, psychological, cultural and environmental development
- (h) The mental, and physical health and moral fitness of the parent.
- (i) The stability or other wise of the child’s existing environment having regard to the desirability of maintaining the *status a quo*
- (j) The desirability or otherwise of keeping siblings together
- (k) The child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration.
- (l) The desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 ... should be placed in the custody of his father and
- (m) Any other factor which is relevant to the particular case with which the court is concerned”.

In my view, useful guidance can also be placed on the provisions of the

CHILDREN'S ACT OF SOUTH AFRICAN 2005 s 7(1)(a)-(n) which also defines the ... best interest of the child by providing for specific bench marks the court should take into account.

In the case of *Jere v Chitsunge* 2003(1) ZLR 116(H) CHEDA J at 118 C-E summarised in a very brief and succinct form some of the factors which constitutes the best interests of the child.

I now proceed to apply the principles of the law set out above to the facts of this case.

There are a number of factors which militate against awarding custody of the minor children to the plaintiff. The two minor children who are both male are aged 15 years and 13 years respectively. They have been in the custody of the defendant for the past 5 years (since they were 10 years and 8 years respectively). It is therefore clear that the children have been in the custody of the defendant for a long time. The question which arises therefore is whether at this point it is in the best interest of the children to remove them from the defendant's custody. I find no compelling reason to do so. Both children are staying in a stable environment with the defendant in Budiriro and are attending school. If custody was to be awarded to the plaintiff this would entail a number of challenges for the children. To begin with the plaintiff has no means to meaningfully fend for the children. An order of contributory maintenance against the defendant may not be adequate in view of defendant's salary. The children would have to relocate from Harare to Bulawayo and start life in a completely new environment. They may well have to learn a new language Sindebele at a stage they are in Grade 7 and Form 3 respectively. Plaintiff was non-committal as to the type of schools she would enrol the children.

The nature of the plaintiff's business of cross border trading in my view would adversely affect the children. In the absence of the plaintiff who spends so many months in South Africa the children would be virtually alone. The plaintiff may not have the capacity to employ a maid. The business the plaintiff engages in South Africa is risky as she has been imprisoned twice in South Africa. If the plaintiff abandons the cross border trading business she has no meaningful means to fall back on for survival save for a maintenance order the court would have awarded against defendant which on its own is wholly inadequate. In my view the risk of ill treatment of the children by defendant's new wife is very minimal and remains an unsubstantiated allegation. This court accepts generally that the plaintiff being the

biological mother of the children would invariably love the children more than the step mother. However that factor alone may not be enough to tilt the balance in favour of the plaintiff.

It is therefore my considered view that it is in the best interest of the minor children to award custody to the defendant. I do not believe that an award of contributory maintenance can be made against the plaintiff in view of her means. The plaintiff should be allowed reasonable access to the children during the first 3 weeks of each school holiday and on any other special occasions as the parties may agree from time to time.

Accordingly, it is ordered as follows:-

1. A decree of divorce is hereby granted.
2. Custody of the two minor children Nyasha Chipofya (born on 12 March 1996) and Hillary Chipofya (born on 25 October 1998) is hereby awarded to the defendant.
3. The plaintiff is hereby granted reasonable access rights to the minor children which shall be exercised as follows:
 - (i) She shall have the minor children for the first three weeks of every school holiday.
 - (ii) She shall have the minor children on any other special occasions as the parties may agree from time to time.
 - (iii) The access shall be exercised in consultation with the defendant.
4. Each party is awarded as his or her sole and exclusive property the movable property in his or her possession.
5. The immovable property being stand Number 5493, 5th Close, Budiro, Harare shall be registered in the names of the two minor children in equal shares within twelve months of granting of this order. The defendant shall pay the costs of transfer. The defendant shall exercise a usufruct over the said property until both minor children attain the age of 18 years.
6. Each party shall bear its own costs.

Legal Aid Directorate, plaintiff's legal practitioners
Baera & Company, defendant's legal practitioners