

PISIRAYI MANGWENGWENDE  
versus  
PRUDENCE CHIRISA

HIGH COURT OF ZIMBABWE  
MUCHAWA & DEME JJ  
HARARE, 17 January, 7 & 24 March, 18 May, 12 & 16 June  
and 13 September 2023

### **Civil Appeal**

Mr *K Kachambwa*, for the appellant  
Ms *D E Kawenda*, for the respondent

MUCHAWA J: This is an appeal against an order of the Magistrates' Court wherein the following order was granted:

- “1. Court application for sole custody be and is hereby dismissed.
2. The applicant is granted access of the three minor children on alternate weekends and the first two weeks of every school holiday.
3. Each party to bear its own costs.”
- 4.

The now appellant was the applicant before the court *a quo*. The brief background is that he met the respondent in 2008 and they contracted a customary law union in 2016 and separated in or about December 2019. Three children were born to them being:

- i. Simbarashe Mangwengwende, a boy, born on 20 April 2010.
- ii. Akudzwe Kateve Mangwengwende, a boy, born on 18 June 2012; and
- iii. Tawana Chidiwa Mangwengwende, a girl, born on 3 July 2015.

Upon separation of the parties, the children remained in the custody of the respondent. Having been denied custody, the appellant lodged this current appeal on the following grounds:

- “:1. The learned court *a quo* was faced with mutually destructive versions from the appellant and respondent, and it fundamentally erred at law in that it failed to apply the legal tests applicable where a court is faced with mutually destructive versions.
2. The finding made by the court *a quo* that the appellant had placed nothing on the record to substantiate his application *a quo* was so outrageous in its defiance of logic that no sensible

person properly applying his mind to the question to be decided would arrive at such a conclusion.

3. The learned court *a quo* erred at law in failing to properly weigh the evidence and make clear findings of fact.
4. The entire judgment of the court *a quo* went against the weight of the evidence placed before the record, which evidence clearly indicated the best interests of the children were not served by maintaining the *status quo*.
5. The learned court *a quo* failed to properly apply the legal concept of the best interests of the child to the facts placed before it, and by so doing, erred fundamentally at law.”

The relief sought is as follows:

- “1. That the appeal is allowed with costs.
2. That the judgment of the court *a quo* is set aside and in its place is substituted the following:
  - a) That the applicant be and is hereby declared the sole custodian of the parties’ three minor children, namely:
    - i. Simbarashe Mangwengwende a boy born on the 20<sup>th</sup> of April 2010.
    - ii. Akudzwe Kateve Mangwengwende a boy born on the 18<sup>th</sup> of June 2012.
    - iii. Tawana Chidiwa Mangwengwende a girl born on the 3<sup>rd</sup> of July 2015.
3. The respondent be and is hereby granted access to the three minor children every alternative school holiday and alternative Christmas holiday.
4. The respondent shall pay costs.

#### IN THE ALTERNATIVE

1. That the appeal is allowed with costs and the judgment of the court *a quo* is set aside and in its place is substituted by the following:
2. The appellant and the respondent are declared the joint custodians of their three minor children namely:
  - i. Simbarashe Mangwengwende a boy born on the 20<sup>th</sup> of April 2010.
  - ii. Akudzwe Kateve Mangwengwende a boy born on the 18<sup>th</sup> of June 2012.
  - iii. Tawana Chidiwa Mangwengwende a girl born on the 3<sup>rd</sup> of July 2015.
3. The appellant be and is hereby declared the three minor children’s primary custodian and primary residence provider and shall stay with them during their school terms from now until each turn 18 years old or becomes self-supportive, whichever occurs first.
4. The respondent be and is hereby declared the three minor children’s secondary custodian and shall stay with them every alternative school holiday and alternative Christmas holiday.
5. The respondent shall pay costs of suit.”

At the hearing of the matter, Mr *Kachambwa* stated that they were no longer pursuing the alternative relief.

It appears that before the court *a quo*, the appellant resisted the filing of a probation officer report as directed by the honourable magistrate on the argument that this is not

provided for in terms of the law and the court had made the decision *mero motu*, therefore it was not made judiciously. The matter proceeded to be heard and decided without any probation officer report being provided. The court application for custody was dismissed and the appellant was granted access to the children as spelt out above.

Due to the nature of the grounds of appeal raised before us, we sought the parties' attitude to the court requesting a probation officer's report as it was our opinion that the deadlock in this matter could be unlocked with the assistance of a probation officer's report. We acted in terms of s 31 (1) (b) (i) of the High Court Act, [*Chapter 7:06*]. It is provided that on hearing a civil appeal, the High Court may, if it thinks it necessary or expedient in the interests of justice, order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears necessary for the determination of the case. Further, s 31 (1) (b) (ii) permit it's the High Court to order any witnesses who would have been compellable at the trial or proceedings to attend and be examined before the High Court. We then requested to interview the minor children to get their insight into this issue.

It was by consent that we then gave the following order:

- “1. The Registrar be and is hereby directed to appoint a suitably qualified probation officer who shall produce and file a report by the 16<sup>th</sup> of February 2023 on the custody matter before the court.
2. Parties to, if they so wish, file supplementary heads of arguments by 23 February 2023.
3. Matter is therefore postponed to 7 March 2023 at 10.00 am.”

On the 7<sup>th</sup> of March and at the instance of the parties, the matter was further postponed to 24 March 2023 at 10.00 am to enable the parties to file supplementary submissions as the probation officer's report had been filed late.

On the 24<sup>th</sup> of March 2023, the appellant made an application to have two school reports and a ZIMSEC results slip which became available after the judgment of the court a quo, admitted into evidence as they were deemed relevant to the resolution of this matter. We granted the application and allowed the respondent to file an affidavit in response to these by 31 March 2023. The appellant would then file an answering affidavit in response to these by 7 April 2023. The matter was further postponed to the 18<sup>th</sup> of May 2023. We heard the matter then and continued the 12<sup>th</sup> of June 2023. On the 16<sup>th</sup> of June 2023 we then interviewed the children.

It is clear therefore that when sat to determine this matter, we had far more extensive evidence before us which renders some of the grounds of appeal raised before us superfluous. It is our considered opinion that it is no longer necessary for us to determine whether the court *a quo* which was allegedly faced with mutually destructive versions from the appellant and respondent, failed to apply the legal tests applicable in such a case. Pursuing this issue would be embarking on a purely academic exercise. Equally, the question of whether the appellant had placed nothing on the record to substantiate his application before the court *a quo* is subsumed by our consideration of what is in the best interests of the children, if consideration is had of the evidence now before us. I would hasten to add that the same would apply to ground of appeal 3 which is questioning whether the court *a quo* properly weighed the evidence placed before it and made clear findings of fact. This court now has more extensive evidence. Going back to look at what was before the court *a quo* would not be useful to the proper resolution of this matter. Grounds 4 and 5 of appeal deal with the real issue which must exercise this court's mind. It is a consideration of what order would be in the best interests of the children regarding both their custody and access, albeit without limiting ourselves to the evidence which was before the court *a quo*. That is the sole issue which we will determine.

### **What custody and access order would serve the best interests of the minor children?**

I start off by setting out all the evidence before us from the founding affidavit before the court *a quo* to the interviews of the children. This is for the sake of completeness and to make sense of the conclusions which we will reach.

#### ***The appellant's case in the founding affidavit.***

Before the court *a quo*, the appellant stated the following in his founding affidavit:

- a. That he met the respondent in 2008 and contracted a customary law union in March 2016 and separated around December 2019 when he left the matrimonial home.
- b. That the respondent was allegedly involved in questionable adulterous liaisons which would take her away from home especially in the appellant's absence for work related trips. During such times she is said to have left the children with the maid under minimal supervision as she would return home in the wee hours of the morning.
- c. She refused to allow a healthy integration of their family into the extended family as she had grown up in an environment where she was told that her own family was evil.

This was said to negatively impact on the children's psychological wellbeing as they would grow up as social misfits who would struggle to exist outside the nuclear family.

- d. Respondent was alleged to show no concern for the children's educational requirements as she caused them to miss school habitually and excessively. She was also alleged not to have responded to the school communications regarding inadequate homework supervision of Simbarashe and failure to attend extracurricular activities organised by the school. She was also said to have rebuffed the appellant's arrangement for a private tutor for Simbarashe. The failure to nurture and support the children in their educational needs was said to extend to the two other children. She is said not to have even bothered to collect the children's school reports for year ended December 2021 despite all school fees having been paid. She is alleged not to take any corrective measures on the issues pointed out as needing attention and fails, refuses and neglects to communicate with the children's schools. She did not take measures to ensure Simbarashe attended online lessons, nor supervised the children's homework.
- e. A detailed run through of the respondent's shortcomings in terms of supporting the children's schooling is given in the founding affidavit in relation to Simbarashe. In grade 4, he is said to have attended only 46 out of 63 lessons in his third term and in grade 6 he attended only 70 days out of 80 days in third term. This is despite fees was paid and she was given money for fuel. For online lessons, in third term of grade 6 Simbarashe had 7 English composition tasks but handed in only 2. He handed in 1 out of 2 comprehensions. Out of the 7 Maths topics covered, three were not done. Out of 23 topics done in Content, he only attempted 10 which were partially completed. He did not attempt any artwork as requested by the teacher nor attend the Friday quizzes. His exercise books were not handed in regularly. A letter from the school confirming this was produced as annexure H. The school believes that there is lack of positive, consistent support and encouragement for Simbarashe leading to dismal performance. It was recommended that he get additional help to ensure he passes grade 7. The respondent is said not to have acted on this and even rebuffed the appellant's arrangements for a private tutor.
- f. The respondent has an amoral disposition as demonstrated in her propensity to lie to the appellant and his relatives even on simple issues like her real names, stirring of

vicious confrontation in front of the children including threats of killing herself if she is not given more money by the appellant, failure to account for large cash advanced to her and instructing the children to lie to the school authorities or to the appellant, their father.

- g. In or about January 2021, the respondent is alleged to have lay underneath the appellant's car and dared him to drive out and crush her as she demanded more money. This is said to have traumatized the minor children who thought their father wanted to run over their mother and was only averted by the arrival of the appellant's mother and aunt who came to counsel her.
- h. In general, the respondent is said to have an unreasonable demand for money on the appellant without accounting for the use it is intended for nor meeting all the children's needs on the amounts paid out to her. The appellant believes that she wants him to cater for her own personal needs. It is alleged that she sets a price even to things relating to the children such as the private tutor access to the children and wants to be paid ahead of this happening.
- i. The respondent is believed to be poisoning the children against their father and does not encourage them to have a healthy view of their father as she is demonising them. Realising that the children were affected by the separation of their parents, the appellant says that he contacted a child psychologist to professionally evaluate and assist the children, but the respondent refused to cooperate.
- j. The respondent is alleged to be causing scenes around the maintenance of the children as she refused to collect the reduced amount of USD500.00 from his legal practitioners and phoned appellant's friends and workmates borrowing money, in a bid to embarrass the appellant.
- k. The appellant has remarried and had one child with his new wife. They were living in a three bedroomed house, and he believed that he could provide an adequate home for the children.
- l. The appellant is employed by Unki Mines (Pvt) Ltd as a company secretary and legal counsel and says he can cater for the children's financial needs whereas the respondent has no such capacity.
- m. The appellant contends that the respondent has failed to discharge her duties as the primary caregiver of the children in a manner consistent with their best interests. He argued that he is better placed to cater for the children's best interests.

- n. The respondent is alleged to be stultifying the appellant's exercise of his access rights thus denying the children their entitlement to have both parents play a role in their development, growth, and sense of well-being. They are therefore denied a balanced, stable, and loving relationship with both parents.
- o. The appellant invited the court a quo to interview the children to establish their views.

The appellant's mother filed a supporting affidavit. She largely supported the appellant's averments but emphasized on the respondent's alleged untruthfulness relating to her family and origins and how she tried to pass off certain women as her family, but they failed the test. The appellant's father embarked on a search and located respondent's relatives to whom lobola was then paid. Her lack of a relationship with her own family is blamed for her attitude to how her own children relate with the extended family. She detailed how the respondent had thwarted her attempts to develop a relationship with the children which extended to refusal to open the gate to receive gifts for the children and refusal to have the children visit their grandparents or meet up with their cousins.

The children are said to being taught to lie about the reasons for their absence from school.

The appellant's current wife, Kudzai Perpetua Svova also filed a supporting affidavit confirming her marriage to the appellant and that they then had one child together. She unreservedly stated her willingness to become, together with the appellant, their primary caregiver. It is her view that it would be in the children's best interests that they grow up together with their half-sister, her child. She professed her support for the minor children. She says that she met the appellant after his relationship with the respondent had ended.

The appellant's averments relating to the children educational needs and arising issues are fully supported by school reports and email correspondence from the appellant to the school authorities. There is also an annexure of summons issued out by the respondent under case M 909/20, in which she was applying for maintenance. She was seeking payment of USD4 254.00 as monthly maintenance for the three minor children, USD5 101.00 as quarterly payments for the children's educational and social development needs and USD3 000.00 as an annual holiday allowance for the children. This was vehemently opposed by the appellant.

***Respondent's Case in the Notice of opposition***

In her notice of opposition before the court a quo, the respondent indicated that the application for custody was not genuine but was an attempt to dispossess her of the house as there had been prior attempts to evict her. She claims that their customary law union has not been dissolved and she remains a wife to appellant. Her version is that the appellant's many extra marital affairs are to blame for the breakdown of the marriage. She also believes that her mother in-law had a big hand in the separation as she never liked her and encouraged her son to leave the matrimonial home.

On the children's absenteeism and poor school performance, the respondent states that Simbarashe has always had learning challenges and was never a top academic performer. She says that during the time they lived together she was the one who would attend to the children's day to day schooling needs and the appellant never supervised any homework. The children's schooling is said to have been worsened by the unhappy marriage of their parents and the appellant's abusive attitude towards her and the children. She claims that the appellant would beat her up in front of the children and verbally abuse them including calling the child Simbarashe, "dofu", meaning he is dull.

It is claimed that the appellant is only now engaging in clever grand-standing for purposes of these proceedings by showing concern regarding the children's schooling. Whilst accepting that the children have missed school on several occasions, she offers explanations for that. The first is that during Covid 19, the children would occasionally fall sick. She also blames the appellant's erratic and irresponsible provision of maintenance as leading to lack of adequate fuel to do the school runs. Her failure to collect school reports is blamed on outstanding school fees for the children. She explains that the school had been communicating directly with the appellant as her own email address had not been availed. She refutes that the school has failed to reach her on the phone and that the appellant is the one who blocked her to bar her from calling to remind him of his maintenance obligations.

The appellant is alleged not to have the children's best interests at heart as evidenced by his initial action after leaving the matrimonial home wherein he sought to evict the respondent therefrom without making any alternative arrangements for them. She relates an incident when one of their sons fell sick and was hospitalised at Trauma Centre for days, but he never visited the child in hospital.



According to the respondent, the application for custody is a smokescreen to enable appellant to take possession of the matrimonial home and avoid handing over any of his money to the respondent in the form of maintenance for the children.

***The appellant's answering affidavit***

In his answering affidavit, the appellant denies that the application for custody is a cover up for evicting the respondent and avoiding paying maintenance. He says he reserves the right to deal with the matrimonial home in a separate process, having abandoned earlier such process after out of court discussions after which the respondent also withdrew her maintenance application. He claims that when he instituted the eviction, he had made suitable alternative arrangements for the respondent and the children's accommodation.

The appellant avers that up until the filing of the application for custody, he had been content to have respondent be the custodian parent. He says that his actions were necessitated by the respondent's behaviour and failure to meet the best interests of the children, as set out in the founding affidavit. He points out that Simbarashe's school continues to complain of failure to reach the respondent to discuss concerns in his academic development and needs.

It is disclosed that his current wife has two children from her previous relationship who are aged 17 and 14 years who live with their grandmother as he has not assumed custody. He states he met all the customary rites of marriage of his new wife and followed the customary process of termination of his marriage to the respondent. There is a supporting affidavit from his uncle who handled this process. He points out that the respondent has not responded to the material facts raised in his mother's affidavit and should be taken to have admitted same.

The appellant concedes that the demands of his current employment inclusive of travel, do not always allow him to be able to exercise hands on supervision of the children's development in school. He says to compensate for this he has tried to engage private tutors but his efforts were unwelcome by the respondent. He believes that his new wife can and is willing to assist him in this.

The appellant denies beating the respondent as alleged. He however accepts that after he discovered the respondent's questionable behaviour as stated in the founding affidavit, they would constantly have verbal fights in front of the children. To deal with this, he decided

to move out of the matrimonial home. He points back at the respondent as the initiator of the violence in the home by reference to the incident when she lay under the car in disregard of the children's psychological trauma. Another incident when the respondent is alleged to have assaulted the appellant in front of the children and his maternal uncle when he went to collect the children for his birthday celebrations. She then refused to release the children.

It is reiterated that the respondent is in the habit of faking the children's illnesses to explain their absences from school without providing any medical report in support thereof, yet the children are on full medical aid cover in USD. He explains that the absences alluded to in his founding affidavit were before the Covid 19 era. He dismisses the excuse of lack of fuel as untrue as he never got any such communication and as the respondent has not taken any measures at her disposal to ensure this is addressed nor even attempted to use public transport to ensure the children go to school. He insists that he pays full fees on time and has provided proof of payment for third term of 2021 and claims that other proof is available. Proof is also availed that the schools have the respondent's contact details and they communicate with her, but she chooses not to communicate with them.

An incident is told of when the respondent, without just cause refused to have Simbarashe participate in a compulsory leadership camp in Nyanga. Despite receiving the notification, she is alleged not to have paid yet she was then receiving USD1 500.00 in maintenance. Over and above this the appellant says he directly pays for wifi, tv subscriptions, maid, gardener, and electricity, inter alia. The appellant says even after paying the amount requested, the respondent failed to deliver the child to the school and the appellant ended driving the child all the way to Nyanga, Even having a teacher pick up Simbarashe was resisted by the respondent. He says that the respondent had lied about having car problems.

The appellant puts on record that the respondent has a child from a prior relationship which she has not communicated with for the whole 10 years they lived together. He questions her maternal instincts, therefore. He is still offering that the children go for professional assessment by a child psychologist.

The appellant argues that no amount of money demanded by the respondent will address the respondent's shortcomings in catering for their best interests. Communicating with the schools, avoiding violent confrontations in front of the children are examples given.

***The respondent's supplementary affidavit***

The respondent who had filed her opposing affidavit without legal representation, was granted leave to file a supplementary affidavit.

It is averred that the appellant's case was based on allegations of abandonment or neglect of the minor children and that for such a case there is a procedure to be followed in terms of s 7 of the Children's Act, [*Chapter 5:06*].

She claims that she has been a victim of the appellant's physical abuse and that this has extended to the children and their cases are known to the local police. She attaches Form 234 as annexure in support of this averment. She avers that the children have lived in fear of the appellant because of his violent disposition. The appellant is described as nomadic and someone who after his violent outbursts would move out of the home and leave the respondent with the children. Reference is made to her answering affidavit in case MC 909/20 wherein she says she details the abuse. She points to family attempts to mediate but says the cycle of violence has continued. The appellant is alleged to be someone who even uses his financial muscle as a weapon of abuse.

The respondent explains that lobola was only paid in 2016 as she had no connections with her paternal family. Further explanations are provided for the children's absenteeism from school. She says due to the abuse she is sometimes incapacitated nursing wounds inflicted by the appellant or he would take the car keys and leave her with no transport to take the children to school. In other instances, she says that he fails to provide the fuel for the children to go to school. In once incident she says she was involved in an accident and the two boys and herself were injured. She therefore pleads lack of means and says she had filed a maintenance application which was withdrawn in preference of family mediation.

The appellant's allegations of the respondent's psychological unwellness are said to fall short as there is no expert opinion provided. The barring of the respondent by the appellant is said to have happened when Simbarashe was hospitalised, and the doctors wanted a shortfall paid. She claims that such barring of communication shows that the appellant does not have the children's best interests at heart and that he would cut her out of the children's lives, if he were to get custody. She blames the appellant's anger issues for the poor communication between them.

The respondent explains that Simbarashe has learning disabilities and at some point, was evaluated as autistic. She says she cannot therefore be blamed for his poor academic performance. The report of 2019 relied on by the appellant is said to relate to a period when the two of them were living together and she states that the appellant should have offered the relevant support then.

Regarding her refusal to have the children visiting with the extended family, she says that during the covid 19 period movement was restricted. The tutor secured by the appellant for Simbarashe was rejected because of the child's special needs and the importance of not forcing him into situations but patiently accommodating him in all his endeavours. Further, Simbarashe is said to have been in and out of hospital and diagnosed with a condition known as dysphagia. Due to his special needs, the respondent argues that it is not in Simbarashe's best interests to be in the appellant's custody.

It is argued too that the children need stability and should not be uprooted and placed in appellant's custody as they are afraid of him. She points to the appellant's placing of a tracking system on the car, without her knowledge as evidence of his controlling and abusive nature.

In opposing the affidavit of Kudzai Perpetua Svova, the respondent says she is a stranger to her and is not confident that she will be able to meet her children's needs. The bonding of the minor children with their half-sister is said to be possible under the exercise of access rights by the appellant.

***Appellant's answering affidavit to the respondent's supplementary affidavit***

In this, the appellant gives further examples of the respondent's failure to provide educational support for Simbarashe in that she failed, without just cause, to attend Simbarashe's consultation with his teacher who then reached out to him, and he stepped in. She is alleged to have failed to ensure that Simbarashe handed in five CALAS projects and neglected to pay USD3.00 which was required for his project.

The appellant denies having any anger issues and says the only time his emotions got the better of him was when he discovered the respondent's alleged infidelity, and they had several heated confrontations in front of the children. He says it was then that he gave her two slaps as evidenced by the police report which talks about being beaten with open hands. He says she never sought any medical treatment as it was not necessary, and this was in the

privacy of their bedroom. He says he is not proud of this. On the contrary he says it is the respondent who is of a violent disposition, but he has always sought family mediation rather than reporting to the police. Some of the incidents are already covered in the founding affidavit. He notes that it is toxic for him to be in the same space with the respondent which is why he stopped visiting the children though he misses them.

It is contended that the respondent has not shown that the appellant does not love his children nor that he abuses them physically or psychologically. The respondent is alleged to have psychologically manipulated the children into thinking that their father does not love them and is a monster. He believes that the respondent is hanging on to custody of the children just to get a healthy maintenance payoff. The respondent is described as someone who is lazy and does not want to work and believes that the appellant owes him a living. He complains that despite his covering most of the children's needs, the respondent, on her part is failing to provide the bare minimum care and dedication to the psychological, educational and socialisation needs of the children.

The appellant denies his characterization as a nomadic father and points back to the respondent's alleged abandonment of a son from her earlier relationship whom she has not cared for or communicated with, as more appropriate to be so described. Further, it is said that the respondent has no sense of family and has not cooperated with both her own and respondent's relatives.

In response to the claim of an accident as having caused the children's absence from school, the appellant says that this was a minor accident to one of the two cars at respondent's disposal as the car could still move. He questions why there are no medical reports of the children's injuries from the accident nor police reports of the alleged severe car accident. It is also denied that Simbarashe was ever sick and there were hospital shortfalls as he says his medical aid cover is adequate. He also denies any knowledge of Simbarashe being allegedly autistic and says if that were the case, the more reason why the respondent should have been cooperating with the schools to offer him support. He questions what the respondent is doing in response to this.

Whilst accepting that the children would be absent from school even when they were living together, he says this would happen when he was away on work related trips. The GPS

system on the car was said to have been installed by the appellant's employer from he acquired the car from and not as his means of monitoring the respondent's movements.

***The probation officer's report***

I proceed to summarise the findings of the probation officer's report.

1. The marriage of the parties was punctuated with quarrels though each party gives different reasons for this as summarized above from their evidence.
2. The reason for the custody application is the assertion by the appellant that the children are being neglected by the respondent especially in offering educational support.
3. It is further alleged that the children are being intoxicated with hatred, isolation and lying tendencies, by the respondent.
4. The respondent feels she is the best custodian of her children who should not be thrust into another woman's care whilst she is alive.
5. She wants to be available when the appellant visits the children as she feels they may be violated by him and his mother as there is always tension when he visits.
6. The probation officer saw a note written by the eldest child in which he referred to his father as evil and always drunk, very angry, aggressive and always calling children names and using vulgar language.
7. At one point the children said they were crying, wanting to go to their mother and their grandmother would threaten them with a plank and taking them to jail as they had done to their mother. The background is that the respondent had been handcuffed by the police when she refused to allow the appellant to exercise access rights in terms of the High Court order under HC 3281/22. The children were then put under the care of their grandmother. They claimed not to have been given food and to have cried throughout the night. One was said to have been punished to sweep the whole house without any help. They claim to have been forced by the grandmother to smile in the presence of visitors or face punishment. It was alleged that the father would fondle his new wife's breasts and kiss her in the children's presence and boast that it was over with their mother who was in jail. Akudzwe was said to have been sick and vomiting but no one helped clean up and Simbarashe says he had to attend to this. When the children told their mother, she reported a case of abuse to Social Welfare but when a police officer and probation officer attended the scene, they left without

taking any further action. The grandmother is said to have insulted the children and when the father came, it is alleged that he pushed Simbarashe to the wall and he smelt blood in his nose whilst the other children cried in fear. Thereafter Simbarashe says that he was told never to say such things again and was pushed hard and lamed on broken glass and sprained his ankle and got bruises as they all laughed.

8. The appellant disputes this and claims it is all the influence of the respondent.
9. The probation officer says that she asked the child to mark on the note the things which were untruths using a blue marker and the truth with a pink marker. The ones which were marked as true were that the father is aggressive and uses vulgar language, that they were denied food, Akudzwe being sick and unattended, Chidiwa cleaning the house unaided and the new wife laughing at them and threatening them with jail.
10. The child confirmed that he had lied when he said that they were beaten with a plank, protecting his siblings, being forced to go to Casamia, father fondling his wife's breasts and threats of being killed. The probation officer was shown pictures and videos of the whole family having good times with the family. The observation made is that the children looked happy and enjoyed the outing. In one picture Chidiwa was singing with everyone listening and commenting on her good performance as also depicted in the video. She was hugged afterwards, and they were joyfully participating in games. Chidiwa was also seen happily holding her half-sister.
11. Interviews with the grandparents and house maid established that the children were properly looked after, and the maid claimed that she was responsible for doing all the work and feeding the children.
12. The respondent is not comfortable in having her children looked after by their stepmother in fear of possible abuse. She therefore wants to personally live with her children.
13. The respondent wants the appellant to pay sufficient maintenance for the children and to continue staying at the matrimonial home with the children till they grow up.
14. A visit to the appellant's home confirmed the living arrangements which he has set out. He lives with his new wife and two children aged one year and another three months in a three bedroomed house within a gated community. There is borehole water and electricity and gas for cooking. There are two girls aged 20 and 19 who help in taking care of the children. The house is clean and well furnished. And is a

child friendly environment. The new wife has two children aged 18 and 16 who stay with her mother in her house in Avondale. These children sometimes visit their mother.

15. The appellant is a lawyer by profession who is currently working as company secretary and legal counsel for Unki Mines (Pvt) Ltd. He claims that he earns enough to provide adequately for his five children.
16. The respondent studied up to Advanced Level but claims she could not pursue a medicine degree which she had started in Zambia due to financial constraints. She runs a buying and selling business in Mutare where she has a shop. She claims that her business is currently down after a robbery, and she is fully dependant on the USD 700.00 to 750.00 she gets from the appellant.
17. The home in which the respondent lives with the children was also found clean and well furnished and three bedroomed too. There was enough food in the house. They use borehole water and have electricity and gas for cooking. It was found to be a child friendly environment. The respondent stays with the three children and a maid.
18. It is noted that the children are minors, and they need motherly love, care and affection and protection. Denying them the right to stay with their mother whom they have stayed with since birth was noted to have the possibility of negatively affecting their development.
19. If custody was to be granted to the appellant, it was observed that the respondent should be granted access rights because in terms of the UNCRC, a child shall not be separated from his or her parents against his or her own will unless it is in the best interests of the children and such determination involves abuse or neglect of children.
20. When asked about who they wish to stay with, the children prefer to stay with their mother and want to see their father in the presence of their mother.
21. The probation officer observed that there is bound to be undue influence on the children from both sides but mainly chances are high where they spend most of their time. It was noted that in this case the children may have been influenced to dislike their father.
22. Where Simbarashe was asked to mark out the lies and truths in his report and he did, it was noted that he may have acted out of fear of being beaten by the appellant and that children usually tell the truth when they are in a neutral environment.



23. The children's three schools were visited, and they all confirmed that the respondent absents the children from school such that they usually do not go to school for the full five days in a week. At times they go a day a week, three days a week or are absent for the whole week. It was established that the respondent does not even communicate with the schools about such absences. When the schools follow up, she is said not to pick up calls, bars call or is unreachable. Though she claims that the children will be sick, she does not provide any doctor's notes. Sometimes she pleads lack of fuel and St Michael's Presentation School was said to have provided fuel in one instance.
24. The respondent claimed that the USD750.00 maintenance was not enough. The appellant provided proof of payment of fees and purchase of uniforms for Simbarashe.
25. The probation officer noted that there is animosity between the parties which has caused huge tension between the father, mother, children, and the extended family. The children are victims caught in the middle of the rivalry of the parents. The effect is damage to the children in all spheres of life and if unresolved, their development will be complicated.
26. The probation officer recommended that custody be granted to a responsible parent as the court deems with access rights being granted to the non-custodial parent.

***Supplementary affidavits after the probation officer's report***

The appellant applied to file the three children's school reports which had been alluded to by the probation officer. We granted the application and allowed the respondent to file an affidavit in response to those.

Some of the highlights in the school reports were just to show for instance that Simbarashe had attended 37 days only out of the 65 days in his third term of 2022. The report noted that a consistent presence at school would have helped Simbarashe to do much better. It also said he had not completed the majority of the 30 projects assigned in the year. Further, it was noted that though he has potential to do well in sports, his potential is severely hampered by erratic school attendance. The headmistress commented that Simbarashe could do much better with consistent school attendance and active support from home. His grade seven results show the predicted failure.

Akudzwe's report shows that he did not sit for some of his exams and his school attendance was also erratic. It is commented that his poor school attendance continues to hinder his schoolwork progress. On the 26<sup>th</sup> of January 2023, the headmistress of Akudzwe's school wrote with concern to the appellant indicating that Akudzwe had only attended 4 out of 13 days of lessons of that term.

In her answering affidavit, the respondent explains that the erratic school attendances are partly a result of the effect of the litigation between their parents which has psychologically and emotionally affected the children. She also blames the appellant's abusive tendencies and his unilateral withholding of finances. She says that she has had issues with the fuelling and maintenance of the motor vehicles and the appellant has not provided solutions. A breakdown is given of the total amount of fuel required as 50 litres per week which then comes up to USD81.00 per week. She faults the lack of open communication lines between them as worsening the situation and says she called for counselling to resolve the conflict between them, but it was shunned as this would help in civil parenting between them. There is indeed a letter from the respondent's lawyers proposing family counselling.

The appellant's alleged abusive tendencies which are said to have affected the children when he sought to enforce his access rights. Simbarashe's poor performance in his grade seven results is blamed on the litigation and related abuse surrounding this which he alleged happened to him. She reiterates that when Simbarashe wrote a report detailing the abuse he suffered he was threatened and beaten up by the appellant. The involvement of the police as and when access is to be exercised, is alleged to have further traumatized the children. Simbarashe is alleged to be now suffering from chronic headaches from the assault perpetrated on him by the appellant in December 2022.

The application for custody is alleged to have been served on Simbarashe and he is said to be emotionally tormented as he blames himself for the family's predicament. The appellant says if the respondent availed the application to Simbarashe, she acted irresponsibly, and it could not have been served on him as he is not a responsible person in terms of the Rules. He reiterates that he has never withheld his finances and contributes to the upkeep of the children by providing accommodation for them, paying utilities being electricity, wifi and rates, paying the children's TV entertainment subscriptions, paying all school fees, school trips, buying uniforms and clothes. The children are also on the

appellant's medical aid scheme which is designed not to have any shortfalls. He also pays USD750.00 per month. It is the respondent who is said not to be contributing financially to the maintenance of the children even though she is self-employed.

On the children's absenteeism from school, the appellant attaches a letter in which he questioned why Chidiwa was not attending school. It is said that the respondent never claimed that she had no fuel but said the child was sick and demanded more maintenance money, over and above the USD750.00 which she had already received. Since the respondent says her fuel requirements are USD81.00 per week, it is argued that she needs USD321.00 per month, and this is well within the USD750.00 she receives per month. The respondent is said to be young and resourceful and should take the court into her confidence about how much she earns.

The appellant denies that he cut off communication lines with the respondent but explains that due to the toxic nature of their communications he had given the respondent, his wife's numbers which she blocked. She is said to have also blocked his parents and him.

It is the appellant's attitude that he does not need any counselling as he has no problems requiring intervention.

The appellant denies ever assaulting Simbarashe and says he reprimanded him after discovering that when he came for a visit, he had a cell phone which he was using to record conversations in the home. He questions how the children call him evil, yet he does not stay with them.

### ***Interviews with the children***

The children were interviewed. Chidiwa who is 7 years old said when she misses school it is because the car will be down, or she will be sick. She however said that she is not sick a lot of time. She said her dad is always shouting at her and her brothers and beats them because he is always angry. She claims to have been injured from the beatings and gone to hospital but there is no such evidence on record even from the respondent. She does not feel comfortable when she visits her dad as she is afraid of him. She also does not like her grandmother whom she does not like. She does not talk to her dad over the phone.

Akudzwe who is 10 years old also said when he misses school, he will be sick, or the car would have had a breakdown. He said he would be largely sick from flu and would visit

the doctor. He too said that his dad is always angry and always shouts at them because he wants them to stay with him. That makes him afraid of him as he beats them when he is angry. He believes that his father has never done anything nice for them and that it is his mother who pays their school fees as she told him so. When quizzed, Akudzwe said that his mother had also told them that his father would come running and opening doors to find them and he would be very angry. He claimed to have seen their father beating their mother. He believes that his grandmother supports their father in his beatings of the children. His greatest fear in life is his father. His breakdown of the car is that it will be fixed by his mother restarting it and when it's a bigger problem, they go to the mechanic who takes a few minutes to fix it.

Simbarashe who is 13 years old also blamed his erratic school attendance on being sick and car breakdowns. On failure to attend online lessons, Simbarashe said he had a broken ipad and when asked why he did not use his mother's device, he said her phone was old and was also having issues. He claims that he personally stopped the private tutor organised by his father as she was not teaching him anything as it was copied stuff from a book. On failure to do some homework, he said he had no material to build what was required and his mother did not have enough money.

Commenting on his father's alleged abuse, Simbarashe said that he is always violent and in one instance he was choking his mother in his presence and her tongue was out and he had to hit him with a scale to stop him. He says he was very afraid as he thought that his mother had died. He claims that he was head butted four times during that incident because of what he had written for a court case. Other than this incident, it was alleged that the father had beaten them 5 times using head and hands. He also said that all the drama had caused him at some point to consider suicide. He wants to see his dad in his mum's presence. He thinks that in order to perform better in school, the wars between his parents should stop and a new car should be availed. He too, never talks to his dada on the phone as he says he is not easy to talk to. He also related an incident he was sick in hospital and when his mother called the father, he is alleged to have responded that, call me when they are dead. He claims too that his father tried to kill his mother with a butcher knife.

### ***Analysis of evidence***

The evidence outlined above shows that the hostilities between the appellant and the respondent are like a huge wave which has swept away the children with it.

It is fitting to warn the parties in line with what Honourable MUNANGATI-MANONGWA J said in the case of *Machacha v Mhlanga* HH 185/23. She said that warring parents should not be oblivious of the best interests of the children and hold and use them as pawns for their selfish ends or to settle scores or score some victory.

The inconsistencies in the children's evidence regarding how their father has been violent had some exaggeration to it and they appear to have been coached on what to generally say. When they were quizzed on what was used to beat them, they gave varying answers. What came through as they gave evidence and cried in the process is that they are genuinely afraid of their father. It does not matter that this may have been planted and not real. The appellant did accept that there were fights between them leading to his moving out to bring an end to the toxic environment.

The breakdown of the cars did not seem to be much of an issue as the children were asked to explain and said sometimes it simply took restarting the car or a few minutes of fixing by the mechanic. If indeed there had been major breakdowns of the car, shouldn't the respondent have provided reports from the attending mechanics?

The real issue appears to be around the amount of maintenance payable by the appellant which the respondent considers inadequate and she feels entitled to receive more without justifying the larger amount claimed considering what the appellant already pays. She also feels entitled to stay in the matrimonial home. There is clear unfinished business between the two and the children are like mere pawns used to settle scores. There is clear recourse for a party to claim maintenance where a responsible party neglects to maintain those that dependant on him. The respondent is aware of this as she filed and withdrew a maintenance claim before. Unfortunately, we were not sitting as a maintenance court and were not equipped with adequate information to make the inquiry as to adequacy of the maintenance.

The amount of maintenance payable by each parent is determined by their respective means and resources. In computing the actual figure, the court must make a value judgment based on the income and assets of the parties. See *Barrass v Barrass* 1978 RLR 384.

Both parties must furnish the court with information regarding earnings, income, savings, other resources, together with their monthly expenses. It is also the duty of both parents to contribute to the maintenance of the children, each according to his means.

The issue of the matrimonial home is also an issue capable of resolution by other means and not in this custody matter. What is relevant, is that for the time being, the appellant is providing accommodation for the children and the respondent and that he is aware of his responsibility in this regard.

What I could not wrap my head around is why the respondent as the custodian parent absents the children so much from school. That they would be sick is not backed by any doctor's report submitted to the school. The children also refuted being sick most of the time. I do not get why she would not communicate with the schools if indeed the children were genuinely sick. The respondent has not shown what alternatives she has put in place as a caring mother who understands the importance of education to her children to ensure that her children are in school most of the time. The levels of absence are shocking as is the fact that this has continued unabated to date.

Though the respondent averred that the children are psychologically and emotionally traumatized, she seems not to have taken advantage of the children's medical aid cover to have them attended to by relevant professionals.

The respondent cannot surely claim that she has no earnings whatsoever from her business. The alleged robbery at her shop in Mutare happened in 2019.

On his part, the appellant's major concern is the respondent's failure to provide adequate educational development of the children as evidenced by the children's excessive absenteeism from school, refusal to allow extra tutoring for Simbarashe, neglecting to assist with online lessons and homework and failure to assist with extracurricular activities for the children. He also paints the character and temperament of the respondent as inappropriate for the children's proper development. The respondent is also said to be unable to provide for the children's psychological needs.

It is interesting that the appellant is refusing to go for counselling together with the children and the respondent and claims that he has no problem requiring such an intervention, yet he acknowledges that his fights with the respondent created a toxic environment which led him to leave the matrimonial home. He also accepts that the ongoing legal wrangles have had a toll on the children and emotionally and psychologically traumatized them and he wants them assessed and treated appropriately. He also says that the respondent has poisoned

the children against him. Our interaction with the children showed us that they are genuinely afraid of him. This may be because of the narrative the respondent is selling to them. We established that the children do not know that their father is taking care of them but believe that it is their mother who pays their school fees. To deconstruct all this, it is necessary that the parties and children undergo counselling.

### ***The Law***

The Constitution of Zimbabwe Amendment (No. 20) Act 2013 protects the rights of children. s 81 provides the following:

“(2) A child’s best interests are paramount in every matter concerning the child.”

Some of the considerations which a court must consider in order to fulfil the best interests of the child test were laid down in *McCall v McCall*, 1994 (3) SA 201 (C) where it was stated:

“In determining what is in the best interest of the child, the court must decide which of the parents is better able to promote 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 that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- (a) The love, affection and 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 child’s needs and desires;
- (c) The ability of the parent to communicate with the child and the parent’s insight into, understanding of and sensitivity to the child’s feelings;
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) The ability of the parent to provide for the basic physical needs of the child, the so-called ‘creature comforts’ 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 of 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 otherwise of the child's existing environment, having regard to the desirability of maintaining the *status 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; and;
- (m) Any other factor which is relevant to the particular case which the Court is concerned."

In this case, the children have stronger love, affection, and emotional ties with their mother rather than their father. She is the one they have lived with all their lives and have better compatibility with her.

The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires is dicey in this case. On the one hand, the appellant is alleged to be of a violent disposition and always angry and the children are afraid of him. On the other hand, the respondent is said to be suicidal, manipulative and a chronic liar. It appears that whatever is alleged against the other, the children are genuinely afraid of the appellant. The shortcomings of the respondent are alleged to be moulding undesirable characteristics in the children, but the impact will emerge in the long run and can be mitigated through counselling.

The appellant seems not to fare very well in respect to the ability to communicate with the children and has limited insight into, understanding of and sensitivity to the children's feelings. This appears very evident in his relationship with Simbarashe. This too is an area which could be attended to through counselling.

On the other hand, the capacity and disposition of the respondent to give the children the guidance which they require is questionable particularly relating to their educational development and cultivation and nurturing of relationships outside the nuclear family. Both parties require to work on their ability to provide for the children's emotional, psychological, cultural and environmental development. It is their ongoing fights which have continued to damage the children emotionally and psychologically. The respondent particularly needs to



embrace the importance of her children integrating with their extended family for cultural and environmental development. This too needs to be explored and worked on, in counselling.

Whereas both parents are physically fit to take custody of the children, the respondent's mental and moral fitness is put into question, particularly as it relates to her absenting of the children from school and the ease with which they lied in certain aspects of their evidence. She too was pelting some untruths which she could not back up regarding the children's absences from school. The appellant's alleged anger issues put into issue his mental and moral fitness. These issues are best dealt with through counselling.

The matrimonial home is the only home the children know. It is desirable to maintain the stability of the children's existing environment and ensure that as siblings, they are not separated. The children prefer to stay with their mother and in a case such as this one where their emotional and psychological wellbeing is at stake, their wishes should be considered. See *N v N* 1999 (1) ZLR 458 and *Hardy v Skaramangas* 2001 ZLR (1) 196 (H).

It would be a dereliction of duty for this court as the upper guardian of the minor children to ignore the respondent's clear shortcomings in catering for children's educational development. She has not shown any just cause for her conduct such that one is left wondering whether the appellant is not correct in saying that she is using the children as pawns to get at the appellant for the unfinished business between them. She is warned that the court's concern is the best interests of the children and not her own interests. I will give an order which places the respondent on notice. If she continues to absent the children from school. Periodic reports from the schools should help monitor progress.

Access matters are to be decided by considering all the facts to a matter having regard to the best interest of the child. In *Bottger V Bottger* HC-H 405-82, at page 7, it was held as follows:

"The object of access is to nurture the affection and companionship between non-custodian parent and child, and while on the one hand it should not be of such frequency as to trespass on the control and direction of the child's daily life that is vested in the custodian parent, on the other it should not be so confined as to stultify the continuing link between child and non-custodian parent."

It is not in the interests of the children for the respondent to deny the children an opportunity to nurture affection and companionship with their father. The respondent is not permitted to impede access rights of the non-custodian parent. Vilifying the appellant to the children does not help the children's development especially when lies are used to paint him as totally irresponsible and uncaring for the children, to the extent of denying that he pays

school fees, amongst the many other things he does. It is also irresponsible to pass to the children a message that he said that he will only see the children when they are dead. The respondent should be protecting her children from such hurt. I will give an order of deferred access subject to the parties and their children undergoing joint family therapy so that they are assisted by professionals to understand and deconstruct the toxic environment in this matter.

In the circumstances, **IT IS ORDERED THAT:**

1. The appeal be and is hereby dismissed with costs, subject to the following conditions:
  - a. That the respondent be and is hereby declared the custodian of the parties' three minor children, namely:
    - i. Simbarashe Mangwengwende a boy born on the 20<sup>th</sup> of April 2010.
    - ii. Akudzwe Kateve Mangwengwende a boy born on the 18<sup>th</sup> of June 2012.
    - iii. Tawana Chidiwa Mangwengwende a girl born on the 3<sup>rd</sup> of July 2015.
  - b. The appellant be and is hereby granted access to the three minor children every alternative school holiday and alternative Christmas holiday on condition the appellant and the respondent attend counselling by a registered clinical psychologist for a minimum period of 6 months with a minimum of 2 sessions a month, with at least half of the sessions being attended together with the three minor children.
  - c. The clinical psychologist shall receive monthly progress reports for each of the minor children from their respective schools, which should detail their school attendance and assistance with online lessons, homework, and extracurricular activities, among other things.
  - d. The Clinical psychologist shall be appointed by the Allied Health Practitioners Council of Zimbabwe.
  - e. The Registrar of the High Court shall within 7 days of this order write to the Registrar/ Chairperson of the Allied Health Practitioners Council of Zimbabwe to effect, such an appointment.
  - f. The Clinical Psychologist so appointed shall render his or her report to the court stated in clause h. below should appellant apply for variation of the custody or access terms or at any time issues of concern are noted from the children's school progress reports.
  - g. The Clinical psychologist's fees are to be borne by the appellant.

- h. The appellant may approach this court or the children's court for a variation of the access terms after successfully going through the counselling.

DEME J Agrees -----

*Dube-Tachiona & Tsvangirai*, appellant's legal practitioners  
*D I Mtisi Law Chambers*, respondent's legal practitioners