

ELLETA NENGOMASHA  
versus  
NGONI ALEX ROBBINS

HIGH COURT OF ZIMBABWE  
MUCHAWA J  
HARARE, 14 February & 21 March 2024

### **Opposed Court Application**

*Ms F Gororo*, for applicant  
*Mr V Chivore*, for respondent

**MUCHAWA J:** This is a court application for variation of a custody and access order.

#### **Background**

The applicant and respondent are ex-wife and ex-husband respectively; their divorce having been granted in 2019 by this Honorable Court. The applicant seeks variation for custody and access order previously granted. The original order which was granted by consent provided as follows:

“Custody of the minor child, namely **G(Born 28th December 2016)** is hereby awarded to the Defendant with plaintiff having access to the minor child on the following terms: -

- i. Between now and until the child attains the age of three, the Defendant will have custody with the plaintiff having access on alternate Saturdays between 9am to 3pm.
- ii. From 3 years to 5 years, the Defendant will have custody with the plaintiff having access on alternate Saturdays from 9am to 6pm.
- iii. From 5 years to 6 years, the defendant will have custody with the plaintiff having access for two full weekends every month.
- iv. From 6 years, either party can apply to the court for variation of the terms regarding custody and access.”

This application was lodged after the child turned six years old and the applicant seeks to vary the access terms. In this application the applicant prays for an order which states that:

- “1. The applicant shall have the custody of the minor child namely G(born 28<sup>th</sup> December 2016) until the child turns eighteen years of age with the respondent having access on alternate Saturdays from 9am to 6pm for a period of one year from the date that this order is granted.
2. The Respondent shall have access to the child for two full weekends every month after a period of one year from the date of this order until the child turns 18 years of age.”

### **The Applicant’s Submissions**

Ms *Gororo* submitted that the reason the applicant initially agreed to have the respondent gradually enjoy more access rights, was because the child suffers from multiple medical problems which require specific care and adherence to a special diet. The physicians are said to have indicated that the child might outgrow the condition but for now the applicant thinks that it is best that he enjoys access rights on alternate Saturdays from 9am to 6pm for a period of one year from the date that this order is granted. Then such access terms shall change to two full weekends every month after a period of one year from the date of this order until the child turns 18 years of age.

It is argued that it is best for the child to stick to day visits until she can take care of herself and understands the importance of adhering to her strict diet. The rationale for the 2019 divorce order access terms is said to have been to gradually introduce the minor child to a different home set up. The 2019 order is said to have been interfered with by the advent of Covid 19 restrictions on movement which were promulgated in April 2020. During that time, the respondent is said to have exercised his access rights on demand even during times when it was inconvenient to the applicant. This, it is argued, did not achieve the desired outcome of getting the child to be gradually introduced and settle into a different home set up.

Another misgiving of the applicant in having the child spend nights at the respondent’s house is that she and respondent’s new wife are involved in a legal wrangle which has spilled into the broader family and points to serious bad blood between the two women. She therefore voiced that she fears that her child may be abused.

What the applicant is essentially seeking is that the terms of the 2019 order be allowed to run to still ensure a gradual acclimatization of the minor child to the respondent’s house.

In support of the arguments put forward, the applicant attached to her answering affidavit, a letter from the child’s paediatrician which says:

“RE : G (D.O.B 28/12/2016)

The parents of the above-mentioned patient of mine are not staying together. Grace has multiple medical problems, and she has visited my rooms x ten times since 04/08/2022 (3 visits in 2023). She has always been in the company of her mother. I have never seen the father on any of the visits. Grace is a pleasant girl who appears to enjoy the company of the mother. I would really recommend that we create a scenario were (sic) we have consistency in terms of care and attention. Kindly use your discretion to make the correct decision”.

The law pointed to in support of this application is s 81 (2) of the Constitution of Zimbabwe which states that the child’s best interests are paramount in every matter concerning the child. In support of her suitability as the parent better placed to cater for the child’s best interests, the applicant avers that she is gainfully employed and has not remarried since the divorce and has ample time to care for her only child outside her work. She states that she enrolled the child at Twin Rivers school and pays her school fees well in advance. Because of the child’s sickly disposition, she says that she has spent some time in hospital with the child and sleeps with her as she sometimes has difficulties in breathing and may require assistance during the night.

The case of *Goba v Muradzikwa* 1992 (2) ZLR 212 (S) @ p 214 was referred to in support of the argument that the mother is better placed to look after her young children and especially for a female child.

On the other hand, the respondent is said to have remarried and has two other children and basically other interests. The respondent is said to have his hands full as he is employed and runs a business. It is acknowledged that he reimburses the applicant the money which she pays as school fees, but he is said to have deregistered the minor child from his medical aid and only contributes to such expenses as and when he wishes. In support of retaining custody of the child, the applicant also cited the case of *McCall v McCall* 1994 (3) SA 201.

It appears that the relationship of the parties has deteriorated over shared parenting of the minor child as the respondent instituted contempt of court proceedings and for committal of the applicant on account of his failure to exercise his access rights at a point when the applicant felt that the child was unwell and there was need to discuss how the access rights would be exercised in the circumstances.

### **The Respondent’s Submissions**

It is the Respondent’s argument that the applicant has consistently denied the respondent access to the minor child as provided for by the order previously granted. The Respondent is not

enjoying full access rights as he should. He says that he has only enjoyed partial access rights with the applicant denying him any full weekend access rights and this is why he then filed contempt of court proceedings which are still pending before the courts. In detailing how the applicant has denied him access rights, the respondent pointed out that he was last given access in June 2023 after having last enjoyed access in August 2022 on two occasions and three times in 2021. The applicant's behaviour is alleged not to be in the best interests of the minor child.

The respondent went as far as opining that this scenario would call for the applicant being divested of custody and have him declared custodian whilst the applicant would enjoy the visitation rights which she wants the respondent to enjoy.

Mr *Chivore*, however clarified that the respondent is not applying for custody of the minor child but wants to enjoy access rights for two full weekends every month and half the school holidays and alternate public holidays.

The applicant's proposed access terms are impugned for being a reduction of the 2019 terms in the divorce order. The applicant's attempt to use the child's sickly disposition is alleged to be without merit as the child's condition was known to the parties even at the stage of divorce. This is particularly so as there is no mention that this condition has gotten any worse.

The paediatrician's letter is dismissed as of no evidentiary value as it falls short of the provisions of s 20 and 23 of the Civil Evidence Act [*Chapter 8:01*] which provide that the production of any expert evidence must be by way of an affidavit. What is before the court is a mere letter. In addition, the contents of such letter are said to be useless to the court as the doctor strays into an area for which she is not an expert being her opinion on custody and access, yet she is not a social worker. The document is silent on what the doctor should have covered which is the nature of the medical issues troubling the child.

According to the respondent, the reason why the applicant wants to reduce the time of the respondent's access rights is the bad blood between the parents. It is pointed out that the applicant has not really pointed to any harm which is likely to befall the child if respondent is granted the access terms he prays for.

It is contended that it is in the best interests of the child to enjoy the right to parental care as set out in s 81 (1) (d) of the Constitution of Zimbabwe. Limiting the father's exercise of access rights is argued to be discriminatory on the child. Reference is made to the cases of

*Kumirai v Kumirai* in which it was held that access should not be confined to such an extent that it stultifies the nurturing of a meaningful relationship between the child and the non-custodian parent. Further reference is made to the case of *Frank Buyanga Sadiq v Muteswa* HH 49/20.

### **The Law and Application to the Facts**

The position of the law is that, when dealing with children, the best interests of the child should be paramount as per s 81 (2) of the Constitution.

Section 81 (3) goes on to state that children are entitled to adequate protection by the courts particularly by the High Court as their upper guardian. It is the right of every child to be well taken care of by both parents. The child's right to parental care is provided for in terms of s 19 (1) and 19(2) (a) and elaborated in s 81 of the Constitution. A court seized with a matter to do with custody, access and guardianship must consider the provisions of s 19 of the Constitution.

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 p 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.”

In *Kumirai v Kumirai* HH 17/06 the subject of access was extensively covered, and I can do no better than reproduce the court's reasoning:

“It is trite that access, in the absence of good reason, is not to be confined to such an extent that it stultifies the nurturing of a meaningful relationship between the child and the non-custodian parent. (See *Marais v Marais* 1960 (1) SA 844(C) and *N v N* 1999 (1) ZLR 459 (H)).

Nothing that has been said by the defendant in her evidence satisfies me that there is good reason to stultify the nurturing of a meaningful relationship between the plaintiff and Tanatswa.

The defendant has testified that the plaintiff never used to spend much time with the minor child during the subsistence of the marriage, that he would rather spend time with his friends and their children and that during the subsistence of the marriage, he never spent time alone with the minor child in her absence. She has also complained that the plaintiff has never assisted the child with his homework and has only bought the child five items of clothing.

With respect, the defendant was not properly advised as to what evidence would persuade the court to deny a natural parent of unsupervised access to his or her child. The plaintiff is not a stranger to the child whose unsupervised introduction into the child's life may traumatize the child. It was not shown that the plaintiff has been violent or abusive towards the child, (see *N v N* (supra)), or that his social life or domestic arrangements are such that exposure to them will injure the best interests of the minor child. It was attempted to show that the plaintiff on one occasion told the minor child the name of his current girl-friend and that he is therefore not suitable to have unsupervised access of his child on this account. That the plaintiff will have other women in his life now he is divorced from the defendant cannot be avoided. The minor child will

have to know of and be acquainted with his father's friends sooner than later. That cannot be avoided and cannot be used as a ground for denying the father access to his child as long as contact with his father's female friend or friends is tastefully handled. There has been no suggestion in *casu* that the introduction of the minor child to his father's friend was not tastefully done or that it was done in a manner likely to injure the best interests of the minor child.

In conclusion, it is my finding that the plaintiff poses no danger to the life, health or morals of the minor child and as such, his access to the minor child shall not be rendered illusory by the imposition of any restrictions other than what is reasonable and in the best interests of the child. His access to the child shall not be supervised."

In *casu* the applicant has not shown how the respondent's exercise of access poses a danger to the life or health of the minor child. She has not even gone as far as taking the court into confidence about the child's ailments. Her doctor's letter does very little in that department leaving me to wonder if there was anything worthy of reporting. Instead, the doctor ventures into unfamiliar terrain in which she is no expert. The child must learn and accept that her father has a new woman in his life as well as her half siblings. This is the reality of her life. Sheltering her from this reality cannot be in her best interests.

It is important for every child to have a normal relationship with both parents. The benefits of nurturing such a relationship were set out in the case of *W v W* 1981 ZLR 243 wherein it was stated as follows:

"The natural affinity and emotional bond and attachment between parent and child are generally irreplaceable and an accepted fact of life. Such an association benefits and promotes a child's emotional security and feelings, normality, whilst the award of a child's custody to a third-party place him in a distinctly unusual or abnormal category. The custody of a child should vest in one parent whilst the non-custodial parent enjoys full access rights so as to have a bond with their child."

The applicant has expressed her fears towards letting the child go for the weekends at her father's house. Her main fear is that she does not have a good relationship with the respondents' new wife and that she is uncomfortable to let the child go there unsupervised. It is important to bear in mind that this is about the best interests of the child in question and not about her and her ex-husband or the new wife. The relationship between the parents is acrimonious as evidenced by the contempt of court proceedings.

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.

For the reasons proffered by Mr Chivore, I have not placed any evidentiary value on the paediatrician's report.

The court normally gives an order as to how and when access should be exercised. An access order can be varied if the custodian parent of the child deems it improper for the minor to maintain contact with the non-custodian parent. In this case no valid reasons have been offered to further limit the respondent's access rights except that the parties have their own unfinished business which has nothing to do with the child's best interests. As adults, they are urged to also place the child's best interests at the centre and not cloud these with the bad blood between them. The determination will be based on the best interests of the child.

The rights of a child to parental care are stated in the case of *Sadiqi v Muteswa* HH249/20. In this case it was argued that spending time with a child ensures that such a child fully enjoys the right to parental care. It was further argued that,

“The right to family and parental care which is enshrined in s 81 (1) (d) of the Constitution includes the child's right to be cared for by both natural parents, see Iain Currie and J. de Waal, Bill of rights Handbook 5<sup>th</sup> edition p607. Care means more than just channeling monetary maintenance through the mother. It entails the opportunity to influence and shape the personality, life of the child by spending time with the child and being involved in making choices about the child's life and future”.

### **Disposition**

Given the circumstances of this case, the best interests of the child and the need to ensure the child enjoys parental care from both parents, I make the following order:

1. Custody of the minor child Gborn on 28 December 2016, be and is hereby awarded to the applicant until the child turns 18 years of age.
2. The respondent is to exercise access rights over the child for two full weekends every month and half the school holidays and alternate public holidays.
3. There is no order as to costs.

*Chivore Dzingirai Group Of Lawyers*, respondent's legal practitioners