

DISTRIBUTABLE (121)

EX - TEMPORE

**CHANTELLE TATENDA MUTESWA
v
FRANK BUYANGA SADIQI**

**SUPREME COURT OF ZIMBABWE
UCHENA JA, CHITAKUNYE JA & KUDYA JA
HARARE, 7 JUNE 2021**

Adv. C. Damiso & S. M Bwanya, for the appellant

Adv T. Uriri, for the respondent

CHITAKUNYE JA: This is an appeal against the judgment of the High Court dated 18 March 2020 in which it granted to the respondent joint custody and joint guardianship of the minor child.

**Judgment No. SC 131/21
Civil Appeal No. SC 153/20**

In the same order, the court *a quo* thereafter ordered that an investigation be conducted by the department of Social Welfare into how the parents were to exercise joint custody and joint guardianship.

The appellant appealed to this Court and has argued that joint custody and joint guardianship is not in the best interests of the minor.

Counsel for the appellant conceded that the court *a quo*'s decision on the applicability of the common law as enunciated in the court *a quo*'s para 1 of this order is correct.

That paragraph reads as follows:

The common law rule that gives the mother of a child born out of wedlock sole guardianship and sole custody and denies the natural father of such a child parental

power is inconsistent with ss 56 (1), 56 (3), 81 (1) (a) of the Constitution of Zimbabwe 2013 and is invalid “

The appellant took issue with the granting of the joint custody and joint guardianship of the minor child before an inquiry into what would be in the best interests of the child had been made. *Adv Damiso* submitted that the best interests of the minor child should have been inquired into before granting joint custody and joint guardianship.

In response, *Adv Uriri* for the respondent, by reference to the chicken and egg conundrum argued that while investigation was essential, the court *a quo* correctly granted joint custody and joint guardianship and thereafter ordered that an investigation be conducted.

In our view, the welfare of the minor child is delicate and important. It should not be prematurely exposed to unverified parental circumstances. **Judgment No. SC 131/21**
Civil Appeal No. SC 153/20 It is therefore our view that the court *a quo* should not have determined the issue of joint custody and joint guardianship before the investigations it ordered in para 4 had been done. In the result,

1. The appeal partially succeeds.
2. The court *a quo*'s order in para 1 is upheld
3. The court *a quo*'s order in paras 2, 3 and 4 are hereby set aside.
4. The matter is hereby remitted to the court *a quo* for it to determine the issue of joint custody and joint guardianship after an inquiry as to whether or not joint custody and joint guardianship in the circumstances of the parties is in the best interest of the child.
5. In the case of a finding that it is in the best interest of the child, how joint custody and joint guardianship should be exercised without jeopardising the best interest of the child.

6. Each party shall bear its own costs.

UCHENA JA : I agree

KUDYA JA : I agree

Mutuso, Taruinga & Mhiribidi, appellant's legal practitioners.

Manase & Manase, respondent's legal practitioners.

Judgment No. SC 131/21
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