

BEAULAH ZUNGUNDE  
versus  
MCDONALD TICHAONA RUSIKE

HIGH COURT OF ZIMBABWE  
TSANGA & MAXWELL JJ  
HARARE, 6 October & 21 December 2022

### **Civil Appeal**

*T Garaba*, for the appellant  
*K Manenji*, for the respondent

### **MAXWELL J:**

This is an appeal against the decision of the Magistrates Court sitting at Harare on 13 May 2022.

### **BACKGROUND**

Respondent herein (Applicant in the lower court) approached the lower court seeking custody of two minor children, namely, Kegan Rusike, born 15 October 2015 and Keane Rusike, born 17 April 2020. He also sought an order that Appellant herein (Respondent in the lower court) be given reasonable access to the minor children and that each party bears its own costs. The parties are the biological parents of the children. They were married customarily but had separated. Respondent averred that upon separation the parties agreed that he retains custody of the minor children and the appellant took all the matrimonial property. Respondent alleged that appellant was staying with a boyfriend and that the marriage broke down due to her infidelity as she would spend most of the time away from home and at times would come home late. He further alleged that appellant was threatening to take the children forcibly hence his quest for an order of custody.

Appellant had opposed the application and alleged that it was respondent who had engaged in extra-marital affairs. She further alleged that respondent would physically abuse her in front of

the children. She disputed surrendering the children to the respondent and insisted that she is a loving and caring mother. Following a request by the lower court, a report was filed by a probation officer from the Social Welfare Department after an assessment of the parties.

### **JUDGMENT OF THE LOWER COURT**

The lower court granted Respondent's prayer after considering what is in the best interests of the minor children. It referred to the case of *Hackim v Hackim* 1998 (2) ZLR 61 in which the court set out what should be considered in arriving at what is in the best interests of the minor child which includes the age, sex, social and financial position of each parent as well as the past behaviour of each parent towards the child. It considered that both children are male and Respondent assumed custody after separation. It considered that respondent stayed with his parents in a good environment. It found the appellant not candid and that she did not have a stable home. It also considered that nothing had been placed on record to show that the respondent is not in a position to provide the children with love and care. It noted that there was a bond between the children and respondent and that respondent looked after the children when appellant left. The lower court agreed with the recommendation of the Probation Officer that respondent retains custody and ordered accordingly.

### **GROUND OF APPEAL**

Appellant was aggrieved and noted an appeal on the following grounds.

- “ 1. The court *a quo* grossly misdirected itself by concluding that there was evidence of an agreement for the Respondent to retain custody of the minor children on separation devoid of any demonstrable evidence to this effect.
2. The court *a quo* grossly erred in failing to give cogent reasons why in the circumstances the Appellant was not suitable to retain custody of the minor children according to law despite acknowledging the need for this in its judgment, thereby ignoring the default position that the Appellant by operation of law is the default custodian parent on separation.
3. The court *a quo* also erred by merely paying lip service to what have become the celebrated factors in determining what is in the best interests of the minor children, thereby rendering the minor children virtually motherless in the absence of demonstrable evidence supporting such a decision.
4. The court *a quo* further erred by heavily relying on the Probation Officer's Report as biblical truth in the absence of any convincing evidence to demonstrate conclusions and findings in his report including those relating to the Appellant's personality.
5. WHEREFORE the Appellant prays for an order upholding her appeal and setting aside the order by the court *a quo* with costs and substituting it with the following:-

“custody of the two minor children be and is hereby awarded to the Appellant subjected to the Respondent enjoying reasonable access as maybe mutually agreed between the parties.”

### **SUBMISSIONS BY THE PARTIES**

Appellant made reference to s 5(1) of the Guardianship of Minors Act [*Chapter 5:08*] which provides that on separation custody should be given to the mother until and unless an order regulating custody otherwise has been made. She argued that the lower court ought to have *mero motu* corrected the position where the father has custody. She further argued that the best interests of the children should have been considered. She pointed out that the elder child suffers from cerebral palsy and requires special care and attention. She further pointed out that there was no evidence suggesting any motherhood abnormality on her part to justify a decision rendering the children motherless as done by the lower court. She criticized the lower court for relying on the Probation Officer’s Report. According to her, the issues that influenced the Probation Officer’s decision can be remedied by an order of maintenance for the children to live comfortably with her. She prayed for the success of her appeal with costs.

Respondent referred to s 81(2) and (3) of the Constitution which codified the position that in every matter concerning a child, it is the child’s best interests that are paramount and that minor children are entitled to protection from the courts. He referred to several case law and concluded that he is the better custodian parent than the appellant. He submitted that the lower court did not err in its ruling. According to him, the lower court ignored the parties’ tug of war and focused on the best interests of the children. He pointed out that the lower court looked into the personal circumstances of the parties and that it is common cause that appellant does not have a fixed place of abode, a fact that was confirmed by the Probation Officer.

Mr Manenji pointed out that the provision in the Guardianship of Minors Act which appellant seeks to rely on was amended and now either party can have custody. He pointed out that if indeed on separation appellant had been denied custody, she ought to have approached the Children’s Court to enforce her right. She neither enforced her right nor challenged the Probation Officer’s Report in the lower court.

Respondent prayed for the dismissal of the appeal with costs on a higher scale.

## ANALYSIS

Appellant alleged that there was no demonstrable evidence of an agreement between the parties for respondent to retain custody of the minor children. On p 11 of the record of proceedings appellant in answer to a question why they separated stated.

“We had an altercation with him on the 25<sup>th</sup> of December and we were never in good books until I decided that we give each other space.” (underlining for emphasis)

On p 12 Respondent stated; -

“We had an altercation and she said she will leave and I told her that she will leave me with the children and we agreed to that. She left the children with me.”

Allegations of being chased away therefore are not supported by the record of proceedings. In any event she however does not attempt to explain why for the past five months she did not seek to enforce her right to have custody of the minor children. There was no error in the lower court proceeding on the basis that the parties had agreed on respondent having custody. That assertion was confirmed by the Probation Officer who stated that appellant chose property over the minor children. The first ground of appeal has no merit and therefore fails.

In the second ground of appeal appellant alleged that the lower court did not give cogent reasons why in the circumstances she was not suitable to retain custody of the minor children. Failing to give reasons is an issue that goes to procedure. It does not deal with the substantive correctness of the decision. It is trite that where a litigant is aggrieved by the manner in which a trial was conducted, and not by the fact that the court came to a wrong conclusion on the facts or the law, the appropriate remedy is to bring the case on review. See *Herbstein & Van Winsen, The Civil Practice of the Superior Courts in South Africa*, 2<sup>nd</sup> ed, p 668. Appellant therefore ought to have raised this issue through review proceedings. In any event the ruling of the lower court contains reasons for its decision. It pointed out that there is a bond between the children and the Respondent who assumed custody on separation. It pointed out that respondent provided a good environment for the children as compared to appellant who has no stable home and that the Probation Officer recommended it. For the above reasons the second ground of appeal cannot succeed also.

The allegation that the lower court paid lip service to the celebrated factors in determining what is in the best interests of the minor children is without basis. The submission in the appellant's heads of argument that an order of maintenance would supplement what is lacking in her circumstances gives the impression that appellant is seeking custody of the minor children in order to get maintenance. This is more so if one considers that she was content to leave them with the respondent on separation after she decided that they should give each other space. It is appellant who rendered the children motherless in the first place. The third ground of appeal has no merit.

In the last ground of appeal, appellant impugns the lower court's reliance on the Probation Officer's Report without providing reasons why it should not. She did not provide any evidence to contradict the findings in the report. There is no merit in this ground as well.

#### **ORDER FOR ACCESS**

The order of the lower court gave appellant what is termed "reasonable access". It is not clear what reasonable access entails. Mr Garaba submitted that appellant had been allowed two hours fortnightly. It is necessary to specify what reasonable access will be. In terms of s 31 of the High Court Act [*Chapter 7:06*], this court on hearing an appeal in civil cases has the power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require. The order of the lower court will therefore be amended to specify what reasonable access will be.

#### **COSTS**

Respondent prayed for an order of costs on a higher scale. Such costs are not awarded lightly. The circumstances of this case do not warrant such costs. Ordinary costs will meet the justice of the case.

**DISPOSITION**

The appeal fails with costs.

The order of the lower court be and is hereby amended in point (ii) to reflect that respondent will have access.

- a) every two weekends of the month from Friday to Sunday
- b) on alternate public holidays
- c) during two weeks of every school holidays

**TSANGA J.....AGREES**

*Garaba, Ncube & Partners*, appellant's legal practitioners.  
*Sande Legal Practice*, respondent's legal practitioners.