

NYASHADZAISHE GASWA
versus
GEORGE CHIMKWASU

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE 16 May 2025 & 19 June 2025

Civil Trial

K B Munakamwe, for the plaintiff
T Muzana, for the defendant

MAXWELL J:

Background

The plaintiff and the defendant married each other on 16 April 2023 under the then Marriage Act [*Chapter 5:11*] now the Marriages Act [*Chapter 5:17*]. The marriage still subsists. The marriage was blessed with two minor children namely Anotidaishe Chimkwasu born on 11 December 2012 and Anesuishe Chimkwasu born on 20 January 2020. On 26 April 2023 the plaintiff sued out summons for divorce and ancillary relief. In her declaration, she stated that the marriage relationship between the parties had irretrievably broken down to such an extent that there are no reasonable prospects of restoration of a normal marriage relationship between the parties. She prayed for custody of the minor children with the defendant having access to the children during weekends. Further that the defendant pays monthly maintenance of US\$ \$100 or ZIG equivalent at the prevailing interbank rate per month per child and pay school fees. Plaintiff stated that during the subsistence of the marriage, the parties did not acquire any movable or immovable properties.

The defendant filed his notice of entry of appearance to defend. In his plea, he stated that the parties separated because of the plaintiff's infidelity. He asserted that the plaintiff is not a model parent and as such custody of the minor children ought to be granted to him with the plaintiff having access during school holidays.

On 3 February 2025, the plaintiff filed her replication. In her replication she pointed out that she never engaged in any extramarital affair. The plaintiff contended that the separation

was necessitated by the defendant's abusive behaviour towards her. The plaintiff further explained that it is in the best interest of the children that custody be awarded to her since the children are females and they are still minors. She further proposed that the defendant be granted access to the children on weekends, as well as during alternate public and school holidays.

Joint Pre-Trial Conference

A Joint Pre-trial conference was held. The parties agreed to refer the following issue to trial:

1. Whether or not the custody of the children should be granted to the plaintiff or the defendant and the amount of maintenance and period to be given to the non-custodian parent?

Trial

Plaintiff's Case

The plaintiff led evidence through two witnesses, namely Nyashadzaishe Gaswa and Ngonidzashe Dzangari, and closed her case after cross-examination and re-examination of the said witnesses. The plaintiff testified first. Her evidence was that she is the biological mother to the two minor children, namely Anotidaishe Chimkwasi born on 11 December 2012, and Anesuishe Chimkwasi born on 20 January 2020. She stated that both minor children are female and that the defendant lives alone. Plaintiff further testified that she is the one who lives with the two minor children, and unilaterally provides for their day-to-day needs such as food, shelter, uniforms, school fees, and medication inter alia.

She explained that the defendant does not contribute to the payment of the children's school fees or their day-to-day expenses. The plaintiff also added that one of the children, Anotidaishe Chimkwasi, is now due for secondary education and as such, the defendant should assist in the payment of school fees. She further told the Court that the defendant is employed by the Ministry of Education and he earns at least USD \$400 per month. She added that the defendant makes extra funds from selling goods in Macheke. On account of the above evidence, the plaintiff urged the court to consider payment by the defendant of monthly maintenance in the sum of USD\$100 per child.

Ngonidzashe Dzangari gave evidence for the plaintiff. She gave evidence to the effect that the plaintiff is the biological mother of the two minor children in question and both are females. She mentioned that the plaintiff is the one who unilaterally provides for the children's day to day needs, with the defendant contributing nothing at all. She stated that prior to their

separation, she stayed with the plaintiff and defendant at their former residence, for at least five months. She asserted that during her stay with the plaintiff and defendant, she observed that the defendant was an abusive husband. She contended that, in her view, it is in the best interests of the children for the plaintiff to be awarded their custody.

Defendant's Case

The defendant was the sole witness in his case. His evidence was that, he earns about US\$ 270.00. He stated that he takes care of his old parents and other dependents who are covered on medical aid. He further acknowledged that he has another wife and three children. The defendant submitted that he is able to contribute US\$ 100.00 as maintenance for both children. He further averred that he wants to have custody of the children because the plaintiff is not a responsible parent. The defendant asserted that the plaintiff once had an extra marital affair, which caused the marriage relationship to have some tensions.

It was the defendant's evidence that he had five rooms and the plaintiff is residing with the children in one room. He further averred that the plaintiff does not have time with the children since she is now enrolled at the Women's University. The defendant pointed out that the plaintiff has questionable morals and the children are not safe with her. He explained that if he gets custody of the children, he does not want maintenance contribution from the plaintiff, he will allow the plaintiff to have access to the children and if custody is awarded to the plaintiff, he is not prepared to have access to the children. The defendant stated that he had a good relationship with the children.

Analysis

In Zimbabwe, custody cases are primarily governed by the Guardianship of Minors Act [Chapter 5:08]. The law relating to custody of minor children is now settled. In terms of Section 81 (2) of the Constitution of Zimbabwe, in custody decisions, the best interests of the children concerned are of paramount importance. In custody matters, if one parent is awarded custody, the other parent usually will be given access rights to spend time with the children. In *Mukundu v Chigumadzi* HH 818/15 the court stated that:

“It is trite that any determination which affects the rights of a child should be guided by the child's best interests”

In the case of *Mackintosh v Mackintosh* SC37/18 the Supreme Court enunciated as follows:

“The need to have due regard to the best interests of the minor children has been part of our law for some time now. Indeed, with the advent of the new Constitution, Section 81(2) thereof

has codified this position and provides 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, particularly by the High Court as the upper guardian of the rights of the children"

In *casu* it is important to note that the High Court as the upper guardian of the children should uphold the best interests of the children. The court in the case of *McCall v MacCall* 1994 (3) SA 201 (C) at page 204-205 highlighted the factors which are relevant in canvassing the best interests of the child principle, it stated that:

"In determining what is in the best interests of a 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, but 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 the other material needs – generally speaking, the provision of economic security...."

It is clear from the case of *McCall (supra)* that the court will make an order that protects the best interests of the children, and not of the parties. In the case of *Goba v Muradzikwa* 1992 (2) ZLR 212 (S) @ p 214 the court stated that the mother is better placed to look after her young children and especially for a female child. Given the circumstances of the case at hand, the plaintiff is better placed to look after the minor children since she is the biological mother of the children in question. The defendant on the other hand has another wife and has three other children and basically other interests. The plaintiff proved to be a responsible parent by placing the children in good schools and the children are settled in a safe environment. The plaintiff has been ever present in her children's lives, and she now understands the children's feelings about certain things.

It is clear from the evidence given at trial that there is love, emotional affinity and attachment between the plaintiff and her children. The plaintiff stays alone and as such, she is better placed to be with the children rather than the defendant, who has another wife and family to look after. The plaintiff is capable of looking after the children, since she is formally

employed by the Ministry of Education. The best interest of the children in this matter can only be protected by awarding custody to the mother of the children (Plaintiff).

It was the defendant's evidence that he stopped contributing towards the upkeep of the children from the time he received divorce summons from the plaintiff. The defendant's action shows that he was involving the minor children in his fights with the plaintiff, thus showing traits of an irresponsible parent. What the defendant is doing was cautioned against by Honourable MUNANGATI-MANONGWA J in the case of *Machacha v Mhlanga* HH 185/23, wherein she said that parents should not use their children as pawns in their divorce and marital disputes.

The children's right to parental care is provided for in section 19 (1) and 19(2) (a) and elaborated in s 81 of the Constitution. Access matters are to be decided by considering all the facts of the matter, having regard to the best interests of the child. In *Bottger v Bottger* HC-H 405-82, at p 7, the court held that:

"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 *casu*, it is important for the defendant to be awarded access rights to the minor children, so as to maintain companionship and bond between the children and the defendant as the father. Both parents should have a normal relationship with their children. The benefits of such a relationship are explained in the case of *W v W* 1981 ZLR 243, wherein the court held that:

"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."

It is of paramount importance for the defendant to have access to the minor children during weekends, alternate school holidays and half of the school holidays. This setup will help the defendant to have a bond with his children while they are growing up.

How much should each party contribute towards maintenance of the minor children?

The plaintiff's evidence is that the defendant should be liable to pay children's maintenance in the sum of US\$ 100.00 per month per child. She stated that the defendant does

not contribute to paying the children's school fees or their day-to-day expenses. The plaintiff testified that she is the one who provides food, shelter, uniforms, school fees and medication. It was the plaintiff's evidence that the defendant is employed by the Ministry of Education and he makes extra funds by selling goods in Macheke. The amount of maintenance payable by each parent is determined by their respective means and resources.

Section 6 (4) of the Maintenance Act [*Chapter 5:09*] encourages a court to have regard to the general standard of living of the responsible person and the dependant, including their social status; the means of the responsible person and the dependant; the number of persons to be supported; and whether the dependant or any of his parents are able to work and if so whether it is desirable that they should do so. In the case of *Kasu v Kasu* HH 106/18, the law on maintenance was aptly set out as follows:

“On maintenance payable for the children, the needs of the children have to be balanced against the means of the person responsible for payment of maintenance. It is however the obligation of both parents to maintain their children each according to their means and at the same time trying to ensure that the children enjoy the quality of life they were accustomed to before the divorce.”

The plaintiff confirmed in her evidence that she is also employed by the Ministry of Education and she earns almost the same amount with the defendant. The plaintiff only takes care of her two minor children. The defendant is also a teacher and his evidence was that he earns about US \$270.00 per month. He takes care of his elderly parents, relatives, and he has another family with three children. He confirmed that he sells goods in Macheke, thereby earning extra money from there. It is the court's finding that the parties should contribute equally towards the maintenance of both children. As the plaintiff will take care of the children's accommodation and day-to-day expenses, the defendant should contribute maintenance, cover school uniforms, pay medical aid, and pay school fees for both children at schools agreed to by both parents. Both parents should buy clothes for the children.

Disposition

1. A decree of divorce be and is hereby granted
2. Custody of the minor children namely Anotidaishe Chimkwasi born on 11 December 2012 and Anesuishe Chimkwasi born on 20 January 2020, be and is hereby awarded to the plaintiff until the children turn 18 years of age.
3. The defendant is to exercise access rights over the children during weekends, alternate school holidays and half of the school holidays

4. Plaintiff be and is hereby ordered to provide accommodation and the day-to-day living expenses for the minor children until each child attains the age of majority or becomes self-supporting.
5. Defendant be and is hereby ordered to contribute school uniforms, pay school fees, pay medical aid and pay maintenance in the sum of US\$ 100.00 per month for both children, at the prevailing inter-bank rate, until each child attains the age of majority or becomes self-supporting.
6. Plaintiff and defendant are ordered to contribute equally towards buying clothes for the children.
7. Each party is to bear its costs.

MAXWELL J:

Tapera Muzana & Partners, plaintiff's legal practitioners
Sawyer & Mukushi, defendant's legal practitioners