

IAN ROSS WATERS
versus
APARNA WATERS

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 21-24 March 2017 and 27 March 2019

Civil trial

A. de Boubon, for the plaintiff
T. Mauwa, for the defendant

NDEWERE J: The plaintiff and the defendant were married in Harare on 3 December, 2005. They were blessed with three children, namely, Keyan Ross Waters, born 17 December, 2006, Aydan Ian Waters, born 29 February, 2008 and Quillan Rohit Waters, born 11 September, 2010.

The plaintiff issued summons for divorce in March, 2012, citing irretrievable breakdown of the parties' marriage. The following month, April, 2012, the plaintiff moved out of the matrimonial bedroom. In January, 2013 the plaintiff moved the defendant's belongings from the matrimonial bedroom to the basement of the house while she was out of the country. When she returned, she occupied the basement and the children joined her there.

On 27 March, 2014, the parties filed a joint PTC Minute where they agreed that their marriage had irretrievably broken down. They wanted the matter referred to trial on the issues of custody, maintenance and asset distribution only.

Following continued acrimony between the parties, the defendant left the family home in February, 2015, together with the three minor children. That is when the parties stopped living together as husband and wife and they never reconciled thereafter.

In March, 2015, the defendant successfully applied for interlocutory relief pending the divorce and on 19 March, 2015, the plaintiff was ordered to pay maintenance for the defendant and the minor children. He was further ordered to pay for the defendant's accommodation costs and all the children's school related costs.

On 23 February, 2016, by consent of both parties, it was ordered that the three minor children shall attend school as weekly boarders at Ruzawi Junior School at the plaintiff's cost. The plaintiff was to have access to the children every alternate weekend and for half of every school holiday. The plaintiff would continue to pay maintenance *pendent lite* and cover all medical costs.

In October, 2016, the parties settled all the outstanding issues about maintenance, access rights and property distribution. The only issue they failed to settle was that of custody of the minor children and they referred it to trial.

On 6 April, 2017, after considering all the submissions by counsel, a decree of divorce was granted and I reserved judgment on the contested issue of custody only.

Both parties filed closing submissions on the issue of custody. The plaintiff filed his on 28 March, 2017 while the defendant filed hers on 16 May, 2017.

The court also noted that the three minor children were sent to a boarding school in May 2017, in line with the earlier settlement between the parties of 23 February 2016. The only variation to the settlement was the change of school from Ruzawi to Lilfordia School.

I now proceed to deliver the ruling on the issue of custody.

The court has noted that when the parties were living together, the children spent more time with their mother. In fact, what triggered the separation of the parties, from plaintiff's own narration, is the fact that the children were always in the matrimonial bedroom with the defendant, thus depriving him of his space in the bedroom. The Plaintiff later moved the defendant from the matrimonial bedroom into the basement and the defendant moved into the basement together with the children. This development further increased the time which the defendant and the minor children were together, to the exclusion of the plaintiff.

By contrast, the plaintiff was with the children in the mornings only, when he shared breakfast with them before they left for school and he left for work and during weekends when he had not travelled. While the court appreciates that the plaintiff was working hard to earn the money which the defendant and the children needed to maintain their comfortable lifestyle, the fact still remains that as a result, the plaintiff spent less time with the children. His work and travel commitments meant that the children had less time with him compared to the defendant. They were therefore more attached to the defendant emotionally because they spent more time with her.

In the case of *Jere v Chitsunge* 2003 (1) ZLR 116, referred to by the defendant the court said the degree of emotional attachment with the minor children was a relevant factor when

deciding what is in the best interests of the child. In the present case, the high degree of emotional attachment between mother and sons tips the scale in favour of the defendant. The *Jere v Chitsunge* case cites the ages of the children. In the present case the ages of the children at the time of the trial were 11, 9 and 6 years respectively. Currently, the children are 12, 10 and 8 years respectively. These are very tender ages which require the emotional nurturing of a mother, regardless of the sex of the child.

The *Jere v Chitsunge* case also cites the risk of ill treatment of the children as a factor to consider.

The court noted that while they were at the family home, no evidence of ill treatment of the children by the defendant or the risk thereof was ever adduced. By contrast, all evidence pointed to the defendant being a loving mother to the children.

In February, 2015, after further acrimony between the parties and plaintiff's mother at the family home, the defendant moved out together with the children. She has been the custodian parent since February, 2015. It was common cause that by virtue of s 5 of the Guardianship of Minors Act [*Chapter 5:08*], the defendant attained the statutory rights of Guardianship.

In support of their custody claims, the parties produced two reports by Francois de Marigny a clinical Psychologist, by consent. The first report was dated 4 May, 2015 and was initiated by the plaintiff. The second report was dated 10 November, 2015 and was initiated by the defendant as an updated version after she had left the family home. In this judgment, I will refer to the reports as the May report and the November report in order to distinguish them.

Both parties approached Francois de Marigny as an expert in clinical psychology. Indeed, his report shows that he is an expert with about 26 years of experience. In fact, in his closing submissions, the plaintiff acknowledged Francois as an expert of forensic psychology concerning the welfare of children whose evidence on the best interest of children has been relied upon by the Superior Courts in Zimbabwe and South Africa.

In spite of that acknowledgement, the plaintiff disagreed with Mr Marigny's recommendation that defendant be granted custody. Despite that disagreement with the final recommendation, the court noted that during the trial, none of the parties disputed the factual contents of Mr Marigny's reports based on the interviews he conducted with various people about the welfare of the children. The court, in this judgment, is going to highlight some of the facts which come out in the two reports by the expert which are relevant to the custody issue.

In addition to having spent little time with the three children the plaintiff never suggested that he could carry out custody obligations on his own or that he would be available for the children at all times. He admitted that he travelled regularly on business. On page 20 paragraph 4.7.1.4, of the May report the expert report states the following:

“Furthermore, his mother is a mobile and healthy 78 year old and jointly they have proved their ability to parent the children independently, without the need for Apu’s involvement.”

The above statement reveals that on his own the plaintiff cannot look after the children on a day today basis. He needs his mother to assist him. On page 41 of the May report, the expert report said it was confirmed by the Defendant on para 5.4.11 and the plaintiff’s mother that the plaintiff travelled frequently, both locally and abroad, to pursue his interest in butterflies and cycads, to maintain his properties in Zimbabwe and abroad and to pursue his business interests in Mauritius, China, Australia and other parts of Africa. The expert report went further to state that during 2014, the plaintiff travelled to China at least three times, for periods of approximately 23 days per trip. He frequently travelled to South Africa to maintain his Lonehill property in Gauteng and to do the household and business shopping; often being away for 5 to 7 days at a time.

On page 42; paragraph 5.4.12,(May) the report stated that the defendant and the three minor children stated that the plaintiff usually travelled without notifying them; did not communicate with them during his travels, or tell them when he was likely to return. He also did not provide sufficiently for them during his period of absence, thus making them anxious.

There was a comment on p 42 by the expert who said various educators interviewed by the expert had revealed the children’s anxiety about them having insufficient food and fuel when their father, the plaintiff, travelled abroad.

The expert confirmed this bad behavior by the plaintiff when the children spent the day and night of 9 March and 10 March, 2015 in plaintiff’s and his mother’s care. The defendant came to collect the children and both the plaintiff and his mother ignored the children for about 45 minutes before their departure. Neither plaintiff nor his mother said good bye to the children. The following day, the plaintiff was travelling to China and would be there for about two weeks. Yet he had not informed the children that he was travelling or said goodbye to them. The plaintiff gave his mother some money to use during his absence, yet he did not leave any financial provision for his family; let alone advise them that he was travelling.

The report revealed that the children were not happy at their father’s home. This is borne out on page 52 in para 6.3.10 and on page 56 para 7.5 in the May expert report.

On page 58(May), the expert report gives a description of the plaintiff by his own mother. Para 9.1.2.

“She describes Ian as a serious and private person who is not the easiest person to communicate with as he assumes that one can read his mind.”

On page 59 (May report), para 9.1.7, plaintiff’s mother confirmed that both she and plaintiff travelled regularly. “She believes that placing the children in a good boarding school would solve most of their care issues.” So we have a situation where the plaintiff on page 20, paragraph 4.7.1.4 is counting on his 78 year old mother and saying jointly they have proved their ability to parent the children without the Defendant. Then on page 59 para 9.1.7, the 78 year old grandmother suggests a boarding school, a clear admission that the plaintiff, even with his mother’s help, cannot cope with full custody of the minor children.

On page 60, in his commentary, the expert witness noted the following;

“the writer observed the children in the presence of Mrs Waters senior, not only during both periods of evaluation in Harare but also in the many video clips provided to the writer by Ian. With respect, her parenting style is somewhat draconian, non-engaging, critical and distant. She corrected and was critical of the children without positive reinforcement and praise. She referred to the need to “train” the children as opposed to the guidance and warmth associated with parenting. There was no tactile engagement with the children. There were no warm welcomes or goodbyes.”

On page 61(May), paragraph 9.2.2 Wendy, the plaintiff’s younger sister described the plaintiff as being “unbendable” and that he will always stand up for what he believes is fair.

On page 64 (May), the expert report gives a summary of what the children’s educators said to the expert.

The educators described Apu the defendant, as a consistent and punctual parent. “The children are always well groomed and do not show signs of neglect.” para 9.4.2.2.1.

The children related incidents of violence at the Ridge Home directed towards the Defendant in para 9.4.2.3

The educators said the plaintiff is seldom seen at the school. There are no signs that he is in any way involved in the monitoring and implementing of homework; para 9.4.2.1.

But, the Defendant is involved in school activities such as reading groups and helping with the tuck shop. She attends all school functions and sporting activities. “She spends much of her day around the children’s schools.” para 9.4.2.4.

The contents of para 9.4.2.5 of plaintiff travelling without informing the children and leaving in sufficient financial provision for them has already been alluded to, leading to the contents of para 9.4.2.6 where the school and friends ended up assisting the defendant and the children. Para 9.4.2.9 is about the children wanting to live away from the Ridge House.

On page 66 (May), the plaintiff's employees described defendant "as a sweet, friendly, soft spoken and fragile person"; Para 9.5.1.1. The employees said the plaintiff lacked communication skills and does not reveal his expectations or travel plans to relevant staff members; para 9.5.1.2. They said he was a loner and spends long hours at the office; para 9.5.1.3.

The domestic and garden staff described the Defendant as an involved, caring and hands on parent; para 9.5.1.5. The domestic staff also said Ian the plaintiff worked long hours and had less time with the children although the children enjoyed time with him catching butterflies; para 9.5.1.6.

On para 9.6, defendant's friends described her as an involved, reliable and dedicated mother who spends her days rallying around the children's activities and schools. Para 9.6.3. is about the defendant getting assistance from friends because of insufficient financial provisions from the plaintiff.

From page 69 (May) the expert refers to the Heather Evans interview. On Page 70, Heather a family friend said the defendant was very involved with the children's school and praised her in that regard, as well as encouraging the children's involvement in extra mural activities.

On page 82, (May) para 12.2, the expert witness gave his opinion. "In the writer's opinion, Ian's psychiatric history, interpersonal deficits and narcissistic and obsessive personality renders him a deficient parent". "In para 12.3, the expert witness concluded that the defendant was a consistent, attentive and dedicated parent who displays spontaneous love for the children which is reciprocated by them. "She is by no means perfect, but her psychological presentation appears to be consistent with the situation" of spousal emotional abuse.

On 10 November, 2015, the expert witness updated his report at the defendant's cost, following the defendant's changed circumstances in that defendant was then living in rented accommodation and the plaintiff had been ordered by the court to pay maintenance *pendente lite*. His opinion was that custody should be granted to the defendant, although he expressed concern about the defendant's failure to assist the children to view the plaintiff in a more positive manner. The expert witness also suggested boarding school for the children.

As previously stated at the beginning of this judgment, the three minor children have been at boarding school since May 2017. The court's view is that the consent paper concluded between the parties which resulted in the children going to boarding school from 2017 and the

extensive detailed access rights for the non-custodial parent mentioned in that consent paper provides sufficient safeguards against the deficiencies of the defendant referred to in the November 2015 expert report. The deficiencies noted were in para 5.6.2, on page 26 of the November 2015 expert report. The two older boys educators were interviewed and they said the defendant was less involved in school related activities and that attention to the children's homework was lacking (para 5.6.1)

“Both children are under-performing school scholastically and the school have sent Aydan for a full educational evaluation.” Para 5.6

In para 5.7, the educators say they have had very little contact with the plaintiff.

The educators also noted reports of abuse made by the children against the plaintiff, although they pointed out that there was no physical evidence of such abuse. Their attitude points to their discomfort with the plaintiff which would affect them negatively if plaintiff were to get custody.

The above extracts of the report show that while some deficiencies have been noted about the defendant, the plaintiff still does not feature as the better custodian parent because of the little contact between him and the children and their school. So the option already adopted by the parties, of putting the children in boarding school, is the best option with regards to improving their educational performance. This is what the plaintiff and his mother have always wanted. So the placement of the children in boarding school should actually have resolved the custody issue for the parties.

The other deficiency, of alleged alienation of the plaintiff, is taken care of by the extensive and detailed access rights negotiated and agreed to by both parties. The boarding school arrangement reduces the children's time with their mother and gives the plaintiff a lot of time with them when he is available through the agreed access rights. It is up to the plaintiff to then use the extensive access rights to create a positive image of himself as a parent to the children.

The court's view is that the behaviour at the Ridge House of the children staying with the defendant in her bedroom was probably caused by the defendant and the children's perceived alienation of the defendant by the plaintiff's extended family, particularly the plaintiff's mother who lived with them and who openly did not get along with the defendant. The defendant's bedroom then became a place of refuge for her and the children, away from the plaintiff's mother's reach. The court was therefore convinced by the defendant's evidence

that in her new independent home, the children now had their own bedrooms and mother and sons were no longer sharing the same bedroom.

The court's view is that the best interests of the children are with the defendant. There is no need for the court to interfere with the emotional bond that has developed between mother and sons for all this period, especially from 2015 when they moved out of the Ridge house.

It is therefore ordered that

1. The custody of the minor children, namely Keyan Ross Waters, born 17 December 2006, Aydan Ian Waters, born 29 February 2008 and Quillan Rotrit Waters born 11 September 2010, be and is hereby granted to the defendant, Aparna Waters.
2. The plaintiff shall pay the defendant's costs of the trial.

Coghlan, Welsh and Guest, plaintiff's legal practitioners
Mauwa and Associates, defendant's legal practitioners