ALICE MAGODORA
versus
BLESSING MOSES NDUNA

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE; 29 September 2022 & 9 March 2023

Civil Appeal

F J Majome, for the appellant
Respondent in person

TSANGA J: Appellant is a maternal grandparent with *de facto* custody of a minor child born on 22 December 2008, having assumed full responsibility for parenting the child whose mother died in a traffic accident in April 2016. The respondent is the father of the child who sought access to his child from the *de facto* custodian grandparent. He was granted that access on alternate weekends, from Friday to Sunday, and, for the first two weeks of each school holiday and on alternate public holidays. He was also later allowed to execute that right to access pending appeal. Appellant appealed against the granting of access as well as the granting of the exercise of that right pending appeal. The matters were consolidated but at the hearing she zeroed in on the access order.

At the heart of her objection to the access order, she maintains he is not a father to the child and that the court erred grossly when it flung a minor child into the home of a stranger without any safeguards. Her five grounds of appeal point to errors on the part of the lower court as follows:

1. Error in dismissing the appellant's counter application for respondent to undergo a DNA test before determining the issue of access and in granting respondent access where paternity is challenged.
2. Misdirection on the part of the court in giving the respondent access when there is no existing bond between the respondent and the child and in failing to consider supervised access.

3. Error in failing to interview the minor child contrary to s 81 of the Constitution.
4. Misdirection in failing to postpone the matter when there was good cause for postponement.
5. Misdirection in that no court applying its mind properly to the facts would have reached the same conclusion in law and facts.

What the appellant therefore seeks is that the appeal succeeds and that the application for access be dismissed. She seeks further that the respondent be ordered to undergo a DNA paternity test with the minor child. Costs are sought on a higher scale.

In reaching its conclusion and granting the access sought, the lower court took into consideration the evidence placed by the respondent before it in the form of maintenance application made by the child's now late mother in which she had sought and had been granted an order for maintenance against the respondent as the father of the child. She had averred in that application that the respondent was the father of the child.

The court deemed the appellants counter application for a DNA test as unnecessary because of the *prima facie* proof from the late mother of the child that applicant was the father of the child. The court thus granted him access as the non-custodial parent noting the significance of a natural parent maintaining a bond with the child especially where that child has already lost one parent. It found that the appellant herein had in fact dragged her own differences with the respondent so that he would not be granted access.

Also informing the lower court's decision in granting the access that it did was that the child, a male, was entering adolescence and would be in need of fatherly guidance. Moreover, there had not been any adverse report on the father in the probation officer's report. Supervised access was deemed unnecessary on the grounds that the minor child is not a baby.

The respondent argues that the appeal court can only interfere where the findings of the lower court are grossly outrageous and that this is not the case in this instance. The respondent also argues that the best interests of the chid are paramount that the appellant is going against the interests of the minor child in trying to prevent a relationship with his father.

Indeed what respondent averred in his application for access was that he was customarily married to the mother of the child in 2008 before they separated in 2009. He had also been paying maintenance and had stopped in 2016 as he could not continue to deposit money into an account which he deemed closed. Further, at a time that he had sought to discuss

the issues of the welfare and upkeep of his son following his son's mother's death, the appellant's family had indicated that they were still mourning.

He had also highlighted in his answering affidavit placed before the lower court that he was once a tenant of the appellant and the reason of her animosity and non-approval of him stemmed from her having considered him to be financially inferior for her daughter.

The appellant, on the other hand, denied any formal customary marriage with her daughter beyond introductory phases and emphasised that the respondent had not declared paternity for purposes of registering the child's birth. The birth certificate only indicated the late mother of the child. It was the lengthy absence of the respondent from the child's life following the child's mother's death as well as his inconsistency in paying child support that appears to have also irked the appellant to taking a stand that he is not the father of the child.

It is evident from the judgment of the court below that the court dismissed the counter application for a DNA test because it considered that there was sufficient *prima facie e*vidence placed before it in the form of the application for maintenance that had been made by the mother of the child that the respondent was indeed the father of the child. The totality of the evidence that was placed before the court lent itself to that conclusion. It was highly irresponsible for appellant to sow seeds of doubt in the child's mind regarding his paternity just because she has an issue with his inconsistency in paying maintenance or inactivity in the child's life. Granted modern technology in the form of DNA test makes the identification of paternity certain. However, as stated in *S* v *Jeggels* 1962 (3) SA 704 (C) at 706 E:

> "The common law is very clear on this point. *Grotius* states that, if a man admits intercourse, the woman is to be believed in her identification of the father, even though she has had intercourse with others".

In essence, the common law is therefore very clear that where a man admits intercourse, as the respondent clearly did and does in this case, a woman is to be believed in her identification of him as the father unless he proves he cannot be the father. Appellant did not even put forward any other man as being the father of her grandchild.

The first ground of appeal lacks merit and is dismissed.

As regards the second ground of appeal that the court did not consider that there was or is no bond between the alleged father and the child, and that it should have ordered supervised access, suffice it to note that in general, access by a non-custodial parent is granted under the criterion of the "best interests" of the child. Evident from the judgment is that the court considered the need for the father, as the surviving parent, to have contact with the child.

Access by a non-custodial parent is deemed to be well established in our law the approach of our courts being that the non-custodial parent has an inherent right to reasonable access. As for supervised access it is generally granted only on good cause shown as our courts have equally emphasized the need to guard against stultifying the development of a meaningful relationship. See *N* v *N* 1999 (1) ZLR 459 (H); *Kumirai* v *Kumirai* HH 17/2006; *Markos Athitakis* v *Kate Bronwyn Worsley-Woswick* HH 536/22. It is therefore fair to say in our jurisdiction access by a non-custodial parent is indeed viewed as tantamount to the "best interests" of the child.

Supervised access encompasses those situations where access to a child is exercised under the supervision of a third party. It is a way of ensuring safe access where the court has reason to believe that they are cogent reasons in the child's best interest for access to be supervised. Common situations include where the father is a substance abuser or has a history of violence perhaps towards the mother but these scenarios are not exhaustive. A situation where a child has had no prior relationship with a parent could indeed lend itself to supervised access especially where a child is very young or is reluctant to have such access. But as with every matter involving minor children each case is dealt with on its own merits.

In this instance, in allowing unfettered direct access, the lower court took into account the child's age who would have been 14 at the end of last year. It also took into account, the absence of any adverse report on the father by the probation officer who conducted home visits. If there is no bond, then it should be fostered rather than extinguished. The court rightly reached the conclusion that there was no need for supervised access for a teenager meeting with his own father under the specific circumstances of the case. Supervised access under the averred facts would more likely than not, have created unnecessary tension, doubt and insecurity in the minor child pertaining to his father. Moreover, in her opposing affidavit the appellant had not even given any indication of what the supervised and gradual access would look like and neither had she dealt on issues of its length or time period, nor outlined who would supervise. There was therefore no error on the part of the lower court in reaching the conclusion that supervised access was unnecessary under circumstances where it was so cursorily put forward. The second ground of appeal is therefore also dismissed as lacking merit.

As for the court's failure to interview the child, again the judgment refers to the report of the probation office r which was indeed made part of the record. The probation officer would have been the one to speak to the child in this instance since she visited both homes and

carried out assessment. Whilst indeed the Constitution does encourage children's voices to be heard in their own right, there is no evidence here that the failure to do so, if indeed it is assumed that the probation officer did not talk to the child, that this resulted in any decision which was contrary to the child's best interests. The ground of appeal therefore equally lacks merit.

The fourth ground of appeal is related to the first ground. There was no need to postpone the matter on account of DNA test since the court deemed the respondent to be the father of the child.

As for the last ground it is trite that an appeal court will not interfere with factual findings unless they are so unreasonable as to defy ordinary logic. This is clearly not such a case. A child ordinarily wants a relationship with their parent and there was no indication that this child does not.

The appeal is dismissed with no order to costs.

MAXWELL J:……AGREES

Jessie Majome & Co, appellant's legal practitioners