

PISIRAYI MANGWENGWENDE  
versus  
PRUDENCE CHIRISA

HIGH COURT OF ZIMBABWE  
MAXWELL J  
HARARE, 13 March 2024 and 10 April 2024

### **Urgent Court Application**

*K Kachambwa and V Chigumbu*, for the applicant  
*Isaac M and T Marufu*, for the respondent

**MAXWELL J:** On 13 September 2023 in HC CIV ‘A’ 153/23, a judgment in which the Respondent was declared to be the custodian of the parties three minor children was handed down. The minor children are:

- S M, a boy born on 20 April 2010;
- A K M, a boy born on 18 June 2012; and
- T C M, a girl born on 3 July 2015.

In addition, the Parties were to undergo counselling by a registered clinical psychologist for at least 6 months with a minimum of 2 sessions a month, with at least half of the sessions being attended together with the three minor children. The clinical psychologist was also mandated to receive monthly progress reports for each of the minor children from their respective schools detailing school attendance and assistance with online lessons, homework and extra-curricular activities, among other things. The clinical psychologist was ordered to render his report to a court in which appellant (applicant in this case) may seek variation of the custody or access terms after successfully going through the counselling.

On 14 February 2024 Mr Phillip F Moses, a registered clinical Psychologist appointed to deal with the matter submitted an Interim progress report to the Registrar of this court. In the report he stated that he had scheduled an initial counselling session with the Parties on 5 December

2023. The second session tentatively set for 30 December 2023 was to include the three minor children. The clinical psychologist reported that no one came for the two counselling sessions scheduled for 5 December 2023 and 30 December 2023. He indicated that he is still waiting for the Parties to request for an appointment for counselling. The report further indicates the monthly school attendance for each child from October 2023 to mid-February 2024. The information from the minor children's schools showed frequent absenteeism by all the minor children. T C M's school suggested that she be withdrawn and be enrolled in a school where she will be able to attend regularly. There was also an indication that the attendance record put his continued enrolment at risk. The school indicated that if immediate and sustained improvement in attendance is not demonstrated, it may re-evaluate his place at it.

On 16 February 2024 Applicant filed the present application. In the founding affidavit he stated that he received the interim report from the psychologist. He stated further that the Respondent is in defiance of a court order that is extant in not attending counselling sessions with him and is also conducting herself in a manner detrimental to the minor children's right to education and the right to parental care. He further submitted that this is a proper case where the court must intervene and divest the Respondent of her role as the custodian of the three minor children by varying the court order that was granted in HC CIV "A" 153/23. Applicant is seeking that he be declared the sole custodian of the minor children with Respondent being granted access every alternate school and Christmas holiday on condition that she avails herself at Dr Moses Phillip's rooms for the counselling sessions. He also sought an order that he places the minor children at boarding schools and that the Respondent be barred from interfering in their school work and or general affairs without his consent. He also sought an order that Respondent be ordered to contribute 45% of the children's school fees as well as 45% of Doctor Phillip's fees.

A certificate of urgency was filed in the matter in which the certifying legal practitioner stated that the urgency arose from the expulsion of one of the minor children from school as a result of absenteeism and that there is a threat of the expulsion of the other two for the same reason.

In opposing the application, Respondent stated that she was not notified of the counseling sessions. She indicated that on her own initiative she had been attending counselling sessions with a different counsellor. She indicated that she was not aware of the judgment in HCH CIV 153/23. She admitted that Applicant through his employer has been paying school fees for the children.

She however, indicated that Applicant's contribution to the children's welfare is insufficient to maintain the lifestyle they were acquainted to before the parties separated. She argues that this is the reason for the children's absenteeism. She submitted that Applicant is not fit to have custody of the minor children and ought to attend counselling before accessing the children as they are afraid of him. She further submitted that he seeks the order of the court prematurely as he is supposed to complete counselling sessions first.

In his answering affidavit Applicant insisted that Respondent has continued to absent children from school and he should be awarded custody of them. He indicated that his circumstances have changed as he has remained and has two other children therefore, he is not in a position to increase the amount he is paying for the up keep of the minor children. He disputed that the minor children are afraid of him when he has not lived with them for over five (5) years and has not been having access to them.

Respondent raised a preliminary point that the application is premature and should be dismissed for lack of compliance with rule 61(2)(b) and rule 61(3) of the High Court Rules 2021. Mr *Isaac* argued that it is mandatory for an application of this nature to have reports from curator *ad litem* and from the Master. In response, Mr *Kachambwa* submitted that in urgent court applications, observance of the rules of Court is dispensed with and in addition, this is an interlocutory application arising from a court order.

It is trite that each matter is dealt with on its own merits and circumstances. Indeed, this application is allegedly born out of the decision of the court in HH 515/23. The court stated that a report be compiled by a clinical psychologist after the Parties attended counselling sessions. A curator *ad litem*'s report was not availed in the initial proceedings.

A decision was made that Respondent should continue to have custody of the minor children. That decision was upheld by this court with conditions for the Parties to fulfill. The present application seeks to alter the order that Respondent should continue to have custody of the minor children. In my view a curator *ad litem*'s report is necessary to guarantee the best interests of the minor children. However, where a clinical psychologist is engaged, his report will serve the same purpose as that of a curator *ad litem*. In *casu*, the report on record does not serve the purpose as it was compiled before any counselling sessions were held. The report that will be compiled

after all the necessary counselling sessions are held will assist the court in determining the parent better placed to have custody of the children. The preliminary point therefore has merit.

However, even though the matter is prematurely before his court, I find that in the best interests of the minor children, an interim order is necessary pending a final decision on the custody issue. That position is arrived at after considering what the court in HH 515/23 stated to *wit*.

- Respondent's capacity and disposition to give the children guidance is questionable particularly relating to their educational development and cultivation and nurturing of relationships outside the nuclear family. (page 24)
- The children are genuinely afraid of the Applicant. It does not matter that this may have been planted and not real. (page 24)
- Applicant's ability to communicate with the children needs to be attended to through counselling.
- Applicant's alleged anger issues put into issue his mental and moral fitness.
- It would be a dereliction of duty for this court as the upper guardian of the minor children to ignore the Respondent's clear short comings in catering for the children's educational development. She has not shown any just cause for her conduct such that one is left wondering whether the appellant is not correct in saying that she is using the children as pawns to get at the appellant for the unfinished business between them. (page 24)
- Vilifying the appellant to the children does not help the children's development especially when lies are used to paint him as morally irresponsible and uncaring for the children, to the extent of denying that he pays school fees, amongst the many other things he does. It is also irresponsible to pass to the children a message that he said he will only see the children when they are dead. The Respondent should be protecting her children from such hurt.

From the foregoing, both Applicant and Respondent are questionable candidates to have custody of the children. They run the risk of raising children who will be classified as "children in need of care" in terms of the Children's Act [*Chapter 5:06*]. However, I take note of the fact that despite the Respondent's shortcomings the appeal court was content to let her continue having custody of the minor children pending counselling sessions of the whole family. I am not persuaded to alter that position. I noted that Applicant is aware that access to the minor children

was conditional upon him finishing counselling sessions. In para 3 of the answering affidavit, he stated:

“... To me, access to the children is very important and in terms of the order I seek to have varied, I was required to have access to them after I finish a certain number of sessions....”

He also stated in para 4 of the same affidavit:

“... I am prepared to attend the sessions and to pay for them, if that is the only way I can access my children....”

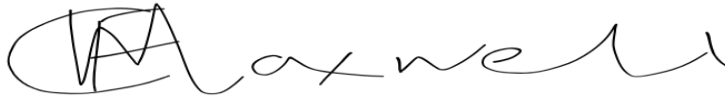
With that in mind it is improper for him to seek to be given custody of the children when access was conditional. In any event, he has not stated that he attended any counselling session at all. For him to expect the court to give him custody in circumstances where the children were found to be genuinely afraid of him without a report to the contrary is surprising. The most he can get is authority to put the children in boarding school.

The conduct of the Respondent justifies the making of that decision. The application in the lower court was dismissed on the 12<sup>th</sup> of May 2022. One of the issues in that matter was the continued absenting of the children from school without reasonable cause. The report by the clinical psychologist dated 14<sup>th</sup> February 2024 showed that as at that date, the situation had not changed. In my view, to allow the children to continue attending school from home whilst in the custody of the Respondent would be to be complicit in their absenteeism and that is detrimental to their educational development. This court, as the upper guardian of minor children has the responsibility of safe guarding the best interests of the minor children. I find that in this case it is not in the minor children’s best interest to continue being day scholars. Their educational welfare is best guarded by their being in boarding school. An order to that effect will accordingly be made.

On the issue of custody, the Parties are directed to follow through the counselling that was ordered in HH 515/23. When they are through with the sessions the clinical psychologist will deem necessary, a report will then be submitted to the Registrar of this court as directed in HH 515/23. Applicant can then approach the court on the basis of the report from the clinical psychologist, if it is in his favour.

In the final analysis, I make the following order:

1. The application for custody, being premature, is not granted.
2. Applicant be and is hereby granted authority to enroll the three minor children in boarding school with effect from the second term of 2024.
3. The Respondent be and is hereby ordered to avail to the Applicant all the minor children's birth certificates, and such other documentation as may be required for their enrolment at a new school.
4. The Applicant and the Respondent be and are hereby ordered to commence counselling sessions as soon as practically possible after liaising with the clinical psychologist.
5. Each party bears its own costs.

A handwritten signature in black ink, appearing to read 'Maxwell J'. The signature is written in a cursive, flowing style with a large initial 'M'.

**MAXWELL J**

*Dube – Tichaona Tsvangirai, applicant's legal practitioners*  
*Legal Aid Directorate, respondent's legal practitioners*