MARKOS ATHITAKIS
versus
KATE BRONWYN WORSLEY-WOSWICK

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 14 July & 5 August 2022

Civil Appeal

Mr *RA Sithothombe*, for the appellant
Mr *B Pabwe*, for the respondent

MUCHAWA J: This is an appeal against an order by the court *a quo* in which the following order was granted:

"**IT IS ORDERED THAT**:

1. The applicant be and is hereby granted the right of access to one minor child LEIA MARIA ATHITAKIS born on 21st November 2018 on weekends, that is Saturdays and Sundays from 0900 hours.
2. The right of access shall be supervised by the respondent the mother of the child who shall take the minor child to and from the applicant's place. The respondent is directed not to interfere with the applicant's exercise of the right of access.
3. Each party to bear its own costs."

At the centre of this matter is a minor child Leia Maria Athitakis who was born to the appellant and respondent. The two were in a relationship from 2017 and started cohabiting in April 2018. They were not married. Another child was born to the two on 14 November 2019 but he unfortunately passed on 13 days later due to several complications. The relationship seems not to have survived the grief the parties suffered leading to the respondent moving out to stay in a cottage at the neighboring house. By then, Leia was a year old. With the help of counsellors, the parties agreed on equal access to the child who would spend half the time with the appellant. The appellant employed professional maids to assist him. Due to their proximity, the appellant was able to spend unsupervised access with Leia. He claims to have then been able to feed her, bath her and play with her.

In September 2020 Leia accidently kicked one of the maids' cup of tea leading to her suffering some minor burns on her toes. This led to the respondent varying the access arrangement and imposing supervised access as she then alleged that the appellant was a smoker and a drinker. This was further varied in March 2022 as the respondent then said the appellant could only see Leia for two hours only, in a public place under her supervision.

The appellant further alleges that when he had been away for 48 days, he had been denied access to video calls with Leia. The prevailing arrangement is alleged not to be in the best interests of the minor child, Leia.

The appellant is disgruntled by the judgment of the court *a quo* and has filed this current appeal on the following grounds:

1. The court *a quo* erred and misdirected itself in granting an order for supervised access in the absence of a finding that the appellant's unsupervised access to the child will injure the child's best interests.
2. The court *a quo* erred and grossly misdirected itself in finding that the appellant's access rights to the minor child ought to be supervised because of the age and sex of the minor child when there was uncontroverted evidence before it that the appellant previously enjoyed unsupervised access to the child and same had not been detrimental to the child's best interests.
3. The court *a quo* erred and grossly misdirected itself when it failed to find that equal access to the child by both parents was in the best interests of the child.
4. The court *a quo* erred and misdirected itself when it failed to grant the appellant an order for video and telephone access to the minor child when such order was not opposed by the respondent.

The relief sought in the main is as follows:

1. That the appeal succeeds with costs.
2. That the whole judgment of the court a quo is set aside and in its place, the following be substituted:
   i. The applicant shall have access half of each week day.
   ii. The applicant shall have access half of each weekend either Saturday or Sunday from 9:00hrs to 17:00hrs.

iii. The applicant shall have video and voice calls with Leia Maria Athitakis, born on 21 February 2018 at least 15-20 minutes at agreed times daily whenever he is out of Zimbabwe.

iv. Respondent to pay cost of suit.

The alternative relief sought is set out as follows:

1. That the appeal succeeds with costs.
2. That the whole judgment of the court *a quo* be set aside and in its place the following is substituted:
    i. The applicant shall have unsupervised access to the minor child Leia Maria Athitakis born on 21 November 2018 on weekends that is Saturdays and Sundays from 9:00hrs to 17:00hrs during the school term.
    ii. The applicant shall have unsupervised access to the minor child for two weeks of the school holiday with public holidays such as Easter, Heroes and Christmas alternating between the applicant and respondent from year to year.
    iii. The applicant shall have video and voice calls with Leia Maria Athitakis, born on 21 February 2018 at least 15-20 minutes at agreed times daily whenever he is out of Zimbabwe.
    iv. Respondent to pay costs of suit.

There appear to be three issues for determination. The first is whether the court *a quo* erred in granting supervised access in the circumstances of this case. The second is whether the court *a quo* erred in not granting equal access and lastly whether it was an error not to grant video and voice calls as had been requested. I proceed to deal with these issues below, not necessarily in the order I have set them out.

Whether it was an error not to grant the appellant access to the minor child through voice and video calls

Mr *Sithothombe* submitted that the court *a quo* erred when it failed to grant an order in favour of the appellant for video and telephone calls to the minor child as such order was not opposed by the respondent. Reliance was placed on the case of *Longman Zimbabwe (Pvt) Ltd* v *Midzi & Ors* 2008 (1) ZLR 198 (S) 203 to argue that it is not proper for the court to make a decision

on only one of the issues raised and say nothing about other equally important issues raised, unless the issue so determined can put the whole matter to rest.

Mr *Pabwe* submitted that the respondent has no problems with this being granted as there is an inbuilt mechanism of supervision as the minor child would be using the respondent's telephone. The only issue raised was that of how the access provision was crafted. It was averred that access should be once a week as the respondent travels frequently. The only rider was that the calls should be made during reasonable times and when the child is available.

It was explained by Mr *Sithothombe* that the appellant does not travel often as the last time he travelled was to support his son who had gotten a scholarship, in his interviews in the UK when he was away for about two months.

The concession way made that this clause should be reworded so that it provides as follows; "The applicant shall have video and voice calls with Leia Maria Athitakis, born on the 21st of February 2018 at agreed times daily whenever he is out of Zimbabwe," seems to cater for the age of the child who may be asleep or simply not interested in attending to a call for the periods which the appellant initially sought.

It was indeed an oversight on the part of the court *a quo*, to have failed to deal with this issue.

Whether the court *a quo* erred in not granting equal access as had been requested

The social worker's report had recommended equal access to the minor child which would be implemented by the parties taking into account their work schedules. The court *a quo* noted that such an arrangement wherein access is exercised within certain days or intervals during the week may not be in the best interests of the child. In particular, it was found that:

> "The minor child cannot be shuttled from one place to another in the middle of the week which I believe might confuse and inconvenience the minor child. The child is still of tender age and should have a stable environment.
> The ideal programme for access should be on continuous days especially during weekends which I believe will not affect the child's schooling."

Mr *Sithothombe* submitted that there was evidence before the court *a quo* that the parties had previously had an equal access arrangement and the circumstances favoured continuity of this arrangement as it would lead to stability. Furthermore it was averred that the arrangement was varied on the basis that the appellant was a drug addict yet the court had found no evidence of this.

Appellant's counsel argued that a child has a constitutional right to parental care in terms of s 81(1) (d) of the Constitution of Zimbabwe 2013. Such rights are said to have been interpreted in the cases of *Dangarembizi* v *Hunda* HH 447/18 and *Sadiqi* v *Muteswa* HH 249/20 to include access, custody and guardianship. It was further argued that spending time with a child ensures that such child fully enjoys the right to parental care. In this case, an equal access arrangement, was said to be what would ensure fulfilment of the child's right to parental care. In the circumstances, it was contended that the basis for denying equal access by the court a quo was startling.

The court *a quo* was said to have ignored the fact that the parties were neighbours and the equal access arrangement had been working perfectly before the respondent unilaterally varied it. Mr *Pabwe* submitted that the appellant had equal and unlimited access when the parties were living together and that the variation was done when the minor child suffered burns as a result of lack of proper care whilst in appellant's custody. The appellant was also said to have lived with a professional maid and his mother before, but no longer had those available to provide additional care for the child. Whilst acknowledging that there had been an equal access arrangement, it was the respondent's case that the parties were no longer neighbours as she had moved to Highlands.

The court *a quo* seemed to have been alive to the change in respondent's living arrangements. The social worker's report makes this clear on page 100 of the record. It is stated that the respondent would be moving from Shawasha Hills end of February 2022 with Leia to her mother's place in Highlands.

The case of *Sadiqi* v *Muteswa (supra)* makes the following observation:

> "The right to family and parental care which is enshrined in s 81(1)(d) of the Constitution includes the child's right to be cared for by both natural parents, see Iain Currie and J. de Waal, *Bill of Rights Handbook 5th Ed. p. 607.* Care means more than just channeling monetary maintenance to the child through the mother. It entails the opportunity to influence and shape the personality, character and life of the child by spending time with the child and being involved in making choices about the child's life and future."

That case was however dealing with an entirely different issue which was the constitutional validity of the common law position on custody and guardianship of a child born out of wedlock. In other words, the issue was whether the applicant, being the father of a child born out of wedlock, is entitled to joint guardianship and joint custody over the child under the Constitution of Zimbabwe, 2013.

Similarly, in the case of *Dangarembizi* v *Hunda (supra)*, the court had to decide what an appropriate order for the custody of two minor children (aged three years and five months) should be, where the parents were not married. The court upheld the best interests of the child principle. In *casu* it is already agreed that the appellant as father needs to spend time with his daughter. It is just the details of how and when in a manner that best serves the child's best interests. The rights of parents to exercise access to their children must be exercised without adversely affecting the rights of the children.

The appellant needs to be alive to the changed circumstances between the parties. They are no longer living together nor are they still neighbours. An equal access arrangement will necessarily involve shuttling the three year old child between Shawasha Hills and Highlands. The court *a quo* was correct in its observation that this would confuse and inconvenience the minor child. It took into account the constraints of logistics such as geographic locations, school attendance and the demands of daily living. I therefore find no merit in this ground of appeal.

Whether the court erred in awarding supervised access to the appellant

Mr *Sithothombe* submitted that supervised access can only be granted on good cause shown as set out in the case of *Kumirai* v *Kumirai* HH 17/2006. The court *a quo* is said not to have given any good cause justifying an order for supervised access. Though the respondent had prayed for supervised access on the basis that the appellant was allegedly a drunkard, marijuana addict and pornography addict and very irresponsible, the court is said to have found that there was insufficient evidence led to support such allegations. The only reason for this order is alleged to be only that the child is a three year old girl, which reason is argued to be inadequate. It was contended that the test should be that of the best interests of the child and not its age.

The appellant points to the evidence on record that the appellant is an exceptional, good, loving and responsible father particularly the affidavit by his ex-wife which is on page 65 of record which details how he has been a good father to their son Eden. It was argued that there was no evidence that unsupervised access would injure the minor child and so the order of supervised access was unjustified.

Mr *Pabwe* submitted that the order of supervised access was backed by the report of the probation officer and that the child was a girl of the tender age of three. The order of supervised access was also said not to be permanent as the probation officer had recommended a regular

review of the order. Issues of substance abuse were alleged to be relevant in this case. The argument was summed up as follows; that it would be in the minor child's best interests if access is supervised at the moment, subject to future variation depending on appellant's behavior.

The court in *Kumirai* v *Kumirai (supra),* when considering the issue of supervised access said the following:

> "It is trite that access, in the absence of good reason, is not to be confined to such an extent that it stultifies the nurturing of a meaningful relationship between the child and the non-custodian parent. (See *Marais* v *Marais* 1960 (1) SA 844(C) and *N* v *N* 1999 (1) ZLR 459 (H)).
> Nothing that has been said by the defendant in her evidence satisfies me that there is good reason to stultify the nurturing of a meaningful relationship between the plaintiff and Tanatswa."

Though the court *a quo* found that there was not much evidence led to prove that the appellant is a marijuana and pornographic addict, there was the probation officer's report who had in fact provided therapeutic support to the parties following the death of their second child and had been involved as they negotiated their separation. Some of her key findings which informed her recommendations were as follows:

1. The parties' relationship had rapidly deteriorated after the death of their second child and was characterized by arguments focused primarily around substance use and differing parenting styles
2. Both parties acknowledged that they have engaged in recreational substance use to varying degrees and for different purposes. There were concerns regarding appellant's various addictions during the probation officer's assessment and attempts to address the possible impact of these upon Leia whilst in his care.
3. The recommendations made were informed by such discussions and the need to ensure Leia's best interests are met.

The key recommendations by the probation officer were as follows:

1. That there be equal access as far as possible taking into account the constraints of logistics such as geographic locations, school attendance and the demands of daily living.
2. Depending on current commitments and circumstances that the appellant would have supervised access to Leia at his home on Tuesday afternoons, Wednesday afternoons and

Sunday mornings. The respondent would drive the child there and remain in the background enabling appellant and Leia to interact freely

3. That the access arrangements be reviewed on a monthly basis with each party keeping notes of any concerns or suggestions for future use in the review. In particular, any substance use which may impair good judgment in the care of Leia or that could impinge on the arranged schedule was to be duly noted and immediately reported to the nominated therapist for consideration upon review
4. That the parties benefit from a therapist or mediator to whom they would report or seek counsel from. The probation officer was willing to take up this role.

It is clear from the probation officer's report that the issue of substance use was very much a factor which was likely to affect Leia's best interests. The court *a quo* may not have noted this as clear worrisome evidence. In my opinion, it is sufficient evidence to justify an order of initial supervised access, subject to review. This is why the age and sex of the minor child become relevant.

In the result, I order as follows:

1. This appeal partly succeeds with no order as to costs.
2. An additional paragraph is inserted in the order of the magistrates court so as to read as follows:

"2.1 The applicant be and is hereby granted the right of access to one minor child LEIA MARIA ATHITAKIS born on 21st November 2018 on weekends, that is Saturdays and Sundays from 0900hrs

2.2 The right of access shall be supervised by the respondent, the mother of the child who shall take the minor child to and from the applicant's place. The respondent is directed not to interfere with the applicant's exercise of the right of access.

2.3 The applicant shall have video and voice calls with Leia Maria Athitakis at agreed times at least three times a week whenever he is out of Zimbabwe.

2.4 Each party to bear its own costs."

MUCHAWA J:……..……..…

WAMAMBO J: Agrees …….

Mtetwa & Nyambirai, appellant's legal practitioners
Venturas & Samukange, respondent's legal practitioners