DORIS MWAITA
versus
FREDRICK SIYAKA TABANIE
and
FRANCIS TABANIE
and
HELEN TABANIE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 14 February and 8 September 2022

Opposed Application

P Musimwa, for the applicant
S Simango, for the 1st respondent
No Appearance for 2nd and 3rd respondents

WAMAMBO J: In this opposed application a maternal grandmother seeks access rights to her grandchild. The minor child at the centre of the dispute resides with his paternal grandparents while attending school and resides with the father on holidays and weekends. The mother to the minor child is resident in Mozambique and is not one of the parties involved in the application. The minor child central to the dispute is Nathaniel Siyaka Tabanie who was born on 18 October 2011 (hereinafter called the minor child). The applicant is the minor child's maternal grandmother. First respondent is the minor child's biological father. Second and third respondents are the minor child's paternal grandmother and grandfather respectively. Applicant seeks to be granted an order for access to the minor child on every first two weekends of the month and every alternative holiday including public and school holidays and costs of suit on a higher scale.

Only first respondent filed opposing papers. According to the founding affidavit the application is based on the following:

In 2010 Kudzai Nyoka (hereinafter called Kudzai) applicant's daughter entered into an unregistered customary union with first respondent. A child was born to that union the minor child central to this application. Kudzai was arrested in 2011 and the minor child briefly stayed with his mother before applicant assumed custody when the child was five months old. The

three respondents never made efforts to support or access the minor child. Kudzai applied for maintenance from first respondent and a maintenance order was granted under M2837/11.

In 2016 at five years old the minor child developed epilepsy. At seven the minor child was admitted at Avenues, Clinic and applicant stayed with him for a week. He was at this stage attending school as Westlea Primary School.

Applicant fearing for the minor child`s epileptic condition while going to and from Westlea Primary School reached out to first respondent on the issue. Second respondent suggested that the minor child should reside with him in Warren Park as there was a school ten metres from his place of residence.

It was therefore agreed that the respondents would assume custody during the school term while applicant would have unsupervised access every school holiday including weekends.

In December 2020 first respondent applied for custody of the minor child. The application resulted in a default order in favour of first respondent. From that time first respondent took away the minor child and refused applicant access to him.

Kudzai has another son who is closely bonded to the minor child.

The minor is under the custody of second and third respondent who are also grandparents to the minor child. First respondent resists the application. He avers as follows:

It will not be in the best interests of the minor child for applicant to be granted access to him. As the father of the minor child who was granted custody of the minor child by the court he can determine who has access to his child and how.

When the mother of the minor child had custody he used to exercise access rights. However, he soon realised that the mother was exposing the minor to criminal activities and was not committed to the child`s welfare.

In 2020 during the holiday period applicant took the minor child from second and third respondents pretending to take him on a holiday. She took him to Mozambique illegally. During his stay in Mozambique he was not attending school. He had no stability.

Despite requests to return the minor to Zimbabwe applicant neglected to do so. It was only after a police report was made that the minor child was returned to Zimbabwe. Applicant's actions are detrimental to the minor child's character and upbringing.

The minor child resides with second and third respondents at their home during school days for convenience and accessibility to school. He resides with the minor child on weekends and school holidays.

A number of cases were cited by counsel for applicant and first respondent. Section 19(1) and 81(3) of the Constitution and Article 3(1) and 12 of the Convention on the Rights of the Child were also extensively referred to. There was also reference to Article 7 of the African Charter on the Rights and Welfare of the Child. Suffice it to say all these references are indeed relevant particularly as they relate to the best interests of the minor child. In the light of the above I am cognisant that it is not the interests of the applicant or the respondents that is most important, but that of the minor child.

Most of the cases I have been referred to are matters regarding a father's access or custody rights to a child born out of wedlock. Although these cases are not directly applicable the principles therein may have some impact on the instant case. To that end I have considered the principles established in these cases in so far as they apply to this case.

It becomes clear that the principle of the best interests of the child looms large and prominent in all these cases.

In *Cruth* v *Manuel* 1999 (1) ZLR 7 (S) MUCHECHETERE JA said the following at page 14 D-H.

> "The rights of legitimate parents and therefore those of the mother of the child born out of wedlock cannot be interfered with ordinarily. Third parties and the father of a child born out of wedlock is placed in the same category can only interfere with those rights in the interests of the child when they are not being exercised properly. In my view, it should first be appreciated here that it is the rights of the parents and the mother which the third parties would seek to interfere with. And one cannot interfere with another's rights if the other person is exercising them properly. The trigger that warrants any interference must therefore be an allegation that the rights are not being exercised properly and that it is therefore in the interests of the child that those rights be interfered with. The welfare of the child in cases of this nature only becomes an issue where there is an allegation that the exercise by the mother of her rights causes some concern.
>
> It therefore follows, in my view that a father of a child born out of wedlock cannot come to the court and simply allege that because he is the father of the child or he is richer than the mother, or he pays maintenance etc, it is in the interests of the child that the rights of the mother should be interfered with. Similarly a third party e.g. child welfare department, religious organisation cannot come to court and simply ask for the rights of either the legitimate parents of a child or the mother of a child born out of wedlock to be interfered with in the interests of the child when no concern has been raised about the exercise of the rights……."

In *Makun*i v *Makuni* 2001(1) ZLR 189 (H) GOWORA J (as she then was) said the following at p 191 D – H to p 192 A:

> "The custodian parent has generally the right to regulate the minor's life for a custody order certainly gives the custodian spouse sole-control over the person and education of the minor.
> If the custody has been awarded to the mother, the father's "natural" right to control his minor child's person and education is however only "displaced" without being extinguished (See) *Spiro Parent and Child 4 ed* pp 295-296……''

An application of this nature can never be determined without regard being had to the interests of the minor children. In *Benly* v *Benley* 1979 (3) SA 128 A at 135 F-136 C TRENGOVE JA had this to say:

> "In approaching a problem of this nature the court is of course primarily concerned with the welfare of the children, that is the paramount consideration just as in custody cases so also in disputes arising out of custody orders the welfare of the children is the predominant consideration which should weigh with the court *Shazin* v *Laufer* 1968(4) SA 657 (A) at 662 ZG –H."

I was also referred to a case closer to the instant case on the facts. It is the case of *Klengeld* v *Heunis and Anor* 2007(5) SA 559(TPD).

In that case a maternal grandmother sought access rights to her two grandchildren MAVUNDLA J at para 6 of the judgment pointed out as follows:

> "[6] In the matter of B v S 1995 (3) SA 571 (A) at 575 D-E
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> HOWIE JA says that "Access, like custody is an incident of parental authority see Boberg, The Law of Persons and the Famil y at 459-60 and cases cited there. Consequently if access is the father's entitlement as a matter of inherent legal right it can only stem from his parental authority. The duty of support and the marriage in no measure imply the existence of any parental authority from which the supposed right of access should have been derived.
> At para 11 MAVUNDLA J continues as follows:
>
> "[11] It is clear from the aforesaid authority that the applicant does not have an inherent right to access to his grandchildren. He must therefore convince the court that it is in the best interest of the grandchildren that the court must grant him access……
> Save for having stated that he wants to exercise his rights of access to his grandchildren he has in no way alleged facts on the basis of which this court can come to the conclusion that it is in the best interest of his grandchildren that he should be granted the right of access, since he does not as a matter of law have an inherent right of access…….…….
> The parents of the children are quite entitled to decide who should or should not visit their children. The court can only intervene where it is shown that it is not in the interest of the children that such refusal is made, alternatively that it is not in the best interest of the children that such access is being allowed by the parents of the children.
> The intervention of the court would be on the basis that the court as the upper guardian of the children, because of special grounds which grounds must be set out in detail in the founding affidavit, must intervene in the best interest of the children."

I find no special grounds to intervene to grant access to the applicant. To the contrary I find that it is not in the best interests of the minor child that applicant be granted access rights to him. The reasons are as follows:

Against the amicable relationship and blood ties that binds the minor child and applicant there is a disturbing twist. The minor child's mother is alive. She has not applied for access rights. She has instead chosen to relocate to Mozambique leaving her three children in

Zimbabwe including the minor child at the centre of this case. The applicant is the maternal grandmother to the minor child.

Criminal activities on the part of the minor child's biological mother and applicant have been alleged by first respondent. These allegations of criminal conduct by applicant and her daughter are reflected in para(s) 12 to 15 and 20 of first respondent's opposing affidavit.

In her answering affidavit applicant does not meet these allegations headlong. In para(s) 12-14 of first respondent's opposing affidavit the following is alleged:

- That applicant undermines the minor's sense of security.
- That in 2020 applicant deliberately and cunningly took the minor child employing misrepresentation tactics.
- That applicant unlawfully took the minor child to a foreign land namely Mozambique.
- That the minor had no passport or any other lawful travelling document.
- That the minor child was exposed to criminal activities.
- That while in Mozambique the minor child was not going to school neither was he home schooled.
- That the stay in Mozambique caused instability in the minor child's life and his education.
- That applicant was insistent on the minor child remaining in Mozambique.
- That the minor child was only returned to Zimbabwe pursuant to a police report made.

Against the above incriminating allegations the applicant in the answering affidavit merely disputes the allegations and avers that she is committed to the minor child's welfare. She does not refute with any vigour the above apparently incriminating allegations. She does not even say I never took the minor child to Mozambique in the first place.

My impression of the response as contained in the answering affidavit is that the allegations as contained in para(s) 12-14 of the opposing affidavit are not disputed. To just assert that it is disputed in the light of the detail contained as aforementioned and the clearly negative and criminal connotations to be drawn is in the circumstances telling.

I find that the allegations as reflected in para(s) 12-14 of the first respondent's affidavit are not disputed. The implication is certainly that applicant is not only not a good grandmother but granting her access rights is not in the best interests of the minor child. For to grant her access to the minor child may be to expose the minor child to possible illegal cross country

visits prejudicing the child of his education and generally exposing the minor child to criminal activities

It is not lost to me that the minor child's mother is based in Mozambique and her grandmother (the applicant) once illegally crossed with the minor child to Mozambique.

The irresistible conclusion to be drawn therefrom is that the applicant may have taken the minor child to see her biological mother in Mozambique.

There has not been any serious negative assertions made with regards to the minor child's stay at his paternal grandparents and father's houses. In fact the minor child's stay with his paternal grandparents has its roots in applicant reaching out to first respondent on the minor child's predicament of attending school a distance away with his epileptic condition.

I find in the circumstances that the application stands to fail.

To that end I order as follows:

The application is dismissed with no order as to costs.

*Justic*e *for Children*, applicant's legal practitioners
Nyikadzino, Simango & Associates, first respondent's legal practitioners