Judgment No. HB 12/2004
Case No. HC 2899/2003

PETRONELLA TIWANDIRE

Versus

PERVES CHIPANDA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 11 FEBRUARY 2004

C P Moyo for applicant
Respondent in person

Judgment

NDOU J: On 26 January 2004, pursuant to an urgent application filed by the applicant, I ordered that the respondent surrender the custody of the minor child of the parties to the applicant within five (5) days of the order failing which I directed the Deputy Sheriff, Bulawayo to secure the child and hand him to the applicant. Eleven (11) days later legal practitioners who have now assumed agency on behalf of the respondent requested that I provide reasons for the judgement. This judgment provides the reasons. The salient facts are that the parties had a love relationship which resulted in the birth of the child forming subject matter of these proceedings. In a typical urban set-up common in our major cities the parties, ignoring both Christian and African customary norms and rites, the parties moved in together in 1998. The respondent neither asked for the applicant's hand in marriage nor made any customary or traditional moves to marry her. They lived together for sometime but without the blessings of either God, their ancestors or parents the "co-habitation" (to borrow the phrase used by the respondent in his affidavit) was challenged in terms of happiness. There was instability in the relationship resulting in the applicant moving out in September 2003 with the minor child. Sometime in October 2003 the

respondent instituted an action in the Bulawayo Juvenile Court. On 29 October 2003 the matter was heard. It appears that the respondent objected to the presence of the applicant's legal practitioner.

The juvenile court magistrate eventually postponed the matter *sine die*. The applicant retained custody of the minor. The matter is still pending in the juvenile court. This urgent application is a direct result of the subsequent events of 7 December 2003. On this day the applicant went to the Gazaland shops in Luveve with the minor. Whilst there, the respondent took away the minor. There is a dispute on how the minor ended up in the respondent's vehicle. According to the applicant the respondent called the minor. The minor went to the vehicle but she did not follow as there is a peace order operating against her prohibiting her from contacting the respondent. When the minor got to the car the respondent opened the door and took the minor in and drove away.

The applicant immediately reported the matter to Luveve Police. The police referred the matter to Western Commonage Magistrates' Court. Applicant went there with the police. The respondent was present and it appears the prosecutor declined to prosecute the respondent. When the matter was placed before me I interviewed the minor and thereafter postponed the matter and left the minor in the custody of the respondent. I ordered a Probation Officer to urgently compile a report in respect of the matter. A report was submitted by the Probation Officer M Basera which recommended that the custody of the applicant be granted to the applicant under supervision of the Department of Social Welfare. I, in fact, allowed the Probation Officer to give oral evidence in explaining the contents of his report so that the parties could ask him questions as his report is crucial in such matters. I proceeded in terms

of rule 229B of the High Court Rules 1971 – *Cruth* v *Manuel* 1999 (1) ZLR 7 (S) at 10D. I awarded the custody of the child to the applicant. Delivering the majority decision in this case, MUCHECHETERE JA and EBRAHIM JA held that under common law all rights in respect of a child born out of wedlok are vested in the mother and she has the same rights as those of the parents of a legitimate child. The father of a child born out of wedlock has no rights at all in relation to the child. Such a father is the same as a third party in relation to the child. To hold that the father of a child born out of wedlock has rights in respect of the child would be to elevate the legal status of the father of such a child to that of a spouse in a divorce and allow unwarranted interference in the mother's rights over the child. At page 14E-G of the judgment MUCHECHETERE JA said:-

> "The rights of legitimate parents and therefore those of the mother of a 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 that it is the rights of the parents and the mother which the third parties would seek to interfere with/and 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 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 when 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 court and simply alleged 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."

At page 15A the learned Judge of Appeal continues:

> "This would, in my view, be elevating the legal status of an illegitimate father to that of a spouse in a divorce situation or on separation and negating the accepted principle of law that he has no inherent rights in the child born out of wedlock."

At page 16A-C EBRAHIM JA added:-

> "The court is being asked to substitute its own decision for that of a person in whom the parental authority of the minor concerned vests where such person has not been shown to be incompetent to make such a decision. I do not believe that the function of the court as the upper guardian of all minors embraces the right to assume such a role. The mere fact that the court may reach a different conclusion as to where the best interests of the minor lie does not automatically make it the best arbiter of such an issue. Accordingly, it is my view that the starting point in conducting an inquiry of this nature is whether the third party instituting the inquiry has provided some basis on which a finding could be made that the court is more competent than the person having parental authority to make the decision. If no such basis exists the inquiry can proceed no further, whether the third party is the father of a minor born out of wedlock or otherwise. If the law is to be changed with regard to such fathers the decision must be that of the legislature not the court."

In South Africa the legislature recently intervened - In South Africa the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 amends the common law and makes provision for the possibility that such fathers of children born out of wedlock may approach the High Court to obtain guardianship or custody of such children. The South African Act came into operation on 4 September 1998. Our legislature, in its wisdom, has not deemed it necessary to come up with such a legislative intervention. Members of Parliament will obviously be alive to the position of such fathers and will act accordingly when a case is made out for legislative intervention. I, however, think that this issue is worth looking into by the lawmaker. *B* v *P* 1991 (4) SA 113 (7); *B* v *S* 1995 (3) SA 571 (A); *F* v *B* 1988 (3) SA 948 (d); *Douglas* v *Meyers* 1991 (2) ZLR I; 1987 (1) SA 910 (ZH); *T* v *M* 1997 (1) SA 54 (A) and *Calitz* v *Calitz* 1939 AD 56.

In *casu*, the respondent does not seem to have confronted the applicant. If he had done so and she refused he will then have to go for an order enforcing custody.

His approach seems to be that he has equal custodial rights as the applicant, this is not the case. Instead he took the child at a shopping centre and drove away with it. He did not first go to court to enforce his rights. This is a typical case of self help by the illegitimate father. He has not laid a foundation interference with the applicant's custodial rights. This is necessary as such rights cannot ordinarily e interfered with. It is for the above reasons that I ordered the respondent to return the minor to its mother failing which, the deputy Sheriff shall remove the child from him and surrender it to the applicant.

Majoko & Majoko applicant's legal practitioners