MEMORY MINEZHI
versus
BOYLAND BOORA

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
Harare, 7, 26, 27 February 2020 & 5 March 2020

OPPOSED APPLICATION

B. T Mudhara, for the applicant
No appearance for the respondent

CHIRAWU-MUGOMBA J: At the centre of this dispute lies a minor child who is blissfully unaware of the storm surrounding him as the applicant who is his mother and the respondent who is his father are involved in a bitter cat-and-mouse game.

The facts of this matter are as follows. The applicant seeks sole guardianship and sole custody of J.M who was born on 19 July 2016. Applicant had previously sought and obtained an order for the appointment of one Roseline Mtengwa under case number HC 6873/19 as curator *ad litem.* She subsequently filed an application under case number HC 7838/19 seeking that she be awarded sole guardianship and sole custody. The matter was placed before CHITAKUNYE J who pointed out to applicant that she must serve the application on the respondent who is the biological father of the child. Instead of complying, the applicant withdrew that application and filed the present one. I note that she incorporated by reference all the pleadings in HC 7838/19 that include the report by the curator. I also note that in the present application, the curator and the Master were not cited but in my view, it is not fatal to the application.

The applicant averred that she and the respondent were never married. They separated shortly after the birth of J.M. Ever since the separation, she has been taking care of the minor child with the assistance of her relatives particularly one Martha her sister who resides in Canada. The applicant has been accepted into a college in Canada to study for general arts

and science certificate. In support she attached a copy of a letter of acceptance from St. Lawrence College International Education Office. She also stated that Martha had applied through a special programme offered by the Canadian government for applicant and her family to relocate to Canada. In support she attached an email from what appears to be an immigration agency dated 6 August 2019. In that email, one of the requirements stated is that applicant must produce a court document indicating that the applicant can move permanently to Canada with J.M. Since she was on separation with the respondent, it was impossible for her to obtain the consent of the respondent. She contended that if the court were to award her sole guardianship and sole custody, she will be able to travel to Canada with J.M. She cannot fathom being separated from J.M who is three years old. Leaving J.M behind will expose him to neglect and abuse. In Canada, she intends to stay with her sister Martha who deposed to an affidavit in support in HC 7838/19. Accordingly, she seeks an order in the following terms:

1. That applicant be awarded sole custody and sole guardianship of J.M born 19 July 2016.

2. That there be no order as to costs.

In a notice of amendment dated 14 November 2019, the applicant added a paragraph to the draft order as follows:

3. Thereby being possessed of the full parental powers over the minor child J.M, born 19 July 2016, including power of representation, choice of residence and the right to reside with the minor child, applicant has authority to remove the minor child J.M, born 19 July 2016 from Zimbabwe as she deems fit.

No proof was proffered whether or not the proposed amendment was served on the respondent.

The respondent strenuously opposed the application. He submitted as follows. The applicant was fully aware of his whereabouts as they were residing together in South Africa before going separate ways. He was in constant touch with her and he used to send money to her through an agency known as mukuru.com. In support, he attached copies of statements as proof. In his view, the applicant had attempted to cheat the court process by claiming that she did not know about his whereabouts. He drew the court's attention to what he termed a fraudulent act in which the applicant changed the surname of the minor child from Boora to

Minezhi. In his view, this was meant to perpetrate a criminal act of depriving him of access and title to his child. The respondent averred that contrary to the applicant's assertion, he had been taking care of the minor child as proved by remittances of money through mukuru.com. Should the minor child relocate to Canada, the respondent will be deprived of the chance to take care of the minor child. In his view, parenthood should be shared between him and the applicant. There are also dangers attendant to migration such as human trafficking. The respondent is financially capable of taking care of J.M instead of the applicant relying on her sister Martha. The respondent also attached copies of photographs presumably of himself and the minor child.

In a clear breach of the law, the applicant attached annexures to her answering affidavit without leave of the court. She tried to justify the change of name through the legal fiction that she 'advertised' the change as is required by the law. I say fiction because how many people actually scan the government gazette and the newspapers for notices of change of name? I doubt that there are many.

At the hearing, Mr *Mudhara* was unable to make any meaningful submissions on the difference if any between sole guardianship and sole custody and guardianship and custody *simpliciter*. In his view, there was no difference.

In my view, this matter epitomises an ever growing trend of practitioners who do not apply their minds to the issues before them. The first issue to consider is whether or not the applicant has made a case for an award of sole guardianship and sole custody? The application was made purportedly in terms of sections 4(1) (b) and 5(1) of the Guardianship of Minors Act [Chapter *5:08*]. These sections read as follows:

> "**4 Guardianship and custody of minors**
> (1) The High Court or a judge thereof may—
> (*b*) On the application of either parent of a minor whose parents are divorced or are living apart;
> if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship, which shall include the power to consent to a marriage, or sole custody of the minor, or order that on the predecease of the parent named in the order, a person other than the survivor shall be the guardian of the minor, to the exclusion of the survivor or otherwise.
> **5 Special provisions relating to custody of minors**
> (1) Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order

> regulating the custody of that minor is made under section *four* or this section or by a superior court such as is referred to in subparagraph (ii) of paragraph (*a*) of subsection (7)."

The court was not referred to a single case that deals with best interests of a child in relation to sole guardianship and custody. Mr *Mudhara* in his heads of argument cited *Mutetwa* v *Mutetwa,* 1983(1) ZLR 176(SC) as authority for the *de facto* custody rights of a mother upon separation. In my view, s 5 (1) envisages a situation where parents are living together and thereafter they separate. The mother must as a matter of law have ***temporary*** custody. I say so because that position is subject to a final order on custody under section 4 of the act. A father may also apply for sole custody in terms of s 5 (3) (b). It is pertinent to note that the applicant never disclosed the actual time of separation from the respondent and instead made general assertions that they separated shortly after the birth of J.M. Given the fact that she never alleged that the respondent tried to interfere with those temporary rights of custody, it is a misnomer to state that the application is in terms of s(5)(1) as that section confirms the legal position upon separation. In my view, it is a section that cannot stand alone unless it is read with s (5) (2) (a) (b) which reads:

> "(2) Where—
> (*a*) the mother of a minor has the sole custody of that minor in terms of subsection (1); and
> (*b*) the father or some other person removes the minor from the custody of the mother or otherwise denies the mother the custody of that minor; the mother may apply to a children's court for an order declaring that she has the sole custody of that minor in terms of subsection (1) and, upon such application, the children's court may make an order declaring that the mother has the sole custody of that minor and, if necessary, directing the father or, as the case may be, the other person to return that minor to the custody of the mother."

I note also that s 5 (1) confirms custody *simpliciter* and not sole custody. Even a court making an order is enjoined to look at custody and not sole custody.

The basis of awarding sole guardianship and sole custody is the "best interests" of the child and not of the parent. The drastic nature of an order of sole guardianship and sole custody is set out in s3 as follows:

> "(3) Subject to any order of court—
> (*a*) a parent to whom the sole guardianship or custody of a minor has been granted under subsection (1) may, by testamentary disposition, appoint any person to be the sole guardian or to be vested with the sole custody of the minor, as the case may be."

This practically means that the sole guardian or sole custodian parent can appoint someone in their will to be the guardian or custodian of their child without consulting the

other parent. This is confirmed in *Erasmus vs. Erasmus* HH-40-07, in which MAKONI J (as she then was) stated as follows:

> "To me the concept of guardianship and sole guardianship are two different issues. That is why they are governed by different sections under the Act. Guardianship ***per se*** is the paramount right exercised by the father of a legitimate child in terms of common law. This right is subject to section 3 of the Act and the power of the court as the upper guardian of children. Sole guardianship is provided for in terms of section 4 of the Act. Either parent may on an application to the High Court be appointed a sole guardian to a minor child provided it would be in the best interests of the minor to do so. He is appointed to act alone without consultation with the mother as is provided for in section 3 of the Act. A parent granted sole guardianship may, unless the court has ordered otherwise, by testamentary disposition appoint any person to succeed him as a sole guardian. A parent granted guardianship is not entitled to appoint, by testamentary disposition, any person as a guardian of a minor. Sole guardianship also includes the power to consent to a marriage of a minor without the concurrence of the other parent. "

Cronje and Heaton in *South African family law*, (3 ed) at p 171 state as follows:

> "If the court awards 'guardianship' to one of the parents, this does not mean that that parent obtains sole guardianship, for an order awarding sole guardianship must be made in express terms. If the court awards sole guardianship to one of the parents, that parent becomes the child's only guardian to the exclusion of the other parent. Sole guardianship means that apart from the child's adoption, the sole guardian is the only parent whose consent needs to be obtained for those acts in respect of which both parent's consent is normally required. Sole guardianship is not readily awarded. It may for example be awarded when the other parent's whereabouts are unknown or when he or she has shown no interest in the child or in performing his or her duties as a guardian."

I also noted that the applicant initially sought to mislead the court in HC 7838/19 by claiming that the whereabouts of the respondent where not known. The court saw through her deceptive act and directed that the respondent be served with the application and as already alluded to, she chose to withdraw that application and file a fresh one. This conduct on the part of the applicant of trying to 'beat the system' can be gleaned from the changing of the surname of the child. The respondent expressed concern that the change was effected without his consent. Section 81 (1) (b) states that every child has a right to be given a name and a family name. Section 81 (2) reinforces the paramouncy of the best interests of the child. MUNANGATI-MANONGWA J in *P* v *The Registrar of Births and Deaths,* 2016 (2) ZLR 238 at 247 (G-H) had occasion to discuss the implications of the right to a family name. She stated as follows:

> 'The shorter *Oxford English Dictionary* Vol 1 describes 'family' as 'all those who are nearly connected by blood or marriage or those descending or claiming descendancy from a common ancestor." The *Concise Oxford English Dictionary* 2011 versions defines a family as a 'group of persons related by blood or marriage' and a family name as a surname. A surname is then

> defined as 'a hereditary name common to all members of a family'. Family name has also been defined as, 'The last name that gives you a sense of identity and helps you to discover who you are and where you came from."

Whilst I am cognisant of the fact that in *Katedza* v *Chunga and anor* 2003(1) 470 the mother of the minor child was allowed to change his surname from that of his father into hers, in my view such an action is never in the best interests of the child. It ends up confusing the child. Today he is known by one surname and the next day by another surname. In my considered view, for a child born out of wedlock, there is nothing that bars the mother from using her own surname for the child from the start- see s 12 of the Births and Deaths Registration Act [*Chapter 5:02*]. South Africa follows the same approach for children born out of wedlock –see the Births and Registration Act 51 of 1992, s 10(1) (a). The applicant could legally have used her own surname rather than subject the minor child to surname changes especially in the absence of a curator *ad litem* to represent his interests. The actions of the applicant were meant to deny respondent access to the minor child. Were she to be awarded sole custody and guardianship, she will likely never allow the respondent access to the child.

The respondent in his opposing affidavit clearly showed that he is not a stranger in the life of his child. He produced proof that he was remitting money to the applicant for the upkeep of the child. In her answering affidavit, the applicant no doubt caught in the act never denied that the respondent remitted money through a money transfer agency. She instead sought to respond to a clear error when the respondent used the word father instead of mother. The respondent also attached copies of photographs that he claimed are those of him and the minor child. The applicant did not dispute those. He cannot therefore be said to be an absentee father contrary to the false picture that the applicant painted.

The applicant incorporated by reference the report by the curator *ad litem* and the Master in HC 7838/19. These reports do not take the applicant's case for sole custody and sole guardianship any further. They do not relate to the issue of 'sole' but to ordinary custody and guardianship. The curator's report reveals that she is a close relative of the applicant. The possibility of bias cannot be discounted. She never made an effort to contact the respondent or even any of his next-of-kin. The report makes a brazen false claim that the respondent never contacted the applicant or the minor child and never provided for his needs

contrary to the proof tendered by the respondent. The report did infact allude to the real reason for the applicant to seek the order in contending that, *"Therefore, applicant's purpose of seeking sole guardianship and sole custody of her minor child is to enable her to take her child with her without obtaining the minor child's father's consent whose whereabouts have been unknown since shortly after the minor child was born."* As the respondent proved in his opposing affidavit, the accusation that he disappeared from the life of the child shortly after giving birth is not true. In *M (*in his capacity as curator *ad litem* of LMZ and SZ) CHITAKUNYE J observed that a curator should investigate the veracity of the claims made by a party to the litigation rather than accept her word at face value- see also *AFM vs Garamukanwa* HH 468-17 on the role of a curator. Perhaps it is also time that this honourable court ceases to rubber – stamp applications for the appointment of curators as seems to be the current practice. I note that even in the application for her appointment, the curator in her consent in HC 6873/19 made a very brief statement that she accepted the appointment. She never disclosed that she is a close relative of the applicant. Her being a relative would not obviously disqualify her from appointment but it would alert the court to potential bias. Her background and qualifications that enable her to carry out an investigation as envisaged in order 32 r 249 (3) were never disclosed. The only logical conclusion is that the report was most probably prepared for her and she just appended her signature with the complicity of the applicant's legal practitioners.

The report by one L Chakafa of the Masters office on the appointment of the curator was very curious. Despite no substantive application for sole guardianship and custody yet having been filed, the Master's representative commented as follows to the application for appointment of a curator, *'The applicant is the biological mother of the said minor child, and she has always been taking care of the child since birth. The father never made contribution (sic) towards the upkeep of the child, and his whereabouts are unknown. The applicant wishes to take her son to Canada for a decent life.'* Let me reiterate that the Master cannot comment on an application that has not yet been served. In terms of order 32 r 249 (2) after service on the Master of a chamber application in relation to the appointment of a curator, s/he is expected to make a written report to the judge. In my view the report must relate only to the appointment of a curator. One S Chapwanya from the office of the Master in the report after service of the substantive application in HC 7838/19 also repeated the same falsehood

that the respondent's whereabouts were not known and that the applicant has been responsible solely for the upkeep of the minor child. Both reports do not address what is at stake, namely sole guardianship and sole custody. The court will therefore not place due weight on the reports as they do not add value to the case.

In my view, the applicant has failed to make a case for the award of *sole* guardianship and *sole* custody. It is inconceivable that this court would be seen to be rewarding the applicant especially in view that she has sought to mislead the court.

The next issue for consideration is whether or not the court should grant applicant any other relief in relation to the minor child. The applicant's legal practitioner and the respondent in their heads of argument referred to case authorities that relate to the best interests of the child in pure custody and pure guardianship matters. Indeed, there is a long line of decisions that outline what the best interests of the child entails, see – *De Montille* v *De Montille* 2003(1) ZLR 240 (H), *Makumbe* v *Chikwenhere* 2003(1) ZLR 372, *Makuni* v *Makuni* 2001 (2) ZLR 189, *Hughson and anor* v *Greyling* 2000 (1) ZLR 434, *Samudzimu* v *Ngwenya* 2008 (2) ZLR 228 and *Jere* v *Chitsunge* 2003(1)116. Some of these cases involve applications in which emigration of one parent with a minor child was a factor. Mr *Mudhara* 'applied' at the hearing to amend the draft order by removing the word sole wherever it appeared so that the relief sought would be purely in relation to custody and guardianship. The court noted that the respondent refused to give his consent to the applicant travelling with the minor child to Canada. That places the matter as one in which one parent seeks to emigrate with the minor child and the other one does not give their consent. It is standard practice for embassies to ensure that the person who intends to migrate with a minor child or children has the authority of the other parent if alive to do so. As I have already observed, the applicant is the *de facto* custodian parent and the respondent has not sought custody. There is therefore no need for the applicant to seek that which has not been taken away from her unless she was seeking a *declaratur.*

The constitution in s 80 (2) has made it very clear that both a father and a mother have equal rights to custody and guardianship. In my view, this simply means that both parents are on an equal footing, for instance were the respondent to also seek custody, the court is enjoined to place his and the applicant's rights in relation to custody on an equal pedestal. The paramouncy of the best interests of the child still remains- see *Jackson* v *Jackson* 2002

(2) SA 303 (SCA) and *F* v *F* (2006) 1 ALL SA 377 (SCA). In *Jackon* v *Jackson (supra)* it was held that as a rule, a court would not lightly refuse the care-giving parent's right permission to emigrate with his or her child if the decision to emigrate was *bona fide* and reasonable. In *F* v *F*, the same court further pointed out that the care-giving parent has constitutionally protected rights to dignity, privacy and also freedom of movement. These same rights are found in our constitution. The same court noted the gendered nature of such applications and pointed out that courts must be:

> "Acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts- who have no reciprocal legal obligation to maintain contact with the child and may relocate at will- may and often does, indirectly constitute unfair gender discrimination. Despite the constitutional commitment to equality, the division of parenting roles in South Africa remain largely gender –based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. The refusal of relocation applications has potentially a disproportionate impact on women, restricting their mobility and subverting their interests and personal choices that they may make to those of their children and former spouses."

Each case must however be decided on its own merits as courts must not readily assume that every custodian parent has the best interests of the child at heart. Some of the factors that courts in South Africa have considered are the presence of other family members in the foreign country, financial and employment prospects- see *van Rooyen vs van Rooyen* 1999 (4) SA 453 (C); *Godbeer vs Godbeer* 2000 (3) SA 976 (W and *Latouf* v *Latouf* (2001) A ALL SA 377 (T) and Schafer *Law of access* 154-158.

Zimbabwean courts whilst cognisant of the fact that emigration of a child removes her or him from the courts' jurisdiction have been inclined to grant the custodian parent the right to emigrate with a minor child unless it is not in the best interests of the child to do so – see *Makuni (supra), Hughson and anor (supra)* and *Samudzimu (supra).* A party opposing relocation must show that it is not in the best interests of the minor child.

In *De Montille (supra),* the court allowed an application of execution pending appeal. The applicant had obtained an order allowing her to migrate with a minor child to Australia. The respondent (the father) had noted an appeal. NDOU J stated as follows p 244 (D)

> "The child is aged three years and some months. In cases of this kind, a vital factor is the need to cause as little disruption as possible to the child's already disrupted life. The court has to take into account the child's need for stability and continuity. Not only in relationships with parents but in physical surroundings, school, friends and above all, brothers and sisters…"

In *casu,* the court has noted the following factors. Despite being economical with the truth, the applicant has been with the child since his birth. The child is at the time of the application aged three and therefore tender in years. The gendered nature of parenting is a reality in Zimbabwe just as it is in South Africa. In its founding values and principles, the constitution is strong on gender equality – see s 3 (1) (g) and also s 17 (1) (a) and s 56 (1) (3). Denying applicant the right to emigrate with the minor child will put her between a hard rock and a stone as she has to make the impossible choice of whether or not to leave the child behind. The applicant intends to relocate with her other children as confirmed by the email regarding visa requirements and confirmed by the respondent in his affidavit in which he refused to give his consent. The minor child will therefore be in the company of persons that he is used to. The applicant's sister Martha seems to be well settled in Canada and will be able to give applicant and the minor child the support required especially during early days to settle in. The applicant's major reason to migrate is for schooling purposes. The respondent's fears among which is that of human trafficking has no basis. If the respondent requires access, he is free to approach the court for an order. As held in *Samudzimu (supra),* a parent who is entitled to access must follow his children at his own expense. On the other hand, a custodian parent is not expected to place impediments in the path of the non-custodian parent's rights of access. The respondent has failed to show that it is not in the best interests of the minor child J. M to migrate with the applicant. To enable applicant to travel and reside in any country with the minor child, she must as of necessity be awarded guardianship of the minor child.

In the result, it is ordered as follows:

1. The applicant be and is hereby awarded guardianship of Junior Minezhi born on 19 July 2016.
2. The applicant be and is hereby authorised to travel and reside in any country outside Zimbabwe with the said minor child without the consent of the respondent.
3. Each party shall bear its own costs.

Mundia and Mudhara, applicant's legal practitioners