FRANK BUYANGA SADIQI
versus
CHANTELLE TATENDA MUTESWA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 3 October 2019 & 18 March 2020

REGISTRAR OF THE HIGH COURT
OF ZIMBABWE
CIVIL DIVISION
19 MAR 2020
P.O. BOX CY 275, CAUSEWAY
ZIMBABWE

Opposed Application

T. Mpofu for the applicant
Miss *F. Mahere* for the respondent

ZHOU J: This application is essentially a challenge to the common law position that the mother of a child born out of wedlock is the sole guardian of and has exclusive custody over that child. The applicant in this instance seeks to be declared joint guardian of the minor child together with the respondent who is the mother and under the current law the natural guardian of the child. Applicant also wants joint custody over the child. In respect of guardianship, the applicant asks the court to order that he and the respondent exercise the rights of guardianship in consultation with each other and that if the parties disagree on any matter relating to the exercise of the rights of guardianship and the matter involved has a bearing on the life, health and morals of the child, either party be entitled to approach a Judge of this Court in Chambers for an order to resolve the disagreement. There is also a prayer for costs if the matter is to be opposed.

The application is opposed by the respondent. The respondent raised an objection *in limine* that the matter is *res judicata*. In the papers, including the heads of argument, the respondent raised the defence of estoppel but did not pursue it in argument. After hearing argument on the objection I dismissed it and advised that my reasons would appear in the judgment.

The factual background to the dispute is as follows. The applicant and respondent were involved in a relationship which resulted in the birth of the child, Daniel Alexander Sadiqi, who is at the centre of this and many other disputes which have clogged this court. They were never married but lived together in South Africa at some point. The child was issued with a South African birth

certificate. After the termination of their relationship the respondent moved to Zimbabwe to live with the child. The parties had executed an agreement which accepted and recorded that the respondent "has the custody and guardianship of the child by operation of law". There was then agreement that applicant be given access to the child as detailed in the memorandum. There was also agreement on the applicant's obligations in respect of the maintenance of the child. An order by consent was granted by the High Court of South Africa on 19 December 2014 in a matter in which the respondent herein was the applicant and the applicant herein was the respondent. The terms of that order are as follows:

> "BY AGREEMENT BETWEEN THE PARTIES IT IS ORDERED THAT:
> 1. The respondent is to sign any documentation that the Department of Home Affairs may require for the issuing of a passport of Daniel Alexander Buyanga Sadiqi (Daniel) on or before 22 December 2014 before 1000.
> 2. Should the respondent not abide by the Order as set forth in paragraph 1 above, then and in that event that Sheriff of the Court with jurisdiction and/or the Registrar of the High Court of South Africa Gauteng Local Division, Johannesburg, is to sign all such documentation on behalf of the respondent.
> 3. The respondent and his family are entitled to with (*sic*) Daniel by prior arrangement at 13 Coventry Road, Greystone Park, Harare, Zimbabwe for a minimum of two days for 2 hours of time within the 24 December 2014 to 8 January 2015period unless the parties agree to lenghthen such ….period.
> 4. The respondent is to pay the costs on the approved scale."

The objections *in limine*

The respondent's contention in respect of the objection *in limine* is that there is an extant order of court in terms of which the respondent was awarded sole guardianship and sole custody of the child. Respondent makes reference to annexure FS2a to the founding affidavit and annexure "B" to the opposing papers as the bases for saying that the issue of sole guardianship and sole custody have been determined by a competent court. Annexure FS2a is a memorandum of agreement between the parties. It is not an order of court. Paragraph 1.1 of that agreement which the respondent relies upon in her contentions states: "It is recorded that the mother of the minor child has the custody and guardianship of the child by operation of law." The paragraph merely records what the parties understood to be the position of the law. The order of the High Court of South Africa whose terms are quoted above did not deal with the question of custody. Annexure B to the opposing affidavit contains the interim relief which was granted in CCA205/18 by the Magistrates Court. The question of the sole custody appears in the "terms of final order sought". The draft which is on record shows that a rule *nisi* was granted calling upon the applicant who is

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the respondent in that matter to show cause why a final order should not be made declaring the respondent who is the applicant in that matter to be the sole custodian of the minor child. Applicant submits in the heads of argument that the order was granted by consent on 27 May 2019 but has not produced a copy of the order. Joint guardianship was not considered because the parties then accepted that they were bound by the common law position. Also, the question of whether or not the parties must have joint custody over the child was not considered.

The constitutional validity of the common law position on custody and guardianship of a child born out of wedlock is what is at issue *in casu*. In other words, the issue is 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. The order granted by consent was based on the existing common law position whose constitutional validity he is challenging. This issue has not been determined by any court and is therefore not *res judicata*. For these reasons I dismissed the objection *in limine*.

In respect of the argument based on estoppel the respondent's case is that the applicant was estopped from disowning the representations to the Children's Court consenting to respondent being the guardian and custodian of the minor child. The so-called representation is not the representation which is envisaged in the context of estoppel. The representation must be of a factual nature. In other words, it must be shown that the party against whom the defence of estoppel is being invoked represented to the other party that a certain factual situation existed. As shown above, the parties proceeded on the basis that because the child was born out of wedlock the respondent was entitled to sole custody and sole guardianship to the exclusion of the applicant, by operation of law. That is the legal principle which the applicant seeks to impeach on the ground of constitutional invalidity in the instant case. There can be no representation of a legal position because the court, which is presumed to know the law, is not bound by a party's representation as to the legal position obtaining in respect of a particular factual situation. A concession by a party on a question of law does not constitute a representation and does not bind a court.

The applicant's case

The applicant's case, as set out in the founding affidavit is that the common law rule in respect of custody and guardianship of children born out of wedlock is contrary to the provisions

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of s 19 (1) and s 19 (2) as read with s 81 of the Constitution of Zimbabwe. Further, that the common law on custody and guardianship of children born out of wedlock is inconsistent with s 56 (3) of the Constitution. Applicant complains that the exercise by the respondent of her exclusive rights of guardianship and custody are not in the best interests of the minor child in that he as the biological father of the child has been prevented from freely interacting with the child by the respondent who always reminds him that she has sole guardianship and sole custody of the child. He therefore wants to be granted joint custody and joint guardianship of the child together with the respondent.

Respondent's case

The respondent disputes that joint custody and joint guardianship with the applicant is in the best interests of the child. She also questions the suitability of the applicant to be given custody or guardianship rights over the child. Respondent denies that the common law on the custody and guardianship of a child born out of wedlock is inconsistent with s 19(1) and s 19(2) as read with s 81 of the Constitution and, further denies that s 56(3) is contravened by the existing common law. The respondent, just like the applicant, has made certain factual allegations against the applicant on the basis of which she questions his suitability to have custody of or to be granted joint guardianship over the child. These are detailed in paragraph 17(a) to (j) of the opposing affidavit. These allegations are denied by the applicant, in paras 31-41 of the answering affidavit.

This court makes no determination or factual findings on these disputed factual allegations for two reasons. Firstly, the disputed facts cannot be resolved on the papers. Secondly, the question of the entitlement or lack thereof of the applicant as the father of a child born out of wedlock to joint guardianship and custody can be resolved without necessarily attempting a resolution of the disputed facts.

The Roma-Dutch common law on custody and guardianship of a child born outside wedlock

The applicant and respondent have consistently understood the question of custody and guardianship of the minor child to be governed by the common law, hence their agreement that these two rights vested in the respondent by operation of law. The common law position is settled. Professor Welshman Ncube articulates it succinctly in his book *Family Law in Zimbabwe*, pp. 108-109:

> "Except for purposes of maintenance the Roman-Dutch common law regarded an illegitimate child as having no father. All parental rights to the child vested in its mother.

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This position of a father with respect to his illegitimate child is summarized effectively by Spiro in **The Law of Parent and Child** in the following words:
'. . . the natural father is not possessed of the parental power and is not the guardian of the minor child.'
Thus the guardianship of illegitimate children under Roman-Dutch common law rests with the mother. This position concerning a mother's guardianship is clearly expressed by Boberg in **The Law of Persons and the Family** in the following words:
'Whereas the parental power over a legitimate child rests with his father, in the case of an illegitimate child it is his mother who, unless she is herself a minor, has the right of guardianship and custody over him and whose surname and domicile he assumes.'
This view was cited with approval by MUCHECHETERE J in *Douglas* v *Meyers (supra)* and was also expressed in *Dhanabakium* v *Subramanian and Anor* when WATERMEYER JA stated:

'Now though the mother, and not the father of an illegitimate child is, generally speaking, the natural guardian of the child . . a person who is a minor is disqualified from being a guardian . . .'
It is clear from the above that under the general law the sole guardianship of an illegitimate minor child rests with its mother if she is herself a major. In cases in which the mother is herself a minor, however, a guardian dative would be appointed over the child by the court. It would also appear that the court as upper guardian of all minors, has the power to deprive a mother of her guardianship and award it to any suitable third party, including the child's father, if it is satisfied that the mother's guardianship is harmful to the welfare of the child."

See also *Edwards* v *Flemming* 1909 TH 232; *Docrat* v *Bhayat* 1932 TPD 125 at p. 127.

Also, under the Roman-Dutch common law the natural custodian of a child born out of wedlock is the mother of the child, see *Douglas* v *Mayers (supra)* pp. 914-15 where MUCHECHETERE J (as he then was) said:

"In *Docrat* v *Bhayat* 1932 TPD 125 it was held that the father of a minor illegitimate child cannot claim custody of the child 'as of right' . . . From the above, my conclusion is that there is no inherent right of access or custody for a father of a minor illegitimate child but the father, in the same way as other third parties, has a right to claim and will be granted these if he can satisfy the court that it is in the best interests of the child."

See also *Cruth* v *Manuel* 1999 (1) ZLR 7(SC) at p. 10E-11D.

The authorities cited above show that the position of a father of a child born out of wedlock is the same as that of any other third party who wants to have custody or guardianship of the child. The father would need to show that the mother's custody and guardianship of the child would be harmful to the welfare of the child, *Edwards* v *Fleming, supra*; *F* v *L and Another* 1987 (4) SA 525 at 527D-E. This is precisely the reason why the parties to the instant case in their agreement recorded that the respondent had custody and guardianship of the minor child by operation of law. What has to be determined *in casu* is whether the common law position is inconsistent with the cited provisions of the Constitution.

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The best interests of the child concept, equality and non-discrimination

The adoption of the concept of the best interests of the child as the paramount consideration in all matters concerning the access, guardianship or custody of minor children changed the approach to these rights. The Constitution of Zimbabwe Amendment (No. 20) Act 2013 protects the rights of children. Section 81 provides the following:

> "(1) Every child, that is to say every boy or girl under the age of eighteen years, has the right –
>
> (a) To equal treatment before the law, including the right to be heard;
>
> (b) . . .
>
> (2) A child's best interests are paramount in every matter concerning the child."

There is also an equality and non-discrimination provision in the Constitution. Section 56 states as follows:

> "(1) All persons are equal before the law and have the rights to equal protection and benefit of the law.
>
> (2) . . .
>
> (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, **or whether they were born in or out of wedlock**."

The common law position discriminates against a child born out of wedlock by treating the child as if he or she had no father save for the purpose of maintenance. The treatment of a father of such a child like any other third party in matters concerning access, custody and guardianship shows that the child was regarded as "fatherless", and deserving of no paternal care or attention save for the purposes of maintenance. The child was in essence being regarded as a commodity of some sort given that without rights of access, custody or guardianship, the maintenance contribution was essentially channeled through the mother of the child. In practice, a father could pay maintenance for a child that he had never seen in his life and the child would be receiving such a benefit from a person he or she had never seen. Because the mother would be the sole guardian and custodian of the child, if she decided that the child should never meet with his or her father the child would grow up without interacting with his or her biological parent.

It is unfair discrimination to deny a child the benefits of associating with his or her biological father, which is an aspect of parental care, on the mere ground of the marital status of

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the parents at the time that he or she was born. The principle of the common law in this respect is inconsistent with s 81(1)(a) and s 56(1) and (3) of the Constitution of Zimbabwe. The parties to this matter fully appreciated the importance of establishing and nurturing a parental bond between the applicant and the child hence their agreement on access notwithstanding the prescriptions of the common law. However, the interaction appears to be losing its value because the applicant and respondent now spend more time in court arguing about the very same child that they accept is entitled to be brought up by both of them. This unending conflict is largely attributable to the fact that the right of access was given benevolently by the respondent and not by the law, yet the respondent by virtue of her exclusive right of guardianship and custody has an overriding advantage in deciding on all the other matters concerning the child without consulting the applicant who is not only the father of the child but has been introduced into the life of the child since birth. 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.

Likewise, it is unfair discrimination to deny the biological father of a child custody and guardianship rights merely on the basis of his marital status in relation to the mother at the time of the birth of the child. In this respect the common law rule that denies the applicant inherent custody and guardianship of the minor child is inconsistent with s 56 (1) and (3) in that it discriminates on the basis of marital status. In the case of *Fraser* v *Children's Court, Pretoria North* 1997 (2) SA 261(CC), the Constitutional Court of South Africa held that the discrimination against fathers in non-Christian marriages is no longer permitted. That reasoning applies equally to unwed fathers like the applicant in relation to denial of the right to custody and guardianship of the child. There are compelling arguments for abolishing the maternal preference by allowing fathers of children born out of wedlock automatic parental rights of access, guardianship and custody. Such an approach, as argued by Currie and de Waal in *The Bill of Rights Handbook 5th Ed. at pp. 607-608*, promotes gender equality by encouraging fathers to be actively involved in the care of their children. The learned authors further posit that giving mothers automatic preferential rights of

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parental care on the ground of their gender encourages the "harmful stereotypes which require only women to shoulder the burden of child care". The approach urged here recognizes that parental roles do not reside in the biological make up of a person. The anatomical constitution of a person as a man or woman is an act of biology, of nature; yet the gender roles pertaining to the roles of mother and father in bringing up a child are social constructs which may and must be challenged in the light of the changing dynamics of our society. Gone are the days when the mother was expected to be carrying a heavy luggage with a baby strapped on her back while the father was carrying only his walking stick or knobkerrie. For these reasons a rule that pretends that a child born of unwed parents has no father must be abolished as it violates the anti-discrimination provisions and values of the 2013 Constitution of Zimbabwe.

The "best interests of the child" requirement enjoins this court as the upper guardian of all minor children to exercise its authority by giving priority to the interests of the child over the rights, interests and entitlements of the parents. In the case of *Fletcher* v *Fletcher* 1948 (1) SA 130, long before the advent of the democratic constitutions in both South Africa and Zimbabwe, the Appellate Division held that the most important consideration in matters of custody and access (and, necessarily, guardianship) is not the rights of parents but the best interests of the child. The constitutional entrenchment of this test shows the importance that the law attaches to it. HUNGWE J (as he then was) dealt with a case in *Dangarembizi* v *Hunda* HH 447 – 18 where the marital status of the parents was raised as a ground of objecting to the granting of custody to the father. At p. 7 of the cyclostyled judgment the Learned Judge said:

> "There is considerable judicial opinion that deciding issues relating to guardianship, custody and access based on the birth status of the child belongs to a bygone era. The best interest of the child was the main criterion employed in disputes relating to the custody of children, to the exclusion of any rule of customary law. Therefore, the criterion, irrespective of the type of marriage contracted, and irrespective of whether or not the parents are unmarried, or *lobola* has been fully provided, applies to all disputes concerning children."

The Constitution trumps all legislation, other laws or rules, practice, custom, practice or conduct inconsistent with it by reason of its supremacy as enshrined in s 2(1). There is therefore no legal obstacle to the granting of joint guardianship and joint custody between the applicant and respondent in respect of the minor child. It seems to me that it is in the best interests of the child that these rights be exercised jointly. The parties must take back their egos and consider the welfare of the child. They must not use the child to resolve their other differences. For the avoidance of

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doubt, it is important for the court to declare the legal position in respect of the rule of the common law regarding the entitlement of unwed fathers to the custody and guardianship of their children. The legislature is invited to consider outlawing the use of the term "illegitimate" in describing children born out of wedlock. That term is pejorative and stigmatizes children unnecessarily.

There has been a lot of litigation involving this minor child. The court is concerned at the effect that such litigation has or may have had on the child. It is necessary that a social worker interviews the minor child in order to assess the extent, if any, to which the litigation between the applicant and the respondent has affected the social life of the child and report to this court with recommendations on how the parties shall exercise their joint custody given that they do not live together. Clearly, from the number of cases filed there is very little chance that giving sole custody to one parent would serve the best interests of the child given how they have continued to litigate over the exercise of access rights. It is therefore in the best interests of the child that there be joint custody.

On the question of costs, this matter is of importance. It raises the issue of the constitutionality of the common law rule relating to a father's right to guardianship and custody of a child born to unmarried parents. It is therefore just that each party bears his or her own costs.

In the result, IT IS ORDERED THAT:

1. The common law rule that gives the mother of a child born out of wedlock sole guardianship and sole custody and denies the natural father of such a child parental power is inconsistent with sections 56(1), 56(3), 81(1)(a) and 81(2) of the Constitution of Zimbabwe, 2013, and is invalid.
2. The applicant be and is hereby granted, together with the respondent, joint guardianship and joint custody of Daniel Alexander Sadiqi (born 14 August 2014).
3. The applicant and respondent shall exercise their rights of guardianship in consultation with each other and if a decision of either parent on any matter relating to guardianship is incompatible with the other parent's wishes and likely to affect the life, health and morals of the minor child, and the applicant and respondent cannot reach agreement, either party may apply to a Judge of the High Court in Chambers for a determination of the course which is in the best interests of the minor child.

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4. The applicant and respondent shall within thirty days of this order arrange to have the minor child interviewed by a Government Social Worker to be appointed by the Registrar of this Court, after which the appointed social worker shall prepare and present a report with recommendations on how the parties shall exercise their joint custodial rights without disrupting the social life of the child. Such report shall be placed before any judge of this Court within thirty days of it being presented to the Registrar, together with this record, for a final order to be made regarding the full terms of the joint custody.
5. If any costs are to be incurred in respect of the work of the Social Worker referred to in paragraph 4 hereof, such costs shall be shared equally by the applicant and the respondent.
6. Each party shall bear his or her own costs.

Rubaya and Chatambudza, applicant's legal practitioners
Wilmot & Bennett, respondent's legal practitioners