

**REPORTABLE (14)**

**HAMUTENDI KOMBAYI**  
v  
**SHARMEN TENDAI KOMBAYI**

**SUPREME COURT OF ZIMBABWE**  
**GWAUNZA JA, GOWORA JA & PATEL JA**  
**HARARE, SEPTEMBER 9, 2013**

*T Magwaliba*, with him *R Chidawanyika*, for the appellant

*E H Mugwadi*, for the respondent

**GOWORA JA:** After reading papers filed of record and hearing counsel in this matter we dismissed the appeal with costs and intimated that our detailed reasons would be availed in due course. These are they.

The parties are married in terms of the Marriage Act [*Chapter 5:11*]. There are two minor children of the marriage, a girl S, (born on 1 March 2004) and U, a boy (born on 3 September 2005). On 12 February 2010 the respondent, alleging marital abuse, moved out of the matrimonial home. She took with her the two minor children and their care giver. She and the children moved in with her parents. On 17 February 2010 she filed an application with the Magistrates Court in Gweru wherein she claimed maintenance for herself and the minor children. She also sought in the application an order binding the appellant to keep the peace

between the parties. The matter was set down for hearing on 11 March 2011. The appellant did not respond to the application.

On 1 and 2 March 2010, respectively, the appellant collected the children from school and conveyed them to the residence of his mother. The parties were summoned to court for the determination of the claim for maintenance. On 21 April 2010 the magistrate issued an order for maintenance in favour of the respondent. He dismissed the claim for maintenance in respect of the minor children, and granted the appellant custody of the children.

The respondent appealed to the High Court which reversed the order in respect of custody. The High Court found that the appellant had acted unlawfully by taking custody of the children in the absence of an application for such relief in terms of s 5(3)(b) of the Guardianship of Minors Act [*Chapter 5:08*]. The High Court further found that the Magistrates Court had erred in the following respects: by disregarding the application for a *declaratur* under s 5(2) sought by the respondent, and secondly, by granting an order for custody to the appellant on the premise that it was in the best interests of the minor children when no application for such had been made. The appellant now appeals against the order of the High Court.

In the grounds of appeal filed the appellant alleged that the high Court erred in the following respects:-

-in concluding that the magistrate had treated the issue of custody as if the appellant had made an application for custody when in fact the magistrate simply dismissed the respondent's application for custody on the premise that it was not in the best interest of the minor children for sole custody to be awarded to the respondent;

-in pronouncing that the appellant had assumed custody of the minor children with the clear intention of defeating respondent's maintenance claim when no such evidence was adduced before the magistrate;

-in failing to consider the best interest of the minor children even when considering an application launched in terms of s 5(2) of the Guardianship and Minors Act [*Chapter 5:08*];

-in substituting its own discretion for that of the magistrates court in determining the issue before it;

-in dealing with the appellant's rights of access when there was an order of the High Court regulating the issue of access.

The summons issued by the respondent in the maintenance court was clear and unambiguous. The appellant did not respond in writing to the same. The respondent's counsel properly presented the claim to the court at which point the appellant was called by his counsel to give evidence on why he opposed the claim for maintenance. He was heard not only on the maintenance claim but on the justification for retention of custody of the minor children after his un-procedural assumption of their custody. A request by the respondent to be heard on the issue of custody was denied.

In dealing with this issue, the court *a quo* said:

"I am satisfied that the learned magistrate misdirected himself by denying the appellant her right provided for in section 5(1) of the Guardianship of Minors Act [Chapter 5:08]. The court *a quo* also misdirected itself by dealing with the matter as if the respondent had made an application in terms of section 5(3) of the same Act. The court *a quo* also failed to appreciate the simple fact that the respondent had acted unlawfully with the clear intention to defeat the appellant's maintenance claim in respect of the minor children. Lastly, the court *a quo* condoned the respondent's illegal conduct and proceeded to cleanse his dirty hands by awarding him custody of the minor children, a relief he had not even properly sought. In the circumstances the appeal should succeed."

As submitted by Mr *Magwaliba*, the matter before the magistrate was brought in terms of the Maintenance Act [Chapter 5:09]. Any person who has custody has the right to issue summons for an order for maintenance against a person who has responsibility for the upkeep of such minor child. The founding affidavit to which the summons was attached clearly spelt out the nature of the complaint before the learned magistrate. A supplementary affidavit filed on 16 March 2010 made reference to the abduction of the minor children by the appellant and a prayer for the intervention of the court for the return of the children to the respondent,

together with a claim for the return of a vehicle for use in taking and fetching the minor children to school.

It is the contents of the supplementary affidavit coupled with the appellant's evidence that led the magistrate to believe that he had to consider the question of custody of the minor children. Neither party filed an application for custody. The appellant did not respond to any of the pleadings filed in writing. The evidence that he adduced was in opposition to the claim for maintenance. In the absence of an application for an order of custody by the appellant, the Magistrates Court was not empowered to afford him the relief it did.

Although the respondent argued that the magistrate proceeded to deal with the matter as if the appellant had approached the court in terms of s 5(3)(b) of the Guardianship of Minors Act, that submission is not borne out by the record. The magistrate noted that the respondent sought reliance on the Act, but in his ruling he seemed to suggest that the dispute could be decided outside the confines of the Act. He said cryptically:

“Applicant has gone so far as only citing the Act that it is her right and the interests of the children were not fully pronounced serve (sic) for minor children need their mother for nurturing, discipline and it's the best person to care of the children.”

He then proceeded to determine the matter in accordance with what was in the best interests of the children. In my view he totally disregarded the matter which had been placed before him for adjudication. The application was filed in the Maintenance Court for an order of maintenance and not for custody. The supplementary affidavit did not convert the application to one for custody. The High Court correctly in my view, determined that the respondent sought a confirmation of her status as sole custodian of the minor children under the Act in the absence of an application for custody by the appellant. The supplementary

affidavit did not found an application for custody. Even if it did, the appellant had not opposed the same and he could not have been granted custody based on his oral evidence as a respondent.

Although the respondent averred before the magistrate that the appellant had taken custody of the children unlawfully, the court did not delve into those allegations. The High Court found that the appellant had taken custody of the children to defeat the respondent's claim for maintenance. The application for maintenance was served on the appellant on 17 February 2010. He did not respond. On 1 March 2010 he unlawfully took custody of the younger child and conveyed him to his mother. His excuse was that the child was ill. He did not communicate with the mother. On 2 March 2010 he abducted the second child. Again he did not communicate with the mother.

When the matter was heard on 10 March 2010 he gave evidence to the effect that although the child was ill he did not consult a medical doctor but instead took him to his mother who is a retired nurse. She prescribed pain killers for the child. He was aware that when the respondent left home she went to stay in Mkoba Township with her parents. He saw no reason why his children should suffer because his mother-in-law wanted maintenance. Thus the finding by the High Court that he was not motivated by the best interests of the children but rather by the service of the application for maintenance upon him cannot be impugned.

It was contended by the appellant that in terms of s 5(2) of the Guardianship of Minors Act, the magistrate had a discretion in deciding whether or not the mother of a minor child should be granted custody upon separation of the parents of such child. Section 5 of the Act provides as follows:

**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).
- (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.
- (3) Where the mother of a minor has the sole custody of that minor in terms of subsection (1), a children's court may at any time, upon the application-
  - (a) of the mother, make an order directing the father to pay, either weekly or monthly, to the applicant such reasonable sum for the maintenance of that minor as the court thinks fit; or
  - (b) of the father, make an order depriving the mother of the sole custody of the minor and granting the sole custody of the father if the court is satisfied that it is in the best interests of that minor that the father be granted the sole custody of that minor and, further, make such order relating to the payment of maintenance by the mother and the right of the mother to have access to that minor as the court thinks fit; or
  - (c) of the father, make an order for the father to have such access to that minor as the court specifies as being reasonable in the circumstances, unless the court is of the opinion that it would be detrimental to the welfare or interests of that minor for the father to have any right to access; or
  - (d) of either parent, make such order in regard to the custody of that minor, the payment of maintenance for and the right of access to that minor as will give effect to the terms of any settlement reached between the parents of that minor.
- (4) An application in terms of subsection (2) or (3) may be made to any children's court and that court may, at any stage of the proceedings—

- (a) remit the matter to another children's court for the taking of evidence;  
or
  - (b) transfer the application to another children's court for the determination of that application by that children's court.
- (5) The Maintenance Act [Chapter 5:09] shall apply, *mutatis mutandis*, in relation to an order for maintenance referred to in subsection (3) as if it were an order for maintenance referred to in section 6 of the Maintenance Act [Chapter 5:09].”

The submission by the appellant as to the court's discretion under s 5(2) of the Act is correct only to the extent that there is such an application for custody before the court. In *casu*, it is an undisputed fact that neither of the parties made an application for custody under the section in question. Instead, the respondent in a supplementary affidavit to the claim for maintenance made the statement that in terms of s 5(1) of the Act she was entitled to “sole custody of the minor children in terms of the dictates of the law”. The statement contained in the affidavit was not challenged, and what is not challenged is taken as having been accepted. There was therefore no discretion to exercise by the magistrate in the circumstances.

In the absence of such application, it would be a futile exercise to enquire as to the extent of the discretion of the magistrate or whether or not the court must consider the best interests of the minor children in such an enquiry. In my view the principles governing custody are trite and need no repetition. Courts of law sit to consider live issues and not to dispense legal advice. An excursion into factors that fall for consideration in such application would be tantamount to the court doing just that in the circumstances of this case. There is no dispute on an application of such a nature for consideration. Ultimately the court *a quo* cannot be faulted in its decision to set aside the order issued in the appellant's favour by the magistrate.

When the High Court set aside the order of the magistrate it remitted the matter for determination on the application for maintenance. In addition it ordered that the same court consider the issue of the appellant's rights of access to the minor children. The appellant

contended that the High Court acted improperly in ordering the Magistrates Court to deal with the issue of access when an order under Case NO HC 3571/10 had already spelt out the rights of the parties.

It seems to me that the High Court was alive to the existence of the provisional order in which the issue of access was referred to. The High Court however made a specific finding that the magistrate had misdirected himself in denying the rights of the respondent as spelt out in s 5(1) and in dealing with the matter as if an application had been made to it under s 5(3) (b). The court *a quo* concluded, correctly in my view, that the magistrate had failed to appreciate that the appellant had acted unlawfully and had instead condoned his illegal actions and proceeded to award him custody of the children, a relief which had not been sought properly. The High Court found that the appellant had dirty hands. I agree. The issue of custody had not been decided and in the circumstances the provisions of s 5(1) were applicable. The respondent was in terms of the law entitled to sole custody until an order for custody was made by an appropriate court. The issue therefore that required determination was access to the children by the appellant.

It was for these reasons that the appeal was dismissed with costs.

**GWAUNZA JA:** I agree

**PATEL JA:** I agree



*Chitere, Chidawanyika & Partners*, appellant's legal practitioners

*Mugwadi & Associates*, respondent's legal practitioners