PISIRAYI MANGWENGWENDE
versus
PRUDENCE CHIRISA

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 14 & 16 January 2025

Urgent Court Application

N Dube-Tachiona with *R Chihota*, for the applicant
L Mandota with *C Marufu,* for the respondent

DEMBURE J:

[1] This matter was placed before me as an urgent court application for variation of a custody order issued by this court in Case No. CIV "A" 153/23. On 14 January 2025, after hearing submissions from the parties' legal practitioners, the court issued an *ex tempore* judgment upholding the point in *limine* that the respondent had dirty hands and could not be heard. Consequently, the court disregarded the respondent's opposing papers and proceeded with the hearing of the application as an unopposed matter. I subsequently reserved judgment on the matter. What follows are the full written reasons for the court's decision.

FACTUAL BACKGROUND

[2] The parties have been in and out of court over the custody of their minor children namely Simbarashe Mangwengwende, a boy, born on 20 April 2010; Akudzwe Kateve Mangwengwende, a boy, born on 18 June 2012; and Tawana Chidiwa Mangwengende, a girl, born on 3 July 2015.

[3] It is common cause that the applicant and the respondent separated in or around December 2019. The applicant filed an application for sole custody of the minor children in the

Children's Court, which was dismissed. He appealed against that decision to this court and the appeal was heard before MUCHAWA J and DEME J in Case No. CIV "A" 153/23. On 13 September 2023, the court handed down its judgment on the matter the operative part of which read as follows:

> "1. The appeal be and is hereby dismissed with costs, subject to the following conditions:
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> a. That the respondent be and is hereby declared the custodian of the parties' three minor children, namely:
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> i. Simbarashe Mangwengwende a boy born on the 20th of April 2010.
>
> ii. Akudzwe Kateve Mangwengwende a boy born on the 18th of June 2012.
>
> iii. Tawana Chidiwa Mangwengwende a girl born on the 3rd of July 2015.
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> b. The appellant be and is hereby granted access to the three minor children every alternative school holiday and alternative Christmas holiday on condition the appellant and the respondent attend counselling by a registered clinical psychologist for a minimum period of 6 months with a minimum of 2 sessions a month, with at least half of the sessions being attended together with the three minor children.
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> c. The clinical psychologist shall receive monthly progress reports for each of the minor children from their respective schools, which should detail their school attendance and assistance with online lessons, homework, and extracurricular activities, among other things.
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> d. The Clinical psychologist shall be appointed by the Allied Health Practitioners Council of Zimbabwe.
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> e. The Registrar of the High Court shall within 7 days of this order write to the Registrar/ Chairperson of the Allied Health Practitioners Council of Zimbabwe to effect, such an appointment.
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> f. The Clinical Psychologist so appointed shall render his or her report to the court stated in clause h. below should appellant apply for variation of the custody or access terms or at any time issues of concern are noted from the children's school progress reports.
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> g. The Clinical psychologist's fees are to be borne by the appellant.
>
> h. The appellant may approach this court or the children's court for a variation of the access terms after successfully going through the counselling."

[4] On 16 February 2024, the applicant filed an application for variation of the custody order in Case No. HCHF 1032/24. On 10 April 2024, before MAXWELL J, the court handed down its judgment on the matter. The operative part of the said judgment read as follows:

> "1. The application for custody, being premature, is not granted.
>
> 2. Applicant be and is hereby granted authority to enroll the three minor children in boarding school with effect from the second term of 2024.

3. The Respondent be and is hereby ordered to avail to the Applicant all the minor children's birth certificates, and such other documentation as may be required for their enrolment at a new school.
4. The Applicant and the Respondent be and are hereby ordered to commence counselling sessions as soon as practically possible after liaising with the clinical psychologist.
5. Each party bears its own costs."

[5] On 8 November 2024, the applicant filed this application seeking a variation of the custody order. He averred that it is in the best interests of the children that he be granted custody of his three minor children. The applicant attached documentary evidence to the application, including *inter alia*, the interim psychological report submitted by the clinical psychologist appointed by this court, Mr Philip F. Moses.

[6] The application was opposed by the respondent. She raised two preliminary points namely; that the matter is not urgent and that the application is fatally defective for failure to comply with the court rules in that there was no draft provisional order attached to the application. On the merits, the respondent contended that it was not in the best interests of the children to vary the custody order.

[7] The applicant also raised a preliminary point that the respondent had dirty hands and should not be heard for being in contempt of the court orders issued before MUCHAWA J and MAXWELL J. Since that point in *limine* directly challenged the respondent's right of audience before me, it became essential that I had to determine that issue first.

PRELIMINARY POINT

WHETHER OR NOT THE RESPONDENT HAD DIRTY HANDS

[8] Mrs *Dube-Tachiona*, counsel for the applicant, submitted that the respondent is in contempt of this court's orders and should not be heard as she had dirty hands. Counsel referred the court to the first order granted on 13 September 2023 and the second one by MAXWELL J granted on 10 April 2024. She submitted that after the second order, the children were enrolled at The Heritage School at the instance of the applicant who paid the school fees for them. There is a letter written to the respondent notifying her of the enrolment. The children were not handed over to the school despite the respondent being aware of the order as it was served on the IECMS platform. A letter was sent to the respondent's legal

practitioners dated 16 May 2024 for them to prevail over their client so that the order could be complied with as schools opened on 7 May 2024. The letter was not responded to. The respondent in the meantime filed an application for condonation for the late noting of an appeal on 14 May 2024. She confirmed that she was aware of the court order by MAXWELL J and intended to note an appeal. Reference was also made to grounds (ii) and (iii) of the notice of appeal at p 84 of the record.

[9] It was further argued that the respondent had formulated an opinion that she was not going to comply with the court order. The Supreme Court withheld its jurisdiction on 28 May 2024 on the basis that the respondent had to comply with the High Court order. The order was issued by consent. On the said date the respondent was reported to the police and during the period to the hearing of the Supreme Court application, she refused to comply with the High Court order. She was eventually arrested and spent a night in police cells and that is how the applicant was able to have the children handed over to the school authorities at The Heritage School. It was argued also that the order by MAXWELL J did not enjoin the applicant to consult the respondent on where the children would be enrolled and as the custodian parent, she had the duty to hand over the children to the school.

[10] Counsel also submitted that the children were handed over to the school on 28 May 2024 after her arrest. The respondent stayed with the children at The Grange a distance of about 18 kilometres after they were said to have run away from school. They were later never to be returned to the school by the respondent. The respondent claimed to be a victim alleging that the children ran away on their own but there is a letter from the school at p 55 inviting both parents to the school for discussions over the issue but only the applicant attended while the respondent did not. In the end, the school directed that the children had to stay at home and return after their mother had reported to the school but she did not. Only the applicant attended the school for the meetings called. The respondent made her own alternative educational arrangements for the children in defiance of the order of this court. The respondent was not incapacitated and even took the children to their previous schools where they were expelled.

[11] Mrs *Dube-Tachiona* further referred to the application for maintenance at p. 154 of the record and in particular to para 12 thereof and argued that the respondent clearly stated that she did not want them to go to boarding school. It was submitted that the respondent also said that she found an alternative teacher to teach them despite the finding by MAXWELL J that the children could not be schooled from home. The Maintenance Court withheld its jurisdiction and the order is at pp 283-284. There is an extant court order which should be complied with. The order by MAXWELL J also ordered that the parties attend counselling sessions. Since September 2023 when the court ordered that the parties attend the sessions with the children, the children have not been brought before the clinical psychologist to date. Reference was made to the report by Mr Moses in particular para(s) 8 and 20 as well as para (2) of the concluding remarks where it was reported that the respondent said that she does not want to be counselled as she had made her own alternative arrangements for counselling before.

[12] Counsel argued that before the court is a respondent who has no regard for what this court ordered. As the upper guardian of minors, the best interests of the minor children cannot be safeguarded if the respondent is heard. When the Supreme Court issued the order, she should have complied with the court order. Lastly, it was submitted, that there was a submission that the children should go back to their previous boarding schools but there are no boarding facilities at those schools and the children were, in any case, expelled from those schools. She has failed as the custodian parent and she could not be heard. There are pending criminal proceedings against her. The children are still at home and she says she wants to stay with the children at home. She does not want to comply with the High Court order for the children to be taken to boarding school.

[13] On the other hand, Mr *Mandota*, counsel for the respondent, submitted that from a reading of the record and submissions made by the applicant's counsel, the issue of contempt of court is neither here nor there. He argued that the case of *Scheelite King Mining Co. (Pvt) Ltd* v *Mahachi* 1998 (1) ZLR 173 clearly states that for one to rely on contempt of a court order there would have been a wilful non-compliance with the court order. It was argued that we have a bundle of documents from the school and nowhere is it said that it was the

respondent who withdrew the children from the school. It was the children themselves who were running away from the school. The order by MUCHAWA J was that the children were supposed to go for counselling. There is no evidence that the respondent was solely responsible for the children running away. She complied with the order. Up to now, we have no knowledge of why the children were running away from school. As a responsible mother, she had to find an alternative school for them.

[14] Counsel also submitted that annexure D to the opposing affidavit is a letter written by the respondent to the school and she wanted to find out what was happening with the children. I hasten to state that Mr *Mandota* attempted to lead evidence from the bar that the school head refused to entertain her. There were no such averments placed before the court in the opposing affidavit. Counsel explained that the respondent did not attend the meeting at the school as she was attending a funeral and there is a burial order attached. It was argued that we cannot presume that the respondent did not want the children to go to a boarding school. She had to make a contingent plan so that the children could continue to go to school. The children are attending school which is convenient for the school run.

[15] As for the counselling sessions, it was submitted that in the MAXWELL J's order the applicant, the respondent and the children themselves are supposed to attend the sessions. She was attending counselling sessions until Mr Moses said he was on leave and this happened twice. Counsel also submitted that he received a letter in December stating that they had to resume those counselling sessions and they replied that the respondent was on holiday and she would resume them after coming back from the holiday. The report by the psychologist is one-sided. Ms *Marufu* also submitted that the children and the parents were not all supposed to attend counselling at the same time. This submission, however, was inconsistent with the court order issued by MUCHAWA J and the report submitted by the clinical psychologist Mr Moses.

[16] It was further argued that with the evidence that had been placed before the court, it would be very unjust to conclude that the respondent was in contempt. The counselling sessions have not yet been completed. It was not the responsibility of the respondent that the children were running away from school. Mr *Mandota* also submitted that the respondent's

non-compliance with the order was not wilful. There were no criminal charges laid against her and there is no pending criminal matter for contempt. Mr *Mandota* accepted that there were findings by the Maintenance Court that the applicant was in contempt of the High Court order but argued that there were discussions with the respondent to note an appeal against that decision and that while the facts are the same as before this court the matter is not yet concluded. The respondent should not be held to be in contempt of the orders issued by this court.

[17] In reply, Mrs *Dube-Tichaona* submitted that the respondent's counsel distorted the facts. She referred me to the report by Mr Moses at pp 52-53 of the record and submitted that he requested for the children as stated in para 20. The applicant was the only one responsible for bringing the children to the counselling sessions. In para 4 on his concluding remarks, the psychologist said that his attempts to engage the respondent to bring the children for counselling in the counselling session on 5 October were ignored.

[18] Counsel referred the court to the case of *Makuni* v *Makuni* 2001 (1) ZLR 189 (H) where GOWORA J (as she then was) explained what it entails to be a custodian parent. It was the respondent's responsibility to train the minds of the children. The respondent should have cultivated the culture for the children to be at school. Instead, she sits and hires a teacher who teaches all of them. Reference was also made to the provisions of s 5 of the Guardianship of Minors Act [*Chapter 5:08*]. It was also argued that the only authority she was divested of was the enrolment of the children at a boarding school. As things stand the order must be granted as unopposed.

[19] The law on the application of the dirty hands principle is settled. It is trite that litigants must not come to court with unclean hands. According to this principle, any litigant who comes to court with dirty hands may not be heard and if he or she is the applicant he should not be allowed to seek relief from the court unless and until he or she purges his defiance or contempt. The legal position was restated in *Richclover (Pvt) Ltd* v *Rambayi & Anor; and Rambayi* v *Royal Home Furniture* HH 269/24 where MUTEVEDZI J had this to say:

> "The dirty hands principle simply means when a litigant appears before a court, he/she/it mustn't do so when their hands are unclean. The rationale for the principle is the preservation of the integrity of the court itself. The court is an institution which must detest

aiding and lending assistance to people who look at it contemptuously. If it does, it lowers itself to the same level as such litigants. In explaining dirty hands, I can do no better than restate the remarks of this court in the case of *Deputy Sheriff, Harare* v *Mahleza & Anor* 1997 (2) ZLR 425(H) where it said:

> "People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions."

That failure to obey a previous order of the court constitutes dirty hands is an open secret…"'

[20] Litigants are required to comply with court orders. If a litigant is held to be in contempt of court, the court, upon the application of the dirty hands principle may refuse to entrain a litigant who violates a court order. Civil contempt of court is the wilful and *mala fide* failure to comply with a court order. In *Mukumbirwa & Ors* v *Gospel of God Church International 1932* SC 8/21, the Supreme Court set out the requirements for contempt of court in the following words:

> "Before holding a party to be in contempt of a court order, a court must be satisfied that there is a court order which is extant, that the order has been served on the individuals concerned and that the individuals in question know what it requires them to do or not do, that knowing what the order dictates, the individuals concerned deliberately and consciously disobeyed the order.
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> In addition to the above the court must be satisfied that, not only was the order not complied with but also that the non-compliance on the part of the defaulting party was wilful and *mala fide*. In *Lindsay* v *Lindsay* (2) 1995 (1) ZLR 296 (S) GUBBAY CJ said:
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> > "The finding was *res judicata*. In none of the subsequent proceedings was any new or different circumstances revealed; nor could they have been. I entertain no doubt that GARWE J was correct in concluding that the appellant remained bound by the order and had failed to comply with it.
> >
> > Once it was established that the order had not been met, which of course was common cause, wilfulness and *mala fides* on the part of the appellant was properly inferred, with the onus upon him to rebut the inference on a balance of probabilities. See *Haddow v Haddow* 1974 (1) RLR 5 (G) at 6; *Gold v Gold* 1975 (4) SA 237 (D) at 239F-G. It may be, as indicated by BAKER AJ (as he then was) in *Consolidated Fish Distributors (Pty) Ltd v Zive & Ors* 1968 (2) SA 517 (C) at 521A-522A that wilfulness and *mala fides* are identical in direct contempt cases, whereas *mala fides* is an essential element in constructive contempt. However that may be, I agree with the learned judge that the appellant failed completely to discharge the requisite onus."

[21] In *casu*, it is common cause that the court orders issued before MUCHAWA J and MAXWELL J in the second matter involving the parties were served on the respondent. The respondent accepted that she was aware of the court orders and what she was required to do. She even sought to appeal against the second order by MUCHAWA J to the Supreme Court by filing an application for condonation for the late filing of an appeal and an extension of time to note an appeal. See also para 17.2 of the respondent's heads of argument where it is also acknowledged that the respondent was aware of the court order and what she was required to do or not to do. There is, therefore, no issue with the first requirement. Whether or not there was disobedience or non-compliance and if the non-compliance was wilful and *mala fide* were the issues in contention.

[22] It was my finding that the applicant established on a balance of probabilities that the respondent was in contempt of the orders issued by this court. In making this finding I was conscious of the decision of the Supreme Court in the respondent's application for condonation where the court, with the consent of the parties, issued an order in terms of which it withheld its jurisdiction to entertain the respondent's application until she purges her contempt or the issue is determined by a magistrate. That order was issued on 28 May 2024. It was not shown that the respondent ever purged that contempt in this case. There is also an extant judgment of the Maintenance Court handed down on 18 November 2024 where the lower court made findings based on the same facts before me that the respondent was in contempt of court and denied her the relief she was seeking. That decision was never appealed and remains effective.

[23] In any case, it is common cause that the order handed down by MAXWELL J authorised the applicant to enrol the children in a boarding school with effect from the second term of 2024. The order placed a reciprocal duty on the respondent as the custodian parent to ensure that it was complied with. Paragraph 3 of the operative order further ordered her to avail all the necessary documents required for the enrolment of the children at a new school. The reason why the court made this order is clear from p 5 of that judgment that it was the conduct of the respondent that necessitated such an order and that the children's educational welfare could only be best guarded by their being in boarding school. It is not

in dispute that the applicant complied with the order and had the children enrolled at The Heritage School on 2 May 2024 and paid school fees before the beginning of the second term. The respondent refused to hand the children over to the school authorities. It was not disputed that she had to be arrested by the police for the children to be handed over to the school authorities and that was three weeks after schools opened on 28 May 2024. The reports from the school and the psychologist Mr Moses show that the respondent decided to keep the children at home after they returned home from the boarding house. The school requested the applicant and the respondent to meet with the school authorities over the issue of the children and only the applicant attended meetings set on 12 June and 4 July 2024. The respondent did not attend those meetings. The letters attached as annexures D and F to the opposing affidavit are dated 26 June and 6 June 2024 respectively. These cannot be used to explain her failure to attend the meetings requested in the letters dated 2 and 9 July 2024. They were allegedly written before the two letters from the school. In any case, there is no indication or evidence that they were ever delivered to the school. The school clearly gave both parents the chance to discuss the issues concerning their children.

[24] The respondent consciously decided to stay with the children at home until the school had to deregister them for being absent for over twenty-one consecutive days on 19 September 2024. It is clear from the evidence that the respondent wilfully disobeyed the court order. She viewed the court order for the children to be in boarding school as erroneous and even indicated that she wanted it to be varied as she did not want them to be away from her. This is what she stated in para 12 of her founding affidavit to the application for maintenance attached to this application. She emphatically said:

> "The children are currently not going to school it is my prayer that the court grants an order that the children be returned to their respective schools as soon as possible... The order that the children sent to boarding schools made the respondent to move the children randomly and without engaging me in the decision. They were better options to put into boarding schools at their respective school but the respondent never engaged me… I would like to stress out that the minor children went through a lot of transition and <u>it is not fit yet for them to be enrolled into boarding schools it is my sole wish that I spend and get involved into their daily life hence I pray for an order that they don't get enrolled into boarding schools</u> as I fear the use of substances due to stress…" [My emphasis]

[25] In defiance of the order requiring that the children be in boarding school, the respondent stated that she does not accept that they should be in boarding school in the said para 12. She further could not meaningfully engage the school authorities to ensure that the children remained at the boarding school but proceeded to enlist the services of a private teacher to teach all of them at home. That arrangement was clearly in breach of the existing order that they remain in boarding school. This arrangement is confirmed by the respondent herself by the attachment of an affidavit from the alleged teacher Selena Damba. The inference of a disdain for the law cannot be avoided. Whether the respondent believes that the order is erroneous or must be varied does not matter. A court order has the force of law and remains valid and binding on the parties to it unless and until it has been reversed or set aside. This applies even if one believes that the court order is erroneous. It must be complied with and then one argues afterwards. This was confirmed in *Econet Wireless (Pvt) Ltd* v *Minister of Public Service, Labour & Social Welfare & Ors* SC 31/16 at p. 6 where it was held that:

> "What this means is that all questioned laws and administrative acts enjoy a presumption of validity until declared otherwise by a competent court. Until the declaration of nullity, they remain lawful and binding, bidding obedience of all subjects of the law.
> The doctrine of obedience of the law until its lawful invalidation was graphically put across by *Lord Radcliffe in Smith v East Elloe Rural district Council* [1956] AC 736 at 769 when he observed that:
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> > "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of illegality on its forehead. Unless the necessary procedures are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."
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> If it were not so, and every litigant challenging the validity of any law was excused from obeying the law pending determination of its validity, there would be absolute chaos and confusion rendering the application of the rule of law virtually impossible. This is because anyone could challenge the validity of any law just to throw spanners into the works to defeat or evade compliance with the law."'

[26] The same legal position was outlined in the leading case of *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 (S) where it was remarked as follows:

> "This Court is a court of law, and as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects

> to pending a determination by this Court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt, the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this Court with clean hands on the same papers."

[27] With regard to the order for the parties to go for counselling sessions, it was clear that the order by MUCHAWA J also ordered that half of the sessions should be attended by the parents together with the three children. The order was reinforced by MAXWELL J. The respondent as the custodian parent had the obligation to bring the children for such counselling sessions in compliance with the order of court. She did not cite any incapacitation in doing so. She did not give any valid reason why she had failed to comply with the order to attend the counselling sessions with the children. From the report by the clinical psychologist, in particular para 8, Mr Moses stated that he had scheduled a session on 8 June where he had directed that the children attend but the respondent did not bring them. When he enquired, it was stated that she did not give any answer as to why the children were not present. On the second session, she attended on 5 October 2024 together with the applicant but again did not bring the children. When asked where the children were, it is stated that she burst in anger and verbally attacked the applicant. In para 4 of his concluding remarks, the psychologist stated that his attempts to engage the respondent to bring the children for counselling in the counselling session on 5 October were ignored.

[28] The respondent herself is reported to have said that she does not need counselling as ordered by the court. The clinical psychologist was appointed by this court. There was no evidence of bias against him placed before me. The process he was leading was a court-sanctioned process and the respondent was required to respect that process and fully comply. She clearly held this process with contempt and ridicule and was not keen to comply with the order of this court. The applicant showed that the respondent disobeyed the court orders and that the disobedience was wilful and *mala fide*. The respondent did not, in any event, rebut the inference at law once non-compliance was established that the non-compliance in this case was not wilful and *mala fide* on a balance of probabilities. Her own statements, particularly in para 12 of the affidavit she filed in the maintenance court

clearly exposed her and showed that she wilfully disobeyed the court orders and that her defiance was *mala fide.*

[29] In the premises, I had to refuse to entertain the respondent as the dirty hands doctrine was applicable and it was in the interest of preserving the authority of this court for me to do so. The respondent has shown to be such a litigant who has no regard for the orders of this court. This court must protect its own integrity. Its orders must not be rendered nugatory. Litigants must be reminded that they must not consciously violate court orders and still expect the court to remain silent or entertain them. The importance of the dirty hands principle was emphasised in *Sadiqi* v *Muteswa* CCZ 14/21 where it was stated that:

> "Section 69 of the Constitution enshrines and protects the right to a fair hearing. It guarantees that the courts are open to every person. However, this is subject to the rules put in place to regulate court proceedings and bring order to the justice delivery system. When the dirty hands doctrine is applied to refuse to entertain a litigant who is in violation of a court order, he is not being denied the right to a fair hearing. This is actually a measure that is necessary to preserve the dignity and the authority of the courts so that the citizenry at large can continue to enjoy the right to a fair hearing. It is an essential part of the inherent power that the courts enjoy so as to protect their own processes."

[30] It was for the above reasons that I upheld the point in *limine* that the respondent had dirty hands. Consequently, the court refused to hear the respondent and disregarded her opposing papers. The court then proceeded to deal with the application as unopposed.

THE MERITS

APPLICANT'S SUBMISSIONS

[31] Mrs *Dube-Tachiona* submitted that the applicant understands the role played by the court as the upper guardian of minor children. Counsel referred me to the case of *Domboka* v *Madhamu* HH 179/04 and submitted that the test for variation of a custody order is two-pronged. Firstly, that the applicant has to show that the respondent who is the custodian parent is not fit to remain the custodian parent and secondly, that he is in a better position to take custody. The court considers the best interests of the minor children. The concept of the best interests of the minor children was explained in *Sadiqi* v *Muteswa*. The court as the upper guardian must grant authority to the parent who prioritises the interests of the minors as opposed to his/her interests. Reference was also made to s 81 of the Constitution

of Zimbabwe. It was argued that there is equality of both parents as to what is in the interests of the minor children.

[32] On why the respondent is not fit and proper to be the custodian parent, Mrs *Dube-Tachiona* submitted that the respondent has shown that she does not care about the children's education and their wellbeing. She refused to avail the children for boarding school despite the court order. MAXWELL J made a finding that it was in their best interests that they be in boarding school. All the children were expelled from their previous schools. Despite being paid maintenance she claimed she had no fuel and did not take them to school. Counsel referred me to the case of *Makuni* v *Makuni* where the role of the custodian parent was outlined. The respondent had to train the children and not promote a scenario where the applicant was perceived as evil. In her papers there is nowhere she said she tried to make them reconcile.

[33] It was further argued that the respondent deprived the children of parental care. She had the duty to protect them as the custodian parent. See also *Muchacha* v *Mhlanga* HH 185/23 where MUNANGATI-MANONGWA J said children cannot be used as pawns or chattels. The respondent's attitude had always been to use the children as pawns. The parties have been separated for over 5 years and the respondent sought maintenance for herself in the sum of US$45,000.00 and for the children in the sum of US$5,500.00. She has used the children for financial gain. She never cared about the children not going to school.

[34] On why it is in the best interests of the minors for the applicant to be granted custody, it was argued that the applicant's papers show that he is a responsible father. He had always been paying for the children's school fees at A schools. He had always placed the best interests of the children first. He contributed outside school fees and paid US$700.00 maintenance monthly on his own volition. He did not appeal the order to enrol them in boarding school. He complied with the order and within a short time enrolled them in school. He even fought for their enrolment with the respondent resulting in her arrest. Mrs *Dube-Tachiona* further argued that the applicant's attitude towards the best interests of the children is very clear. He could have run away but did not. There is a court order where the respondent's counter-claim for the house was dismissed and she was evicted. There was

no order for her to be paid anything. Despite all that the applicant voluntarily parted with US$115,876.54 from the proceeds of the sale of his house which he gave the respondent for the sake of the children. The balance of US$85,876.54 was paid on 26 April 2024. A few months down the line she was already claiming maintenance. The applicant is a responsible parent, he is a lawyer employed at Unki Mines and has a family. He remarried and has two children and wants the children to integrate as a family. It was also argued that the Guardianship of Minors Act places parents at par.

[35] Counsel further submitted that the applicant is the only one who attended at school after the children ran away from school. In his founding affidavit, he says he still believed he could continue with the counselling sessions. He has been paying for these sessions. While counsel accepted that psychological damage to the children had already been done, she argued that the applicant believes he must be given the chance to undo the damage. It was also argued that healing would not happen if the respondent remains the custodian parent. That the applicant has cooperated very well during the sessions he attended as shown by the report.

[36] Counsel applied to amend the draft order by the deletion of the alternative relief in para 2 of the draft order. Paragraph 5 was also amended by its deletion and substitution with an order for the respondent to hand over the children to a boarding school where they are enrolled by the applicant or be arrested for contempt. I had raised issues with the draft order committing the respondent to jail for 3 months if it is then alleged in future that she had defied the court order to hand over the children to the school. The court cannot at this stage be asked to sanction her imprisonment for a crime yet to be committed. That would be unlawful. This is a court of law. Counsel also applied for para 6 of the draft to be amended by the deletion of whatever appeared after "save" and their substitution with a provision allowing Mr Moses to determine when the counselling sessions will cease.

[37] It was submitted that the application should be granted in terms of the draft order as amended. Mrs *Dube-Tachiona* insisted that the respondent must be ordered to pay the costs of suit on a punitive scale. She argued that these proceedings should not have happened and the applicant was put out of pocket. The respondent did not comply with about four

court orders. The defiance is one warranting an order for punitive costs. Reference was made to the case of *Crief Investments (Pvt) Ltd & Anor* v *Grand Home Centre (Pvt) Ltd & Ors* HH 12/18. There is need to censure her.

THE LAW

[38] Section 81(2) of the Constitution of Zimbabwe, 2013 is very clear that in every matter concerning a minor child, the best interests of the child are the paramount consideration. Minor children have a right to family or parental care set in s 81(1)(d) of the same Constitution. The court explained this right to family or parental care in *Sadiqi* v *Muteswa* HH 249/20 as follows:

> "Include the child's right to be cared for by both natural parents [which] means more than just channelling monetary maintenance through the mother. It entails the opportunity to influence and shape the personality, life of a child by spending time with the child and being involved in making choices about the child's life and future."

[39] The test for variation of custody was remarkably outlined in *Domboka* v *Madhamu* HH 179/04 at p 4 where MAKARAU J (as she then was) had this to say:

> "It appears to me that while the accepted position is that a parent seeking variation of the custody order has to show on a balance of probabilities that it is in the best interest of the children that the existing order be varied, in cases where the variation is sought on the basis of changed circumstances, the onus is to be discharged in a two prong attack. In my view, such a parent must show that it is not in the best interest of the children that they remain in the custody of the custodian parent and further that it is the best interest of the children that custody is awarded to them. It is insufficient in my view to merely show a change of circumstances for the worse on the part of the custodian parent. It is not difficult to envisage a situation where although the circumstances of the custodian parent have deteriorated from the date of the granting of the order, the court still finds that it is in the best interests of the children that they remain in the custody of the parent whose fortunes are waning. It is the role of the court to interrogate the circumstances of both parents to establish where the best interests of the minor children lie."

THE ANALYSIS AND DETERMINATION

[40] Applying the above principles, this court must determine what has changed between the awarding of custody to the respondent on 13 September 2023 to the present day to warrant varying the custody order. In all this, the paramount consideration is the best interests of the minor children. As held in *Hackim* v *Hackim* 1988 (2) ZLR 61 (S) it was incumbent upon the applicant who is seeking a variation to show that there was a change in circumstances. At 66G, CHIDYAUSIKU CJ (as he then was) said:

> "In my view, in cases of this nature, the proper approach to the question of onus must be one that is broad and wide. It should include the showing on a balance of probabilities, the changed circumstances of the parties or any behaviour or shortcomings of the parties; if those circumstances, behaviour or shortcomings impinge on the welfare or interests of the child. In determining an application for variation of a custody order, these changed circumstances matter. It is not wrong, in my view, for the applicant who seeks variation to show that there has been a change in the circumstances of the parties or misbehaviour or shortcomings on the part of the respondent or that the child is suffering injury or prejudice under the existing order. There may be cases in which circumstances have so altered that the variation of an order of custody becomes compelling because the welfare of the minor child is intertwined with those changed circumstances." [My emphasis]

[41] It is my view that the applicant has discharged the onus thereby entitling him to the order sought as per the amended draft order. It is clear from the evidence that the role of the respondent as a custodian parent has damaged the education and the overall welfare of the minor children. The respondent has been shown to be an irresponsible parent who does not care about her children's welfare. There is no dispute that the court found that their education can only be safeguarded if they are in boarding school and not learning at home or from home. Thus, MAXWELL J in *Mangwengwende* v *Chirisa* HH 144/24 had this to say:

> "The most he can get is authority to put the children in boarding school. The conduct of the Respondent justifies the making of that decision. The application in the lower court was dismissed on the 12th of May 2022. One of the issues in that matter was the continued absenting of the children from school without reasonable cause. The report by the clinical psychologist dated 14th February 2024 showed that as at that date, the situation had not changed. In my view, to allow the children to continue attending school from home whilst in the custody of the Respondent would be to be complicit in their absenteeism and that is detrimental to their educational development. This court, as the upper guardian of minor children has the responsibility of safe guarding the best interests of the minor children. I find that in this case it is not in the minor children's best interest to continue being day scholars. Their educational welfare is best guarded by their being in boarding school. An order to that effect will accordingly be made."

[42] The applicant's papers show that the children had been expelled from their previous schools due to their erratic attendance and participation in activities at those schools. This prompted the court to issue the order entitling the applicant to have the children enrolled in boarding school. The respondent has consciously undermined that court order. She did not voluntarily release the children to the school they were enrolled by the applicant. She had to be arrested for the children to be handed over to their boarding school at The Heritage School and this was well after three weeks from the date schools opened for the

second term of 2024. The children are said to have run away from the boarding house but the respondent did not show any serious efforts to correct the children's behavior and engage the school authorities over the issue. She ought to have trained them and cultivated a culture in them to respect authorities and accept to learn in their new environment. That is leadership. Instead, she remained with the children at home and when asked to come for meetings at the school she chose not to go there culminating in their deregistration on 19 September 2024 after being absent for more than twenty-one consecutive days. She went ahead to have them taught at home by a private teacher in open defiance of the court order that their best interests could only be best served if they attended boarding school.

[43] This court emphasized the important role played by a custodian parent in the development of the minor children including socially or psychologically in *Makuni* v *Makuni supra*. At 191 GOWORA J (as she then was) held that:

> "However, the applicant is the custodian parent and in her are vested all the rights that entail the nurturing, shaping and bringing up of the minor children. I can do no better than quote from Boberg Family Law at p 460 where he states as follows:
>
> > "An award of custody to a mother entrusts to her all that is meant by the nurture and upbringing of the minor children. In this is included all that makes up the ordinary daily life of the child – shelter, nourishment and the training of the mind ... The child ... passes into the home of the mother, and there it must find all that is necessary to its growth in mind and body .... A custodian parent has therefore the right to regulate the life of the child, determining with whom he should or should not associate, how he should be educated, what religious training he should receive and how his health should be cared for. The non-custodian parent has no right to interfere in these matters, though he may petition the court to do so if it appears that the custodian parent has exercised his discretion in a manner contrary to the interests of the child or in conflict with an order of court. Otherwise, he is confined to his right of access to the child."
>
> 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)."'

[44] The respondent had the legal responsibility as the custodian parent to direct the life of these children and even to discipline them. She had to train them to understand the importance of education and remain disciplined in the context of the court order. It was her role to psychologically train them for these transitions including explaining to them the important

role of the applicant as their father. She failed to properly perform her duties as the custodian parent in this case. I agree that she has deprived them of parental care. She was also legally bound to bring the children for the counselling sessions before Mr Moses. The court order directed that half of the sessions should also be held in their presence. These sessions were meant to prepare the children for their psychological development to nurture a healthy relationship between them and their parents. That would have addressed the concerns raised in the probation officer's report which was placed before the court when the first matter was heard.

[45] The fact that the applicant is the children's father can never be wished away. The report from Mr Moses established that the respondent despised the counselling sessions as ordered by the court and she is reported to have said that she did not require any counselling. The report also establishes that she failed to explain why she could not bring the children to these sessions as directed by the court. In all this, I could only conclude that the respondent's role as the custodian parent has done more damage than good to the wellbeing of the minor children. The change prayed for cannot be avoided if at all the future of these children is to be safeguarded. The damage has already been done as confirmed by the probation report in the first court matter. It is, however, not too late to seek to rebuild the children's lives again. That exercise can honestly and reasonably start with the change of their custodian parent.

[46] The applicant's papers establish that the respondent had weaponized the children in her fight against the applicant. The report by Mr Moses, states that the respondent could not give any reason why she was not bringing the children to the counselling sessions. She could not disclose to the psychologist where they were and if they were attending school after they were expelled from The Heritage School. Paragraph (1)(c) of the order by MUCHAWA J is clear that the clinical psychologist was required to receive monthly reports of the children's school performances and attendance. It was also reported that she refused to reveal where the children were staying. While all this was happening, she then launched an application for maintenance claiming US$45,000.00 for herself and US$ 5,500.00 for the children. In all this, the children are placed at the center of the litigation. The evidence

before me even showed that the applicant paid her more than US$115,000.00 after the sale of his house for the sake of these children yet the respondent is still using the children as pawns in her fight against the applicant. To even think that all this drama is happening after more than five years since their separation makes it an unpalatable opera given that priority should by now have shifted to the welfare of the children. This is exactly what this court detested in *Muchacha* v *Mhlanga supra* where the court stated that: -

> "As parents tussle over custody of children, they are oblivious that the best interests of the children reign supreme over the parents' preferences. This court as the upper guardian of children will ensure that the duty placed upon it by the Constitution of Zimbabwe, and indeed the dictates of regional conventions such as the African Charter on the Rights to Welfare of the Child and international instruments such as the United Nations Convention on the Rights of the Child, beg to safeguard the best interests of the children shall be undertaken without hesitation. Children are not chattels to be exchanged at will, held and used as pawns for parents' selfish ends either to settle scores or score a victory."

[47] I agree with Mrs *Dube-Tachiona*'s submission that the respondent had used the children for her own selfish ends. Further, schooling does not necessarily entail academic achievement but also involves extracurricular activities. The children benefit more from associating with others in a school environment than being taught by one teacher at home. They should not be deprived of that opportunity to grow among their own peers. That is part of the normal life of a child in our jurisdiction. The reasoning of the court in the judgment by MAXWELL J to direct that the children be enrolled in boarding school is also one founded on the basis that the children must have formal education. Studies have shown that formal education is an essential part of a child's cognitive development. This entails the growth in the child's ability to think and solve problems. Ndlovu and Muthivhi, *The Developmental Conditions of Classroom Teaching and Learning in a Primary School in Zimbabwe*, African Journal of Teacher Education, 2013 at p 7 highlighted this position and quoted from Vygotsky, a well-known psychologist, who stated:

> "School education is qualitatively different from education in the broad sense. At school, the child is faced with a particular task to grasp the bases of scientific studies, i.e., a system of scientific conception. The early concepts that have been built in the child in the process of living, and which were assisted by rapport with his social environment, are now switched to a new process, to a new specially cognitive relationship to the world, and so in this process the child's concepts are transformed and their structure changes. In the

> development of a child's consciousness the grasping of the bases of a science-system of concepts now takes the lead (Vygotsky, 1978, p. 130).

[48] The above is also the rationale for the court order that directed that they be enrolled in boarding school so that they can attend classes and participate in extracurricular activities with other children of their ages. The court cannot, therefore, condone the clear disdain for its authority. I associate myself with the remarks by Hahlo Husband and Wife 5th ed at p 396 who stated as follows:

> "If the custodian spouse does not exercise the right of control in the best interest of the child, parenthood and natural rights give the non-custodian spouse *locus standi* to move the court for intervention be it by a variation of the custody order, be it by a direction to the custodian spouse as to what he should or should not do."

There are changed circumstances which warrants the intervention of the court to protect the three minor children's best interests or welfare.

[49] I have also considered the evidence filed of record which shows that the applicant had attended about three counselling sessions and that he has undertaken to continue attending such sessions with the minor children and the respondent to nurture a healthy relationship with their children. In his report, Mr Moses, in particular para 1 of his concluding remarks, he spoke highly of the attitude and conduct of the applicant in the following words:

> "Over the period I have interacted with Mr Pasirayi Mangwengwende I have observed that he is motivated and eager to complete and comply with the counselling sessions as required by the High Court order. He contributes in a rational manner to all counselling sessions to date."

[50] The applicant has established that he is a responsible parent. The constant concern and commitment he has exhibited towards the welfare of the children and the respect he has for the court's authority is very commendable. If it was another father who does not care about his children, he might have capitulated given the struggles he had to endure to get the children enrolled in boarding school and the incessant verbal insults from the respondent which were also meted at him even before Mr Moses. The psychological report is in his favour. Although the counselling sessions are yet to be completed, I do not hesitate to say that he is now a person who can be trusted with the welfare of the children. However, as the applicant also accepted, the sessions shall continue subject to the guidance of the

clinical psychologist. The time is ripe for the children to be shown the proper direction as the present situation is clearly untenable. The incorporation of continued counselling sessions in the order would in my view allay any fears that the relationship between the children and their father can never be repaired. The applicant deserves that chance to show leadership and the time is now or else the damage may never be repaired.

[51] The applicant has continued to be available for the children. The reports from the school and Mr Moses show that he was the only parent who attended meetings with the school authorities over their children's education. The founding affidavit also buttresses that he is a family man who has moved on with a new family. The children deserve to grow together with their siblings. The applicant will ably provide for their basic needs as the custodian parent as he is gainfully employed at Unki Mines and has a family house which can accommodate all the minor children. I have also considered that the draft order incorporated an access order that the respondent have the children during the first two weeks of their school holidays. This effectively leaves the applicant taking them during the other two weeks of the school holidays. Since the children will still be attending boarding school, they will naturally spend more time at their respective schools than at home. Coupled with the counselling sessions that will be taking place there is a reasonable likelihood that the children will heal and a strong bond with the applicant will eventually ensue.

[52] Further, since the last order was granted in 2023 significant time has lapsed which has also meant the further growth of the minor children. The youngest is now edging closer to ten years of age; the second and first-born children will be turning thirteen and fifteen years in June and April this year respectively. Their ages would not in my view, create any problems for their stay with the applicant, him training them and influencing a positive direction in their lives. They clearly require psychological reorientation and that can only be attained with a change of the existing order. This would avert the risk alluded to by MAXWELL J in the previous judgment of these children turning to be "children in need of care" in terms of the Children's Act [*Chapter 5:06*]. The intervention by this court is warranted in the best interests of the children. It is now ripe for the variation of custody as that promotes the

children's welfare. The court cannot defer the exercise of its authority as the upper guardian of the minor children given the present circumstances.

DISPOSITION

[53] For the above reasons, it is in the best interests of the minor children that this application for variation of custody be granted in terms of the amended draft order. I have no reason to depart from the general rule that costs should follow the cause. The applicant's counsel, however, insisted that the respondent's conduct warrants censure through an award for costs on a legal practitioner and client scale. It is trite that costs on a higher scale are awarded in exceptional cases where the conduct of the losing party would warrant such an award. In *Crief Investments (Pvt) Ltd & Anor* v *Grand Home Centre supra* at pp. 2-3 MUSHORE J restated the law on costs as follows:

> "In order for a litigant to successfully claim costs on the attorney and client scale, which is punitive, he/she must show that the other party's behaviour and attitude deserved to be punished.
> The awarding of costs at a higher scale is within the discretion of the Court. Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a favourable decision against a genuine complaint. The learned authors Hebstein and Van Winsen in *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5 ed : Vol 2 p 954, stated the following:
>
> > "The award of costs in a matter is wholly within the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issued in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties..."
>
> According to the leading authority as to attorney and client costs in South African law, *Nel* v *Waterberg Landbouwers Ko-operative Vereeninging* 1946 AD 597 at 607 where his Lordship TINDAL JA stated:
>
> > "The true explanation of awards of attorney and client costs not authorized by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the courts in case considers it just, by means of such order, to ensure more effective than it can do by means of judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation ."
>
> AC Cilliers in *The Law of Costs* 2nd ed p 66, classified the grounds upon which would the court be justified in awarding the cost as between attorney and client:
> (a) Vexatious and frivolous proceedings

(b) Dishonesty of fraud of litigant
(c) Reckless or malicious proceedings
(d) Litigant's deplorable attitude towards the court
(e) Other circumstances"

[54] In *casu*, I accept that the respondent's conduct had been deplorable. She has shown complete disregard for the authority of this court. Litigants must respect the authority of the courts by complying with court orders as they have the force of law. The conduct of the respondent has made me consider that the only just and proper award of costs would be costs on a legal practitioner and client scale to register this court's displeasure with the conduct of the respondent in these proceedings. I am also of the view that she should have conceded on the point in *limine* given the clear evidence of her defiance or contempt of court and not waste the court's time as she eventually did. I am also conscious of the findings made against her by the Supreme Court and Maintenance Court that she had wilfully defied this court's orders. This court also came to the same conclusion as afore-stated. Any litigant who despises the authority of the court should not be given kid-glove treatment otherwise the system of the administration of justice will be brought into disrepute. Given the above, there exist exceptional or special circumstances warranting that the respondent be mulcted with punitive costs.

[55] In the premises, I make the following order:

1. The custody order granted by the court in Case No. CIV A' 153/23 be and is hereby varied and the applicant, be and is hereby declared the primary custodian of Simbarashe Mangwengwende, a boy born on 20 April, 2010, Akudzwe Mangwengwende, a boy born on l8 June 2012, and Tawana Chidiwa Mangwengwende, a girl, born on 3 July 2015.
2. The respondent be and is hereby granted access to the three minor children every first two weeks of their school holidays.
3. The respondent be and is hereby permanently barred from receiving and accommodating the three minor children at her home at any time during the school term, should they run away from school. If they do, she shall immediately return

them to the school and shall cooperate with the school and in all her dealings with the school she shall be respectful and cooperative.

4. The respondent shall attend all meetings she is invited to attend by The Heritage School principal and or any principal at a school being attended by the three minor children.
5. The respondent shall immediately hand over the children to the boarding school where the applicant would have enrolled them immediately after the date of this order failing which the Zimbabwe Republic Police be and is hereby ordered to forthwith arrest her and have her prosecuted for contempt of court.
6. The applicant and the respondent shall continue to attend the counselling sessions with the three minor children before the clinical psychologist appointed by this court, Mr Philip F. Moses until he makes a determination that there shall be no need for such sessions.
7. The respondent shall pay the costs of this application on a legal practitioner and client scale.

DEMBURE J: ……

Dube-Tachiona & Tsvangirai, applicant's legal practitioners
Ross Chavi Law Office, respondent's legal practitioners