AL-MARIE IRIS HALL
versus
KUDAKWASHE DAVID MNANGAGWA

HIGH COURT OF ZIMBABWE
TAGU & MUCHAWA JJ
HARARE, 23 September 2021 & 20 October 2021

Civil Appeal

C Damiso, for the appellant
T Chinyoka, for the respondent

MUCHAWA J: This is an appeal against a decision of a magistrate which dismissed appellant's application for rescission of default judgment, thereby preserving a custody order which had been granted

The brief facts to this matter are that the appellant and respondent had a child together who was born on 16 November 2019 though at that time the respondent was married to someone else in terms of a civil marriage. The respondent then made an *exparte* application for custody of the child. Following the directions of the court, the matter proceeded by way of notice. Opposing and answering papers were filed and a further direction by the court was that a probation officer be appointed and a report be filed on the circumstances of the child so as to assist the court. This was done but on the date of hearing, 29 October 2020, the appellant and her legal practitioner were in default at the time set for the hearing. The court proceeded to grant custody to the respondent resulting in the filing of the application for rescission which was dismissed leading to this appeal.

The grounds of appeal before us are:

1. The *court a quo* erred at law in finding that it is in the best interests of a minor child for a custody application matter to be determined in the absence of an interested party, the mother of the child, who has filed opposing papers.

2. The *court a quo* grossly misdirected itself at law in finding that it had the discretion to waive/ forego the mandatory requirements of the Guardianship of Minor Act to conduct an enquiry relating to applications for custody as read with section 81 of the Constitution.
3. The *court a quo* erred at law in relying on an unchallenged report of a probation officer in that;
    a. The report, being a report of an administrative authority is subject to challenge in terms of the appellant's exercise of her constitutional rights to administrative justice, in particular probation officer failed to be fair and the court a quo denied appellant any right to *audi alteram partem* relative to the report.
    b. Probation officer failed in his constitutional obligations to be fair and to treat appellant fairly.
4. The *court a quo* erred at law in finding that it is competent for a custody application to be made on an *ex parte* basis.
5. The *court a quo* erred at law in considering irrelevant information, in particular the affidavit of Priscilla Bridgette and Bridget Mudhosi and disregarding relevant evidence relating to the safety of the minor child of violence in the home.

In her heads of argument, appellant narrows the issues for determination, to two only *viz*

1. Whether or not the court *a quo* erred at law in finding that it is in the best interests of a minor child for a custody application matter to be determined in the absence of an interested party, the mother of the child; and
2. Whether or not the court erred at law in relying on an unchallenged report of a probation officer.

The appeal was opposed both on the merits and through the raising of some preliminary points. We heard the parties and reserved our judgment on both. This is it, starting with the preliminary points.

The Preliminary Points

The respondent raised four points *in limine*, as follows:

a. That there is an invalid notice of appeal;
b. That the appeal is directed at the reasons and not the order;

c. That incompetent relief is sought; and
d. That the appellant is engaged in forum shopping

I deal with the points, in turn, below.

Whether the notice of appeal is invalid and whether it is directed at the reasons and not the order

Mr *Chinyoka* submitted that the grounds of appeal as initia1ly framed and as amended in the heads of argument fail to meet the requirements of the Magistrates Court Rules, Order 31 rule 2(4) and are therefore invalid as they do not specify any findings of fact or rulings of law that are appealed against.

On ground 1 of appeal, Mr *Chinyoka* submitted that the court a quo did not pronounce itself on whether or not or in what circumstances, a custody matter can be heard with or without a mother present. It was averred that what the court a quo pronounced itself on was that in the circumstances of the matter, the best interests of the child were best served by awarding custody to the respondent and that on the papers before it, the appellant had failed to show that she had prospects of success if rescission was granted. Mr *Chinyoka* contended that in her grounds of appeal, appellant had not challenged these findings but challenged a decision that was neither made or the implications of the discussion of the ruling.

Ms *Damiso* submitted that ground 1 of appeal attacks a principle of law and is a valid ground of appeal in that the magistrate made a finding that it was in the best interests of the child for the default judgment to stand and that is what is attacked in ground 1 of appeal. She also conceded that grounds 1 and 4 have similarities and should be treated as one and further that the grounds were inelegantly drafted.

Ground of appeal 3 was impugned for its failure to challenge any legal conclusions drawn from the probation officer's report but that the appellant avers she was not heard on this and is effectively raising a ground of review and not of appeal. Mr *Chinyoka* submitted that it is factually incorrect for appellant to say she was not heard, when she had the opportunity to comment on the report in filing her application for rescission of judgment but she failed to do so. Ms *Damiso*'s submission was that the filing of an application for review in relation to the same matter does not preclude the appellant from bringing a similar ground on appeal.

Order 31 r 2 (4) of the Magistrates Court Rules provides in para (b) that the notice of appeal shall state, "in the grounds of appeal, concisely and clearly the findings of fact or rulings of law appealed against." This provision is peremptory. A perusal of the judgment appealed against shows clearly that at no time did the magistrate make a finding of fact or law that it was in the best interests of the/a minor child for a custody application to be determined in the absence of an interested party, being the mother. There is equally no finding that the *court a quo* had a discretion to waive or forgo the mandatory requirements of the Guardianship of Minors Act to conduct an inquiry. Needless to say that the court a quo did not find that it is competent for a custody application to be made on an ex parte basis as it in fact directed that this matter which had initially been filed as an *exparte* application, be heard on notice to the appellant. Grounds of appeal 1, 2 and 4 do not therefore deal with the judgment before this court. It is incompetent to impugn the court for findings of fact and law which it never made as those issues were not before it as appellant only placed an application for rescission of judgment before the court *a quo*. I find that ground 1, 2 and 4 are therefore invalid grounds of appeal.

The issue of ground 3 of appeal is settled by the learned authors Herbstein and Van Winsen in *The Civil Practice of The High Court of South Africa*, 5th edition wherein it is stated as follows:

> "The reason for bringing proceedings under review or on appeal is usually the same, *viz* to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of trial, it is proper to bring the case on review."

In ground 3 of appeal the appellant is not challenging the findings of fact or law made based on the probation officer's report. What is questioned is the fact that the appellant was not heard and the *audi alteram partem* rule was violated. The grievance is therefore against the method of trial and that would fall as a ground of review. Ground 3 is therefore improperly before this court as an appeal ground.

In any event, the appeal may very well be directed at the reasoning and implications of the court *a quo* and not the order itself. The result is that the grounds of appeal, particularly 1, 2 and 4, speak to jurisprudential implications of the judgment and not its order. That was already found to be unacceptable in the case of *Chidyausiku* v *Nyakabambo* 1987 (2) ZLR 119 (S) where it was held as follows:

> "In order to be valid, a notice of appeal must be directed to the whole or part of the order made by the court *a quo* and not to its reasons for making the order in question. It must be lodged against

> the substantive order. This much emerges plainly from the decision in *Western Johannesburg Rent Board & Anor* v *Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) where at 355 CENTLIVRES JA said this:
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> ". . . It is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a Court."

In *casu*, the substantive order made by the court was a dismissal of the application for rescission. She held that it was in the best interests of the child to be in the hands of a stable and responsible parent and that the applicant (now Appellant), in the eyes of the court did not have a bona fide defense or prospects of succeeding in the main matter.

It is our finding that grounds 1, 2, 3 and 4 are invalid grounds of appeal which we proceed to strike out. This leaves only ground 5, for consideration on the merits.

The Merits

In ground 5 of appeal it is averred that the court *a quo* erred at law in considering irrelevant information, in particular the affidavit of Priscilla Bridgette and Bridget Mudhosi and disregarding relevant evidence relating to the safety of the minor child of violence in the home. Ms *Damiso* submitted that the affidavits were irrelevant as they were deposed to by parties who were not involved in the day to day affairs of the minor child and did not speak to the best interests of the child. She further stated that the affidavits did not show that the appellant was an unfit mother and that overall there was no inquiry held yet she conceded that the probation officer's report was a form of inquiry provided under the Guardianship of Minors Act.

Mr *Chinyoka* submitted that the court a quo had before it, the probation officer's report, the affidavit of one Priscilla Ndoro who was appellant and respondent's maid, employed to look after the minor child from when she was less than two weeks. Her affidavit is said to be relevant as it speaks to her first-hand experience of what was happening in the house including appellant's attitude towards the child and bad mothering allegations. He also pointed out that the appellant in her application for rescission of judgment did not even attempt to address the conversation between the maid and her own mother wherein the mother confirmed that her daughter was hooked on drugs and the maid indicated she had been out all night and the mother venturing to suggest that her daughter's situation was so bad that she could even sell the child for drugs.

A perusal of the judgment by the *court a quo* shows that the magistrate relied on the probation officer's report to conclude that the appellant had checked into Borrowdale Halfway House for three weeks for rehabilitation, together with the affidavit of the maid, Priscilla Ndoro. The maid indicates that during that period she stayed alone with the baby in the house and the respondent would come to see the child daily and also take her to visit her mother at the facility. The appellant did not rebut this in her founding affidavit for the application for rescission.

Priscilla Ndoro's affidavit speaks to how she looked after the minor child from when she was less than two weeks, and contrasts respondent's care and concern for the child against that of the appellant. She states that the respondent visited every day except Sundays. She points out that it was in fact the appellant's mother who would step in and help her bathe, that she was the one who slept with the child in her room and that the child was breastfed for three months only. She states too that sometimes the appellant would go out throughout the night and leave the child in her care till morning. A conversation between her and appellant's mother which appellant did not comment on, confirms this. Most telling is the fact that the maid states that she would find drug things all over the house and sometimes hidden in the toilet or under appellant's bed. She further claims not to have witnessed that respondent's alleged violence directed at the appellant. Instead she states that it was the appellant who exhibited a violent disposition towards respondent and would threaten to commit suicide leading to intervention by a neighbor, one Bridgette.

Bridgette Mudhosi's affidavit speaks to her interactions with appellant and respondent as a neighbor. Her affidavit confirms the appellant's alleged violent disposition towards the respondent and how the shouting and smashing of bottles had become usual in appellant's flat. It appears that the fights revolved around respondent's announcements that he was leaving. She deposes to the exchange wherein the respondent indicated that appellant was doing drugs as was evident in the toilet, and appellant is alleged to have said that it is hard to just stop. In execution of the threat to commit suicide, the appellant is said to have put several pills in her mouth which Bridgette Mudhosi then scooped out. Furthermore, Bridgette Mudhosi had a recording on her phone of what transpired when appellant's mother invited her to their house to help deal with appellant who had had a psychotic episode following imbibing in drugs and violent actions.

The two affidavits clearly speak to the appellant's unsuitability as custodian parent. They cannot be termed irrelevant. The appellant's application for rescission did not provide the alleged

medical reports which would have tilted the scale in her favour in dispelling the allegation that she was hooked on drugs, and was "clean" as she claimed. These should have been attached to her founding affidavit. They were not.

The court a court proceeded to also consider case law authorities which emphasize that the best interests of the child are of paramount consideration even for a child born out of wedlock. Though the case of *Zawaira and Ors* v *Zawaira and Ors* SC65/17, involved the deceased estate of a man who had died intestate and left ten children born out of wedlock and six born in wedlock, it states the important principle of non-discrimination on grounds of whether one is born in or out of wedlock as being unfair.

The case of *Sadiqi* v *Muteswa* HH249/20 sets out the legal position in respect to custody of minors born out of wedlock and was relied upon by the court *a quo*. It states as follows:

> "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."

Furthermore, the court *a quo* relied on the provisions of the Guardianship of Minors Act and the Universal Declaration on the Rights of the Child. These cannot be said to have been irrelevant considerations. One cannot therefore successfully impugn the court *a quo*'s conclusion that the best interests of the child in *casu* would best be served by placing her in the custody of a stable and responsible person, being the respondent.

In the result the appeal is dismissed with costs.

TAGU J agrees……

Kadzere, Hungwe and Mandevere, appellant's legal practitioners
Gunje Legal Practice, respondent's legal practitioners