KUDAKWASHE CHRISTINE SHOKO

VERSUS

SHOKORASHE SHOKO

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 13 SEPTEMBER AND 26 SEPTEMBER 2013

Mr *S. Mawere* for the applicant

Mrs *C. T Mugabe* for the respondent

Opposed application

Family law- custody of minor children

MAKONESE J: This matter has been brought on an urgent basis. Having gone through the papers by both parties I was satisfied that the matter was indeed urgent and the Respondent conceded that the issue of urgency was not disputed. The Application was originally filed on the 9th April 2013 but due to circumstances beyond the scope and control of the court I was only able to hear the parties in Chambers on the 13th September 2013. I reserved judgment on the matter and I now pronounce my ruling on the matter.

Background

The parties were married on the 29 August 2008 in terms of the Marriage Act [Chapter 5:11]. There are two minor children of the marriage, both girls, namely Naishe Shoko (born 4 July 2009) and Kunashe Shoko (born 10 January 2011). The parties did not enjoy a happy matrimonial relationship and the marriage relationship rapidly deteriorated resulting in the parties commencing to live apart in February 2011. The circumstances surrounding the separation of the parties is not entirely clear, but it seems that the parties' relatives played a major role in persuading the parties to separate as the marriage relationship was characterised by instances of violence. In this judgment I shall not attempt to establish who was responsible for the violent conduct. The Respondent alleges that the Applicant moved out of the matrimonial home with the youngest minor children, namely, Kunashe, then only one month old. The elder child remained with the Respondent. The Applicant, however, alleges that the Respondent placed the elder child into the custody of his parents in Shurugwi without her knowledge or consent. She further says that she did not voluntarily leave the matrimonial home but that she was chased away by the Respondent.

Facts that are common cause

It is not in dispute that on 23 December 2011, the Respondent obtained an interim protection order against the Applicant which was confirmed in default on 19 January 2012 by a Magistrate sitting at Kwekwe. It is further common cause that in September 2012 the Applicant filed a court application in the Magistrates Court, Kwekwe, under case number CC 54/12 seeking custody of the two minor children in assertion of her statutory right conferred by Section 5(1) of the Guardianship of minors Act [Chapter 5:08] to have sole custody of the minor children once the parties commenced to live apart. The relevant section provides as

follows:

> *"Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor child shall have the sole custody of that minor child until an order regulating the custody of that minor is made under section three of this section or by a superior court such as us referred to in sub-paragraph (ii) of subsection (7)."*

In March 2013 the Respondent issued divorce summons in this court against the Applicant under case number HC 381/13 seeking a decree of divorce and other ancillary relief. The matrimonial proceedings are pending before the court. On the 21 March 2013 Applicant withdrew her court application for sole custody of the minor children from the Kwekwe Magistrates' court. She contended that her case was not being properly handled and besides it was being postponed *sine die* for no good cause. In April 2013 the Applicant filed a Chamber Application with this court pursuant to section 5(1) of the Guardianship of Minors Act, pending finalisation of the divorce proceedings. The Applicant further claims maintenance for the two minor children in the event that she is awarded custody of the minor children. The Respondent is contesting the Chamber Application and the relief sought by the Applicant

Issues for determination

1. The Respondent argued that the Chamber Application is not properly before the Honourable Court in light of the provisions of Order 32 Rule 249(1) and (2) of the High Court Rules, 1971 which require service of the application upon the Master of the High Court.
2. The Respondent also averred that the Chamber Application was not properly before the court in that section 5(1) and (2) of the Guardianship of Minors Act confers jurisdiction to a children's court

to adjudicate upon such an application.

3. The Respondent further contended that there were material disputes of fact which could not be resolved on the papers and required the leading of *viva voce* evidence.

4. The Respondent also argued that it was in the best interests of the children for him to have custody of the children with the Applicant having reasonable rights of access to the minor children.

5. The issue of maintenance depended upon who was granted custody by the court. The Respondent has not disputed his duty to maintain the children in the event custody is awarded to the Applicant.

The Law

At the hearing of the matter *Ms C. Mugabe*, Counsel for the Respondent conceded that

Order 32 Rule 249 (1) and (2) of the High Court Rules did not apply to this application.

Rule 249 provides as follows:

"(1) In the case of any application in connection with –

(a) the estate of a person alleged to be a prodigal or under any disability, mental or otherwise;

or

(b) a minor

a chamber application, annexing the written consent of the person proposed to be so appointed, shall first be made for the appointment of a curator *ad litem*.

(2) A copy of a Chamber Application in terms of subrule (1) shall be served on the Master, who shall

make a written report to the Judge."

It is clear that Rule 249 has no application to the instant case and I shall not dwell on that aspect at great length.

The Respondent made a further attempt to persuade the court not to entertain the matter on the basis that section 5(1) of the Guardianship of Minors Act confers jurisdiction to a children's court where the parties commence to live apart. The Respondent's Counsel did not pursue this point when she realised that the High Court is indeed the upper Guardian of all minor children by virtue of and in terms of the provisions of section 9 of the Guardianship of Minors Act. In the result there can be no dispute that this court has jurisdiction to hear any matter relating to custody or guardianship of minor children.

The law is now fairly settled that material disputes of fact can only be said to exist where the court cannot decide on a matter without hearing *viva voce* evidence. In this matter the legal practitioners presented themselves at the hearing with the two parties and the court had the opportunity to probe the allegations and counter-allegations made by the parties against each other. I was satisfied that there were no material disputes of fact which could not be resolved on the papers. The so-called disputes of fact are not disputes at all.

Circumstances of the parties

In cases of this nature where either of the parties claims to be the better parent over the other, the overriding consideration is the best interests of the children. The court has to weigh the circumstances of

each party and make a value judgment as to what are the best interests of the child. I shall now endeavour to summarise the personal circumstances of both Applicant and Respondent before deciding what the best interest of the children are.

The Applicant

The Applicant is a school teacher aged 28 years. She is employed at Patchway Primary School near Kadoma. She earns US$434 per month. She has experience in teaching Grades 2 and 5. Her working hours are from 0730 hours to 1300 hours from Monday to Friday. Applicant says that the minor children are young girls and it is in their best interests that she has custody of the children as she will give them motherly love and care. She lives in a two bedroom house which is decently furnished, with a security fence, and is less than a kilometre away from school.

Applicant states that her two girls will have a bedroom to share. She has fellow teachers and their families as neighbours who have children in the same age group as her children. This environment, so contends the Applicant is conducive to the minor children's upkeep as they will have an opportunity to make friends and grow up in a stable environment. The Applicant states that she has a maid to assist her look after the minor children during the time she will be at work. Applicant avers that she has secured a

place for Naishe at Smiles pre-school in Kadoma. She proposes to keep Kunashe at home for the remainder of the year as she is still below the recommended school going age.

The Respondent

The Respondent is a 32 year old single father. He is a Metallurgical Engineer and is employed at Zimasco Kwekwe, Division. He is employed as a Senior Projects Metallurgist. He earns a salary of US$2000 per month. He resides at 62 Flamboyant Drive Msasa Park, Kwekwe. He lives in a three bedroom house. He has the whole house to himself and his two minor daughters. There is an outside cottage where his niece and her husband reside. They assist him in looking after his daughters and for that reason he does not find it necessary to employee a maid. His working hours are 0700 hours to 1630 hours. The children are attending school at Cuddle Inn Nursery school in Kwekwe. They are collected from school by his niece. The Respondent's position is that the best interests of the minor children are served by maintaining the *status quo* and not disturbing their custody to the Applicant. The Respondent gave the general impression that the Applicant is not a suitable parent in that she is temperamental and of violent disposition. I found the accusations regarding the Applicant to be an unwarranted attack on her person and integrity. The Applicant clearly demonstrated her desire to retain custody of the children as she naturally felt plucked away from the two young girls. I am not convinced that the Applicant's character is so discredited to the extent that she could be regarded as incapable of having proper care and motherly love for her two girls.

Findings by the Court

I am satisfied that on the papers filed by both parties and enquires made of both parties, the two girls are still too young and of a tender age to allow them to remain in the custody of the Respondent. In this regard, I make the specific finding that the Applicant did not voluntarily surrender custody of the minor children to the Respondent. What further disturbs me is the fact that the Respondent deliberately sends the two minors to his parents in Shurugwi during school holidays in which event, the Applicant is forced to travel to Shurugwi and then only be accorded access to the children at the Respondent's parents house, without being allowed to have them even for a single day, let alone a weekend. Any mother who loves and cares for her children would not accept such restrictive visitation rights.

I have concluded that the best interests of the minor children would be best served if custody is granted to the Applicant for these primary reasons:

(a) the two children are still of tender age

(b) the fact that the minor children are girls weighs in favour of the Applicant although each case must be decided on its own merits, see the case of *Mtengwa v Mtengwa* 2010 (1) ZLR 312

(c) the Applicant will have more time with the minor children than the Respondent.

(d) the children still require the tender loving care of their mother

(e) the Applicant is entitled at law to have custody of the children in terms of section 5(1) of the Guardianship of Minors Act.

See the case of *Mutetwa v Mutetwa* 1993 (1) ZLR 177.

(f) the Respondent sought a protection order against the Applicant from the Kwekwe magistrates'

court thereby effectively barring the Applicant from visiting his house to see the children. It is clear that the Respondent has frustrated any attempts by the Applicant to exercise her reasonable right of access in respect of the minor children

I am inclined to follow the reasoning in *Sakupwanya v Sakupwanya* S-180-88 where the Supreme Court held that the wife's custody cannot be "defeated, delayed or postponed" pending the determination in the divorce proceedings unless the Respondent who has the onus of proof, establishes that their two minor daughters would suffer if they were left with her.

It is my firm view that the Respondent has not established, as the onus is upon him, that Applicant's character is such as to render it undesirable to leave the children in her custody. The Respondent clearly failed to articulate his assertions that the Applicant was of such a character as to be incapable of looking after her two young girls. To the contrary this court takes the view that the mother of the young children, especially girls is most suited to take care of their day to day needs. The courts should not, and must not lightly temper with the rights given to a mother under section 5(1) of the Guardianship of Minors Act.

In the result, it is ordered:-

1. That custody of the two minor children, being;

   (i) Naishe Shoko (born on 4 July 2009) and

   (ii) Kunashe Shoko (born on 10 January 2011)

   be awarded to Applicant pending finalisation of divorce proceedings in case number HC 381/13

2. that the Respondent shall forthwith cause the aforesaid minor children to be handed over to the Applicant together with their personal effects.

3. That in the event that Respondent fails to comply with this order within 48 hours of service of this order, the Officer-in-Charge, Kwekwe Central Police or any police station in whose jurisdiction the minor children are residing, be and is hereby directed and authorised to assist the Applicant to take custody of the aforesaid minor children together with their personal effects.

4. That Respondent shall pay maintenance in the sum of US$300 per month per child for the said children with effect from the date of this order pending finalisation of divorce proceedings under case number HC 381/13.

5. That Respondent shall pay costs of suit.

Messrs Morris-Davis and Company, Applicant's legal practitioners

Gonese Attorneys, C/O Lazarus and Sarif, respondent's legal practitioners