JOVITA SANYANGOWE
versus
ELVIS CHALIMBA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 16, 17 July and 19 November 2009

FAMILY LAW COURT

Opposed Application

S Machiridza, for applicant
L Uriri, for respondent

MUSAKWA J: The applicant is seeking an order that she be appointed the legal guardian of Tinashe Esther Chalimba, born on 17 August, 1996 and Anesu Esther Chalimba, born on 29 July, 1999, plus costs of suit.

In her founding affidavit the applicant states that she cohabited with the respondent from 1995. As a result of such cohabitation she gave birth to Tinashe Constance Chalimba on 17 August, 1996 and Anesu Esther Chalimba on 29 July, 1999. Due to the violent nature of the respondent the two separated. The applicant obtained an order for the custody of the minor children in the Magistrates court. She also sought a binding over order against the respondent in the Magistrates court. In addition she filed two applications for maintenance for the minor children.

In 2003 the applicant secured employment in New Zealand. With her mother having passed away she had no alternative but to leave the children with the respondent. She intended to collect the children later.

In 2005 she informed the respondent on the need for the children to join her but he refused. Later she learnt that the respondent had taken the children to South Africa. She subsequently visited them and she was allowed limited access to them. In 2007 she established that the children were back in Zimbabwe and attending school in Rusape where she visited them. She concludes by stating that since she was never married to the respondent she is the legal guardian of the children. She then prays for an order in terms of the draft.

In his opposing affidavit the respondent states that the South African High Court ruled that the children should stay with him, with the applicant having access. He contends that the applicant applied for custody of the children in the local courts but she did not prosecute the matter to finality. He also contends that he never agreed that the children would return to the applicant. He was never told that the applicant intended to leave the country. There was no communication from the applicant between January 2003 and June 2005. The applicant is said to have filed an application for custody of the children in the South African High Court and the matter had not yet been determined at the time of filing of the opposing affidavit.

Mr *Machiridza* submitted that it is trite that an unregistered customary law union does not bestow guardianship on the father. He prayed for the order sought despite the issue taken up by Mr *Uriri* regarding the propriety of such an order. It was further his submission that nothing turns on the criticism aimed at the draft order as it seeks to confirm the legal position that the applicant is the legal guardian of the children. He also urged the court to dispose of the matter notwithstanding that there is pending litigation between the parties in the South African courts.

On the other hand Mr *Uriri* submitted that the present proceedings are substantially similar to the matter that was pending before the South African courts. He thus urged this court to exercise its discretion by declining to determine the present matter as the applicant has not finalized the matter that is before the South African courts. It was his submission that as a matter of public policy a litigant should not hop from one court to the other without good cause. In truth and substance the present application is said to be exactly the same as the one pending before the South African courts, so Mr *Uriri* further argued.

On the merits Mr *Uriri* submitted that it is incompetent to grant the order sought. This is because the law recognizes two types of orders. There is what is termed a constitutive order which confers rights to one party and imposes obligations on the other party. The other order is declaratory as it does not confer rights but states what the position of the law is regarding a particular issue.

Mr *Uriri* further submitted that a litigant's case stands or falls on its founding affidavit. Thus the founding affidavit sets out the applicant's cause of action. If it is accepted that the father of children born out of wedlock has no rights regarding those children then that can only be the subject of a declaratory order as opposed to a constitutive one. Mr *Uriri* further pointed out paragraph 31 of the applicant's founding affidavit in which she seeks to be appointed

guardian of her children. If that is the case she does not require such an appointment as she is the natural guardian by operation of law.

Mr *Uriri* also submitted that the court must endeavor to look at the substance of the application as opposed to its form. In his view the substance of the present application is captured in paragraphs 13 to 28 of the founding affidavit. In essence the applicant is said to be seeking custody under the guise of an application for an order for guardianship. This according to Mr *Uriri,* is evidenced by what is contained in the founding affidavit. Finally, Mr *Uriri* submitted that the case of *Katedza* v *Chunga* 2003 (1) ZLR 470 (H) in which SMITH J granted a declaratory order in favour of the applicant to the effect that she was the guardian of her child was wrongly decided.

The defense of *lis alibi pendens* was raised for the first time in the respondent's heads of argument as it had not been raised as a point in *limine*. The authorities cited in the respondent's heads of argument are quite clear on the requirements for such a defence. As was stated by McNALLY JA in the case of *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (S) at p 172:

> "The defense raised by this allegation is the defense of *lis pendens*, sometimes known as *lis alibi pendens*. Herbstein and van Winsen in the *Civil Practice of the Superior Courts in South Africa* 3rd ed. at pp 269 et seq say, at pp 269-270:
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> > 'if an action is already pending between the parties and the plaintiff therein brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or different court, it is open to such defendant to take the objection of *lis pendens*, that is, another action respecting the identical subject matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision in the first action'."

As stated in the above-cited case the court has discretion to stay the second matter pending a decision on the first one. The application pending before the South African court is for an order of custody of the minor children. In the present matter the applicant is seeking to be appointed guardian of her own children. Mr *Uriri* urged this court to consider the substance of the present application as opposed to its form and make a finding that it is essentially a custody claim. Once I make such a finding I should then use my discretion to decline to determine the matter on the merits pending the decision on the application filed in South Africa.

I do not think that for purposes of determining whether a matter qualifies as *lis alibi pendens* one is required to look at the substance of each application as opposed to its form. I think it should suffice to consider whether the causes of action are the same. In the two matters the causes of action are different and as a result the defense of *lis alibi pendens* does not apply.

As regards the merits of the application I agree with Mr *Uriri*'s submission that the substance of the applicant's founding affidavit deals with her quest to have custody of the minor children. It is quite clear that the applicant relinquished custody of the children to the respondent and wants it restored. But she is seeking that in an indirect manner. If she was awarded custody by the Magistrates court it is not clear why she is not seeking the appropriate relief if such order has been violated.

There is no doubt that the mother of a child born out of wedlock has sole rights of custody and guardianship. In this respect see such authorities as *D* v *M* 1986 (1) ZLR 188 (HC), *Katedza* v *Chunga supra* and *Paul Cruth* v *Michele Thora Manuel* 1999 (1) ZLR 7(S). However, in my view this is not the real issue between the parties as can be noted from the papers. The crux of the applicant's founding affidavit is that she wants the children to join her in New Zealand but the respondent has refused to release the children.

I do not agree with Mr *Uriri*'s submission that the case of *Katedza* v *Chunga supra* was wrongly decided. I am mindful that that was an unopposed application but in my view it sets out the law clearly. In that case the applicant and first respondent stayed in an unregistered customary law union for three years which resulted in the birth of a son. The applicant had the child's surname changed to hers by notarial deed. Thereafter her legal practitioners sought the issuance of a new birth certificate by the Registrar-General who declined on the basis that the consent of the father of the child was required. Despite the applicant's legal practitioners pointing out that the father's consent was not a requirement as the child was born out of wedlock, the Registrar-General maintained his objection. It was also pointed to the applicant's legal practitioners that the child's father was opposed to the issuance of a new birth certificate without his consent and that he was prepared to fight the issue in the courts. Neither the father of the child nor the Registrar opposed the application.

In *Katedza*'s case *supra* the applicant sought a declaratory order to the effect that she was the guardian of her child and for an order that the Registrar-General issue the child with a new birth certificate in the applicant's name. Contrast that with the relief being sought in the present application. The applicant cannot be appointed guardian of her children when the law

already bestows her with such a right. There is no allegation that such rights have been violated. In short, the relief sought is not supported by the facts disclosed in the founding affidavit.

Therefore, the application is dismissed with costs.

Muzangaza, Mandaza & Tomana, applicant's legal practitioners
Honey & Blancenberg, respondent's legal practitioners