FARAYI JAMES MABASHA
versus
PAMELA GAZI

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 20 October 2016 & 27 September 2017

Civil Appeal

The appellant, in person
Mr *S Ushewokunze*, for the respondent

MWAYERA J: This appeal was heard and finalised on 20 October 2016 when we delivered an *ex tempore* judgment. The appellant has requested for the written reasons for our disposition. These are they.

The brief background to the matter is that the appellant and respondent sired a child out of wedlock on 21 June 2013. The appellant approached the magistrate's court in 2013, seeking access rights to the said child. The court *a quo* granted the appellant access rights to be exercised during the presence of the respondent that is the mother of the child. The court *a quo* ordered as follows "Applicant is granted reasonable access to the minor child every weekend in the presence of the mother and in consultation with the respondent." The appellant, applicant then was not happy with the decision of the court *a quo* and thus mounted the present appeal.

The grounds of appeal as discerned from the record are as follows:

1. "The learned magistrate erred in fact and in law in granting the respondent unfettered discretion of deciding when the appellant can have access by refusing to give a time line

when in fact the respondent had offered access over alternate weekends from 8.00 am to 4.00 pm and 9.00 am to 3.00 am on Saturdays and Sundays.

2. The learned magistrate erred in granting the appellant reasonable access when the word 'reasonable' is ambiguous and liable to be interpreted to suit the whims of the interpreter.
3. The learned magistrate erred infact and in law when it granted access to the appellant which is to be exercised in consultation and in the presence of the respondent when there is evidence of bad blood existing between the appellant and respondent and no evidence was led that the appellant is a danger to the welfare and morals of the child."

It is apparent from the judgment of the court *a quo* that the trial court took into account the fact that the child for whom access was sought was 1 year 8 months old and it still required the mother's attention. The court *a quo* centered its decision on what it viewed as the best interest of the child in the circumstances. Even though the respondent had agreed to specified access in terms of time the court *a quo* did not deem it necessary to define the reasonable access time during weekends. Further the court *a quo* ordered that the access was to be in consultation with the respondent and in her presence. The defendant argued that the decision of the court *a quo* was erroneous in fact and at law by giving the respondent unfettered discretion to decide when the appellant can have access to his child. The access rights were left open to the discretion of the respondent at the expense of the best interest of the child. The argument was that no meaningful relationship would be achieved between the father and child if the order for access was at the discretion of the mother. The appellant argued that, failure to specify the access rights given the background of the bitter relationship between the parties, with the appellant having ditched the respondent and also appellant's wife suing the respondent for adultery damages, was not according access rights which would entail nurturing a meaningful relationship between the child and the non-custodian parent. Such a vague order would not be in the best interest of the child. More so given the respondent herself had offered specific access. It is important to note that a child has a right to parental care and guidance. The purpose of access is to ensure that a child enjoys a meaningful relationship with the non-custodian parent. The question is would such a meaningful relationship be cultivated if access is unspecified and left to the discretion of the custodian parent. In my view the answer is in the negative more so given the circumstances in this case, were the parents of the child are not enjoying the best interactive relations. If anything besides having a

child together there is no evidence of cordial relationship existing. What is apparent from the record is that the appellant's wife is suing the respondent for adultery damages while the appellant himself no longer has a love relationship with the respondent. By simply granting unspecific access the court left the appellant and child's relationship to be determined by the respondent. It is my considered view that, that would not promote nurturing of a meaningful relationship between the child and the non-custodian parent. Such a scenario would not amount to the best interest of the child.

In the case of *Felix Kumirai* v *Memory Kumirayi* HH 6/99 where the plaintiff claimed reasonable unsupervised access to the minor child as a non-custodian parent, the court emphasized on the importance of a good relationship between the parent and the child and that good reason should exist to deny them a meaningful relationship. MAKARAU J as she then was stated that

> "It is trite that access in the absence of good reason is not to be confined to such an extent in that it stultifies the nurturing of a meaningful relationship between the child and non-custodial parent."

Such an observation resonates well with the constitution in that it is the best interest of a child which are of paramount interest when dealing with any children's issues. The child has a right to both parent's love care and guidance. Such that in the absence of any special reasons militating against such right then the non-custodian parent ought to be accorded access to the child. In the present case the court *a quo* recognized the primary need to accord access rights. The only anomaly with the court's finding is the fact that despite the parties agreeing on definite access rights with specific time frames the court chose to grant an order open to the respondent's own interpretation as regards reasonable access time for supervised access. I must mention that given the age of the child there was nothing wrong with access being supervised and being over every weekend but failure to define the reasonable access and time frames rendered hollow the court *a quo's* order. Leaving access to the discretion of the respondent would not be in the best interest of the child as that would affect the creation and cultivation of a meaningful relationship between of the appellant as father, and the child. In this case the magistrate correctly accorded the appellant access rights and to that extent we find no fault with the court *a quo's* reasoning. However, by leaving reasonable supervised access to be defined by the respondent, the court granted access with one hand and took away the right to access with other hand. This is more so given the appellant and respondent are not married and are not enjoying the best of relations. If the

respondent chooses to grant reasonable access over weekend as amounting to 30 minutes or an hour she would not be flouting the court order which granted undefined reasonable access over every weekend. It is the lack of specificity and clarity in the order which raised problems. In our view such an order is problematic and was not properly couched for purposes of it being clear and specific and enforceable. To the extent of the vagueness of the order we hold the view that the court *a quo* erred and misdirected itself by leaving access to the whims and discretion of the respondent. There is need to clearly specify and spell out the access rights for purpose of giving an order capable of enforcement. In the absence of good reason for denying access there would be no basis for living access to the discretion of the custodian parent. See *N* v *N* 1999 (1) ZLR 459. What is important is the best interest of the child and having access to both parents would constitute such best interest as long as the contact or access does not pose a danger to the life of the child in question.

The appellant sought to raise debate that the fact that a child born out of wedlock's custody and guardianship is automatically vested in the mother is discriminatory and thus *ultra vire* s 56 of the Constitution. Section 56 states

1. "all person are equal before the law and have the right to equal protection and benefit of the law."
2. ……..
3. Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or special origin, language, class, religious belief, political affiliation, opinion, custom culture, sex gender, marital status, age pregnancy, disability or economic or social status or whether they were born in or out of wedlock.
4. A person is treated in a discriminatory manner for purposes of subsection (3) if-
    (a) They are subjected directly or indirectly to a condition, restriction or disability, to which other people are not subjected; or
    (b) Other people are accorded directly or indirectly a privilege or advantage which they are not accorded

5. Discrimination on any grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness justice, human dignity, equality and freedom[underlining my emphasis].

In my view the fact that the father of a child born out of wedlock has to apply for access is necessary so as to avoid unnecessary haggling over minor children which would be detrimental to the welfare and best interests of the child. The obvious reason being the fact that the child born out of wedlock will be in the custody of its mother unless evidence is adduced showing the impropriety of such a position. This is the situation where the discrimination is fair and justifiable in a progressive society. The position of our law as set out in *Cruth* v *Manuel* 1999 (1) ZLR 75 C and also *Nyakopa* v *Muzengi* HH 181/12 is clear that there is no inherent right to access or custody for a father of a minor illegitimate child, but that the father, in the same manner as other third parties has a right to claim and be granted the access and or custody rights if he satisfies the court it is in the best interests of the child.

The primary consideration is the best interest of the child. One should not pay a blind eye to the Children's Act and the Constitutional provisions which speak to the paramount importance of the child's rights. The obvious confusion created by the child being born out of wedlock had to be minimized by certainty on who should be the custodian parent. In the furtherance of the interest of the child there is room for the non-custodian parent to apply and be granted rights upon satisfying the court that it is not detrimental to the child. There is need for certainty so as to minimize disruption of the child's welfare. The appellant fathered a child out of wedlock and the position of our law is clear that the mother of the child is the custodian parent.

However, the father has a right to claim and be granted these rights if he satisfies the court that it is in the best interest of the child. In this case appellant sought access rights and was granted rights though they were not specified thus occasioning this appeal.

I must mention that the issue of custody and guardianship is not before us as it never arose at the court *a quo*. The appellant sought access rights and he was granted some albeit, not specific. There is no constitutional issue for debate here. The law is clear that the courts consider the best interests of the child. A party requiring custody or guardianship is not barred from approaching the court and seeking to be granted custody or guardianship on the basis that the custodian parent is not fit and proper to be so designated and that it is not in the best interest of the minor child born

out of wedlock to be retained in the custody of the mother. The fact that our law provides for such an avenue for a party desiring to exercise access, custody or guardianship rights shows the flexibility availed by the law. By granting access rights the court will be upholding the rights of both parents to maintain personal relations and direct contact with the child and this is desirable where it is in the best interest of the child concerned. The court *a quo* granted access rights to the appellant so as to foster that personal relation between the father and child. The only problem with the order is that it lacks specificity on time and how the access rights were to be regulated.

The position in our law is more or less like the South African position. Section 29 of the Constitution of the Republic of South Africa, stipulates that in all matters concerning a child, it is the child's best interest that are paramount and every child has a right to parental care. The South African Natural Fathers of Children Born Out Of Wedlock Act 89/1997 s (2) (1) thereof provides that a court may on application by a natural father of a child born out of wedlock make an order granting him access rights or custody or guardianship on conditions determined by the court.

This resonates well with our Children's Act [*Chapter 5:06*] and Constitution s 81 on Rights of Children.

Section 81 Rights of Children

"(1) Every child that is to say every boy and girl under the age of 18 years, has a right-

(a) ……
(b) ……
(c) ……
(d) To family or parental care, or to appropriate care when removed from family environment.
(2) A child's best interest are paramount in every matter concerning the child."

The court *a quo* was alive to these provisions when it granted access rights to the appellant. The only misgiving we had with the order is the wide couching of same which left access at the mercy of the respondent. It is because of that anomaly that we then held that the appeal partially succeeds in that we spelt out the access times and dropped out the need for supervised access.

Accordingly it is ordered that

1. The appeal partially succeeds and the decision of the court *a quo* is set aside and substituted as follows;
2. The appellant be and is hereby granted reasonable access to the minor child every alternate weekend on Saturdays and Sundays between 9.00 am and 4.00 pm per the parties arrangement.

3. Each party bears its own costs.

MUNANGATI- MANONGWA J *agrees*

Ushewokunze Law Chambers, respondent's legal practitioners