JACINTA JOAQUINA ANASTANSIA CHAPANER nee CARDOSO
versus
ROSHAN CHAPANER

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 14, 15 November 2016 and 24 August 2017

**Matrimonial action**

*D K Chikumba,* for the plaintiff
*T Magwaliba,* for the defendant

CHITAKUNYE J. The plaintiff and the defendant were joined in holy matrimony in terms of the Marriage Act [*Chapter 5:11*] on 22 September 2007.

They were blessed with one child born on 21 March 2010.

Their marriage was however beset with some differences such that on 22 November 2012 the plaintiff issued summons against the defendant seeking *inter alia* a decree of divorce and other ancillary relief.

In seeking the dissolution of the marriage the plaintiff alleged that the marriage relationship between the parties has irretrievably broken down to an extent whereby there is no reasonable prospect of restoration to a normal marriage relationship. The factors she alluded to for the breakdown included that:

1. The parties have lost love and affection for each other; and
2. The parties have lived apart for a continuous period in excess of nine months immediately preceding the commencement of these proceedings.

Due to the irretrievable breakdown of the marriage relationship the plaintiff sought a decree of divorce; custody of the minor child and distribution of the movable assets the parties had acquired during their brief marital life. She also sought maintenance for herself and for the minor child.

The defendant, in his plea, conceded that the marriage has irretrievably broken down. He however contested the manner of distribution of the property acquired during the marriage and access rights for the non-custodian parent.

In a bid to advance his interests as well the defendant filed a counter claim in which he basically confirmed the breakdown of the marriage and that the plaintiff be awarded custody of the minor child. He contended that the award of custody to the plaintiff must however be subject to the defendant being granted reasonable rights of access in respect of the minor child in a way that will enhance a sound and meaningful paternal relationship between him and the child.

On maintenance, the defendant accepted to pay maintenance for the minor child but not at the rate suggested by the plaintiff. He however contested post divorce spousal maintenance for the plaintiff.

At a pre-trial conference held in terms of r 182 of the High Court Rules, 1971, the parties agreed that:

1. The marriage had irretrievably broken down hence a decree of divorce should be granted
2. The defendant admitted owing the plaintiff a sum of USD 2,750.00;
3. The maintenance of the minor child should be at a rate of US$400.00 per month.

The issues referred to trial were as follows:

1. What order should be made in respect of custody of the minor child and reasonable access by the non-custodian parent?
2. Whether or not defendant should pay post divorce spousal maintenance and how much?
3. The order to be made in respect of matrimonial property.
4. Which party to pay costs of suit and on what scale?

On the trial date the parties had reached settlement on the issues of custody and distribution of movable property. They agreed that the plaintiff be awarded custody of the minor child and that each party retains the movable property which was in his or her possession.

What remained for determination as at the commencement of trial was narrowed down to two issues namely:

1. What would be reasonable access for the non-custodian parent; and
2. Whether or not the defendant should pay post divorce spousal maintenance? If so, how much?

During the plaintiff's evidence, and also under cross examination, the plaintiff abandoned her claim for post divorce spousal maintenance. She, however, indicated that the defendant should pay $620.00 per month as maintenance for the minor child. Apparently, the initial figure of US$400.00 that the defendant had been paying had been increased to US$620.00 and, as at the date of trial, that is the figure the defendant was paying. Thus the issues of access and quantum of maintenance for the minor child remained to be determined.

The plaintiff gave evidence and called one witness. Thereafter the defendant gave evidence.

From the evidence adduced the parties were agreed that the defendant should be granted reasonable access to the minor child. The bone of contention was on what constitutes reasonable access in the circumstances of this case.

During the pendency of the case I directed that parties engage the assistance of experts in clinical psychology to prepare reports which could assist the parties and the court in arriving at a decision which will be in the best interest of the child. The first such report was prepared by Zimbabwe Institute of Systemic Therapy (CONNECT) and is dated 15th July 2015. The second report was prepared by Mr. L Kajawu, a psycho-therapist and clinical psychologist and is dated 21st September 2015. Both the plaintiff and the defendant accepted the findings and recommendations in the two reports but would not agree on what would constitute reasonable access in this case.

The first issue is thus on what would constitute reasonable access in the circumstances of this case.

It was common cause that currently the defendant was allowed access to the minor child on alternate weekends on Saturdays from 2 pm to 5 pm and on Sundays from 2 pm to 4 pm. This access would be under the watchful eye of the plaintiff as she will be present. This is the access the defendant has been afforded since the separation of the parties.

The plaintiff, in her evidence, argued for the continuation of such access regime. Upon being asked to consider the contents of the assessment reports she still maintained that only access during the day should be granted. It was clear that she was vehemently opposed to the defendant having access to the child overnight.

The plaintiff's grounds for seeking to maintain such access regime included that:

1. During the duration of their marriage the defendant had constantly abused her and so she feared he would do the same to the child. She alluded to some incidents that she alleged occurred during the marriage when the two of them quarrelled;

2. The defendant drinks alcohol and when he is drunk he is reckless and is short tempered. Basically the plaintiff's stance was based on what she portrayed as defendant's character which she feared would rub onto the child.
3. She feared that the defendant would take the child outside this court's jurisdiction.
4. She felt strongly that the child should not be subjected to or exposed to what she termed religious dogma or paraphernalia other than the Catholic faith. She thus feared that if the child is taken to the defendant's home the child will be subjected to or exposed to the religion of the defendant's parents (Muslim) which religion she seemed to have no respect for.

The plaintiff's brother, Francisco Benjamin Cardoso, gave evidence in support of her stance. There was nothing of substance in his testimony but sheer regurgitation of the plaintiff's stance *vis-a-vis* the access regime preferred and the reasons thereof.

Both the plaintiff and her brother could not see reason in granting the defendant reasonable access in a home environment. They both seemed to be of the view that access period should only be progressively increased once the child is in its teens. As for now they preferred the supervised access during the day and in a public place as has been the case.

The defendant, on the other hand, testified that the current access regime is unreasonable and not conducive for him to cultivate meaningful bond with the child. He alluded to the fact that the plaintiff has virtually shut out the child from his life serve for those two weekends per month at an average of 5 hours per weekend in the plaintiff's presence. He has been barred from speaking to the child even over the phone. The only instance he spoke to the child over the phone was when the judge who presided over the pre-trial conference directed that he should be allowed to speak to the child on the phone and it was only during that pre-trial conference hearing and nothing more.

He further stated that the plaintiff also barred him from visiting the child at school by instructing school authorities at Twin River School not to allow him or his relatives to enter the school premises. This is a fact the plaintiff confirmed.

It is in these circumstances that the defendant sought a reasonable access regime in the following manner:

1. Access on alternate weekends from 5 pm on Friday to 5 pm on Sunday;
2. During alternate public holidays and half of the school holiday;
3. Alternate birthdays and festive periods including the periods of Eid and Diwali;
4. Full and unrestricted entitlement to attend at all school sporting or other functions that the minor child may attend or be involved in;
5. Any other extra-mural or cultural activities in which the minor child may be involved.

It was apparent during his evidence that he has been denied reasonable access that would ordinary be due to a responsible parent. He expressed his desire to see his child more often and the fact that he misses the child so much in various emails to the plaintiff which she acknowledged but she would not give in.

In determining what would be reasonable access for the defendant court is enjoined to consider the best interest of the child above the personal or selfish interests and desires of the parents. In this regard s 81 (2) of the Zimbabwe Constitution provides that:

> "A child's best interests are paramount in every matter concerning the child."

This is in keeping with Regional and International instruments which Zimbabwe has ratified.

For instance, at regional level Article 4 (1) of the African Charter on the Rights and Welfare of the Child states that:

> "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

At international level Article 3(1) of the United Nations Convention on the Rights of the Child states that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The primacy of the best interests of the child must thus be considered in determining what would be reasonable rights of access to be enjoyed by the non custodian parents. The access regime to be granted must be such as would advance the best interests of the child in its relationship with its parents.

In *Marais* v *Marais* 1960 (1) SA 844 at 847 DE VILLIERS A J opined that in deciding on access:-

> "what is aimed at is the preservation of some degree of parent-and-child relationship between the non-custodian parent and the child, for the benefit of both, but in a manner not incompatible in substance with the vesting of undivided control and regulation of the care and upbringing of the child in the custodian parent……. On the other hand access arrangements are, in the absence of good reason, not to be so confined as to stultify the nurturing of real affection and companionship between non-custodian parent and child. Within these broad limits access arrangements are matters of degree, due regard being paid to each corner of the triangle. The interests of the child would naturally be paramount, where their dictates are clear; but the human needs and feelings of either parent are not to be overridden unnecessarily…."

In *Rosa* v *Rosa* 1980 ZLR 387 court reiterated the above and held that:

> "An effective balance must be sought between the rights of access of the custodian and the non-custodian parent. Children should not lose their affection and love for the non-custodian parent. (*Marais* v *Marais* 1960(1) SA 844 (CPD) referred. Rights of access should cultivate an affinity between parent and child."

What is in the best interest of the child is that the non custodian parent be afforded adequate time to cultivate meaningful relationship with the child. Such time should not be under the watchful eyes of a custodian parent unless it has been proven that the child is likely to be harmed by the non custodian parent. In the absence of genuine fear, founded on bona fide grounds, of likely harm or danger to the child, the non custodian parent must not be inhibited from enjoying unsupervised quality time with the child for such duration as is necessary for effective parent and child relationship. Where, as in this case, the parents' relationship is strained to an extent of not talking to each other except through the police or their legal practitioners, the presence of the custodian parent would act as a hindrance to proper interaction between the non custodian parent and the child.

In *casu*, the plaintiff's fears over the child should defendant be granted more access than is currently the situation was in my view not well founded. It was primarily based on her own selfish interests of wanting to get at the defendant for the failed relationship. Indeed even the incidents she sought to rely on to justify her stance all pertained to the failed relationship between the two parents and had nothing to do with the manner the defendant has treated the child since its birth.

In *Kumirai* v *Kumirai* 2006 (1) ZLR 134, a case wherein the custodian parent was insisting on a restrictive and supervised access , just as in this case, MAKARAU J (as she then was) at 138C-D aptly stated that:

> "It is trite that access, in the absence of good reasons, is not to be confined to such an extent that it stultifies the nurturing of a meaningful relationship between the child and the non-custodian parent. See *Marais* v *Marais* 1960 (1) SA 844(C) and *N* v *N* 1999 (1) ZLR 459 (H)."

If a custodian parent wants the non custodian parent to be so restricted in his rights of access and duration thereof he or she should lay a firm basis justifying such. The onus is upon the custodian parent to prove that the circumstances of the case warrant the curtailing of the expected access regime and necessitate supervision.

In the *Kumirai* v *Kumirai* (*supra*), the non custodian parent claimed for reasonable access whilst the custodian parent contended that access should be supervised. At p 138F-139C the learned judge had this to say on the custodian parent's stance:

> "With respect, the defendant was not properly advised as to what evidence would persuade the court to deny a natural parent the right of unsupervised access to his or her child. The plaintiff is not a stranger to the child whose unsupervised introduction into the child's life may traumatise the child. It was not shown that the plaintiff has been violent or abusive towards the child (see *N v N supra*), or that his social life or domestic arrangements are such that the exposure to them will injure the best interests of the minor child. …… That the plaintiff will have other women in his life now he is divorced from the defendant cannot be avoided. The minor child will have to know of and be acquainted with his father's friends sooner rather than later. That cannot be avoided and cannot be used as a ground for denying the father access to his child, as long as contact with his father's female friend or friends is tastefully handled. ----
>
> In conclusion, it is my finding that the Plaintiff poses no danger to the life, health or morals of the minor child and as such, his access to the minor child shall not be rendered illusory by the imposition of any restrictions other than what is reasonable and in the best interest of the child. His access to the child shall not be supervised."

In *casu*, I have alluded to the flimsy grounds advanced by the plaintiff for seeking to maintain supervised access, in a public place and for very minimal hours. The two assessment reports, exh 1, confirm that there is need for an access regime that will assist in the nurturing of a father -child relationship.

It is pertinent to note that the persons who compiled the reports visited the homes of the two parents at different intervals and interviewed the parties and their close relatives. Mr Kajawu went further and interviewed school authorities at Twin River school where the child is attending. After a thorough assessment, Mr Dennis Mudede of CONNECT observed, of the two families, that:

a) Both the maternal and paternal grand parents would want to be involved in the raising of Shaylin. To be effective grandparents they need to work on the anger of seeing their children divorcing;
b) Roshan and Jacinta need to be helped to appreciate that it is their spousal relationship which is ending and not their parental roles;
c) They both seem to want to play a significant role in the upbringing of their child;
d) However, they need to work on improving their communication and avoid triangulating the child as this might have long lasting negative effects on the development of the child.

He proceeded to recommend that:

a) The child remains in the custody of the mother, Jacinta;
b) the father, Roshan is allowed access to the child in a home environment;
c) Both parents attend counselling with a counsellor of their choice on how to manage their divorce/separation and parental roles.

Mr. Kajawu in his assessment observed similar traits as regards the parents and observed that:

> "The mother denies the father to see the child at school. The parents were shouting and fighting each other before separation. Currently the parents have no direct contact except through the police or their lawyers."

He also noted that:

> "The school views the child would be happier with the mother who was giving full support of the child. However, the school feels the child should have exposure to both parents. The school encourages both parents to communicate openly when dealing with the child's matters."

It was upon consideration of the above that Mr Kajawu proceeded to recommend the defendant should have reasonable access to the child as suggested by the school..

These reports in my view support unsupervised access and more access time. In the circumstance the restrictive access regime advocated by the plaintiff is untenable. Such access regime is evident of the plaintiff's paranoiac obsession with the issues between the parents and has nothing to do with the best interests of the child.

The plaintiff's alleged fear that the defendant will take the child out of the country is unfounded. It was agreed that at some point when the plaintiff was admitted in hospital the defendant had custody of the child for about two days. He did not take or attempt to take the child out of the country during those days and neither was it alleged that he caused harm to the child during that period.

As regards the suitability of the defendant's residence to host the child during the access period, no issue was raised as clearly the assessment reports showed that there was suitable accommodation for the child.

The other aspect the plaintiff raised was the defendant's drinking habits. In my view, it is only when such drinking habits pose a danger to the child that it should be cause for concern. In the circumstances of this case, no such danger was posed to the child during the period they stayed together and the defendant stated categorically that he would tone down on this drinking in order to be with the child.

A further aspect of concern to the plaintiff was the religion of the defendant's parents. This was really a non issue. The plaintiff was simply raising it to show her own religious intolerance and prejudices yet she had agreed to marry a son of Muslim and Hindu parents knowing full well those are the parents -in- laws she will stay with. Clearly in my view the

issue of religion should not be a bar to the child interacting with its paternal relatives and father in their home environment.

After a careful analysis of the evidence adduced and considering what is in the best interest of the child, I am of the view that the defendant should be allowed unsupervised access in a home environment of his choice. He should also not be barred from attending the school where the child is enrolled.

The next issue pertains to the quantum of maintenance for the minor child.
The pre-trial conference minute states that:

> "Both parties admit that maintenance of the minor child should be at the rate of US$400-00 per month."

It would appear that payments in the stated amount were made till a point when there was an upwards adjustment to US$620.00 which is the figure the plaintiff now wants to be made an order of this court. The defendant on the other hand asked for a reduction of the maintenance sum to US$350.00.

It is pertinent to note that under common law both parents have a legal obligation to contribute towards the maintenance of their children each according to their means. In the assessment of how much each parent should contribute, the needs of the child are considered together with the means of the parents. If the means and necessary expenses are such that the income available cannot sustain a certain lifestyle then that lifestyle may have to give way to what the parties can afford from their own resources. In the assessment of the quantum the needs of the child take precedence over the moral obligation to look after other relations. See *Edwards* v *Chizema* 1992 (2) ZLR 14 (SC).

Where parties have reached agreement on the quantum of maintenance to be paid it is safe to assume that they have taken into account the ability of the responsible person to meet that agreed sum. In *casu*, the parties agreed on US$400.00 after taking into account the defendant's income of US$952.00 per month and the needs of the child. Later that sum was increased to US$620.00 in circumstances they are not agreed. The plaintiff alleged that they voluntarily agreed to the new figure whilst the defendant contended that he only accepted to pay that sum because the plaintiff had threatened to withdraw the child from Twin River School. He thus has been paying that sum from borrowings from wealthy relatives and not that he can afford such an amount. As this was maintenance pending finalisation of this trial he hoped the issue would be resolved by this court considering his means against the sum. It

is in these circumstances that he contended that his true income of US$952.00 be considered and a reduction to US$350.00 be granted.

Counsel for the defendant contended that as the figure of US$400.00 was admitted to by both parties, it must be taken as an admission that cannot be lightly overlooked see *DD Transport (Pvt) Ltd* v *Abbot* 1988 (2) ZLR 92 (S). In as far as that admission was not withdrawn it should stand as the parties position on what would be reasonable maintenance for the child.

Whilst it is true that an admission should not be lightly disregarded, in *casu*, the parties conceded that they had upped the sum to $620.00 which the defendant has since been paying. In my view the determining factor should be the circumstances under which the agreed sum was changed to a new figure of US$620.00. If it is that the defendant offered that figure voluntarily in recognition of the fact that the child was now attending school then that cannot be ignored on the premise that the parties had previously agreed on a lesser sum. If, on the other hand, the circumstances of the increase were not as stated above then court is enjoined to consider the issue and determine whether to adhere to what the parties had agreed or not.

It is important to consider the ability of the defendant to meet the obligation. Maintenance is not meant as a punishment or a way of getting back at the other party. It must thus be within the means of the payer. In *casu*, there is no dispute that the defendant's income is US$952.00 per month. It is from that sum that he has to pay maintenance for the child and his own needs.

The plaintiff seemed to accept as much that a sum of $620.00 is about two thirds of the defendant's income. She also did not deny that defendant has to borrow in order to pay $620.00. The question is thus: is paying two thirds of one's salary towards the maintenance of a child sustainable? Clearly if the defendant has to borrow, it means the quantum is unsustainable. This lends credence to the contention that he only agreed to this under the threat that plaintiff would withdraw the child from the school. This must also be taken in the background of a father who was being denied meaningful access and communication with his child due to the strained relations with the mother.

Counsel for defendant asked plaintiff on her own contribution and from her evidence it was clear that all the needs of the child could be met from the sum of $400.00 without burdening the defendant with having to borrow or to seek donations from wealthy relatives in order to meet his maintenance obligations.

I am of the view that maintenance be maintained at the agreed sum of US$400.00 per month. Should the need to adjust arise parties will sincerely approach the issue and not with the threat of denying or compromising the child's education.

Costs of suit

The plaintiff argued that each party should pay their own costs. The defendant on the other hand contended that as the plaintiff has been unreasonable in her insistence on restrictive and supervised access, she must pay the costs of this suit.

I am of the view that by virtue of the emotional nature of matrimonial matters orders for costs against a party must be treated with circumspection. Whilst it is true that had the plaintiff been reasonable on the aspect of access this matter would not have gone through a contested trial and thus costs would have been curtailed, it is nevertheless a reality that courts determination was still necessary for court to decide on the dissolution of the marriage and other ancillary relief. See *Kumirai* v *Kumirai (supra).*

I am of the view that each party should bear their own costs of suit.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted
2. The plaintiff be and is hereby awarded custody of the minor child, namely Shaylin Xavier Chapaner, born on 21st March 2010.
3. The defendant is hereby granted reasonable rights of access to the aforesaid minor child during the following periods:
   a) alternate weekends from 5.00 pm on Friday to 5.00 pm on Sunday;
   b) during alternate public holidays; and
   c) for half of the school holidays.
4. The defendant shall pay maintenance for the minor child in the sum of US$400.00 per month until the said minor child attains the age of eighteen (18) years or becomes self supporting whichever is earlier .
5. Each party shall retain the property in his or her possession as their sole and exclusive property.
6. The defendant shall reimburse to the plaintiff the sum of US$2 750.00 upon the granting of this order.
7. Each party shall bear their own costs of suit.

*Chizengeya & Partners*, plaintiff's legal practitioners
*Atherstone and Cook*, defendant's legal practitioners