

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: CA 02/2017

In the matter between:

LISIAS KONDJENI PAULUS

APPELLANT

and

NDILIMEKE TUHAFENI

RESPONDENT

Neutral citation: *Paulus v Tuhafeni* (CA 02/2017) [2018] NAHCNLD 40 (23 April 2018)

Coram: CHEDA J

Heard: 22 March 2018

Delivered: 23 April 2018

Flynote: Custody of minor children must be awarded to a parent or guardian/caregiver who is favoured by the principle of the best interest of the children. A Social Welfare Report, though not binding is however persuasive and should be ignored if the conclusion is not in the interest of the children.

Summary: Applicant and respondent's daughter were customarily married and had 5 children. She died and left behind five minor children. Applicant gave custody to respondent who then started receiving a social grant, upon realising this new development, he forcibly took the children away from her. The court upon hearing evidence, granted custody to the respondent. He appealed this decision. The Social Worker reported that applicant was not a suitable parent. The appeal court adopted this report. Appeal is dismissed.

ORDER

The appeal is dismissed with costs.

JUDGMENT

CHEDA J:

[1] This is an appeal against a decision by the Magistrate's Court which sat at Eenhana on the 07th of October 2016, wherein, it made an order in the following terms:

'Order: 1. That the said child,

- (a) Be placed in the custody of Ms. Ndilimeke Tuhafeni
- 1. Be placed under supervision of a Social Worker Ministry of Gender Equality and Child Welfare.
- 2. And that a Foster Care grant to be paid in terms of Section 89 (1) of the Children's Act (Act 33 of 1960) to Ms. Ndilimeke Tuhafeni ID: (sic)'

[2] The historical background of this matter makes a sad reading in that appellant has five children with respondent's daughter one Martha Haindongo who has since passed away. The parties were married to each other although it is not clear what type

of marriage this was, but, since it was in the north it is safe to assume that it was under customary law in terms of the Native Administration Proclamation Act, Act 15 of 1928.

[3] The children consist of a girl and four boys. It is not in dispute that after his wife's demise, appellant voluntarily gave custody of the said children to his mother-in-law, the now respondent.

[4] First and foremost, I should note that the appeal was way out of time in terms of section 6 of the Children's Status Act, Act 6 of 2006. The said appeal is further regulated by regulation 19(2) of the Regulations to the Children Status Act, Act 6 of 2006 which states:

'19 (2) An appeal in terms of section 6 of the Act must be noted within 30 days of the granting of the order appealed against and any cross-appeal must be noted within seven days of the noting of the appeal.'

[5] Appellant was supposed to note his appeal within 30 days. The general principle is that the rules of court should be observed and adhered to by all and sundry. This is trite. However, sight should not be lost of the fact that rules are there for the court's convenience in the furtherance of the ultimate attainment of justice. Therefore, the court, in my view should not be a slave of its own rules. The court should be in a position to administer the rules in a way that litigants are left with a feeling that the courts are prepared to fall backwards in order to give them audience especially when there is no prejudice to the parties themselves.

[6] The parties are villagers from the previously disadvantaged society, who like all Namibians are entitled to justice. It is through this process that they should feel that they are part of the legal system of their land. The parties were previously represented, but, they are now self-actors and they, however, still yearn for justice. This is despite the fact they are guilty of non-compliance with the rules of court. Justice should be explored at all cost and a good example in my view, is where the interest of the children are a core issue. In that case a litigant is not supposed to wriggle out of litigation due to a minor legal technicality in the circumstances.

[7] Appellant strongly feels that he should appeal the decision of the court *a quo* and it will be wrong for him to be shut out of the court on the basis of non-compliance. Non-compliance indeed is a bar from proceedings in the absence of an application for condonation. However, in *casu*, the court should avoid an armchair approach, but, instead adopt a robust one for the following distinct reasons:

- a) that the appellant is a self-actor and is not familiar with the rules and is not expected to be; and
- b) that, this is a matter which involves children's rights which are very important to the court, hence the High Court's position as an upper guardian of all minors decided *mero motu* to condone the non-compliance with the rules.

[8] In my considered view, the previously disadvantaged members of our society should not be placed in the same platform in certain issues due to historical factual circumstances, which are not of their making, see *Hange & others v Ormann* NLLP 2014 (8) 451 LCN at para (19) where I stated:

'It is a fact that applicants belong to the previously disadvantaged group of society and some of the consequences of their socio-historical background manifest themselves in their illiteracy. This is a fact which the court, in my view, can ill afford to ignore as by doing so, it will be abdicating its judicial duty of dispensing justice fairly to all manner of people irrespective of their social background.'

[9] It is now trite that our courts have a tendency of leaning in favour of the interest of the children as a serious and determining consideration, see also *JM & another v SM* 2016 (1) NR 27 (HC) and *McDonald v Moor* (A244-2015) [2015] NAHCMD 235 (21/09/2015).

[10] The second issue regarding non-compliance is failure by the Registrar's Office to act timeously. Appellant noted his appeal on 18 January 2017. The appellant is supposed to request for a date of hearing within 40 days of noting an appeal in terms of Rule 116(5) and thereafter in terms of sub rule (9) the Clerk of Court upon receipt

of the request for a set down date which date must be within 40 days. Sub rule 5 reads thus:

‘(5) The appellant must, within 40 days of noting an appeal, request from the registrar in writing and on notice to all other parties for the assignment of a date for the hearing of the appeal and must at the same time make available to the registrar in writing his or her full residential and postal addresses and the address of his or her legal practitioner if he or she is represented.

(9) On receipt of the request for assignment of a date, the registrar must forthwith assign a date of hearing, which date must be at least 40 days after the receipt of the application for the assignment of a date of hearing, unless all parties consent in writing to an earlier date but the registrar may not assign a date of hearing until subrule (12) has been duly complied with.’

[11] The Registrar’s Office received the record of proceedings from the Magistrate Court on the 18 April 2017 and is supposed to have set the matter down within 40 days. However, this was not done, what happened is that, the Registrar’s Office, wrote a letter directly to the Judge requesting for a date of hearing. This was improper, as all correspondence to a Judge should be addressed to the Judge’ Secretary and/or Clerk and never to a Judge directly. In all other correspondences all letters are addressed to the Registrar of the High Court or Secretary to the Judge. The Registrar’s Office is accordingly encouraged to adhere to this practice.

[12] Married to that problem is that, there was no need for a letter. What the Registrar’s Office should have done is to set the matter down for hearing within 40 days. This was, however, followed by a notice of set down which was filed on 14 June 2017 for a hearing on the 23 June 2017. The notice was too short.

[13] It is trite that parties must be given reasonable notice. The notice of set down of hearing was issued on the 14 June 2017 for the 23rd June 2017, this was outside the 40 days stipulated by the rules, of which rule 116(9) reads:

‘Rule 116(9) On receipt of the request for assignment of a date, the registrar must forthwith assign a date of hearing, which date must be at least 40 days after the receipt of the application for the assignment of a date of hearing, unless all parties consent in writing to an earlier date

but the registrar may not assign a date of hearing until sub rule (12) has been duly complied with.'

[14] The rule is peremptory. This stands to reason that immediately upon receipt of the record on the 18 April 2017, the Registrar's Office should have assigned a date of hearing. Taking these short comings in totality I allowed the appeal to be heard in the interest of justice.

[15] Respondent had custody of the children with appellant's clear consent. The problem started when she started receiving social services grant for vulnerable children. Appellant then forcibly removed the children from the respondent for the reason that he wanted to receive the grant himself. His reason for his change of heart is that in his view respondent was no longer looking after the children well.

[16] The matter was heard by the court *a quo* which ruled that respondent should have custody of the minor children. It is this order which appellant is appealing against. Both parties are self-actors. The court *a quo*'s decision was on the basis of the Social Welfare Report filed of record. The salient findings of the Social Worker are as follows:

- a) that appellant and respondent's deceased daughter were married ostensibly under customary law and had 5 children;
- b) upon her death, appellant voluntarily surrendered the children to respondent, but, took them away under false pretences;
- c) that he removed them from respondent in order to receive the social grant;
- d) appellant is a pensioner and depends on the social grant and some help from his major children;
- e) appellant shares a bed with his 3 sons while his daughter shares a bed with her younger brother;

- f) he occasionally gets help from a community nurse and he refused to employ a nanny;
- g) he is said to be harsh to the children and as such they are fearful of him;
- h) he owns a motor vehicle;
- i) he refuses the children permission to see the respondent who is their maternal grandmother;
- j) he acknowledges that respondent is a good parent, although he stated that the children were dirty and untidy when he visited them.

[17] On the other hand, the social worker found the following factors regarding respondent's circumstances:

- a) she resides in the village and has always been living with one of the twin boys from the age of 3 years. This was by agreement between his parents as per the prevailing customs;
- b) when appellant and the deceased moved from Okambebe village where they were residing to Hooda where appellant is presently residing all the 3 young children were staying with respondent;
- c) she is a pensioner and also receives financial assistance from her grown up children;
- d) she lives in a fairly big home which comprises of modern houses, traditional huts and there is enough space for the children to play;
- e) there are other children in this home and she adequately cares for them by timeously preparing all the meals for them;
- f) she attends Evangelical Lutheran Church in Namibia together with all her grandchildren and that;
- g) she is a social drinker.

[18] The social worker's overall assessment is that;

- a) respondent is generally healthy, but, is worried about the welfare of her grandchildren;
- b) appellant prevents children from communicating with anyone around and even prevents them from visiting respondent;
- c) the girl's educational performance is declining and;
- d) that children fear appellant who is harsh and rude not only to them, but, to the respondent by using vulgar language towards respondent in their presence.

[19] It is her recommendation that custody and guardianship of the children be granted to respondent with appellant being allowed reasonable access.

[20] Mr Nyambe was requested by the court to appear for appellant filed Heads of Argument wherein he attacked the court *a quo* as he stated that the court should not have questioned the parties further, in addition to the Social Worker's report. He further argued that there was reference to an "Aunt" who visits appellant, but, was not called. In as much as the court is entitled to call for further evidence in investigating the suitability of a parent it should only do so if it is not satisfied with other evidence from a relevant professional.

[21] In *casu*, a Social Worker who is better qualified to assess the situation compiled a comprehensive report which cannot be faulted by a non-professional in that field, the magistrate included. This report is the pillar and determining factor upon which the court *a quo* should use.

[22] With regards to the "Aunt" it is clear that she has no relationship with the children but seems to be more related to the appellant himself. For that reason, I do not see what purpose it would have served for her to appear before the court based on her casual visit to appellant. I find that it was proper for the magistrate to have hinged his decision on the basis of the Social Workers' report.

[23] On the other hand respondent through her legal representative has forcefully argued that respondent is better suited to take custodianship of these children. She ably demonstrated respondent's strong and homely atmosphere beyond doubt. On a balance of probabilities I find that respondent is a grounded woman who has the interest of her grandchildren at heart. These courts are reluctant to deprive a natural parent custodianship and will only do so where circumstances are clearly in favour of achieving the ultimate goal of fostering the best interests of the children.

[24] It is important at this stage that I express the court's profound gratitude to the two legal practitioners namely Mr Nyambe and Ms Ndilula who agreed to represent the parties' *amicus curiae*. They both operate busy practices, but, found it fitting to represent the indigent in our community. This is a rare breed of legal practitioners who should be applauded for a job well done.

[25] Children have a right to a good home and environment which is conducive to their upbringing. These courts cannot look aside when their welfare is being compromised by a parent(s) and/or guardian(s) who seek to satisfy their own selfish personal aggrandisements.

[26] Respondent is not a natural mother of the children, but, a grandmother. She is therefore a third party, but, she falls within the category of a primary caretaker as defined under section 1(b) of the Children Status Act, Act 6 of 2006 which reads thus:

'Primary caretaker means a person, other than the parent or a custodian of a child whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of the child's custodian.'

[27] In deciding the issue of custodianship in a contested custody, the court must base its decision on the paramount consideration of the best interest of the child. The best interest of the child is extremely important in making an order affecting a child including custody, access, care or control.

[28] In some instances the court enlists the services of either a Social Worker or Psychologist for professional assessment. The recommendations therefrom, though

not binding on the court are, however, persuasive and unless they are out of step with the normal upkeep of children or offend the sense of decency or are outrageous, the court is likely to follow them with amendments where necessary.

[29] In, my view, the court should consider the following factors in order to come up with an appropriate order:

- a) the nature, quality and stability of the relationship between;
 - i) the child and own parent or caregiver seeking custody or access, and
 - ii) the child and other significant individuals in the child's life;
- b) The child's physical, psychological, educational, social, moral and emotional needs, including the need for stability and gender, taking into account the child's age, and stage of development;
- c) the impact on the child of any domestic violence if any;
- d) the safety of the child and other family and household members who are for the child;
- e) the child's wellbeing;
- f) the ability and willingness of each parent or caregiver to communicate and co-operate on issues affecting the child;
- g) the willingness of each parent or caregiver to facilitate the relationship between the child and the other parent;
- h) the capacity of each parent or caregiver seeking custody to provide a safe home, adequate food, clothing and medical care for the child; and
- i) the history of the care arrangements for the child;

[30] The list is in exhaustive. In as much as the child's wishes regarding custody may be considered they should only be of influence if the court is satisfied that a child is able to understand the nature of the proceedings and the court considers that it would not be harmful to the child. However, each case should be considered on its own merits as there can never be any standard custody order.

[31] The principle of the "best interest of the child" is a child's rights principle as enshrined in Article 3 of the United Nations Convention on the Rights of the Child which reads thus:

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

[32] On the national front, the children's rights are adequately protected by the Namibian Constitution under Article 15(1) which reads:

'Article 15 (1):

Children shall have the right from birth to a name, the right to acquire a nationality and subject to legislation enacted in the best interest of children, as far as possible the right to know and be cared for by their parents.' (own emphasis)

[33] It is the duty of this court to assess and balance the factors vis-a-vis the suitability of each parent or caregiver. In *casu* the Social Worker's report has adequately assessed the circumstances of both appellant and respondent inclusive of the needs of the children and make a recommendation.

[34] Although the court is not bound by such a recommendation it is important, in my opinion that in the absence of any adverse evidence or proof of the unsuitability of the opposing parent, the court should be largely persuaded to abide by it, with any other modifications where it deems fit.

[35] Appellant is reported to be a harsh father, who in his quest for authority and discipline on the children has turned out to be an unreasonably harsh and intolerant parent who instils, fear in the children. In addition to this behaviour, he has gone a step further and discouraged and/or prevented the children from seeking or visiting their maternal grandmother (respondent), let alone other relatives.

[36] In my view, he is not the type of a parent who can be trusted with properly bringing up children into a normal society. He shares a bed with his three sons and allows his teenage daughter to share a bed with her youngest brother. Above all, the children are terrified of him.

[37] Appellant's behaviour and conduct as compared to that of the respondent is a far cry from a decent and a normal home. Respondent as pointed out by the Social Worker's report has all the ingredients of a basic normal home.

[38] This court being as the upper guardian of all minors its powers go beyond the ordinary powers of parents. This point was well laid in the persuasive judgment of *J v J* 2008 (6) SA 30 (C) (20 May 2008) p 13-14 at para 20 where HJ Erasmus J and Yekiso JJ remarked:

'As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child. In *Terblanche v Terblanche* it was stated that when a court sits as upper guardian in a custody matter –

...it has extremely wide powers in establishing what is in the best interest of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes. (my emphasis)

In *P and Another v P and Another* (2002 (6) SA 105 (N) at 110C—D.), Hurt, J, stated that the court does not look at sets of circumstances in isolation:

I am bound, in considering what is in the best interest of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.

In *AD and DD v DW and Others* ([2007] ZACC 27; 2008 (4) BCLR 359 (CC) at 370A (par [30]) the Constitutional Court endorsed the view of the minority in the supreme Court of Appeal that the interests of minors should not be held to ransom for the sake of legal niceties' (De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae) 2007 (5) SA 184 (SCA) at 220I (par [99]) and held that in the case before it the best interests of the child 'should not be mechanically sacrificed on the altar of jurisdictional formalism'.

[39] It is for the above approach that I *mero motu* condoned the parties and the Registrar's Office's non-compliance and short comings in the preparation of this appeal. The quest to uphold the interest of the children became paramount. This has been our law, see, *McCall v McCall* 1994 (3) SA 201 (CPD) at 203 F and *Potgieter v Potgieter* [2007] SCA 47 (RSA) even nearer home, the matter of *WD v IVI* 268/10, HC (Delivered 14/1/2011) permanently dealt with this point.

[40] In determining the suitability of the parties it is necessary to take into account their respective circumstances in totality. Having done so I find that appellant is not a suitable parent and should, therefore, be deprived of custodianship of these children.

[41] The court *a quo* had the privilege of seeing the parties and perused the Social Worker's report. The said court being guided by the Social Worker's report and the principle of the best interest of the children concluded that appellant was not a suitable parent, and thus awarded custody of the minor children to the respondent. I find that this was a proper finding and I have no reason to disturb it. The following is the order of court.

Order:

1. The appeal is dismissed with costs.

M Cheda
Judge

APPEARANCES

PLAINTIFF:

M Nyambe
of Shikongo Law Chambers, Ongwediva

DEFENDANT:

N Ndilula
of Samuel Legal Practitioner, Ondangwa