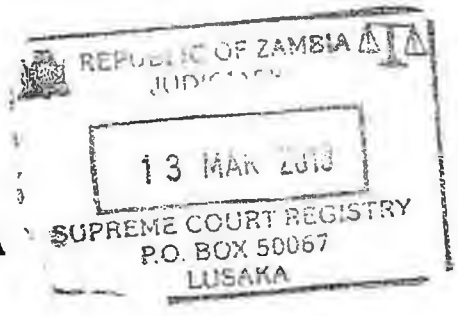
IN THE SUPREME COURT OF ZAMBIA APPEAL NO.199/2015

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

EMMANUEL MPONDA **APPELLANT**

AND

MUTALE I. CHISANGA MPONDA **RESPONDENT**

CORAM: Muyovwe, Musonda, Kabuka, JJS.

On 4th October, 2017 and 13th March, 2018.

FOR THE APPELLANT: In Person

FOR THE RESPONDENT: Mr D. Mazumba, Messrs Douglas & Partners

JUDGMENT

KABUKA, JS delivered the Judgment of the Court.

Cases referred to:

1. Jamas Milling Company Limited v Imex International (Pty) Limited (2002) Z.R. 79.
2. Elizabeth Nadine Smith Wesson v Brian Sydney Stroud SCZ No. 35 of 1998.

3. BP Zambia Plc v Interland Motors Limited (2001) ZR 37.
4. J v C (1970) AC 668.
5. D v M (Minor Custody Appeal) (1982) 3 All E.R. 897.
6. Kelvin Hangándu & Company (a firm) v Webby Mulubisha (2008) Z.R. 82.
7. Wilson Masauso Zulu v Avondale Housing Projects Limited (1982) Z.R. 194.
8. Ross-Taylor & Carson v Seldon (New Zealand Family Court, Wellington FP 085/286/95, 18 December 1995).

Legislation referred to:

Matrimonial Causes Act No. 20 0f 2007, section 72, 72(6) and 75 (1) (a).
The Supreme Court Practice (White Book) O.59 r 13.
The High Court Rules, Cap. 27 O.39 r 2.

In a ruling delivered by the High Court on 29th September, 2015, custody of the parties' two minor children was granted to their mother, the respondent in this appeal. Dissatisfied with that ruling, the appellant has now appealed to this Court.

The brief background to the matter is that the appellant and the respondent were lawfully married on 1st December, 2005. Two female children were born between them, Taonga Mponda and Isubilo Mponda, who at the material time of commencing divorce proceedings were aged 7 and 3, respectively. There were

two other older girls, Mwenzi Mponda aged 16 and Victoria Mponda 15 who were respectively, born from the respondent and appellant's previous relationships.

On 27th September, 2012, the appellant commenced proceedings for dissolution of the marriage and the court granted him a *decree nisi* of divorce on 19th December, 2012. The appellant was also granted physical custody of the children of the family with liberal access to the respondent. A month later, on 22nd January, 2013, the respondent took out an application seeking to vary the order for custody.

In a judgment rendered on that application dated 21st June, 2013, the parties were granted joint custody of the children by the court on the following conditions: (i) that the children would remain in the appellant's physical care and control and continue going to the same schools unless both parties agreed otherwise; ((ii) the parents were to decide in which school the infant child, Isubilo, was to be enrolled; (iii) the appellant was ordered to be paying school fees and other school requirements, whilst the respondent was to generally provide for the children's financial

and material needs; (iv) the respondent was to have weekend visitation rights every fortnight with the children required to return to the appellant's home by 14:30 hours on Sunday; (v) the children were also to spend every other school holiday with the respondent. Liberty to apply for variation was granted to the parties, in the event of what the judge termed, 'a drastic change' to the circumstances, as they were at the material time.

On 3rd July, 2013, the respondent made an application for review of this judgment on grounds that, the learned judge had misconstrued the facts of the case as regards the children. Her contention was that, since the two oldest children were not born from the appellant and herself and did not reside with them during the subsistence of their marriage, the issue of custody only affected the two minor children who were born from the marriage. The application for review was opposed by the appellant on the basis that, it was misconceived as the affidavit had not shown any circumstances that had drastically changed to warrant a review of the judgment; and was therefore, an abuse of court process.

In her ruling on the same, the learned trial judge agreed with counsel for the appellant that there was no fresh evidence to warrant any review and cited as authority, the case of **Jamas Milling Co. Ltd v Imex International (Pty) Limited.**[1] The judge also noted that, the respondent should have properly made the application under **section 72 (6) of the Matrimonial Causes Act, 2007** and not pursue it as a review under **Order 39 rule 2 of the High Court Rules** which was a wrong provision to use for such applications. Accordingly, the application for variation of the custody order was dismissed, with costs.

On 25th March, 2015, the respondent made her third application to vary the custody order made in the judgment of 21st June, 2013 on the grounds that there had been a drastic change in circumstances, as the appellant had been transferred to Lusaka. The respondent contended that it would be difficult and costly for her to have access to the children every fortnight. It was also her contention that whilst the appellant could be concerned about the welfare of the children, he had failed to pay their school fees as a result of which the children had missed classes. This prompted the respondent's advocates to request the

school for a report with regard to non-payment of fees for the two minor children. The respondent further claimed that the appellant would go out drinking after work and that he at times left the minor children in the care of a stranger only known as Uncle Joe.

In opposing the application, the appellant claimed that the court had no jurisdiction to review the custody order based on grounds that could have been raised by the respondent in the initial application. He claimed that the issue having already been determined by a judgment of the court, it was *res judicata*. That the application itself was misconceived, malicious and lacked merit as the respondent was only forum shopping.

In answer to these contentions, the argument by the respondent's advocates was to the effect that, **sections 72 (6) and 75 (1) (a) of the Matrimonial Causes Act** grant the court power, in the best interest of the child, to vary or discharge an order made by it previously, relating to such child's custody or education. He further relied on the case of **Elizabeth Nadine Smith Wesson v Brian Sydney Stroud**[2] in which this Court

varied a joint custody order relating to a child of a tender age, as a result of which the mother was given custody with access to the father. He submitted that the present case was suitable for such variation.

In his submission in response, the appellant who represented himself urged that, the issue raised in the affidavit in support by the respondent had already been considered by the court in the two previous decisions; and in the absence of a comprehensive social welfare report or school report disclosing that he was incapable of raising the children well, it would be unfair to alter the custody order. The appellant further argued to the effect that, the nature of his job as a Marketing representative was such that transfer to Lusaka should not be an issue, as the respondent had at all material times been aware of the possibility of such an eventuality. In his reply, counsel for the respondent asserted that the earlier order had been premised on the fact that both parties were living in Kitwe. That it was also not possible that the respondent could have anticipated the transfer to Lusaka two years in advance.

In her ruling on the application, the judge held that, it had the power to review any custody order pursuant to **section 72 subsections (6) and (7) of the Matrimonial Causes Act.** She further noted that, in the custody order in issue, she had actually granted liberty to either party to apply for variation of the order, in the event of a drastic change in the circumstances. Accordingly, the learned judge found that the circumstances of the parties had indeed changed as anticipated, for both parties were previously of fixed abode resident in Kitwe and it was thus easy for them to access the children. As such, that she did not then, have in mind that the father of the children would, two years later be transferred to another town. On the affidavit evidence before her, the judge found that the appellant had indeed failed to pay school fees. That he had also not disputed coming home late and being drunk. Nor that, the two minor children were in his absence looked after by the maid, his wife or her male relative.

Granted those circumstances, the learned judge concluded that it was not in the best interests of the children to move to Lusaka with the appellant as the children were already settled

down in Kitwe. That in view of the order allowing the respondent fortnightly access, such a move would require them to travel to Kitwe several times in a year. She further noted that the respondent who monitored their progress in school would be unable to do so if the children moved to Lusaka. It was a finding of the judge that the appellant did not provide any evidence that the children would go to better schools in Lusaka as claimed by himself. Based on those considerations, the learned judge varied her earlier order and now awarded custody to the respondent. It is this decision that has brought the appellant to this Court on appeal, on the following grounds:

1. **That the learned trial judge misdirected herself and hence erred both in law and fact by tolerating and hearing the respondent's application which was filed into court based on frivolous grounds and whose grounds were already dismissed by the court in a judgment and ruling dated 21st June and 22nd July, 2013, respectively.**
2. **That the learned trial judge misdirected herself and seriously erred both in law and fact by putting the interests of the respondent first as opposed to putting the interest of the minor children first, thereby exposing them to unnecessary mental torture and anguish through their untimely relocation to another place to suit the wishes of the respondent.**
3. **The learned trial judge misdirected herself and hence erred both in law and fact by not considering the need and necessity of a comprehensive social welfare report which was paramount during the hearing of the custody matter to assist**

> **the court to come to a logical conclusion of the matter, but instead the learned trial judge elected to rely on the respondent's frivolous allegations against the appellant and whose allegations were not supported by any proof nor tangible facts thereof."**

In his heads of arguments filed in support of his appeal on 11th December, 2015, the appellant argued that the court in its ruling appealed against reversed its judgment of the 21st June and ruling of 22nd July, 2013, respectively without taking into account all relevant facts which are on the record or consideration of the law.

The submission was that the learned trial judge considered the respondent's application for variation of the custody order which in the appellant's view was frivolous and ought to have been dismissed on a point of law as the matter was *res judicata*. The appellant cited the case of **BP Zambia Plc v Interland Motors Limited**[3] which dealt with multiplicity of actions and held that, a party in a dispute should not be allowed to litigate in piecemeal manner, resulting in taking the same opponent over the same matter before different courts and thereby bringing the administration of justice into disrepute, if conflicting judgements were obtained from two or more judges over the same subject

matter. The appellant's contention was that, the ruling appealed against reverses and contradicts the learned trial judge's decisions of 21st June and 22nd July, 2013 in which the learned judge had noted that the application to vary the custody order was made under wrong provisions of the law.

The appellant submitted that, the learned trial judge had already made the custody order based on considerations of what was in the best interest of the children and cited **section 75 (1) (a) of the Matrimonial Causes Act** as well as **J v C (1970) AC 668**[4] and **D v M (Minor Custody Appeal)**[5]**.** As such, that the application for variation was an abuse of the court process. That it was frivolous and vexatious, as the matter on which the respondent was seeking the court's order had already been considered and concluded. The appellant relied on the case of **Kelvin Hangándu & Company (a firm) v Webby Mulubisha,**[6] to that effect.

On ground 2, the appellant's argument was that the learned trial judge failed to authoritatively hear the appellant's application based on tangible facts on record and the relevant

law but that she instead elected to put the respondent's allegations and interest ahead of those of the minor children. That the judge's decision was based on her subjective opinion as opposed to facts on record. He further alleged that the respondent is merely using the minor children as pawns to harass the appellant and for personal financial gain and that the children ought to be taken care of under the guidance of a responsible parent or guardian. The appellant contended that the record shows that the performance of the 8 year old Taonga at her new school in Lusaka was good and she should therefore not be disturbed. He further argued that, the failure of the trial court to grant a stay of its ruling pending the hearing of this appeal was wrong as the law compels the court to grant a stay in matters of child custody as provided in **Order 59 Rule 13 of the Supreme Court Practice (White Book).**

On ground 3, the appellant argued that the trial judge failed to consider and request for a comprehensive social welfare report but instead chose to rely on the respondent's frivolous allegations. His submission was that, there was no evidence on record to show that he had neglected the children or failed to pay

school fees as the respondent's payment, was a one-off payment. He further submitted that, the judge contradicted herself in the ruling appealed against when she stated that the appellant was irresponsible and a drunk without any proof of the same and without the support of a social welfare report to confirm that the circumstances of the minor children had changed drastically. The appellant cited the case of **Wilson Masauso Zulu v Avondale Housing Projects Limited**[7] wherein it was held that the trial court has a duty to adjudicate upon every aspect of the suit between the parties in order to finally determine every issue in controversy. The case was used to make the submission that without a comprehensive social welfare report, the judge was unable to fully determine the issues in controversy between the parties.

It was the appellant's argument that, the respondent and himself are both domiciled in Zambia and that the respondent who is a teacher by profession and a civil servant, can also be transferred to any part of the country, especially remote areas, whilst, he, can only be transferred to urban areas from where his employers operate. The appellant ended his submission on this

ground by arguing that, it is in the best interest of the children to remain in his custody as he is better placed to offer them quality education, medical care, a better standard of living, whilst giving reasonable access to the respondent. He referred to the case of **Ross-Taylor & Carson v Seldon (New Zealand Family Court) Wellington**[8] where children were placed in the father's custody as the mother had made access to the father difficult and thereby put her own interests before that of the minor boys.

In his arguments in response, learned counsel for the respondent addressed grounds one and two together. The gist of his argument was that the trial court's decision was based on findings of facts which cannot be reversed except where it is demonstrated 'that the said findings were either perverse, or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence no court acting correctly could make.' His submission was to the effect that, the appellant failed to demonstrate on what basis this Court should interfere with the findings of the trial judge below. Citing **sections 72 (6) and (7) of the Matrimonial Causes Act No. 20 of 2007**, counsel's

submission was that, the trial judge had power to vary the custody order in favour of the respondent, as she did, contrary to the appellant's arguments that she could not.

Finally, the argument on ground three was to the effect that, on the facts of this case where the custody concerns the two youngest girl children of the family, the trial judge was on firm ground to grant physical custody and care to their mother, the respondent, as it was in the said children's best interest. The decision of this Court in the case of **Elizabeth Nadine**[2] was cited as authority.

We have given due consideration to the appellant's heads of arguments, those of the respondent and the cases and statutory law to which we were referred.

Starting with ground one raising the issue of *res judicata*. The record shows it is not in dispute that the trial judge had earlier granted joint custody to the parties in her judgment dated 21st June, 2013 with liberty to either party to apply for a variation in the event of any significant change in the circumstances. In her ruling of 22nd July, 2013, the learned

judge dismissed an application made by the respondent for variation of the joint custody order on the basis that, the respondent had relied on a wrong provision of the law, namely **Order 39 of the High Court Rules, Cap. 27** which provides for review of court decisions as opposed to **section 72 (6) and (7) of the Matrimonial Causes Act of 2007** which grants the court power to make orders for custody and education of a child under 25 years. The relevant parts of this section provide as follows:-

> **"72 (1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of twenty five.**
>
> **(a) in any proceedings for divorce, ...before or after the decree is made absolute; or**
>
> **(b) .....**
>
> **(6) The power of the court under paragraph (a) of subsection (1).....to make an order with respect to a child shall be exercisable from time to time; and where the court makes an order under paragraph (b) of subsection (1) with respect to a child it may from time to time until that child attains the age of twenty five make a further order with respect to the child's custody and education.**
>
> **(7) The court shall have power to vary or discharge an order made under this section or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.**

A reading of the above sections as quoted, shows that a judge is given discretionary powers to vary or make a further

order with respect to a child's custody and education until they attain the age of twenty five. Hence, the specific wording under **subsection (6)** that the power to make an order **'shall be exercisable from time to time'** from when the initial order is made until the time the child attains the age of twenty five. In light of those provisions, the appellant's contention in ground one that the learned judge should not have heard the respondent's application as it was filed into court on frivolous grounds; and was also *res judicata* as those grounds were already dismissed in the judgment and ruling of 21st June and 22nd July, 2013, is misconceived and we cannot sustain it.

We also note in this regard that, a perusal of the judgment of 21st June, 2013 shows the divorce petition was uncontested by the respondent as according to her, the appellant had given her the impression that the same had been withdrawn when infact not. When she learnt that the appellant had actually proceeded with the matter and obtained a custody order, she made an application for variation of the said order, on which the judge further ordered that, the children of the family remain in the custody of the appellant with liberal access to herself.

The court in the said judgment had based its earlier decision on the uncontested evidence available at the time, which showed that the appellant had been caring for the children and there was no evidence then, that he was irresponsible, in that he had neglected them or caused them harm.

The record shows that the respondent made a number of applications for variation of the said custody order. In the first application, the respondent's initial grounds for variation of the custody order were that, the appellant is an irresponsible man who cannot look after children, as he was always out drinking and even slept out. That the maid was not live-in, who could be relied upon to look after the children in his absence. The court however found that the respondent's allegations were not supported by the evidence initially adduced before her.

Regarding the final application for variation of the custody order by the respondent which was made on 25th March, 2015 and culminated in the ruling being appealed against, now before us; the grounds for this application were essentially that, the appellant had been transferred from Kitwe to Lusaka which made

it difficult for the respondent to access the children. Further, that following the custody order made in his favour the appellant had neglected to pay school fees for the children prompting the respondent to do so and that there was concern raised by school authorities regarding the welfare of the children. There were also fresh allegations raised that the two younger girls were now being left in the care of an uncle named Joe, a nephew of the appellant's new wife, whilst the appellant himself was away from home, drinking.

The appellant in his affidavit in opposition did not deny these allegations but rather heavily focused his response on disparaging the respondent and her advocates Messrs Douglas and Partners. He also did not deny that he had relocated to Lusaka, but attempted to downplay this move by arguing that the nature of his job as a Sales representative required that he should be on the move at any time. That the learned judge should have considered this fact when she initially made the custody order in his favour, as well as the second order granting joint custody to the parties, leaving physical care and control of the children to him.

Instead of responding to the allegations that the children had missed school due to non-payment of fees; that he had left the young girls under the care of a male relative, and came home late, drunk. The appellant in his submissions belaboured the issue of the trial court's failure to call for a social welfare report, which according to him, should have assisted the court in resolving the matter.

The issue in our view, is whether there was evidence placed before the trial court on which the variation order could be determined. We have noted from the affidavit evidence on record, that the respondent produced five receipts in support of her claim that she had paid school fees for the minor children, as the appellant had failed to do so. It is also on record, that the respondent's advocates had written the school requesting a report on the non-payment of fees and the children's absenteeism as a result, but before the school could respond, the appellant had already written them a letter threatening them with a lawsuit if they obliged. The appellant in his affidavit evidence, further did not deny that an uncle Joe indeed came to their home during holidays and had been left with the girls on certain occasions.

In the event, the question before the court was whether the respondent had substantiated her allegations as to require the court to re-consider the order of joint custody in which physical care and control of the children was given to the appellant.

Granted that evidence in support of the allegations was not denied, the appellant's argument that the respondent's application for variation was misconceived on grounds that the previous application was made under a wrong provision, cannot stand. This is so, as the court's decision was premised on a purely procedural default and was not one made on the merits. In the circumstances, as the law specifically provides for variation of custody orders, the party applying is not precluded from following the correct procedure and renewing the application. Particularly, that **section 72 of the Matrimonial Causes Act of 2007** does not limit the number of times a party can apply for variation of a custody order relating to minor children or to their educational requirements. The reason is simple, it is generally accepted that circumstances of the children

from 0-25 years or those of their parents, are subject to many changes, financial or otherwise which have an impact on the children that may require to be taken into account when considering what would promote their best interests, at a particular time. It is for these reasons that we find ground one of the appeal which substantially faults the trial judge for entertaining the respondent's renewed application for variation of the custody order for allegedly being *res judicata*, misconceived and unsustainable.

Coming to ground two of the appeal, the substance of grievance raised here, was that in varying the custody order in favour of the respondent the court put the interests of the respondent before those of the children. The arguments were that the judge was swayed by the respondent's presentations of the financial burden this would cause to her in accessing the children every fortnight. By so doing, the court disregarded evidence that the child Taonga had obtained very good results at her new school in Lusaka and even declined to grant a stay of execution pending appeal as required by Order 59 of the Supreme Court Practice. The court did not also consider that the

respondent was using the children as pawns for obtaining money from him for her own personal financial gain. We will revert to the arguments raised under this ground when dealing with ground three.

In addressing the substance of the grievance in this ground, our perusal of the record shows, contrary to the appellant's allegations, that the judge infact revealed her mind on the issue as to what informed her decision when she observed that, allowing the order to stand would result in the children having to travel several times in a year for the fortnightly access with their mother. That the mother who is a teacher by profession would also be unable to monitor their school progress as she used to. The judge also made it clear that the order was premised on the consideration of both parties living in the same town and in close proximity of each other. In our view, these considerations only go to underscore the point that it was the inconvenience to the children of frequent travel rather than the financial burden that informed the court's decision. Ground two of the appeal accordingly fails.

Finally, on ground 3 of the appellant's appeal, suffice to state that in order to arrive at a decision that will promote the best interest of the children, there is no requirement under the law which compels the court to first obtain a comprehensive social welfare report. The court is entitled to make its decisions and conclusion on the evidence adduced before it, if such evidence is sufficient to arrive at a decision that will promote the best interest of the child. Section 75 (2) of the Matrimonial Causes Act, makes it clear that the court has discretion whether or not to call for a social welfare report or any other report, as may be deemed relevant. The record shows in arriving at its decision to vary the joint custody order, the trial judge took into account all the relevant circumstances of the matter.

The appellant's submissions that the learned trial judge did not consider the circumstances leading to his relocation from Kitwe to Lusaka are therefore devoid of merit. The issue is not about the reasons the appellant moved, but the impact, at the time, that the relocation would have had on the children, being uprooted from a familiar place and taken further away from their mother and their regular schools. It is accepted, that young

children require stability and consistency in their formative years and any changes to their status quo would indeed have an impact. The appellant in his submissions acknowledged that the process of dissolution of the marriage had traumatised the children. A holistic consideration of the circumstances in this case disclosed that the children were being relocated to a new town, new home, new school with a new step mother, who herself had new twin babies to take care of. This by any standard was a major break in established bonds which would require drastic adjustments for the children. As was held in the case of **D v M (Minor Custody Appeal):**

> *"...it is generally accepted by those who are professionally concerned with children that, particularly in early years, continuity of care is a most important part of a child's sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so."*

Order 59 of the White Book which was relied on by the appellant in arguing that the court below should have granted a stay of execution, is not a mandatory provision. A trial judge considering an application for stay of a custody order pending appeal is still required to consider the circumstances of the particular case and determine the matter, informed by

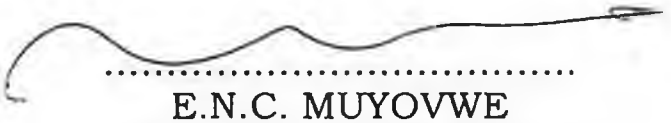
considerations of what would be in the best interests of the particular child or children.

On the facts of this case, removing children of very tender years from an environment where they were transitioning from recovery of the effects on them, of their parents' divorce was certainly not in their best interest. Their living environment provided continuation of established bonds with their mother whose role in their lives had more or less continued as before, from next door, where she had shifted following the divorce.

It is for the reasons given that we cannot fault the trial judge when she considered the appellant's transfer a drastic change which would impact on the joint custody order that was grounded on the fact that both parents resided in the same town and were living within such proximity as to allow fortnightly visits without any onerous burden, financial or otherwise, on account of the distance. Ground three of the appeal equally fails.

All the grounds of appeal having been unsuccessful, this appeal is dismissed and we find an appropriate order on costs in

the circumstances, is for each party to bear their own costs of the appeal.



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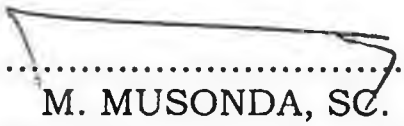
E.N.C. MUYOVWE
SUPREME COURT JUDGE



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M. MUSONDA, SC.
SUPREME COURT JUDGE

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J.K. KABUKA
SUPREME COURT JUDGE