

CASES REFERRED TO:

1. *Stoyke v Stoyke* – Appeal No. 67 of 1998;
2. *Musweu v Musweu* – Appeal No.30 of 2019 ZMCA 236;
3. *Joel Colange v Pharis Chikachi* – 2014/HP/D039;
4. *Re G (Education; Religious Upbringing) (2012) EWCA Civ. 123;*
5. *Poel v Poel (2001) Fam 473;*
6. *Re E (1987) 1 FLR 368;*
7. *RE O (infants) (1971) 2 ALL ER 744; and*
8. *Andreas Panagiotis Xirocostas v Yolanda Guizada Poma* – Appeal No. 206 of 2013.

LEGISLATION REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia;*
2. *The Legitimacy Act, Chapter 52, Volume 5 of the Laws of Zambia;*
3. *The Births and Deaths Registration Act 1953 – United Kingdom;*
4. *The United Nations Convention on the Rights of the Child; and*
5. *The Affiliation and Maintenance of Children Act, Chapter 64, Volume 5 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

1. *Lillian Mushota, Family Law in Zambia: Cases and Materials (2005);*
2. *Bryan A. Garner, Black’s Law Dictionary, 9th Edition; and*
3. *Hayes & Williams Family Law, Gilmore and Glennon, 6th Edition.*

1. INTRODUCTION

1.1 This matter was re-allocated to this Court on 6th March, 2024. A perusal of the Record revealed that matter had been heard by Justice T. I. Katanekwa, on 26th February, 2021 and was adjourned for delivery of Judgment on 15th April, 2021. There was no trace of the said Judgment on the Record. Consequently, I scheduled the matter for status conference on 2nd May, 2024.

1.2 On the return date, the Parties were represented by their respective Counsel. Both Counsel indicated that the

status with respect to the Parties herein remained the same since the matter was launched. They urged the Court to proceed to render a Judgment based on the documents on the Record.

1.3 Accordingly, this Judgment is rendered based on the documents on the Record.

2. BACKGROUND

2.1 The background to this matter, as can be ascertained from the Affidavit evidence, is that Peter Ronald Oliver Jones, the Applicant herein and Jacqueline Claire McBrearty, the Respondent herein, are the parents of Olivia Caroline Rose McBrearty-Jones (“Child”), a Child born out of wedlock. Over the years, the said parents have failed to formally agree on the custody arrangements of the said Child, which eventually resulted in a strained relationship between the said parents. In addition, the Respondent has intimated on several occasions her desire to live out of jurisdiction and to send the Child to a boarding school out of jurisdiction. It appears that the decisions made by the Respondent, with respect to the Child, do not sit well with the Applicant. It is against this backdrop that the Applicant launched this suit.

2.2 The Applicant, launched this suit on 11th September, 2020, by way of Originating Summons, made pursuant to **Order VI, Rule (3)** of **The High Court Rules**¹. The Applicant seeks the following reliefs: -

1. *An Order declaring that the Applicant is the biological father of the illegitimate Child known as Olivia Caroline Rose McBrearty Jones;*
2. *An Order that the Applicant be granted liberal access to the Child;*
3. *An Order that the Applicant be allowed to pick the Child up on Friday from school, and return the Child to the Respondent at Manager's Village, David Livingstone Safari Lodge and Spa, on Sunday 10:00 AM and that the Applicant and the Respondent alternate access to the Child during school and public holidays;*
4. *An Order for joint custody of the Child, with the Respondent having day to day care and control;*
5. *An order restraining Ms. Jacqueline Clare McBrearty from removing the Child, Olivia Caroline Rose McBrearty Jones from the Zambian Jurisdiction without the consent of the Applicant; and*
6. *Further or other relief.*

3. AFFIDAVIT EVIDENCE

3.1 The Application is supported by Affidavit and is opposed by the Respondent, who filed herein an Affidavit in Opposition.

3.2 AFFIDAVIT IN SUPPORT

3.2.1 The Affidavit in Support of the Originating Summons is deposed by the Applicant herein, who is a British Zambian National, residing in Livingstone.

3.2.2 The Deponent deposed, *inter alia*, that he is the biological father of Olivia Caroline Rose McBrearty Jones, the Child herein and that the Respondent is the Child's biological mother. He avowed that the Child was born on 20th May, 2013. Copies of the Child's Entry of Birth record and Certificate were exhibited and marked "**PROJ1(a)** and **PROJ1(b)**."

3.2.3 It was asserted that the Applicant and Respondent were never married and are no longer in a relationship, except as parents to the Child. The Deponent stated that he has provided financial support to the Respondent to support the Child's day to day care, maintenance and subsequently, her education, since before her birth, to date.

3.2.4 It was affirmed that the Respondent has not been forthcoming to engage the Respondent with regard to establishing a fair joint custody arrangement that would be acceptable to both Parties and would be in the best interest of the Child. Instead, the Respondent has sporadically

dictated her own terms when it comes to matters such as visitations, travel arrangements, nature and extent of maintenance and schooling, among others.

3.2.5 The Deponent stated that as a result of the above, he has had little or no say over how much time he and the Child spend together or indeed, her day to day welfare. He further stated that there has also been uncertainty in the conditions upon which he has been allowed to access the Child and often subject to change at last minute. He also stated that his relationship with the Respondent has become increasingly strained resulting in unnecessary antagonism, to which the Child has on some occasions borne witness.

3.2.6 It was deposed that due to this, the Applicant has, through legal Counsel, tried to enter a compromise agreement with the Respondent, setting out how he and the Respondent are to co-parent and share responsibility, for the benefit of the Child, which proposed agreement has been rejected by the Respondent. A copy of the proposed agreement was exhibited and marked **“PROJ2”**.

3.2.7 It was further deposed that from time to time, the Respondent has intimated her intentions to send the Child to boarding school, both in and outside

Zambia, and on other occasions, had indicated her intentions to live outside Zambia with the Child to the Applicant's exclusion and without offering any reasonable or viable justification for such a decision. Recent evidence of this was exhibited and marked "**PROJ3**". Further, copies of correspondence in the form of emails and text messages exchanged between the Respondent and Applicant were exhibited and marked "**PROJ4**".

3.2.8 The Applicant avowed that his proposed custody arrangements are set out as follows: -

- i. That the Applicant be granted liberal access to the Child;
- ii. That the Applicant be allowed to pick the Child on Friday from school and return the Child to the Respondent at the Manager's Village, David Livingstone Safari Lodge and Spa on Sunday at 13:00 hours; and
- iii. That the Applicant and Respondent alternate access to the Child during school and public holidays.

3.2.9 The Applicant averred that he has in his employ two care givers, who have taken care of the Child since she was 3 months old and another, who

has helped look after the Child since she was 3 years old, and both of whom are always available at his residence when the Child is scheduled to stay with him.

3.2.10 The Applicant further averred that his home provides a peaceful, loving and caring environment for the Child and has a clean and safe garden area, conducive for her outdoor play activities. He also averred that the Child has her own bedroom and bathroom within his home and has sufficient, safe and comfortable space within which to play and generally develop.

3.2.11 The Applicant asserted that he is self-employed and as such, has ample time to dedicate to the Child when she is in his care. He further asserted that he has the physical and financial means to ensure that the Child is always well fed, well dressed and well supported in her educational and developmental needs. He also asserted that the Child and the Applicant share a close bond and relationship, which he has nurtured and developed since her birth and it is his belief that it is the best interest of the Child to enjoy the love, support and guidance of both parents.

3.3 **AFFIDAVIT IN OPPOSITION**

- 3.3.1 The Respondent filed her Affidavit in Opposition to the Affidavit in Support of Originating Summons, on 19th January, 2021, in which she deposed, *inter alia*, that the Child was born to her and the Respondent on 20th May, 2013, at Nevill Hall Hospital, Abergavenny, in Wales, United Kingdom.
- 3.3.2 She further deposed that she and the Applicant were not joined in holy matrimony but were nevertheless in an intimate relationship, which led to a marriage proposal and a request that she resigns from her place of employment in Botswana to join the Applicant in Zambia, which request came with a job offer at his company. She stated that upon moving to Zambia in December, 2010, she was employed at the Applicant's company. She also stated that her relationship with the Applicant broke down in 2016.
- 3.3.3 The Respondent averred that the Applicant terminated her employment with his company and immediately replaced her, leaving her with no source of income at the time. She further averred that she promptly applied for and secured a job in Livingstone, at the David Safari

Lodge and Spa, where she benefitted from the company housing.

3.3.4 The Respondent asserted that she has been with the company for nearly nine years, however, due to the Covid-19 pandemic, her employers were adversely affected and there was a high possibility that upon the expiration of her work permit in November, 2020, she would not have been retained by the company. Fortunately, she was retained by the company and they assisted her to procure a work permit for another twenty-one months, valid until November, 2022. The Respondent also asserted that in the event that her work permit is not extended after November, 2022, her intentions to leave Zambia in pursuance of employment and furtherance of her career would subsist.

3.3.5 The Respondent affirmed that upon the conception of the Child, the Applicant was adamant that she terminates the pregnancy and that only upon her refusal to abide did he endeavour to state that he would support both her and the Child. She further affirmed that the Child was born in Wales, near the Respondent's parents, thus the Respondent resided with her parents after the birth of the Child. She also affirmed that the Applicant pleaded for her

return to Zambia with the Child and informed her that if it did not workout, she would be at liberty to return to the United Kingdom. Accordingly, the Respondent returned to Zambia when the Child was four months old. A copy of the email correspondence marked “**JCM1**” was exhibited.

3.3.6 The Respondent avowed that the Applicant undertook to contribute a monthly sum of US \$500.00 for the welfare of the upkeep for the Child. She further avowed that she had received the Applicant’s financial contributions and that she, as primary caregiver of the Child, has substantially provided support ranging from financial, day to day care, upkeep, regional and international travel, healthcare, educational needs, and any and all needs as they arise.

3.3.7 The Respondent stated that the Applicant has previously denied her requests for an increase in the monthly contributions despite the fact that since 2013, he has paid \$500.00 per month, whereas the cost of living has significantly gone up over the years as the Child continues to develop and grow. She further stated that the \$500.00 monthly contributions have consistently arrived with complications, which range from the Applicant deducting what he

terms bank charges to basing his contributions on the Kwacha currency instead of the agreed United States Dollar.

3.3.8 It was asserted that the Applicant last paid the Respondent \$500.00 in full, in November, 2020. It was further asserted that the Respondent insists on paying less with the last payment being \$350.00, and he was yet to make any contribution for the month of January, 2021. She also asserted that though she is in employment, the Covid-19 pandemic in her industry has crippled her finances and that of her employers, to the extent where she has gone for seven months without pay. She stated that as at December, 2020, she only received the equivalent of 12 percent of her salary. Despite her financial woes, she managed to pay 50 percent of the Child's school fees and other costs incidental to her education such as uniforms. A copy of the receipts marked "**JCM 2**" was exhibited.

3.3.9 The Respondent avowed that whilst the Applicant has previously presented her with a custody agreement, the same was not acceptable to her as the agreement was drafted solely by the Applicant with little or no input from her. Furthermore, it was avowed that the Applicant

would repeatedly try and coerce her into the said agreement whenever he would sense that she was in a vulnerable position.

3.3.10 It was affirmed that the Respondent has always been open to a reasonable custody agreement, however, she maintains that the previously proposed 50 percent shared parenting agreement is untenable and that it would not be in the best interest of a female minor Child to be away from her mother for prolonged periods of time. She stated that the Child had spent multiple holidays with the Applicant and his relatives, such as Christmas, Easter and Birthdays.

3.3.11 The Respondent averred that she has never discouraged their Child from visiting the Applicant at his residence and she has always been a proponent of the Applicant and the Child developing a strong father-daughter bond. She further averred that she has actively encouraged the Applicant to travel with the Child when he visits relatives outside Zambia so that she may foster a relationship with the Applicant's family. The Respondent added that when she suggested to the Applicant that he travels with the Child to meet his relatives in Perth, Australia, in April,

2017, he declined and also declined to travel with the Child to London in 2018.

3.3.12 The Respondent gave evidence that the provision in “**PROJ 2**”, exhibited in the Affidavit in Support of Originating Summons, being the proposed Agreement of Compromise under Article 2 (b), on page 2 of the said Agreement, is unfair and unsustainable considering that she is a non-resident, who is currently on a work permit that expires in November, 2022. She stated that she will have no choice but to leave Zambia if it happens that her work permit is not renewed further or in the event that her employment is terminated.

3.3.13 The Respondent asserted that she has communicated her circumstances to the Applicant and that while her situation is a state of flux, she is unable to sign an agreement that limits her and the Child’s options to Zambia. She added that in the event that she sought written consent from the Applicant, she has little doubt in her mind that he would unreasonably withhold such consent even under circumstances that she has no control over.

3.3.14 It was her assertion that the Applicant has proven that he will often times be unreasonable, as recently he offered to drive her and the Child

to Mazabuka to her school but was not willing to drive back from Mazabuka with her. A copy of the screen shots of the text where he stated that he was unwilling to travel back with her, marked “**JCM 3**”, was exhibited.

3.3.15 The Respondent stated that she was always open to discussing matters relating to the Child with the Applicant. That at no point had she denied the Applicant access to the Child and has encouraged his presence in her life. However, the Applicant has continually tried to frustrate her efforts and always seeks to exert control over her. A copy of an email thread between the Applicant and the Respondent marked, “**JCM 4**”, was exhibited.

3.3.16 The Respondent affirmed that the relationship between the Applicant and her has in recent times proved to be extremely strenuous to the point where the Applicant proceeds to undermine and frustrate her parenting efforts at any given point. A copy of a screen shot of her conversation with the Applicant detailing an incident at the school, that greatly affected the Child, marked “**JCM 5**”, was exhibited.

3.3.17 The Respondent stated that there have been various occasions on which the Applicant has proceeded to make arrangements for and on

behalf of the Child without informing her as the primary caregiver. A copy of the conversation between the Applicant and the Respondent, where the Respondent is lamenting that she be informed of any arrangements the Applicant makes, marked “**JCM 6**”, was produced.

3.3.18 It was the Respondent’s assertion that there had been other occasions on which the Applicant has wilfully ignored her explicit instruction to the Child, opting instead to encourage her to do anything other than what she had instructed, which in the Respondent’s view, would lead her to having problems with authority in the future. A copy of the text from the Respondent to the Applicant inquiring on why she had not been made to do her homework marked, “**JCM 7**”, was exhibited.

3.3.19 The Respondent avowed that due to the foregoing, she has broached to the Applicant the possibility of placing the Child in a boarding school located in either their home countries being South Africa or Wales or in the alternative, a boarding school attended by her cousins of the same age group in Australia. The Respondent further avowed that the Parties settled on enrolling the Child at Musikili Primary School in Mazabuka, Southern Province, Zambia. She also

avowed that the Applicant has undertaken to fully fund the Child's educational needs. A copy of the screenshots of a conversation between the Applicant and the Respondent, wherein the Applicant endeavours everything relating to the Child's school, marked "**JCM 8**", was exhibited.

3.3.20 The Respondent averred that due to her immigration status, she is seriously considering returning to the United Kingdom with the Child, where she will receive free education and excellent free health care, which she is already registered for and shall have the benefit and security of staying in her grandparents' house, surrounded by family. She stated that she is confident that both her home in South Africa and that of her Grandparents in the United Kingdom would provide a loving and secure environment for the Child, as both boast a clean and safe garden, in neighbourhoods conducive for outdoor play and activities.

3.3.21 The Respondent stated that the Child already has her own ensuite bedroom within both her house in South Africa and her Grandparents' house in the United Kingdom. She further stated that either situation would be a safe and comfortable environment, conducive for her

general development, as both places provide structure, discipline and stability.

3.3.22 The Respondent deposed that she possesses the physical and financial means to ensure that the Child is always well fed, well dressed, well acquainted with her relatives abroad and well supported in her educational, developmental and health needs. She stated that since the Child's birth, she has always provided the support she needs for her wellbeing and welfare.

3.3.23 It was averred that the Respondent's proposed custody arrangements are set out as follows: -

- i. That she be granted full custody of the Child;
- ii. That the Applicant will have access to the Child two weekends in a month. The Child may be picked from school on Friday and returned on Monday at a drop off point in Choma at 06:30 hours;
- iii. That the Child and the Respondent shall continue to receive private health cover;
- iv. That the Applicant is liable for 100 percent of the Child's private school fees;

- v. That the Respondent shall consult the Applicant on matters relating to selection of primary and secondary schools, but ultimately she shall reserve the rights to make the final decision;
- vi. That the Applicant will be responsible for the fees, costs and expenses relating to the Child's tertiary and post-graduate education, wherever the Child shall attend, should the Child prove so capable, until the age of 25 years or completion of tertiary education;
- vii. That the Child will spend half her school holiday with the Respondent and the other half of the holiday with the Applicant;
- viii. That in the event that the Child is enrolled in a school outside Zambia, the Child shall spend alternate holidays with both her and the Applicant;
- ix. That the Applicant shall bear 50 percent of all travel arrangements to and from school and school related tours and excursions together with sundries;

- x. That the Applicant shall bear 50 percent cost of the Child's birthday parties and that all birthday gifts should be discussed before they are purchased and presented to the Child;
- xi. That the Respondent shall provide appropriate clothing fit for a developing girl Child;
- xii. That the Applicant provides or covers the cost to secure comfortable housing for the Respondent and the Child whilst she is a minor in her primary care;
- xiii. That the Applicant will be responsible for the Child's future holy matrimonial costs.

3.3.24 The Respondent affirmed that she and the Child share a very strong mother-daughter relationship and she verily believes that at such a tender age, the best place for the Child is besides her mother. She also affirmed that she will soon be in transition regarding her employment and she shall have adequate time to dedicate to the Child, considering the possibility that she might have to soon settle down in a new country and environment.

3.4 **AFFIDAVIT IN REPLY**

3.4.1 By the Affidavit in Reply, filed on 5th February, 2021, and deposed by the Applicant herein, it was averred, *inter alia*, that contrary to the Respondent's claim that she is the primary caregiver of the Child, the Applicant has shared the responsibility of caring and raising the Child even to the extent of looking after her at his house on his own, since the Child was an infant, for days at a time.

3.4.2 The Applicant avowed that he in fact funded travel expenses to and from the United Kingdom for the Respondent and subsequently, for the Child as well. He stated that he and the Respondent in fact ceased to be in a relationship in early 2011, and while they strictly maintained only a friendship thereafter, in 2012, during a brief trip to Namibia, the Respondent and Applicant shared a room, resulting in the Respondent's pregnancy. He further stated that there was no further intimate relationship between the Respondent and him, and thereafter, they had only shared a relationship as parents of the Child.

3.4.3 The Applicant affirmed that the Respondent had failed to mention that it was in fact him who paid the sum of K10,000.00, to facilitate the

procurement of the Respondent's current work permit, as part of his efforts to ensure that the Child has both parents present and involved in her upbringing.

3.4.4 The Applicant denied that he has ever asked the Respondent to terminate the pregnancy, but rather asked if she wished to continue with it, in view of the fact that their relationship had already come to an end by the time she conceived. He stated that he clearly communicated to the Respondent that he had no intentions of living with her let alone having a relationship beyond being parents to the Child.

3.4.5 The Respondent avowed that he has made monthly contributions in the amount of \$500.00 towards maintenance of the Child, which amount only began to vary due to the effects of the Covid-19 pandemic and in view of the fact that the Child was spending half the month with him. In addition, he avowed that he has provided for both the Child's and Respondent's medical needs through a medical scheme funded entirely by the Applicant and has paid for a Child minder's salary at the Respondent's house, as well as paid for the Child's school fees.

3.4.6 The Applicant stated that the Respondent always claims and received the difference created by

bank charges, in cash, directly from him, either in US dollars or the Kwacha equivalent at the prevailing rate.

3.4.7 The Applicant stated that the Respondent had not been entirely truthful with regards to the monthly maintenance as the sum was reduced when the Child began spending half her time with him and further came to an end when the Child began attending boarding school, which costs he is meeting single-handedly, despite the fact that the Respondent has had means to purchase property in South Africa but now claims to have no means to care for the Child's education.

3.4.8 The Applicant stated that while he does not dispute that the Respondent did make some contributions towards the Child's fees when she attended Acacia School in Livingstone, where the fees recently were K11,500.00 per term, since the Respondent's unilateral decision to move the Child to Musikili where the fees are US \$4,200.00 per term, he has been solely responsible for the school fees.

3.4.9 The Applicant asserted that the Respondent has never raised any objection to the proposed shared parenting agreement, nor offered any input since it was presented to her in 2015. The

Applicant denied that he has ever coerced the Respondent into signing the Agreement.

3.4.10 The Applicant further asserted that it is imperative that the consent of both parents be granted whenever the Child is to leave the jurisdiction of Zambia, so as to ensure that both parents are involved in the Child's life within and outside of Zambia. He stated that he would never unreasonably withhold consent for the Child to travel with the Respondent provided that he is sufficiently informed of her whereabouts and how he may communicate with the Child and the Respondent during such travel, which information the Respondent denies him each time she travels with the Child, both locally and abroad.

3.4.11 The Applicant affirmed that his apprehension towards traveling back from Mazabuka stemmed from previous experiences, which have resulted in the Respondent being verbally and physically abusive towards him, for which reason he preferred to not be in the Respondent's company. He stated that he has always had the Child's best interest at heart and has never placed the Child in harm's way nor allowed indiscipline, recognising, however, that the Child is of tender age and should be allowed to express herself and

behave in the same manner in which a Child her age would.

3.4.12 The Applicant averred that he has never fully been agreeable to sending the Child to boarding school at a tender age and that the decision to send her to Musikili was primarily made by the Respondent, amid his protests and without consultation with him, regarding the affordability of the school and more importantly, the emotional impact that such a decision would have on the Child.

3.4.13 The Applicant asserted that the screen shot exhibited as “**JCM 7**”, referred to by the Respondent, shows his commitment to fund everything at that point in time, meaning for the current period until the Respondent can pay her share when she possesses the physical and financial means to ensure that the Child is well supported in her educational, developmental and health needs.

3.4.14 The Applicant further asserted that while the Respondent proposes to relocate to South Africa or indeed the United Kingdom with the Child, she has not offered any evidence of how she will generate sufficient income to sustain the Child nor has she offered evidence of any job prospects, let alone evidence of how she

proposes to care for the Child while she is at work.

3.4.15 The Applicant highlighted that the Respondent on the one hand alleges that she will possess financial capacity to sustain herself and the Child once in the United Kingdom or South Africa, on the other, demands that he should be the one to provide the same financial support needed to sustain herself and the Child.

3.4.16 In response to the custody arrangements, the Applicant proposed as follows: -

- i. That the parties should be granted joint custody as neither has proven to be an unfit parent but instead both parents have a critical role to play in the life of the Child and both have only the Child's best interest at heart;
- ii. That he has no objection to the proposal of having access to the Child two weekends in a month and that the Child may be picked up from school on Friday and returned on Monday at a drop off point in Choma at 06:30 hours;
- iii. He stated that as the primary objective is to the Child alone, he shall cover only the Child's health care needs;

- iv. That reasonable and affordable tuition and educational costs of the Child should be shared equally between the Respondent and himself and that in the event that the Court ordered him to be solely responsible for the Child's educational requirements, that he should have a say in which school the Child should be enrolled so as to ensure that he is able to consistently and timeously meet reasonable and affordable tuition fees;
- v. That all costs pertaining to the Child's tertiary and post-graduate education should be shared equally between the Applicant and Respondent;
- vi. That decisions relating to selection of the Child's education should be arrived at in consultation and full agreement of both Parties or in any event, in the manner proposed under (iv) above;
- vii. That he has no objection to settling half of the Child's travel arrangements as proposed;
- viii. That he has no objection to settling half the Child's airfare as proposed;

- ix. That the Respondent and Applicant should each bear the cost of the respective birthday parties that they may have for the Child, trusting each other's better judgment as regards presents purchased for the Child;
- x. That he has no objection to meeting the Child's clothing requirements;
- xi. That he has never been responsible for the Respondent's housing and thus objects to such demand. He further objects to the Respondent being the primary caregiver of the Child when in fact, he and the Respondent share care and parental responsibility over the Child on an equal basis;
- xii. That the proposal that he be solely responsible for the Child's future holy matrimony is absurd as neither the Respondent nor Applicant can properly predict the future at this point in time, given the Child's tender age and the more pressing needs that lie ahead, and that in any event, the said costs should be rightly shared between the Applicant and Respondent.

3.4.17 The Applicant asserted that there appears to be a conflict between the Respondent's decision to place the Child in boarding school, far away from both parents without regard to the impact of the decision on a Child of such a tender age and the Respondent's assertion in her Affidavit that she will be in transition soon and would have enough time to dedicate to the Child. He stated that the Respondent appears to want to relocate to the detriment of the Child, instead of making efforts to seek alternative employment in Zambia, where she had spent her life and is happy, settled and well acquainted with all those around her.

4. SUBMISSIONS

4.1 Both Parties filed herein Skeleton Arguments, to augment their respective Affidavits.

4.2 APPLICANT'S SKELETON ARGUMENTS

4.2.1 By Skeleton Arguments and List of Authorities, filed on behalf of the Applicant, on 11th September, 2020, the Applicant's Counsel, *inter alia*, cited **Order VI, Rule 1 (3)** of **The High Court Rules**¹, on which this Application is anchored, which provision provides for the mode of commencement of a matter that may be disposed of in Chambers. Counsel submitted that in hearing and determining this Application,

this Court is required to regard the welfare of the infant as the first and paramount consideration.

4.2.2 In fortifying her submission, Counsel invited the Court to the book titled ***Family Law in Zambia: Cases and Materials***¹, where the learned author stated at **page 377**, as follows: -

“The duty of the Court is to concern itself with the Child’s welfare whether the father’s claim is superior to the mother or vice versa. Courts also consider the age of the Child, sex and their health. Courts do not ignore the reality that where Children are very young, the mother is often better placed to bring them up.”

4.2.3 Based on the foregoing, it was submitted that the best interest of the Child refer to the totality of the circumstances and conditions as are congenial to the survival, protection and feelings of security of the Child, encouraging to his or her physical, psychological and emotional development. Counsel further submitted that it also means the least detrimental available alternative for safeguarding the growth and development of the Child.

4.2.4 The case of ***Stoyke v Stoyke***¹ was cited, in which it was explained that in considering the welfare of the Child, it is not monetary or physical comfort that should be considered but rather the moral and religious welfare of the Child and their

physical wellbeing. That the rights and wishes of the parents must be weighed against the welfare of the Child. In the said case, the Court held that the question for the Judge to ask is not what the essential justice of the case requires but what the best interest of the Child requires.

4.2.5 Further, Counsel cited the case of ***Musweu v Musweu***², in which the Court of Appeal pointed out that: -

“It is in the best interest of the Child in line with the United Nations Convention on the Rights of a Child and the African Charter on the Rights and Welfare of the Child for the Child to be brought up by both parents.”

4.2.6 Based on the foregoing, as well as other authorities cited, it was submitted that the best interest of the Child, though paramount, is not the only interest. That other factors must be considered in determining the question of custody, which factors must mirror the facts set out in the Affidavit. Counsel submitted that an analysis of the Affidavit in Support of the Originating Summons, reveal the following factors: -

- a) Accommodation and Material advantage
 - That the Child currently enjoys the

benefit of a clean, stable and safe home during her visits to the Applicant's home.

- b) Stability of home life – That the Child enjoys the stability of the relationship between her and the Applicant, and her care givers, in whose care she has been from her tender years.
- c) Child's wishes – That the Child has a loving and warm relationship with the Applicant, which include the benefit of having her father present for school and recreational events and other social gatherings.
- d) Sex and Age of the Child – That the Child's tender age makes her highly susceptible to the Respondent's displays of temper, to which the Respondent is predisposed, while the Child enjoys a peaceful, loving and caring environment with the Applicant.
- e) Personality and Character of Parents – That unlike the Respondent who has in the past exhibited aggressive displays of her temper, to which the Child has borne witness on occasion, the Applicant has endeavoured to maintain cordial relations with the Respondent, especially

so as to have a civil arrangement under which the Child can have the benefit of the continued presence of both parents in her life.

- f) Education and Health Care – That the Applicant meets the Child’s education and health care needs as the Respondent has indicated that she does not have the financial means to afford school fees.
- g) Retention or existing position – That the Child has, since her birth, known the care and love of her father and the assurance of his presence through the milestone developments of her life, which established bonds are of much importance to the Child’s sense of security.
- h) Access – That while the present arrangements allows for the Applicant to make liberal contact with the Child, these are disrupted by the Respondent making changes at short notice and without proper reason being advanced.

4.2.7 Counsel submitted that the reality to be appreciated is that it is beneficial to a Child to have both parents play a role in the Child’s life and be involved in the day to day aspects of Child

rearing. Counsel further submitted that denying this fact would be contrary to the best interest of the Child as it would result in two battling parents that cannot amicably work together, thus affecting the wellbeing and emotional stability of the Child, all of which are already at risk, as evidenced by the communication brought before this Court by the Applicant.

4.2.8 It was contended that a further concern and possibly a risk to the Child, is the Respondent's dismissive approach towards the Applicant's requests for his permission, in respect of the Respondent's travels with the Child, which permission is required in certain jurisdictions on account of the Applicant's name appearing on the Child's Birth Certificate.

4.2.9 It was further contended that the picture that emerges from the correspondence between the Applicant and the Respondent is a concerning one as there appears the real tangible possibility that in the event of emergency affecting the Child, which would require written consent of both parents, the Child's life could be at risk if there can be no consensus or open communication between the Parties.

4.2.10 Finally, Counsel submitted that the best interest of the Child would be served by this Court

granting to the Applicant the reliefs sought by him.

4.3 **RESPONDENT'S SKELETON ARGUMENTS**

4.3.1 The Respondent filed her Skeleton Arguments on 26th January, 2021, in which Counsel for the Respondent submitted, *inter alia*, that she agrees in totality with the Applicant's argument that the paramount consideration in all matters relating to a child must be the welfare of the child, which approach has universally been accepted and is often times the sole basis on which the Courts rely when it comes to making Orders as to custody.

4.3.2 In bringing clarity and context to the considerations outlined in the Applicant's arguments, Counsel directed this Court's attention to the fact that in deliberating over custody matters, no parent comes to the table as a dominant party and that all parties involved are on a level playing field with the only question to ask being what is best for the child. In fortifying this submission, Counsel placed reliance on the High Court case of ***Joel Colange v Pharis Chikachi***³, in which the Court stated as follows: -

"The best interest of the children principle does not only look at the financial standing of the

parties, their status or what they can provide but demands that the children's best interest be considered holistically."

4.3.3 Counsel went on to add that the financial standing or any parameter, at all, not based on the welfare of the child does not place one parent over the other in the determination of the question of custody. Counsel further submitted that the Respondent acknowledges that the Applicant is the breadwinner of the two Parties, as he has the more stable source of income and that he is a Citizen of the Republic of Zambia, whereas, the Respondent is, while in gainful employment, has little to no job security, due to the effects of the Covid-19 pandemic and the fact that she is a foreigner on an Employment Permit, which simply makes matters even more taxing. Counsel argued that the Applicant's financial position and immigration status are not a factor in matters relating to the custody of the Child.

4.3.4 Counsel contends that the Parties herein have a joint custody arrangement, which has seen both of them having a wonderful relationship with the Child, thus it is baffling to the Respondent that the Applicant proceeded to take this suit for joint custody and liberal access. For avoidance of doubt, Counsel resorted to the meaning of

custody as expounded by the learned author of ***Black's Law Dictionary***², as follows: -

“An arrangement by which both parents share the responsibility for and authority over the child at all times, although one parent may exercise primary physical custody. In most jurisdictions, there is a rebuttable presumption that joint custody is in the child’s best interest. Joint custody arrangements are favoured unless there is so much animosity between the parents that the child or children will be adversely affected by a joint-custody arrangement. An award of joint custody does not necessarily mean an equal sharing of time; it does, however, mean that the parents will consult and share equally in the child’s upbringing and in decision-making about upbringing. In a joint-custody arrangement, the rights, privileges, and responsibilities are shared, though not necessarily the physical custody. In a joint-custody arrangement, physical custody is usually given to one parent. In fact, awards of joint physical custody, in the absence of extraordinary circumstances, are usually found not to be in the best interest of children.” (Counsel’s emphasis)

4.3.5 Counsel implored the Court to take a broad approach towards the development of the Child when considering the welfare principle. In fortifying this submission, Counsel cited the case of ***Re G (Education: Religious Upbringing)***⁴, in

which the Court stated as follows on the broad approach that must be employed: -

“Welfare... extends to and embraces everything that relates to the child’s development as a human being and to the child’s present and future life as a human being.”

4.3.6 Counsel urged the Court to disregard the Applicant’s proposal on custody arrangement, where the Applicant suggested that the Child alternates residence between the Parties, which entails that the Child spends three days and nights of every week with the Applicant and the remainder of the week with the Respondent. Counsel contends that this sort of arrangement will cause confusion to the Child as it is impractical and undesirable for a child to have two permanent homes, and will disrupt the Child’s development. In fortifying this contention, Counsel invited the Court to the book ***Hayes & Williams Family Law***³, where the learned authors state at **page 495**, as follows: -

“The Court is required to have particular regard to ‘any risk there might be of proposed application disrupting the child’s life to such an extent that he would be harmed by it’. Indeed, it is regarded as a ‘factor of crucial significance’.” (Counsel’s emphasis)

4.3.7 Counsel also implored the Court to disregard the Applicant's proposal which entails the Respondent not being at liberty to leave the jurisdiction of Zambia without the Applicant's written consent. Counsel contends that aside from this being a Human Rights issue relating to the right to liberty, that the proposed provision gives rise to, the provision shines a light on the controlling nature of the Applicant, considering that the Respondent is a British South African National and that her stay in Zambia is depended on her maintaining employment and having a valid Employment Permit. For this submission, Counsel placed reliance on the English case of ***Poel v Poel***⁵, where it was held that relocation cases have been consistently decided upon the application of the following two propositions: -

“(a) the welfare of the child is the paramount consideration; and

(b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore, her application to relocate will be granted unless the Court concludes that it is incompatible with the welfare of the children.”

4.3.8 Based on the foregoing submission and authority cited, Counsel argued that the attempts by the Applicant to have the Respondent seek permission from him to leave the Country is wholly unreasonable as the reality is that Zambia will not always be home for the Respondent.

4.3.9 Finally, Counsel contended that the Applicant had failed to show why the current status of affairs must be changed and that the Respondent is unfit to continue being the primary care giver of the Child. She urged the Court to maintain the *status quo* and placed reliance on the case of **Re E**⁶, where it was held that: -

“A status quo argument will not be compelling where a parent has established the status quo wrongly or where one parent has prevented the other from maintaining a relationship with the child.” (Counsel’s emphasis).

5. AT THE HEARING OF THE APPLICATION

5.1 At the hearing of the Application, on 2nd May, 2024, both Counsel opted to rely on the documents on record.

6. CONSIDERATION AND DECISION OF THE COURT

6.1 I have considered the Applicant’s Originating Summons, the Parties’ Affidavit evidence and the Skeleton

Arguments, filed by Counsel on behalf of the Parties. I have further considered the Authorities cited, which have made my task considerably more straightforward.

6.2 The Application is brought pursuant to **Order VI, Rule 1 (3)** of **The High Court Rules**¹, as read with **Section 14 (1) and (2)** of **The Legitimacy Act**². For ease of reference **Order VI, Rule 1 (3)** of **The High Court Rules**¹, is couched as follows: -

“A matter which, under any written law or theses Rules, may be disposed of in Chambers shall be commenced by an originating summons accompanied by an Affidavit in Support”

6.3 **Section 14 (1) and (2)** of **The Legitimacy Act**², provides as follows: -

“(1) The High Court may, upon the application of either parent of an illegitimate infant, make such order as it may think fit relating to the custody of such infant and the right of access thereto of either parent.

(2) Where, upon the hearing of an application under this section, the custody of an illegitimate infant is in question, the Court, in deciding that question, shall regard the welfare of such infant as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father in respect of such custody is superior to that of the mother, or the claim of the mother is superior to that of the father.” (Court’s emphasis)

6.4 The facts of this matter are the Parties herein had an intimate relationship that resulted in the Child being born out of wedlock. The Child has enjoyed a healthy relationship with both Parties, with the Applicant shouldering the bulk of the Child's necessities, while the Respondent is the primary care giver. It is not disputed that the Parties, who are no longer in an intimate relationship have a strained relationship which is causing anxiety on the part of the Applicant, who now desires to be declared as the biological father of the Child and to have a formal joint custody Order of the Court.

6.5 Having analysed the Affidavit evidence adduced before this Court, the issues that fall for determination in this matter are the following: -

1. Whether the Applicant is entitled to a declaration that he is the biological father of the Child born out of wedlock known as Olivia Caroline Rose McBrearty Jones;
2. Whether the Applicant is entitled to an Order for joint custody of the Child, with the Respondent having day to day care and control; and
3. Whether the Applicant is entitled to an Order restraining the Respondent from removing the Child from the Zambian Jurisdiction without the consent of the Applicant.

- 6.6 I will address the legal issues in the manner I have identified them starting with whether the Applicant is entitled to a declaration that he is the biological father of the Child.
- 6.7 To prove his assertion that he is the biological father of the Child, the Applicant produced copies of the Child's Birth Certificate and Record of Birth Entry in the Register of Births, issued pursuant to the English ***Births and Deaths Act 1953***³ of the United Kingdom. The burden of proof on paternity of the Child lies with the Applicant, for he who asserts must prove that those facts exist. The burden of proof of the existence of any fact lies with the person who would fail if no evidence at all were given on the other side. It lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that proof of that fact lie on any particular person.
- 6.8 On my analysis of the Applicant's assertion and the evidence produced in support thereof, I find that though it is not in dispute that the Applicant is the Child's biological father, the Applicant has not led any cogent evidence, such as DNA/Blood test results, from which this Court can make a determination that he is the biological father of the Child. In my view, a fact is not proved when it is neither proved nor disproved. Neither of the Parties proved the paternity of the Child. The Applicant was shouldered with the burden of proof.

While I accept that a Birth Certificate is proof of paternity, however, it is not the only and final proof. It is further my view that DNA/Blood testing is the only final proof of paternity. Accordingly, in the absence of such proof, this Court cannot declare the Applicant as the biological father of the Child. Consequently, this claim is dismissed.

6.9 I note, however, that as the Applicant's name appears on the Certificate of Registration of Birth, the Applicant is acknowledged as the father of the Child, thus, he is the legal father of the Child for all intents and purposes. I am persuaded in my finding by **Section 10 of The Births and Deaths Registration Act**³ that provides as follows: -

“Notwithstanding anything in the foregoing provisions of this Act (and subject to section 10ZA of this Act), in the case of a Child whose father and mother were not married to (or civil partners of) each other at the time of his birth, no person shall as father of the Child be required to give information concerning the birth of the Child, and the registrar shall not enter in the register the name of any person as father of the Child except—

(a) at the joint request of the mother and the person stating himself to be the father of the Child (in which case that person shall sign the register together with the mother); or

(b) at the request of the mother on production of—

- (i) a declaration in the prescribed form made by the mother stating that that person is the father of the Child; and*
- (ii) a statutory declaration made by that person stating himself to be the father of the Child; or*
- (c) at the request of that person on production of—*
 - (i) a declaration in the prescribed form by that person stating himself to be the father of the Child; and*
 - (ii) a statutory declaration made by the mother stating that that person is the father of the Child...”*

6.10 The foregoing provision shows that a person cannot be entered in the Register of Births as the father of a child unless he requests that he be entered as such. Therefore, as the Applicant herein has been entered as the father of the Child in the Register of Births, he is the legal father of the Child and I so Order.

6.11 I now turn to consider the second legal issue of whether the Applicant is entitled to an Order for joint custody of the Child. I shall also consider the Applicant's claim for an Order that he be granted liberal access to the Child and his claim for an Order that the Applicant picks the Child up on Friday from school and return her to the Respondent on Sunday, as these claims are related to the claim for joint custody.

6.12 I wish to point out from the onset that in issues concerning the welfare of Children, of paramount importance, is where the best interest of the Child lies. **Article 3 (1) and (2) of The UN Convention on the Rights of the Child**⁴, to which Zambia is a State Party, provides as follows: -

“1. In all actions concerning Children, whether undertaken by public or private social welfare institutions, courts or law, administrative qualities or legislative bodies, the best interest of the Child shall be a primary consideration.

2. State Parties undertake to ensure the Child such protection and care necessary for his or her wellbeing, taking into account the rights and duties of his parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative administrative measures.”

6.13 Similarly, the learned author of **Family Law in Zambia: Cases and Materials**¹, cited by the Applicant’s Counsel, states as follows: -

“The duty of the Court is to concern itself with the Child’s welfare whether the father’s claim is superior to the mother or vice-versa. Courts also consider the age of the Child, Sex and their health. Courts do not ignore the reality that where Children are very young, the mother is often better placed to bring them up.”

6.14 The foregoing authorities attest to the fact that in all actions concerning Children, the best interest of the

Child shall be the primary consideration, taking into account the rights and duties of the parents.

6.15 To support his claim for an Order of joint custody, the Applicant alleges that he has attempted to establish a fair joint custody arrangement with the Respondent that would be acceptable to the Child and to both of them but has failed to do so. He asserted that though the current arrangement between him and the Respondent allows him liberal contact with the Child, it has been subject to sporadic changes by the Respondent, sometimes at short notice, without proper reason being advanced. Further, the Applicant asserted that the Respondent has sporadically dictated her own terms as it relates to visitation by the Child. The Applicant also asserted that he has shared in the responsibility of caring and raising the Child to an extent of looking after her at his house on his own since she was an infant for days at a time.

6.16 In Response to these assertions, the Respondent stated that she has never discouraged the Child from visiting the Applicant at his residence and that she has always been a proponent of the Applicant and the Child developing a strong bond and therefore, encouraged his presence in her life. She asserted that the Child has spent multiple holidays with the Applicant and his relatives from the time she was born. She stated that she has even actively encouraged the Applicant to travel

with the Child to visit relatives outside Zambia in order for her to foster a relationship with them. The Respondent further stated that she has always been open to a reasonable custody agreement, but opposes the proposed 50 percent shared parenting agreement, as in her view, it would not be in the best interest of a female minor Child to be away from her mother for prolonged periods of time.

6.17 Additionally, the Respondent asserts in her proposed custody arrangements that she wants full custody of the Child and has also proposed arrangements of when the Applicant can have access to the Child.

6.18 To determine the issue of joint custody, I am guided by the provisions of **Section 15 (2) and (3) of *The Affiliation and Maintenance of Children Act***⁵, which provides that: -

“(2) In making any order as to custody or access, the court shall regard the welfare of the Child as the paramount consideration, and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother, or vice versa.

(3) If the court is satisfied that-

(a) the mother or father of a Child is not a fit and proper person to have custody of the Child;

(b) the mother or father of a Child has died or become of unsound mind or is serving a term of imprisonment of more than six months; or

(c) there are exceptional circumstances making it impracticable for the Child to be entrusted to the custody of either of its parents;

the court may, at the time of making a maintenance order or at any time thereafter, appoint any other person as custodian of the Child.” (Court’s emphasis)

6.19 Further, in the case of **Re O (infants)**⁷, the Court ruled that: -

“There is no rule that little Children should be with their mother, any more than there is a rule that boys approaching adolescence should be with their father, it depends on what is proper in the individual case.”

6.20 Based on the foregoing authorities and my analysis of the evidence of record, I find that the Applicant has demonstrated that he is capable of taking care of the Child in that he possesses the physical and financial means to look after the Child. He has also demonstrated that he has nurtured a close bond with the Child since her birth. The Applicant has also asserted that he is self-employed and has ample time to dedicate to the Child when she is in his care. Additionally, he stated that he has employed two care givers who are acquainted with the Child and are always available at his residence. Further, the Applicant has stated that the Child has her own bedroom, which is ensuite, within

his home and has sufficient safe and comfortable space within which the Child can play and develop.

6.21 I note further that no evidence has been led by the Respondent to demonstrate that the Applicant is not a fit and proper person to have custody of the Child nor has she demonstrated any exceptional circumstances making it impracticable for the Child to be entrusted to the custody of the Applicant. Further, the Respondent has not led any cogent evidence to support her proposal that she should have full custody of the Child. Therefore, the Applicant, as the father of the Child, has demonstrated that he is capable of looking after the Child.

6.22 As this is a claim for joint custody, it is imperative that I consider whether the Respondent is capable of looking after the Child in the event that full custody is granted to her. To demonstrate that the Respondent has the capacity to look after the Child, she has stated that she is presently employed and is benefitting from company housing provided for her and the Child. She has also stated that due to the Covid-19 pandemic, her finances have been crippled, but has nevertheless managed to pay 50 percent of the Child's school fees.

6.23 The Respondent has further stated that there is a real possibility that she would have no choice but to leave Zambia in the event that her work permit is not renewed, in which event she would move to the United

Kingdom with the Child, to live with the Respondent's parents, where the Child would receive free health care and education, that the Child is already registered for. Alternatively, the Respondent would move to South Africa, where the Child will have a loving and secure environment with sufficient outdoor and play activities. The Respondent also stated that the Child has her own ensuite bedroom at both her Grandparents' home in the United Kingdom and her house in South Africa.

6.24 As regards her physical and financial means, the Respondent states that she will have the means to ensure her daughter is well dressed, well fed, well acquainted with her relatives, and well supported in her educational, developmental and health needs.

6.25 Based on the foregoing, and in the absence of evidence that the Respondent is not a fit and proper person to have custody of the Child and in the absence of evidence of exceptional circumstances making it impracticable for the Child to be entrusted to the custody of the Respondent, I find that the Respondent herein has demonstrated that she is capable of looking after the Child.

6.26 Having determined that both the Applicant and the Respondent are capable of looking after the Child, I grant an Order of joint custody of the Child to the Applicant and Respondent. I further Order, that both the Applicant and the Respondent shall have liberal

access to the Child whilst she is residing with either of the Parties.

6.27 As the Parties herein are not in complete agreement on the manner in which the Child shall be maintained or accessed, this Court shall proceed to determine the said issues, taking into consideration the best interest of the Child and the facts as presented before the Court.

6.28 **Access**

6.28.1 I shall begin by considering how the Child shall be accessed. From the facts on record, it is clear that presently the Child has been enrolled in a boarding school. It is also clear that the Parties are in agreement with regards to the pickup of the Child from boarding school on Friday and returning her to a drop off point in Choma. Accordingly, I Order that the Applicant and Respondent will have access to the Child for two weekends in a month on an alternate basis and that the Child shall be picked up from school on Friday and returned on Monday at a drop off point in Choma at 06:30 hours.

6.28.2 Further, I Order that the Child shall spend half her holiday with the Respondent and the other half with the Applicant.

6.28.3 In the event that the Child is enrolled in a school outside Zambia, I Order that the Child shall

spend alternate holidays with either the Respondent or Applicant.

6.29 I shall now proceed to determine how the Child shall be maintained which shall include the consideration of the Child's education, health, clothing, nourishment and housing.

6.30 **Education**

6.30.1 As regards the Child's education, the Applicant stated that he is currently footing all the school fees of US \$4,200.00 per term, which fees are being paid at a school chosen by the Respondent. He has however proposed that the affordable tuition and educational costs of the Child should be shared equally between himself and the Respondent. He went on to propose that in the event that this Court Orders that he be solely responsible for the Child's education, he should have a say on which school the Child should go to, in order to ensure that he meets the reasonably and affordable school fees. The Respondent has, however, proposed that 100 percent of the school fees be paid by the Applicant including all tertiary and post-graduate fees and costs incidental thereto.

6.30.2 On my analysis of the foregoing and in consideration of the best interest of the Child, as well as to retain the existing position of the Child

being in a boarding school, I order that the Applicant shall continue paying 100 percent of the school fees of the Child, until it is demonstrated to this Court that the Respondent's financial status has improved, at which point the Respondent will be required to pay an amount as close to 50 percent of the cost of school fees as the Respondent's financial status will allow.

6.30.3 Further, as it is not in dispute, I Order that in the event that the Child is enrolled in a school outside Zambia, the Applicant and the Respondent shall bear 50 percent cost of all travel arrangements, school related tours and excursions, airfare to and from the Child's place of residence for every school holiday.

6.30.4 As regards to the Respondent's proposal that the Applicant be responsible to pay the Child's tertiary and post-graduate fees, I am of the view that this proposal ought to only be considered when the Child approaches tertiary education taking into account the financial status of either Party. In the event that either Party is financially able, the responsibility to pay the Child's tertiary and post-graduate fees ought to be shared equally between the Parties.

6.31 I now turn to consider the Child's health care needs.

6.32 **Health Care**

6.32.1 In my view, the responsibility of providing health care to the Child that each of the Parties have, cannot be extended to meeting either the Applicant's or Respondent's healthcare. Therefore, the Applicant is under no obligation to pay for the Respondent's health care needs and I so Order.

6.32.2 On my analysis of the facts, as the Applicant is presently capable of meeting all the Child's health care needs, I Order that the Applicant shall be responsible for meeting the Child's health care needs.

6.33 **Clothing and Nourishment**

6.33.1 I now turn to consider the Child's clothing and nourishment. As neither Party has disputed to being capable of providing reasonable clothing and food for the Child, I Order that each Party provides for reasonable clothing and nourishment to the Child when the Child is in their care.

6.34 **Housing**

6.34.1 On my analysis of the facts, both the Applicant and Respondent have led evidence that they have adequate housing for the Child. Therefore, the Respondent's proposal that the Applicant be

responsible to provide housing for her and the Child is not tenable as the Respondent has not shown that she requires it. Accordingly, based on the facts as presented, I Order that the Parties avail comfortable and safe housing for the Child, in the manner as set out in the evidence adduced before Court.

6.35 **Birthdays and Presents**

6.35.1 As regards to the Child birthday and birthday presents, I note that this is not a material need of a Child from which a lack of can result in a cause of action for litigation. However, as it has been raised by the Parties and in my view, can be a source of acrimony between the Parties, which may affect the welfare of the Child, I shall consider it.

6.35.2 Accordingly, I Order that the decision to host a birthday party should be made in consultation with either Party and the cost of such party should be shared equally between the Applicant and Respondent.

6.35.3 In the event that only one of the Parties decides to host a birthday party or any party for the Child, I Order that the Party hosting such party shall foot 100 percent of the cost of the party.

6.35.4 Further, I Order that each Party should bear the cost of the Child's birthday present.

6.36 I now turn to consider the third legal issue of whether the Applicant is entitled to an order restraining the Respondent from removing the Child from the Zambian Jurisdiction without the consent of the Applicant.

6.37 Having Ordered that the Applicant and Respondent have joint custody of the Child, it follows that the consent of either Party is required before the Child is removed from Zambia. My decision is fortified by the decision of the Supreme Court in the case **Andreas Panagiotis Xirocostas v Yolanda Guizada Poma**⁸, where they stated that: -

“Although the net effect is that the entire appeal fails, we are mindful of the fact that Maria Lucia, who is still a minor, is now 11 years old and not as young as she was at the time the application for variation of interim custody was initially made by the appellant. It is on those considerations, that we vary the custody order to allow the appellant visitation rights and to have the Child during school holiday, mid-term school breaks and long weekends. The Child, may however, only be removed from the jurisdiction by either party with the consent of the other.” (Court's emphasis)

6.38 Accordingly, I Order that both the Applicant and the Respondent shall obtain the prior written approval of either Party to remove the Child from the Zambia. I further Order that such consent shall not be

unreasonably withheld by either Party. In the event that either Party unreasonably withholds their consent, the consent shall be obtained from the Family Division of the High Court for Zambia.

7. CONCLUSION

- 7.1 In conclusion, though it is not in dispute that the Applicant is the Child's father, the Applicant has not led any cogent evidence, such as DNA/Blood test results, from which this Court can make a determination that he is the biological father of the Child. Therefore, this Court cannot declare the Applicant as the biological father of the Child. Accordingly, this claim is dismissed. However, as the Applicant has been entered as the father of the Child in the Register of Births, I find that he is the legal father of the Child and I so Order.
- 7.2 Having determined that both the Applicant and the Respondent are capable of looking after the Child, I grant an Order of joint custody of the Child, Olivia Caroline Rose McBrearty Jones, to both the Applicant and Respondent. I further Order, that both the Applicant and the Respondent shall have liberal access to the Child whilst she is residing with either of the Parties.
- 7.3 As regards access to the Child, I Order that the Applicant and Respondent will each have access to the Child for two weekends in a month on an alternate basis and that the Child shall be picked up from school on

Friday and returned on Monday at a drop off point in Choma at 06:30 hours. Further, I Order that the Child shall spend half her holiday with the Respondent and the other half with the Applicant.

- 7.4 In the event that the Child is enrolled in a school outside Zambia, I Order that the Child shall spend alternate holidays with either the Respondent and Applicant.
- 7.5 I Order that the Applicant shall continue paying 100 percent of the school fees of the Child until it is demonstrated to this Court that the Respondent's financial status has improved, at which point the Respondent shall be required to pay an amount as close to 50 percent of the cost of school fees as the Respondent's financial status will allow.
- 7.6 I Order that in the event that the Child is enrolled in a school outside Zambia, the Applicant and the Respondent shall bear the 50 percent cost of all travel arrangements, school related tours and excursions, airfare to and from the Child's place of residence for every school holiday.
- 7.7 As regards health care, as the Applicant is presently capable of meeting all the Child's health care needs, I Order that the Applicant shall continue to be responsible for meeting the Child's health care needs.

7.8 Further, I Order that each Party provides for reasonable clothing and nourishment to the Child as and when the Child is in their care.

7.9 I Order that the Parties avail comfortable and safe housing for the Child in the manner as set out in the evidence adduced before Court.

7.10 Additionally, I Order that the decision to host a birthday party should be made in consultation with either Party and the cost of such party should be shared equally between the Applicant and Respondent. In the event that only one of the Parties decides to host a birthday party or any party for the Child, I Order that the Party hosting such party shall foot 100 percent of the cost of the party. Further, I Order that each Party should bear the cost of the Child's birthday present.


7.11 Finally, I Order that both the Applicant and the Respondent shall obtain the prior written approval of either Party to remove the Child from the jurisdiction of Zambia. I further Order that such consent shall not be unreasonably withheld by either Party. In the event that either Party unreasonably withholds their consent, it shall be obtained from the Family Division of the High Court for Zambia.

7.12 I wish to underscore the point that the law recognises that various circumstances relevant to the issue of custody sometimes change for either or both Parties, as indeed do the needs of a growing Child. The Parties,

thus, retain the liberty to apply for variation of custody Orders, before the Family Division of the High Court for Zambia.

7.13 Due to the circumstances of this case, each Party shall bear their own costs.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS
13TH DAY OF JUNE, 2024.**



**P. K. YANGAILO
HIGH COURT JUDGE**