

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2018/HP/D150

(Civil Jurisdiction)

B E T W E E N:

**ALEX CHIPO MAPUSHI
AND**

BENITA SHAWA



PETITIONER

RESPONDENT

*Before the Hon. Mrs. Justice M.M. Bah-Matandala
On the 23rd day of April, 2025.*

For the Petitioner: Ms. D. Banda & Ms. Cornhill Messrs. Wilson & Cornhill

*For the Respondent: Mr. I. Siame & Mrs. S. K. Sinkamba Messrs. Lynda Mataka
& Partners*

RULING

Legislation Referred To:

1. *The High Court Rules Chapter 27 of the Laws of Zambia*
2. *The Matrimonial Causes Act No. 20 of 2007*
3. *The Children's Code Act No. 12 of 2022*

Works Referred To:

1. *Emmanuel Mponda v Mutale I. Mponda (SCZ Appeal No. 199/2015)*
2. *Elizabeth Nadine Smith Wesson vs. Brian Sydney Strond SCZ No. 35 of 1998*
3. *Jobsi Ulrish Stoyke vs Cleotha Ilona Emily Stoyke- Appeal No. 67 of 1998*
4. *J v C (1970) AC 686*

1.0 INTRODUCTION

- 1.1 By way of summons supported by an affidavit dated 27th September, 2024, the Petitioner is seeking to vary the

joint custody order dated 20th November, 2020 relating to the child namely **Elih Lubona Mapushi**.

- 1.2 The Application is made pursuant to **section 72 (7) of the Matrimonial Causes Act No. 20 of 2007** as read together with section **146 of the Children's Code Act No. 12 of 2022**.

2.0 AFFIDAVIT IN SUPPORT

- 2.1 The affidavit in support of the application is dated 27th September, 2024 and is deposed to by **Alex Chipo Mapushi**, the Petitioner herein. He deposed that following the dissolution of the marriage between the Petitioner and the Respondent, a joint custody order with respect to the only child of the family at the time namely Elih Lubona Mapushi (hereinafter referred to as the child), was issued and later varied by the Court on 20th November, 2020.

- 2.2 The Court directed in the aforesaid order that;

- i) the Respondent continues to reside with the child of the family and have physical custody over the child;*

- ii) *the Petitioner or Applicant herein be accorded day access to the child on weekends every fortnight in the presence of the child's nanny;*
- iii) *the Applicant be allowed to pick up the child as agreed in (ii) above and to be returned to the Respondent on the evening of the last day of the weekend as the case may be, say from Friday evening to Sunday evening, in the presence of the nanny until the child attains the age of 5 years;*
- iv) *the child be allowed to travel out of jurisdiction with either parent provided that the consent of the other parent is obtained and which consent should not be unreasonably withheld.*

2.3 The Petitioner averred that at the time when the aforementioned order was granted the child was aged 4 years old.

2.4 Furthermore, and notwithstanding the order in paragraph 2.2 above, the custody arrangements obtaining are those which the Petitioner and the Respondent have put in place; which are;

- i) the Respondent has the primary physical custody of the child;*
- ii) the Petitioner has access to the child every weekend fortnightly.*

2.5 However, the Petitioner averred that the child has now turned 8 years old and he did on 29th February, 2024 express his desire to vary the current custody arrangements so that the Respondent and the Petitioner could have a joint custody which would allow the parties to have equal physical custody and decision making over the child. This has been exhibited in a letter marked as "ACM2".

2.6 The reasons given for the variation of the custody order by the Petitioner are as follows;

- i) *the child is now 8 years old and capable of being physically cared for by the Petitioner and or the Respondent;*
- ii) *that from 27th August, 2022 to date, the Petitioner has remarried to a responsible wife who encouraged him to be more present and involved in the life of the child. The marriage certificate has been issued in that respect marked as 'ACM3.*
- iii) *the wife of the Petitioner is an advocate of the High Court of Zambia owns a Law Firm by the name of Sameta Mapushi Legal Practitioners.*
- iv) *the Petitioner is serving as a senior Government Officer serving under the President as the Deputy Permanent Secretary for Lusaka Province;*
- v) *the Petitioner owns a couple of businesses which include Chibombo Radio Station,*

*Red Scorpion Security and Consultancy
Firm*

- 2.7 The Petitioner avers that apart from his wife's advice, he does personally wish to have more time with the child so that he can teach, mentor, mold him and inculcate the principles and values that were passed on to him by his late father and by which he lives by in his life now.
- 2.8 The Petitioner has averred that the child herein is male and as such he believes that as a male child, he needs more of the Petitioner as he transitions into his teenage years. The Petitioner averred that he would like to further make an impact in the child's life to the best of his human capabilities so as to avoid the delinquency in the child, which is common amongst boys with absent fathers or with limited access to their fathers as is currently the case between the Petitioner and the child.
- 2.9 The Petitioner averred that he now also has 3 biological children with his current wife namely;
- i) *Nkanga Mapushi female aged 5 years old;*

ii) *Ndakondwa Mapushi, female aged 3 years old*

iii) *Chipo Mapushi, a male aged 2 months old*

2.10 The Petitioner has expressed desire for the child to spend more time with the aforesaid siblings and be able to form family bonds from as early as possible.

2.11 The Petitioner averred that as opposed to what was his financial status at the time when the child was born, he now has attained some level of financial stability that has enabled him to fully participate in the financial wellbeing of the child since both him and his wife are in gainful employment.

2.12 The Petitioner averred that although he has trust and confidence in the Respondent's parenting skills together with her new husband, he however, as the child's biological father, is desirous of equally sharing the physical custody of the child, the decision-making powers and every other aspect of the child's life with the Respondent.

2.13 The Petitioner proposes that a joint order be granted on the following terms which are;

i) Custody during school holidays

a) the Petitioner and the Respondent be granted equal shared custody of the child during school holidays;

b) the Petitioner and the Respondent be granted alternate custody of the child during the half of the school holidays in which Christmas and New Year falls.

ii) Custody during school days

a) the child should continue to reside with the Respondent during school days whilst the Petitioner should continue to have access to the child during weekends, however, the weekends shall be increased from two to three weekends in a roll in a school month from Friday evening to Sunday evening.

b) *the Respondent should have custody of the child during all the school days and in addition, one weekend in school month.*

iii) *Custody during Public Holidays*

a) *the Petitioner should have custody of the child unless he is required to attend a special event.*

iv) *Communication with the child*

a) *the Petitioner and the Respondent should continue to have unrestricted access to the child on mobile phone whenever the child is not in their custody provided always that the communication is planned in advance taking into account the child's planned activities, scheduled travel within and outside the jurisdiction and family time.*

b) *the planned communication through mobile phone shall not be unnecessary and shall allow the child time to settle down and*

reintegrate into the family with which he is staying at the time.

c) the parties shall each provide a working, charged mobile phone with sufficient internet connectivity through which communication with the child shall take place provided, in case of the Petitioner, the child shall not be allowed to own a mobile phone in his home.

v) Financial Support

a) The parties shall continue to jointly financially support the child.

2.14 The Petitioner averred that him and Respondent have failed to agree on the proposals foresaid and as such the Petitioner has been left with no option but to bring this application.

3.0 AFFIDAVIT IN OPPOSITION

3.1 The Affidavit in opposition, it was deposed by **Benita Shawa**, the Respondent and mother to the child herein. She averred that the Custody Order dated 20th November, 2020 gave her sole physical custody of the child with

access to the Petitioner on weekends every fortnight in the presence of a nanny.

3.2 The Respondent stated that despite the order of the Court only granting the Petitioner day access every fortnight, the Respondent has allowed the child to spend more time at the Petitioner's house, including sleepovers and holidays beyond the period ordered by the Court.

3.3 The Respondent stated that in July of 2024, the Petitioner expressed his desire to vary the custody order and the Respondent was not completely averse to varying the custody order and thus proposed the following;

a) that the custody order be varied to allow the Petitioner to have the child for two (2) weeks every school holiday and the Respondent to have the child in the remainder of the two (2) weeks out of the four (4) school holidays, provided the Petitioner would be able to communicate with the child at any time while he is in the custody of the Petitioner. and to this end the Respondent expressed willingness, if

need be, to provide the child with a mobile phone for communication purposes.

b) that the current arrangements in place regarding the child during school terms remains the same.

- 3.4 The Respondent averred that the Petitioner disagreed with the Respondent's proposals and a meeting was held between the parties to try and reach an amicable conclusion but to no avail.
- 3.5 The Respondent stated that since 2020 to date when the child custody arrangements were made, the Respondent has been solely supporting the child financially with no help from the Petitioner. The Respondent averred that she has provided for all the child's needs, including clothing, food, accommodation and medical expenses as evidenced in exhibit marked "BS1"
- 3.6 The Respondent further went on to aver that the child suffers from a severe form of asthma and the Respondent has been the only one taking care of his medical bills including his trip to South Africa to see a specialist. The

child is scheduled for an operation in South Africa soon as evidenced in exhibit marked "BS 2" the copies of medical bills and doctor's reports.

3.7 The Respondent averred that at various times when the child had suffered an asthma attack whilst at the Petitioner's home, the Petitioner would take the child to the hospital but wait for the Respondent to pay the medical bills as evidenced by the receipts and medical bills marked "BS3".

3.8 The Respondent averred that she has solely been taking care of the child's school fees and needs without any help from the Petitioner until somewhere around 2022.

3.9 The Respondent averred that she has invited the Petitioner and his spouse to participate in the child's birthdays in order to bond with his siblings born between the Petitioner and his spouse, but the Petitioner has shown unwillingness to participate in the same as evidenced by the un responded-to messages on WhatsApp evidenced and marked as "BS4"

- 3.10 The Respondent averred that the child suffers from other health concerns such as Attention Deficit Hyperactivity Disorder (ADHD) which was diagnosed with and he has been struggling emotionally. The child was seeing a psychologist for counselling at Psych Health Zambia as evidenced by exhibit marked "BS5" the copies of the medical bills and report from Psych Health Zambia.
- 3.11 The Respondent has alleged that the Petitioner was informed of the aforesaid counselling but opted not to participate in the process as evidenced in exhibit marked "BS6" the WhatsApp messages exchanged between the Respondent and the Petitioner's spouse in relation to the child's counselling sessions. The Petitioner is said to have refused to consider the health of the child in the process to vary the custody order. The Respondent said that this is not in the best interest of the child.
- 3.12 The Respondent averred that due to the aforesaid issues she disagreed with the Petitioner's proposed custody variation reasons as the same will not benefit the child at all.

3.13 Furthermore, the Respondent has alleged that the child is not comfortable at the Petitioner's residence and he has shared his concerns with the Respondent whenever the child returns from visiting the Petitioner. The Respondent averred that she has brought the said concerns to the attention of the Petitioner in the past to ensure the child's needs are attended to but to no avail.

3.14 In support of this concern the Respondent stated that she was compelled to record the child when he shared his experience/discomfort that he experienced at the Petitioner's residence which has been evidence as "BS7" a copy of the recording.

3.15 Consequently, the Respondent averred that what would be in the best interest of the child considering his's age and health concerns are as follows;

a) Custody during school holidays and public holidays

i) the Respondent agrees that the Petitioner and the Respondent be granted equal shared

custody of the child being two weeks for the Petitioner and 2 weeks for the Respondent.

- ii) the Respondent disagrees that the Respondent be granted alternate custody of the child during Christmas and New Year's Day.*

b) Custody during school days

- i) the Respondent disagrees that the weekends be increased from two (2) weeks to three (3) weeks as the child has several health concerns and requires a lot of care which he does not receive from the Petitioner's home. The Respondent proposes that the Petitioner maintains spending weekends with the child every fortnight.*
- ii) Further the Respondent proposes that the child be allowed to travel out of jurisdiction with either parent provided that the consent of the other parent is obtained and which*

consent should not be unreasonably withheld.

c) Custody during public holidays

- i) *the Respondent disagrees that the Petitioner should have the child for all the public holidays.*
- ii) *She has proposed that the Petitioner and the Respondent should alternate public holidays with prior notice before arrangements can be made for the said public holiday.*

d) Communication

- i) *the Respondent strongly disagrees that the child should not have access to a mobile phone due to past events that have transpired when the child was in the custody of the Petitioner. the Respondent has alleged that it has proven difficult to communicate with the child whenever the Petitioner and his spouse are not at their home to speak to the child. This is so because the Petitioner*

and his spouse are busy people which has led to the child suffering from health complications in their absence in the past.

e) Financial contribution

i) the Respondent averred that she is not averse to the Petitioner's financial support for the child jointly with herself.

4.0 Affidavit in Reply to the affidavit in opposition

4.1 The Petitioner submitted in reply to paragraph 10 of the affidavit in opposition that the Respondent had refused any new arrangement for child custody because the child was undergoing counselling at Psych Health Zambia but she was willing to have the custody order varied after the counselling.

4.2 The Petitioner averred that he had requested that the recommendation by Psych Health be reviewed but the Respondent refused.

4.3 The Petitioner has averred that as a father to the child, he believes that the child does not have any grave psychological challenges that would warrant excluding his

involvement in the child's life as suggested by Psych Health Zambia and as such he requested for a second opinion to be obtained by a three-member panel of counsellors. This has not been done.

- 4.4 Furthermore, the Petitioner averred that he was not averse to attending all counselling sessions pertaining to the child and was not willing to be excluded from such arrangements since he did not believe that the child has any psychological health challenges.
- 4.5 The Petitioner averred that contrary to paragraphs 11, 14 and 15 of the affidavit in opposition, he has before his remarriage, taken the Respondent for bulk grocery buying for the child's consumption. And that he has paid school fees at Jiggles School where the child started school from and school fees at Cherry Hills Pre-school as evidenced on the copy of proof of payment of K6,645 where the child studied for only a term.
- 4.6 The Petitioner averred that he pays school fees at Nalsa Hydro Park Limited as shown by the bank statements and

invoices exhibited as "ACM2", showing zero balances of the child's school fees.

- 4.7 The Petitioner states that when the child is in his custody he pays for his food, groceries and extra curriculum activities and that the Respondent does not send the child with food or meet his financial needs when he is with the Petitioner.
- 4.8 The Petitioner in addition averred that he has purchased clothes for the child when he is in his custody and whenever he has travelled out of the country. The child has a full-fledged wardrobe in the Petitioner's home containing clothes that the Petitioner has bought and also toys.
- 4.9 The Petitioner in responding to paragraph 12 averred that his wife stopped communicating with Respondent due the accusations made against her by the Respondent before and the recording of the child's alleged discomfort when at the Petitioner's home by the Respondent. And also, because the Respondent was stopping the child from calling the Petitioner's wife as mum, as opposed to aunty.

Nevertheless, the Petitioner stated that his spouse still takes care of the child when he visits the Petitioner.

4.10 The Petitioner despites that the child suffers from asthma for the following reasons;

- i) *The child spends time with the Petitioner and has never suffered from severe asthma; to the contrary this is just a picture the Respondent has developed and wants to paint, in order to limit the child's time with the Respondent.*
- ii) *If at all the child suffers from the alleged severe asthma attack, that in and of itself is said to be more reason why the Petitioner should be allowed more time with the child and not be excluded or limited so as to learn how to manage if that state exists.*
- iii) *There is no evidence of severe asthma diagnosis in exhibit marked "BS2"*

- 4.11 The Petitioner averred that in respect to medical bills paid by the Respondent, the Petitioner averred that Respondent works for Hollard Insurance and is issued with comprehensive medical cover which includes the child, that is why the Petitioner would rely on her to cover the child's medical expenses, however, he claimed that if this position is not correct and the Respondent wishes that the Petitioner refunds all the verified medical expenses that she has personally incurred, the Petitioner will refund her.
- 4.12 The Petitioner in response to paragraph 19 of the affidavit in opposition, reiterates his desire, that as a biological father of the child he needs to be more involved in the child's life because the child needs him more now and this is above the Respondent's personal wishes and preferences.
- 4.13 In reply to paragraph 20, the Petitioner submitted that the child being a young, he has also expressed to him that he does not want to stay with the Respondent but the Petitioner nonetheless confirms that the Respondent is not a bad mother.

4.14 Furthermore, the Petitioner states that he has encouraged the child to respect the Respondent, her spouse and the rules that they have in their home.

4.15 The Petitioner alleges that the recording of the child's experiences at the Petitioner's home, is merely calculated at misleading the child to giving answers that the Respondent wants to hear when recording the child however it is not correct.

4.16 The Petitioner in response to paragraph 22 of the affidavit in opposition repeated his averments in paragraph 15 of the affidavit in support.

4.17 The Petitioner averred that the child be subjected to psychological assessment by an independent expert and the child be subjected to medical examination by an independent and experienced pediatrician or specialist for the said severe asthma attacks to be diagnosed.

5.0 Skeleton Arguments in support

5.1 In the Skeleton Arguments in Support of this application, it was submitted that this Court is empowered to decide on the question of custody of the child of the family upon

considering the best interest of the child which is of paramount importance.

- 5.2 The application was anchored on **section 72(7) of the Matrimonial Causes Act** as read with **section 146 of the Children's Code Act** which provides as follows;

"72(7)- The Court shall have power to vary or discharge any order made under this section or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended."

"146- Where two persons having parental responsibility vested in them jointly by a custody order disagree on the exercise or performance of the joint custody order, either person appointed in the order may apply to the Court, and the Court may refer the matter to mediation or make an order regarding the exercise of the parental responsibility where the Mediation fails."

5.3 The aforesaid provisions are said to confer the Court with jurisdiction to deal with the application herein. And the test to be applied in order to determine whether or not a custody order should be varied consists of the following questions;

- i) is there a pre-existing custody order that can be varied?*
- ii) what is the nature of the pre-existing custody order?*
- iii) taking in account factors such as age, sex, health and educational needs of the child are the proposed custody terms in the best interest of the child? And*
- iv) what factual changes have occurred to warrant the variation of the existing custody order?*

5.4 The Petitioner has addressed each question as follows. Firstly, it has been submitted that as per the ruling dated 20th November, 2020, the Court had granted a Joint Custody Order in relation to the child and this answers

the first question. There is a pre-existing custody order which was made pursuant to section 72 of the Matrimonial Causes Act capable of being varied.

5.5 The Petitioner has submitted that in order to respond to the second question, reliance has been placed on page 10 of the Ruling dated 20th November, 2020 which granted a joint custody order wherein the Respondent was granted physical custody of the child and access to Petitioner. Despite the said order, the Petitioner submitted that it is the Respondent that has been exercising primary physical custody of the child and spends more time with the child than him which position the Petitioner now seeks to be varied.

5.6 The Petitioner has submitted that in answering the third question, he has considered the rationale which was used for granting physical custody to the Respondent, this was due to the young age of the child at the time which position has however changed since the child is now 8 years old and is male. Therefore, it is in that respect that the Petitioner now seeks the order be varied considering the

current age, health and now school going, that the Petitioner should be given more time so as to form the necessary bonds of father and son.

5.7 In responding to the last question, the Petitioner submitted that he has since remarried as confirmed by the Marriage Certificate herein. He has submitted that he now has three (3) more children, two girls and one boy with his current wife. Furthermore, the Petitioner's wife owns a Law Firm and the Petitioner is a Senior Government Official serving under the Office of the President as Deputy Permanent Secretary for Lusaka Province. And the Petitioner has also submitted that he owns several businesses.

5.8 In this regard the Petitioner now submits that contrary to the then prevailing financial constraints, he is now financially stable. The Petitioner has also submitted that he has now attained levels of emotional stability and maturity which has made him to realize the importance of building a bond with his son through shaping his son's

views of a responsible man, as the child transitions into teenage age.

5.9 The Petitioner submitted that he is also a parent three (3) additional children whom he would like his son to build a bond with.

5.10 The Petitioner is fortified in his submissions by the decision in the case of **Emmanuel Mponda vs. Mutale I. Chisanga Mponda**¹ in which the Supreme Court refused to set aside a Ruling of the High Court varying a custody order based in the applicant's changed circumstances. The Supreme Court in the same authority went on to pronounce that there is no limit to how many times a custody order can be varied as the party's circumstances will change any time, financial or otherwise. Further reference was made to the case of **Elizabeth Nadine Smith Wesson vs. Brian Sydney Strond**² where the Court varied a joint custody order relating to a child of a tender age.

5.11 The Petitioner submitted that this is a proper and fit case which this Court should vary the custody order prevailing

for that is in the best interest of the child when the parties share equal physical time with the child as proposed in the affidavit in support of the application.

6.0 Skeleton Arguments in opposition

6.1 The Respondent has submitted that it is trite that in an application for custody of a child, the best interest of a child is the primary consideration of the Court to take as was stated in the case referred to of ***Jobsi Ulrish Stoyke vs Cleotha Ilona Emily Stoyke***³ where it was held that; “the welfare of a child could not be measured by money or physical comfort only and that the moral and religious welfare also had to be considered as well.”

6.2 Further reference was made to the case of Zannetta Nyendwa vs. Kenneth Spooner wherein the question of the best interest was considered and it was held; *“That it is settled law that every parent is entitled to contact (access) with the children of the family, Article 9 of the United Nations Convention on the Rights of the Child provides that a child who is separated from one parent or both has the right to personal relations and direct contact*

with both parents on a regular basis except if it is contrary to the child's best interest. It must be noted that what is in issue is the best interest of the child and not the rights and interests of the parents."

- 6.3 In light of the authorities cited the Respondent has submitted that that the main consideration in this matter is the child's welfare which is in the best interest of the child.
- 6.4 In this case the Respondent has indicated that it is in the best interest of the child if the counselling sessions continue and for the same to work, the current arrangement in place must remain open.
- 6.5 The Respondent has submitted that the child can still continue to bond with the siblings whilst spending time every fortnightly at the Petitioner's home during school days and two weeks during school holidays. And it is also submitted that it is in the best interest of the child if a phone is provided for communication with any one parent at any given time in case of emergencies.

6.6 The Respondent has submitted that considering the child's age and state of health, the current custody arrangement must be maintained. The Respondent has submitted that that there is no need to vary the current arrangements.

6.7 However, she has alternatively submitted that should the Court be of the view that a variation would be in the best interest of the child, the following are proposed;

a) The child custody arrangement be varied to allow the Petitioner to have the child for two weeks every school holiday and Respondent would have the child for the other two weeks of the four weeks holidays.

b) That the current arrangements in place regarding the child while in school remain the same

c) The parties should alternate public holidays with prior notice before arrangements can be made for the said public holiday.

- d) The child should have access to a mobile phone for easy of communication when the custody of the other parent.*
- e) Both parties should financially support the child jointly.*

7.0 Hearing

- 7.1 At the hearing of the matter, the Petitioner relied on the Affidavit in Support and the Skeleton Arguments outlined above.
- 7.2 In response the Respondent submitted that she would rely on the filed affidavit in opposition and skeleton argument as well as list of authorities filed herein but augmented that **section 144 (2) of the Children's Code Act** points out to what the Court should consider in order to vary a custody order such as the (a) the best interest of the child, (b) the ascertainable wishes of the child
- 7.3 The Respondent submitted that the child is 8 years old and that the child requires consistency in his formative years and as such the Court must take cognisance of the child's welfare.

- 7.4 The Respondent submitted that if an order of custody is to be varied by the Court there must be change in the circumstances of the environment in which the child lives in, however, it was submitted by the Respondent that in this case at hand, the affidavit in support has failed to demonstrate what has changed from the time the order for custody was granted to necessitate the variation of the said order.
- 7.5 The Respondent has referred to the averments by the Petitioner stating that he is now financially stable to take care of the child, however the Respondent submitted that this is not sufficient and there is no evidence to show this position.
- 7.6 Furthermore, it was submitted that the child is still in his formative age and needs to be with the Respondent as the primary caregiver.
- 7.7 At the hearing on the 23rd of January, 2025 the child was brought before the Court in order for the Court to hear the ascertainable wishes of the child in relation to application to vary the custody order now prevailing.

- 7.8 The child was able to give the court his particulars and he informed the court that he lives with his mother the Respondent and that he goes to the Petitioner's (father), house over the weekends.
- 7.9 The child clearly said that he only wants to live with the Respondent but will be visiting the Petitioner over the weekends at least for a day.
- 7.10 During the hearing of the child's ascertainable wishes, the Court observed that the child was hyperactive and kept moving from one place to the other and was also not able to focus on what was happening in Court even though he was answering the questions posed to him. The child generally gave one-word answers.

8.0 Considerations and Conclusions

- 8.1 I have considered the Affidavit evidence on record herein and the submissions made by both parties.
- 8.2 It is common cause that;
- 1) The petitioner and the Respondent are divorced and had in the course of their marriage the child herein;*

2) *At the dissolution of the marriage the custody of the child was granted to the Respondent with access to the Petitioner.*

3) *The initial custody order was varied to the current one dated 20th November, 2020*

8.3 Furthermore, and to begin with the Respondent has alleged on the record a history of mental health called Attention Deficit Hyperactivity Disorder (ADHA) which was diagnosed and as such the child has been struggling emotionally. For this reason, the Respondent submitted that the child has been seeing a child psychologist for counselling at Psych Health Zambia.

8.4 I have perused the said report from Psych Health Zambia. The report dated 3rd February, 2023 has confirmed the health condition and therein recommended that the child's primary care givers deliver a unison parenting style that maintains the existing attachment the child has with all care-givers involved.

8.5 Further the report indicated that the child could at that point of the report take a break from therapy although he

should continue to express his emotions through molding, slime, drawing and through talk which the child is said loves to express his imagination.

- 8.6 On the other hand, the Petitioner has confirmed to have seen the Report from Psych Health Zambia and knew about the counselling the child underwent. Nevertheless, the Petitioner claims that the child is in good health and him and his spouse are capable of taking care of the child.
- 8.7 The Petitioner has also indicated that he is capable of taking care of the health concern if it arises of asthma that is if indeed the child has it. He said so because he has not experienced a time when the child has a severe attack on of asthma as claimed by the Respondent.
- 8.8 I have observed that the Respondent has not provided evidence to show that the Respondent would not be capable of ensuring that the health concerns if they arose the Petitioner would not seek medical attention for the child. In this regard it is my understanding that the Petitioner is not a danger to the child; I say so because the evidence on the record is that when the child has had a

health scare, the Respondent submitted on record that she did meet the Petitioner at the hospital where the child has been taken to seek medical treatment.

8.9 It is therefore, my considered view that unless there is further evidence to show the contrary, the Petitioner is not a danger to the child. Thus, the health conditions of the child are not sufficient reasons to stop the variation of the custody order. I find from the record herein that the Petitioner as a parent cares for the child as much as does the Respondent.

8.10 In determining this application, I have also looked at **Section 144 2 (a) (b) and (c) of the Children's Code Act No. 12 of 2022** which provides as follows:

"A court shall, in determining whether or not a custody order should be made in respect of a child in favour of the applicant, have regard to

—
(a) the best interests of the child;

(b) the ascertainable wishes of the child;

(c) *the conduct and wishes of the parent or guardian of the child;*”

8.11 In the case *in casu*, it is clear from the affidavit evidence that the person to whom the custody order is being sought is a child; furthermore, the Petitioner and the Respondent are father and mother to the child respectively.

8.12 The Petitioner seeks to have custody order currently obtaining of the child to be varied; he has submitted that his application should be considered because it meets the criteria to be considered by this Court. The said criteria are, he has now remarried, has three more children and that it is in the best interest of the child who is now aged 8 years, and a male to spend more time with him so as to improve bonds with his new family. For the aforesaid reasons, the Petitioner seeks for the custody order to be varied.

8.13 The Respondent has also demonstrated that she has had primary custody of the child herein from birth and after divorce of the parties, therefore it is necessary and in the interest of the child to maintain the status core. However,

the Respondent submitted that alternatively the court may give more time during the holidays, of two weeks with the Petitioner to improve the bonds between them as father and son and with his siblings born from the father.

8.14 I found comfort by looking at the case of **J v C (1970) AC 688⁴** where Lord Mac Dermott aptly explained the meaning of the best interest of the child in the following terms;

“I think the words “shall regard the welfare of the infant as the first and paramount consideration” connote a process whereby, when all the relevant factors, relationship, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is mostly in the interest of the child’s welfare... “

8.15 I have further looked at the Supreme Court’s decision in the case of **Emmanuel Mponda v Mutale I. Mponda (SCZ Appeal No. 199/2015)** where the court held that:

“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”

8.16 And it has been established that the ascertainable wish of the child when examined was to remain in the custody of the mother, the Respondent and visit the Petitioner who is the father on holidays. I further note that the child has established bonds with the Respondent. The guides that the ascertainable wishes of the child should be considered.

8.17 From the above analysis, it is my considered view that the child’s wishes, sense of security and maintenance of established bonds would be achieved if and I order the following that;

- i) the Respondent continues and is given primary custody whilst the Petitioner is*

- given the right of access every weekend fortnightly during school days.*
- ii) during holidays the Petitioner is granted physical custody of the child for two weeks and the Respondent to have the child the remainder of the two weeks in the holiday.*
 - iii) the parties are given alternate custody during public holidays with prior notice before arrangements can be made for the said public holiday.*
 - iv) the parties make available communication access to the child through mobile phone access for the parent without the physical custody of the child.*
 - v) the parties are allowed to travel with the child outside jurisdiction with the consent of the other parent who shall not withhold consent unreasonably.*

vi) and as agreed by the parties they provide
for the child's maintenance jointly.

9.0 Needless to state that the varied grant is as per the prevailing
circumstances and each party is at liberty to apply for variation
should the circumstances change.

10.0 I order no costs.

11.0 Leave to appeal is granted.

Dated at Lusaka, this 23rd day of April 2025


M.M. Bah-Matandala

HIGH COURT JUDGE

