

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

(Civil Jurisdiction)

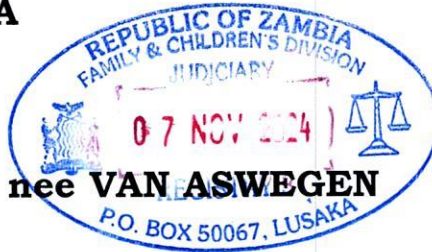
BETWEEN

HANNALIDU PLOOY nee VAN ASWEGEN

AND

JACOB BESTER DU PLOOY

2019/HPF/D119



PETITIONER

RESPONDENT

Before the Hon. Mrs. Justice M.M. Bah-Matandala

On the 7th day of November, 2024.

For the Applicant: Ms. M. K. Banda Messrs. F. B. Nanguzyambo & Associates.

For the Respondents: Mr. I. Shikapwasha Messrs. Howard & Marietta – Legal Practitioners

RULING

Legislation referred to:

1. *The Children's Code Act No. 12 of 2022*

1.0 INTRODUCTION

1.0 This is the Respondent's application for an order to enforce a joint custody order pursuant to **Section 146 of the Children's Code Act, Act No. 12 of 2022.**

2.0 BACKGROUND

2.1 The Petitioner filed for divorce, accompanied by an affidavit in support, on 24th April, 2019 seeking the following reliefs:

- i) *That the said marriage may be dissolved;*
- ii) *The parties have joint custody of the children of the family;*
- iii) *That the Respondent maintain both the petitioner and the children of the family;*
- iv) *That there be property settlement and adjustment;*
- v) *Any other relief the court may deem fit.*

2.2 By a Judgment dated 31st December, 2019 the marriage was dissolved, and a decree nisi was issued. Following a consent summons for an order on custody and access to the children, dated 2nd March, 2020, a consent order was made regarding custody, access, maintenance, and property settlement/adjustment before the Deputy Registrar. The parties agreed as follows:

- (i) *The children shall continue with their schooling at Martin House for (2) years and later move to Wolseley Hall and the Respondent shall meet all their school requirements, financial or otherwise until the age of 21 or completion of their university education whichever is later;*
- (ii) *The Respondent shall pay a monthly sum of ZMW 25,000 towards the general upkeep of the children to be revised upward until the age of 21 or completion of university education whichever is later;*

2.3 Against this background, by summons dated 3rd November 2023, the Respondent filed this application. In the affidavit supporting this application, deposed to by Jacob Bester Plooy, the Respondent asserts that since the dissolution of the marriage, the Petitioner has consistently denied his relatives access to the children.

2.4 He further alleges that the Petitioner does not consult him on matters relating to the children's health, education,

and general wellbeing, thereby infringing upon his parental rights and obligations.

2.5 In the affidavit in opposition, it was stated that the children communicate with the Respondent's relatives, particularly his sister, with whom they share a close bond, as well as some of their cousins.

2.6 The Petitioner claims she has always provided the Respondent with the login details for the children's Canvas accounts and has sent him weekly reports on their performance, but stopped when the Respondent's communication became inappropriate.

3.0 SUBMISSIONS AND ANALYSIS

3.1 Both parties filed skeleton arguments, on which they relied on at the hearing. For brevity, I shall not reproduce them here, suffice to state that I shall take them into account in this Ruling.

3.2 This application hinges on **Section 146 of the Children's Code Act No. 12 of 2022**, which states as follows:

“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 mediation fails.”

3.3 The above provision provides the procedure to be followed when two individuals with joint parental responsibility disagree on the exercise or performance of a joint custody order.

3.4 I have also reviewed Section 141(2) (a) and (b) of the Children’s Code Act, which outlines the persons to whom custody of a child may be granted:

(a) parent of the child;

(b) guardian

(a) a person who applies, with the consent of a parent or guardian of the child and

has actual custody of the child for three months preceding the making of the application; or

(d) person who, while not falling within paragraphs (a), (b) or (c), can show cause why an order should be made awarding that person custody of the child.

- 3.5 Regarding the factors in determining a custody order, **Section 144(2)(a), (b), and (c) of the Children's Code Act No. 12 of 2022** provides that:

(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;”

- 3.6 In this case, the evidence shows that the parties agreed to joint custody. The Respondent contends that the Petitioner is denying him access to the children and is influencing them to distance themselves from him.

- 3.7 The Petitioner, however, argues that the Respondent had, in the past, without justification, mistreated both her and

the children, leading to feelings of resentment among the children.

- 3.8 The Applicant seeks enforcement of the joint custody order, asserting his right to access and exercise his parental responsibilities. However, each party places blame on the other.
- 3.9 I have also considered the Social Welfare Report on the home assessment of the parties. The report reveals that the relationship between the children and the Respondent has significantly deteriorated.
- 3.10 The children recall both physical and emotional abuse by the Respondent, which has led to their preference to live with the Petitioner.
- 3.11 One of the children, Jana, even expressed a desire for a restraining order against the Respondent, recounting an incident in which the Respondent's violence resulted in the Petitioner's jaw being dislocated.
- 3.12 Section 3 of the Code provides guidance that:

"A child's best interest is the primary consideration in a matter or action

*concerning the child, whether undertaken
by a public or private body."*

- 3.13 Further, Section 146, under which this application is made, suggests that mediation may be appropriate where the parties disagree. However, it is my view that in this case, the Respondent has not demonstrated a disagreement on the exercise or performance of joint custody.
- 3.14 Instead, the children's aversion to the Respondent appears rooted in their past negative experiences.
- 3.15 The evidence does not show that the Petitioner is opposed to the joint custody order. However, the children seem to harbor resentment against the Respondent.
- 3.16 The Petitioner is open to the children receiving counseling to accept the Respondent as their father despite the past abuse, and she is willing to support this.
- 3.17 Given the circumstances, it is my view that the current arrangement should remain in place.
- 3.18 It is further ordered that the children receive counseling through the Social Welfare Office to help them understand

and accept the Respondent as their father, irrespective of their past experiences.

3.19 The Respondent is also urged to continue supporting the family financially.

3.20 This ruling is subject to change should the circumstances evolve, and either party may apply for a variation as necessary.

4.0 No order as to costs.

5.0 Leave to appeal is granted.

Dated at Lusaka, this 7th November, 2024.


M.M. Bah-Matandala
HIGH COURT JUDGE

