



CASE NO.: A 17/2005

**SUMMARY**

**DAVID NKWANGA MONDO vs SPECIOZA MONDO**

**Silungwe, AJ**

23 JULY 2008

**Husband and wife** – Divorce - Custody of minor child - Variation of - Application by non-custodian father to be awarded custody - Child's best interests are of paramount importance - In deciding what is in best interests of child, Court does not look for "perfect parent" - Court's quest is to find parent who is better able to promote and safeguard minor child's growth, development and welfare - Parenting is a gender-neutral function - Held child's interests best served by putting her in custody and control of her father.



**CASE NO.: A 17/2005**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**DAVID NKWANGA MONDO**

**Applicant**

and

**SPECIOZA MONDO**  
(born **NNAMPIJJA**)

**Respondent**

**CORAM:**                   **SILUNGWE, AJ**

Heard on:                   2007.11.27

Delivered on:             2008.07.23

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**JUDGMENT:**

**SILUNGWE, AJ:** [1]     The only issue before the Court is the custody of the minor child, Christine Mondo, who is now aged ten years and two months and whose custody and control order was provisionally varied when the Court granted a *Rule Nisi* in favour of the applicant.

[2] This matter has had a long and chequered acrimonious history. The applicant and the respondent (both of whom are Ugandan citizens) were married to each other at Nyeri, Kenya, on June 16, 1987, and subsequently had three minor children, namely, Rachael, now aged twenty years and nine months, Charles, aged sixteen years and four months and Christine, born on May 5, 1998. The parties' marriage was dissolved by this Court on February 24, 2004, and custody of Rachael and Charles was awarded to the applicant while custody of Christine was awarded to the respondent.

[3] On January 28, 2005, the applicant brought an urgent application in which he sought a variation of the Court order of February 24, 2004, to read that custody and control of Christine be awarded to him. The application was favourably considered, resulting in the issuance of a *Rule Nisi* in terms of which custody and control of Christine were awarded to the applicant, subject to the respondent's right of reasonable access to the minor child, pending a specified return date which has since been extended from time to time and the extension still subsists. The Court is now duty-bound to decide whether the *Rule Nisi* should be confirmed or discharged.

[4] The fundamental and guiding principle concerning custody disputes and all matters involving children is that a child's best interests are of paramount importance. Determining what custody arrangement will serve the best interests of the child in any particular case involves the making, by the Court, of a value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children. King, J expressed himself thus in *McCall v McCall* 1994 (3) SA 2001 at 204I – J:

*“In determining what is in the best interests of the child, the court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare.”*

A comprehensive, albeit non-exhaustive, checklist of criteria relevant to the application of the best interests standards is set out in *McCall’s* case at 205A–F.

In *P v P* 2007(5) SA 94 (SCA), the Supreme Court of Appeal remarked (per Van Heerden, JA, with whom four other judges agreed) at para. 26 (101J–102A) that:

*“In determining what custody arrangement will best serve the children’s interests in a case such as the present, a Court is not looking for the ‘perfect parent’ – doubtless there is no such being. The Court’s quest is to find what has been called the least detrimental available alternative for safeguarding the child’s growth and, development. (See Joseph Goldstein, Anna Freud and Albert J Solnit Beyond the Best Interests of the Child (1973) at 53, as cited in Boberg’s Law of Persons and the Family 2 ed. (1999) at 528–9 n 117).”*

*P v P*, *supra*, demonstrates at para. 26 (101E–F) that in recent cases, the value systems and societal beliefs underpinning the “maternal preference” or “tender years” principle have been challenged and the Courts have stressed “that parenting is a gender-neutral function and that the assumption that a mother is necessarily in a better position to care for a child than the father belongs to a past, era.” Evidently, the overriding reason for this development is merely that the interests of the child must prevail.

[5] The matter under consideration raises emotional issues for the parties as well as for their daughter, Christine. Indeed, the dispute between the parties as to who should have custody and control of the minor child is quite intense. On a reading of the papers in this case and an examination of the evidence adduced by both sides, it

is inescapable to come to the obvious conclusion that, for a considerable time prior to, and since, the dissolution of the marriage, the parties ran into, and still remain, in murky waters of an antagonistic relationship. Mrs Mafwila Ellen, a social worker at Grootfontein stated as follows in her report of December 27, 2002:

*“9 ... The animosity that exists between Dr Mondo and Mrs Mondo is of such a degree that it will be extremely destructive to the children and prevents any functional communication between the two of them on any subject.”*

Faced with a somewhat similar situation in *McCall's* case, *supra*, King, J appropriately remarked thus at 203E-F:

*“In view of the unremitting enmity between the parties, it is as well to remind them that the Court is determining what is in the best interests of their child. The Court is not adjudicating a dispute between antagonists with conflicting interests in order to resolve their discordance. The Court's concern is for the child.”*

Eventually, those sentiments are of application to the current case.

[6] It is common cause that, initially, Christine's paternity was disputed by the applicant until September 2001, when it was forensically established that he was the biological father.

[7] Following termination of the marriage between the parties, the respondent, who lives in Windhoek, retained custody and control of Christine. The minor child attended Tiny Toon's Kindergarten from August 2001 up to October 2004.

[8] The applicant lives, and has lived, in Grootfontein as a private general medical practitioner since 2004. Rachael and Charles, over whom the applicant exercises custody and control, also live with him (though Rachael is currently a law student at

the University of Namibia). In addition, another son of the applicant – Eria – now an adult aged twenty three years and two months, a child of another woman (born out of wedlock) has been living with him. Besides his children, the applicant lives with a woman named Irene who has since (the divorce occurred) become the applicant's spouse.

[9] It suffices to say, without going into much detail, that when the applicant was apparently exercising his right of access to Christine during the Christmas period of 2004/2005, the respondent made a report to the police that he had kidnapped Christine, which resulted in his arrest and subsequent release on warning. Thereafter, according to the applicant's testimony, Christine was not willing to return to Windhoek with the respondent. Nevertheless, the respondent travelled to Windhoek with Christine. On or about January 24, 2005, the applicant, in the company of a friend of his – Dr Solomon Wanguru – went to the respondent's residence in Windhoek, knocked at the door and asked to be let in. The applicant then heard Christine telling the respondent that the person knocking was the applicant but the door was not opened. Notwithstanding the minor child's crying and pleading with the respondent to open the door, that door remained shut.

[10] Thereafter, the applicant filed an urgent application against the respondent which was served upon her on January 27 and was scheduled for hearing on January 28. However, during the morning of January 28, the applicant was visited by the police and taken to Windhoek Police Station where he was arrested, apparently on charges of harassment and threatening the respondent. He then pleaded with the police and sought permission, which was granted, to enable him to attend the hearing of his application in the High Court. That urgent application was

none other than the one discussed in para. 3, *supra*, which resulted in the granting of the *Rule Nisi*, the subject-matter of this judgment.

[11] In his evidence, the applicant portrayed the respondent as a mother who did not take good care of Christine, who often left her alone, who was not in a position to meet the minor child's physical, emotional and medical needs and whose living quarters were not ideal for Christine's upbringing. He told the Court that he was in a better position to meet all those needs, that he had a loving wife who was a good care-provider for Christine, that his other children got on well with Christine, that he had spacious accommodation for the family, that he provided a good supportive and conducive home environment for Christine's welfare and that Christine was attending a school where she was happily intergrated. He further testified that the respondent's allegation that he had sexually abused Rachael, his daughter, was factually false and unsupported by evidence. I agree that the respondent's allegation is unsubstantiated and therefore not credible.

[12] In contrast, the respondent painted a favourable picture of herself as a caring mother who had the best interests of Christine at heart. She testified that she was emotionally attached to Christine, that she loved her, that from the time of Christine's birth, she was always there for her, that although the respondent had made allegations that she was mentally unfit to look after Christine, such allegations were unsupported by evidence. This assertion finds support in a Psychological Report of May 31, 2005, compiled by Mr William Chiremba, a clinical psychologist at the Windhoek Mental Health Centre, which shows that the respondent did not have psychological and psychiatric disorders but that she received treatment for stress in April 2005.

[13] On June 22, 2006, a comprehensive Evaluation Report was compiled by a social work practitioner – Ms Waldi-Beate Kubirske – who had been approached by the then respondent’s legal practitioner (instructed by the Directorate of Legal Aid) with the concurrence of the respondent and the applicant, designed to assist the Court in determining the issue of Christine’s custody and control.

[14] When the Evaluation Report (unmistakably not in the respondent’s favour) was presented to the Court, the respondent, who acknowledged having read it, broke down and the Court had to go into recess to enable her to calm down. On resumption, the respondent sought a longer period to think the matter over. The case then had to be postponed to distant available dates. At her request, she was subsequently allocated another legal practitioner by the Directorate of Legal Aid.

[15] Some of the major findings by the social work practitioner include the following:

- (1) On February 4, 2005, a protection order against the respondent was served on her as she had tried to abduct Christine from Wilhelm Nortier Primary school in Grootfontein where she had been enrolled. The protection order restrained the respondent from entering, or coming near, the applicant’s house, workplace or Christine’s school. This order was uplifted on October 24, 2005.
- (2) The respondent occupies a room in a three-bedroomed house at 21 Schonlein Street, Windhoek West. The bedroom is adequately furnished and would be sufficient for two people to live therein. The premises are clean and fenced in. She worked at Bema College up to December 2005 and joined Lima College as a Lecturer in February 2006, receiving a basic monthly salary of N\$2000-00 without any other benefits. (It seems questionable whether she is any longer in regular employment). The respondent loves her children dearly and feels she has Christine’s best interests at heart. She further feels she can create a stable home for

Christine. She also feels she has a strong emotional bond with Christine which cannot be duplicated. According to the supervisors of Tiny Toon's Kindergarten which Christine used to attend when she was in the custody and control of the respondent, she was often brought to school late and normally arrived there after 9 a.m.

The respondent has no previous history of clinical psychiatric disorder except treatment for reactive depression.

- (3) The applicant, on the other hand, has been working as a private general medical practitioner in Grootfontein since 2004 and earned (in June 2006) N\$15 000-00 per month. He owns a six-bedroomed house there which is fairly furnished and is sufficient for the needs of his family. There is a strong emotional bond between the applicant and all the three minor children. The applicant was evaluated as a father that tries to offer the best for his children and who is very protective of them. He is emotionally a strong person who tries hard to stabilize his children emotionally. His other children describe him as "The very best Dad", adding that he is cool.

The applicant describes his family as very happy and says that he enjoys family life. Christine, the Report continues, is very much attached to her step mother and to Eria, the applicant's oldest offspring; she call's Mrs Irene Mondo "Mom". Mrs Irene Mondo is a housewife who helps Christine with her homework and prepares meals for the family. Christine has a good support system with her brothers and sister. The applicant attends to Christine's physical, emotional, educational and medical needs. He has a better scope of knowledge with regard to Christine, such as interpersonal relationships, daily routine and eating disorders. It is obvious (so writes the social work practitioner) that he is a more hands-on parent and has a softer approach to her. Christine reflects that she believes her dad contributes the most to the family unit and cooperation. She further feels more at home with her father compared to her mother when she is alone with that parent; that her mother is not good at comforting her in new situations; that the mother does not recognize her "upsetness"; that she pulls her hair when she is mad at her; that she hits her when she is mad; that she sometime hits her with things such as a spoon; that she hurts her feelings when she is mad; that she doesn't

know how hard it is to be a child; that she doesn't notice when she (the child) is good. Christine's parent of choice is her dad.

- (4) Christine went through very traumatic situations which she does not understand. Tests indicate that she doesn't trust her mom and that her mom is not good at staying calm. The respondent acts on her emotions which make her lose her rationality of the consequences of her behaviour and impact on Christine. It seems that the respondent is blind to the damage she causes to her child and the emotional harm she causes with her acts of impulsiveness.
- (5) All three tests conducted were in favour of the applicant. Indeed, she concludes:

*"It is in the best interest for Christine to stay with her dad since he is identified as the primary care-taking parent and will be less disruptive to Christine to stay in her current circumstances to keep her life as normal as possible."*

(6) RECOMMENDATION

1. It is recommended that custody and control be granted to Dr David Mondo the biological father of the minor child, Christine Mondo ...
2. It is important for Christine to have regular contact with her mother, Mrs Specioza Mondo.

Access can only be established to Mrs Mondo on condition that she undergoes a psychological evaluation in order to identify:

- (a) if there will be further consequences which could further damage the relationship between Christine and her mother, such as any mental disorder/obsessive behaviour, irrational irresponsible behaviour not realizing the consequences of her behaviour, etc.
- (b) the abuse of access to Christine.

3. As soon as the results of the above evaluation can be made available a final recommendation of access by Mrs Specioza Mondo to Christine can be determined.
4. It is further recommended that Mrs Mondo goes for therapy to assist her in dealing with her emotional wellbeing and divorce since it has a negative effect on Christine.

[16] As the Evaluation Report of the social work practitioner is damning against the respondent, it is not surprising that the written submissions made on her behalf make no reference whatsoever to the said Report. I have no hesitation in accepting the Report (and its recommendation) which essentially encapsulates the evidence given in the matter.

[17] Having heard the respondent in the witness box and having read her papers as well as the Evaluation Report, it is abundantly clear to me that the respondent is highly passionate about winning back the custody and control of Christine. But the odds are heavily against her. As previously shown, passion alone, or even love *per se*, for that matter, is not enough in custody disputes, let alone in all matters involving children, for the determinant lies in what will serve the best interests of the minor child.

[18] From what we have seen above, it must be apparent that when the relative suitability of the parties in the case is weighed, in the context of who is better able to promote and safeguard Christine's growth, development and welfare, it tilts the balance in favour of the applicant. I am thus satisfied that Christine's best interests will be served by placing her in the custody and control of the applicant. Accordingly, the following order is made:

1.1 The *Rule Nisi* of January 28, 2005, is confirmed.

1.2 For case of reference, the *Rule Nisi* referred to in 1.1 above is to the following effect:

Paragraph 4 of the final order of divorce granted on February 24, 2004, under Case No. I 1738/2002 is amended to read that custody and control of the minor child, namely, Christine Mondo, be awarded to the applicant (then plaintiff) Dr David Mondo.

2. The respondent's right to reasonable access is subject to a psychological evaluation upon her and a recommendation thereon.

3. The questions of access and costs are reserved for argument to a date to be arranged with the Registrar of the Court.

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**SILUNGWE, AJ**

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