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LOH SIEW HONG v. NAGAHSWARAN MUNIANDY; MAJLIS AGAMA ISLAM DAN ADAT ISTIADAT MELAYU PERLIS (MAIPS) (PROPOSED INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
B [PETITION NO: WA-33-734-12-2019]
18 JULY 2022

Abstract – *The proposed intervener's application for leave to intervene to vary a custody order involving three children who had been converted from Hinduism to Islam by their father ought not to be allowed as (i) the conversion, being unilateral, was not valid; and (ii) the proposed intervener failed to show the nexus between itself and the children and was therefore not 'an interested person'. The welfare of the children ought to be prioritised, and in doing so, the court should be cautious of any such application by any third party that might cause unwanted intrusion to the children who has been reunited with their mother.*

FAMILY LAW: *Children – Custody order – Proposed intervener applied for leave to intervene to vary custody order involving three children of petitioner and respondent – Children converted to Islam by respondent – Whether conversion valid/ illegal – Whether proposed intervener had interest in custody of children – Whether welfare of children ought to be prioritised – Rules of Court 2012, O. 15 r. 6(2)(b) – Law Reform (Marriage & Divorce) Act 1976, s. 96*

This was an application by the Majlis Agama Islam dan Adat Istiadat Melayu Perlis (MAIPS) ('proposed intervener') for leave to intervene to vary the custody order granted by this court in March 2021 which involved three children ('children') of the petitioner wife and the respondent husband. The petitioner and the respondent were married on 25 May 2008 under the Law Reform (Marriage and Divorce) Act 1976 ('Law Reform Act') and had three children ('children') from such union. The marriage deteriorated and in July 2020, without the consent or knowledge of the petitioner, the respondent facilitated the children's conversion from Hinduism to Islam by the proposed intervener at the Pejabat Agama Islam Perlis. As a result, a certificate of conversion into Islam was issued to the children individually. However, pursuant to two court orders, an interim *ex parte* order dated 20 December 2019 and another issued on 31 March 2021, sole custody, care and control of the children was granted to the petitioner. Despite these orders, the children eventually found themselves in the care of one Nazirah Nantha Kumari Abdullah at the Hidayah Centre Foundation. The petitioner claimed Nazirah had prevented her from meeting and taking the children into her care and custody. As a result thereof, the petitioner filed a *habeas corpus* application. The High Court allowed the *habeas corpus* application and the

children were reunited with the petitioner. Hence, this application. The issues that arose were (i) whether the proposed intervener had an interest on the basis that the conversion was not valid/illegal; and (ii) whether this application should be allowed if this court were to hold that the children were in fact Muslims, would the proposed intervener have an interest in the custody of the children.

Held (dismissing application with costs):

(1) The fact that this was a unilateral conversion had not been disputed by the proposed intervener. The law, as it stands, is undeniably as that expounded by the Federal Court in *Indira Gandhi v. Pengarah Jabatan Agama Islam Perak* ('*Indira Gandhi*'), that is, unilateral conversions are illegal and not valid. As such, this court was judicially bound by *Indira Gandhi*, and to depart from it would be inconsistent with the doctrine of *stare decisis* which was part and parcel of the administration of justice in this country. In fact, to depart from the decision of the Federal Court which expounded the principles of law, would amount to judicial infraction. Thus, the conversion of the children, being a unilateral one, was not valid. (para 17)

(2) This application would still be dismissed, even if the children were Muslims. This application was premised on O. 15 r. 6(2)(b) of the Rules of Court 2012, which states the words 'at any stage of the proceedings.' In the present case, there were no proceedings as such. There was nothing pending in these divorce proceedings. As such, there was no room whatsoever for intervention. Further, the whole point of this application was to vary the custody order granted in March 2021 and, in doing so, s. 96 of the Law Reform (Marriage & Divorce) Act 1976 came to the forefront, which provides that the court may vary an order for custody of the child on the application of any interested person. Herein, the children did not belong to the community in the state of Perlis. They resided in Selangor and their connection to Perlis was fleeting and transitory, that was, when they were taken there to be converted. The proposed intervener had failed to show the nexus between itself and the children. (paras 22-27)

(3) The proposed intervener failed to convince this court if its involvement was required or even needed considering that the children were not orphans. The proposed intervener had not proved that the petitioner was incapable of bringing up the children as Muslims and there was no evidence to show that the petitioner had been neglecting her duties in raising the children in the Muslim faith. The proposed intervener's application was premised on the fact that the petitioner had failed to ensure that the children perform or observe their duties and obligations as Muslims. That was premature because there was no proof of such averment before this court. (paras 28 & 29)

(4) The conversion of the children from Hinduism to Islam occurred in July 2020, whereas the custody order was granted in March 2021. There was no material change to warrant an application for variation, let alone leave to file an application to vary. There was no misrepresentation or mistake of fact in obtaining the custody order in March 2021. Further, the welfare of the children should be viewed holistically. The proposed intervener was a stranger to the family and had nothing to do with the children. As such, disallowing this application would, in fact, fortify the welfare of the children. (paras 32-36)

(5) Despite the low threshold for leave, the proposed intervener had failed to meet it. Even if the children are Muslims, this application was dismissed as the proposed intervener had failed to show that it was an interested person. The relationship between parent and child is sacred and should not be subject to intrusion by third parties who have no interest in their welfare. The petitioner was reunited with the children just a few months ago and any unwanted intrusion by a third party would be most pernicious to their journey which should embody healing and restoring, rather than scrutiny and surveillance. The proposed intervener's intention may be noble but this court has to prioritise the welfare of the children, and in doing so, should be cautious of any such application by any third party for that matter. (paras 38-41)

Obiter:

(1) The decision of this court was not based on which religion the children should embrace, or remain in, or should renounce. It was not about choosing one religion over the other, and it was definitely not about which religion should prevail. At the expense of saying this *ad nauseam*, the decision of this court must be, and was, about the exercise of the rights of the children, and as such, the gist of this application was whether the proposed intervener had the right to be involved in the children's lives by intervening to vary the custody order granted by this court.

Case(s) referred to:

In Re McGrath (Infants) [1893] 1 Ch 143 ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***
Loh Siew Hong v. Nazirah Nanthakumar Abdullah & Anor [2022] 4 CLJ 467 HC ***(refd)***
SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 CLJ 339 FC ***(refd)***

Legislation referred to:

Administration of the Religion of Islam Enactment 2006, s. 7
Federal Constitution, art. 12(4)
Interpretation Acts 1948 and 1967, s. 3
Law Reform (Marriage and Divorce) Act 1976, ss. 3, 96
Rules of Court 2012, O. 15 r. 6(2)(b)

For the petitioner - Srimurugan Alagan, Shamsher Singh & Gunamalar Joorindanjn; M/s Gunamalar Law Chambers
For the proposed intervener - Haniff Khatri, Zainul Rijal Abu Bakar, Aidil Khalid & Danial Farhan Zainul Rijal; M/s Chambers of Zainul Rijal

Reported by Suhainah Wahiduddin

JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] This was an application ("the application") by the Majlis Agama Islam Dan Adat Istiadat Melayu Perlis or MAIPs ("the proposed intervener") for leave to intervene to vary the custody order granted by this court in March 2021 which involved three children ("the children") of the petitioner wife and respondent husband.

The Factual Background

[2] The petitioner and respondent were married on 25 May 2008 under the Law Reform (Marriage and Divorce) Act 1976 ("the Law Reform Act") and had three children ("the children") from such union.

[3] The marriage had deteriorated and in July 2020, without the consent or knowledge of the petitioner, the respondent had facilitated the children's conversion from Hinduism to Islam by the proposed intervener at the Pejabat Agama Islam Perlis. As a result of such conversion, a certificate of conversion into Islam was issued to the children individually.

[4] However, pursuant to two court orders, an interim *ex parte* order dated 20 December 2019, and another issued on 31 March 2021, sole custody, care and control of the children was granted to the petitioner.

[5] Despite these orders, the children eventually found themselves in the care of one Nazirah Nantha Kumari Abdullah at the Hidayah Centre Foundation in Bayan Lepas, Penang. The petitioner claimed that Nazirah had prevented her from meeting and taking the children into her care and custody. As a result thereof, the petitioner filed a *habeas corpus* application.

[6] In February 2022, the High Court allowed the *habeas corpus* application, and the children were reunited with the petitioner. However, on 7 March 2022, this application was filed, which was dismissed by this court for the following reasons.

Contentions, Evaluation, And Findings

[7] At the outset, I am compelled to state that the decision of this court is not based on which religion the children should embrace, or remain in, or should renounce. It is not about choosing one religion over the other, and it is definitely not about which religion should prevail. At the expense of

saying this *ad nauseam*, the decision of this court must be, and is, about the exercise of the rights of the children, and as such, the gist of this application was whether the proposed intervener has the right to be involved in the children's lives by intervening to vary the custody order granted by this court in March 2021.

Whether The Proposed Intervener Is A Muslim

[8] The petitioner resisted this application on the premise that the proposed intervener was not a 'person' within the definition of the Law Reform Act; and even if it was, it was a Muslim entity and, therefore, precluded from making this application, by virtue of s. 3 of the Law Reform Act, which reads:

> Section 3 – Application
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> …
>
> (3) **This Act shall not apply to a Muslim or to any person who is married under Muslim law** and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a court from having exclusive jurisdiction over the dissolution of a marriage and all matters incidental thereto including granting a decree of divorce or other orders under Part VII and Part VIII on a petition for divorce under section 53 where one party converts to Islam after the filing of the petition or after the pronouncement of a decree, or a petition for divorce under either section 51, 52 or 53 on the petition of either party or both parties to a marriage where one party has converted to Islam, and such decree and orders made shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.
>
> (emphasis added)

[9] I had to disagree with the petitioner's contention for the reason that although the definition of 'person' is not found in the Law Reform Act, according to s. 3 of the Interpretation Acts 1948 and 1967, a 'person' includes a body of persons, corporate or unincorporated, which would encompass the proposed intervener. In fact, the petitioner conceded that there was no express provision in the Law Reform Act, that would preclude the proposed intervener from applying pursuant thereto.

[10] I also found untenable the petitioner's submission that the proposed intervener was disallowed from making this application on the basis that it professed Islam, and therefore precluded by s. 3 of the Law Reform Act. On this note, I found instructive the Federal Court cases of *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559 and *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 CLJ 339, where in the latter case, it was stated by Tengku Maimun Tuan Mat CJ, in the following passage:

[89] Further, the word "profess" in its natural and ordinary meaning suggests a declaration of faith which is something an artificial or juridical person is incapable of doing.

[11] As such, I proceeded to hear this application on its merits.

[12] Since a major part of the submissions of parties pivoted on the legality or otherwise of the conversion of the children from Hinduism to Islam, the grounds of this judgment will be premised on two permutations, namely:

(i) the conversion is illegal; and

(ii) the conversion is in fact legal and valid.

Whether The Proposed Intervener Had An Interest On The Basis That The Conversion Was Not Valid/Illegal

[13] Counsel for the petitioner had argued that the conversion was illegal on the basis of the Federal Court case of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145, and had submitted that this court should not ignore such decision.

[14] Counsel for the proposed intervener, on the other hand, offered another perspective – that is, first, that the issue of conversion was not relevant and, that at this point in time, the children are in fact Muslims, having been issued certificates of conversion into Islam. The proposed intervener further contended that the decision of the Federal Court case of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* was *per incuriam* as it had defined 'parent' in the plural, when it actually appeared in the singular as stipulated in art. 12(4) of the Federal Constitution, which reads:

Article 12 – Rights in respect of education

…

(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be **decided by his parent** or guardian.

(emphasis added)

[15] As such, the proposed intervener contended that the consent of one parent was sufficient to allow the conversion of the children from Hinduism to Islam.

[16] Although the proposed intervener's arguments contained novel points of law, at this stage, it was my view that pursuant to the agreement of all parties present, the issue of legality or otherwise of the conversion of the children was not before this court today. It was a matter that had been fixed for judicial review at the special powers division.

[17] However, having perused the submissions of parties and being mindful of the authorities, the law as it stands is undeniably as that expounded by the Federal Court in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals*, that is, unilateral conversions are illegal and not valid. Although the proposed intervener submitted that the petitioner had waived her consent to the conversion of the children from Hinduism to Islam, the fact that this was a unilateral conversion had not been disputed by the proposed intervener. As such, this court was judicially bound by the decision of the Federal Court in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals*, and to depart from it would be inconsistent with the doctrine of *stare decisis* which is part and parcel of the administration of justice in this country. In fact, to depart from the decision of the Federal Court, which expounded trite principles of law, would amount to judicial infraction.

[18] A valid point raised by the counsel for the petitioner was that although the issue of conversion was not before this court, this court nevertheless should not turn a blind eye to the factual history of this case. In doing so, learned counsel for the petitioner cited the decision of YA Datuk Collin Sequerah in the *habeas corpus* application of *Loh Siew Hong v. Nazirah Nanthakumar Abdullah & Anor* [2022] 4 CLJ 467, where His Lordship stated in the following passages:

> [73] Although the matter of the unilateral conversion of the children is not directly in issue in this application, it is best not to mimic Nelson at the Battle of Copenhagen (where the hero of Trafalgar put the telescope to his blind eye, suffered during the siege at Calvi, and pretended not to see the signal ordering a withdrawal of the fleet) and ignore the fact that it is undoubtedly connected to the Applicant's hitherto futile attempts to locate and reunite with her children, which eventually led to the filing of the present application.
>
> [74] In legal parlance of the common law variety, the reference to Lord Nelson's actions above is referred to as "willful blindness" while the Americans call it "contrived ignorance".
>
> [75] The point must therefore be made that *the issue regarding the unilateral conversion of the three children to the Islamic religion has been resoundingly settled by the decision of the apex court in Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 3 CLJ 145; [2018] MLJU 69, the facts of which are not dissimilar to the instant case.* (emphasis added)

[19] I agreed with counsel for the petitioner, that this court cannot adopt a tunnel vision approach and ignore the factual history of this application. In fact, to do so would be inequitable and unjust. A peripheral vision is required to dispense justice in this case, and in adopting such vision, I would agree with the views of YA Datuk Collin Sequerah, that the conversion of the children, being a unilateral one, was not valid.

[20] At this juncture, I also have to remind parties that counsel for proposed intervener did agree that if the conversion of the children was indeed illegal and not valid, the matter would end there, and that the proposed intervener would have no basis whatsoever to intervene.

Whether The Proposed Intervener Had An Interest On The Basis That The Conversion Was Valid/Legal

[21] Having said that, however, I have to also look at this case from the perspective of the proposed intervener, that is, on the permutation that the conversion was in fact valid and legal. The question that arose, therefore, would be whether this application should be allowed if this court were to hold that the children are in fact Muslims. In other words, would the proposed intervener have an interest in the custody of the children?

[22] The answer to that would still be a resounding NO, that is, that this application would still be dismissed, even if the children are Muslims. I say this based on the following reasons:

[23] The first reason is that this application is premised on O. 15 r. 6(2)(b) of the Rules of Court 2012 ("Rules of Court"), which reads:

> Order 15 – Causes of action, counterclaims and parties
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> Rule 6 – Misjoinder and non-joinder of parties
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> …
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> (2) Subject to this rule, **at any stage of the proceedings in any cause or matter,** the Court may on such terms **as it thinks just** and either of its own motion or on application:
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> …
>
> (b) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. (emphasis added)

[24] What is crucial to note in O. 15 r. 6(2)(b) of the Rules of Court are the words, 'at any stage of the proceedings …'. In the present case, there were no proceedings as such. There was nothing pending in these divorce proceedings. As such, there was no room whatsoever for intervention.

[25] Even if counsel for the proposed intervener had crossed the hurdle in O. 15 r. 6(2)(b) of the Rules of Court, the whole point of this application was to vary the custody order granted in March 2021, and in doing do s. 96 of the Law Reform (Marriage and Divorce) Act 1976 came to the forefront, which provides that the court may vary an order for custody of the child on the application of any interested person. Section 96 of the Law Reform Act reads:

> Section 96 – Power for court to vary orders for custody or maintenance
>
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application **of any interested person,** where it is satisfied that the order was based on any **misrepresentation or mistake of fact** or where there has been any **material change in the circumstances.** (emphasis added)

[26] The crucial question here is whether the proposed intervener is an interested person. Counsel for the proposed intervener drew the court's attention to the Administration of the Religion of Islam Enactment 2006 to explain its powers, duties and obligation, where in s. 7 it is stipulated that it has a duty to promote, stimulate facilitate and undertake the economic and social development of the Muslim community in the state of Perlis. Section 7 of the Administration of the Religion of Islam Enactment 2006 reads:

> Section 7. The duty of the Majlis for the economic and social development of Muslims
>
> (1) It shall be **duty of the Majlis to promote, stimulate, facilitate an undertake the economic and social development of the Muslim community in the State of Perlis** consistent with Hukum Syarak.
>
> (2) The Majlis shall have power, for the purpose of the discharge of its duty under subsection (1):
>
> (a) to carry on all activities, which does not involve any element which is not approved by the religion of Islam, particularly the development of commercial and industrial enterprises, the carrying on of which appears to the Majlis to be requisite, advantageous or convenient for or in connection with the discharge of such duty, including the manufacturing, assembling, processing, packing, grading and marketing of products;
>
> (b) to promote the carrying on of any such activities by other bodies or persons, and for that purpose to establish or expand, or promote the establishment or expansion, of other bodies to carry on any such activities either under the control or partial control of the Majlis or independently, and to give assistance to such bodies or to other bodies or persons appearing to the Majlis to have the facilities for the carrying on of any such activities, including the giving of financial assistance by way of loan or otherwise;

(c) to carry on any such activities in association with other bodies or any person, including the department or authorities of the Federal Government or the Government of any State or as managing agent or otherwise on behalf of the State Government of Perlis;

(d) to invest in any authorised investment as defined by the Trustee Act 1949 [Act 208], and to dispose of the investment on such terms and conditions as the Majlis may determine;

(e) to establish any scheme for the granting of loans from the Baitulmal to Muslim individuals for higher education;

(f) to establish and maintain Islamic schools and Islamic training and research institutions;

(g) to establish, maintain and manage welfare home for orphans; and

(h) to do such acts as the Majlis considers desirable or expedient.
(emphasis added)

[27] What is pertinent to note is that the children do not belong to the community in the State of Perlis. They reside in Selangor and their connection to Perlis was fleeting and transitory, that is, when they were taken there to be converted. On this ground alone, this application should not be allowed, as the proposed intervener had failed to show the nexus between itself and the children.

[28] Furthermore, the proposed intervener had failed to convince this court if its involvement is required or even needed, considering that the children are not orphans. Towards that end, two sub-issues arise:

(i) has the proposed intervener proved that the petitioner is incapable of bringing up the children as Muslims; and

(ii) is there any evidence to show that the petitioner has been neglecting her duties in raising the children in the Muslim faith.

[29] The answers to both questions are in the negative. In fact, the proposed intervener's application is premised on the fact that the petitioner had failed to ensure that the children perform or observe their duties and obligations as Muslims. In my view, that is premature because there is no proof of such averment before this court.

[30] Secondly, we cannot ignore the respondent's presence. The fact of the matter is the respondent is alive, *albeit* in prison. The proposed intervener had not even alluded to the respondent's role and his views with regard to the intervention of the proposed intervener.

[31] A scrutiny of s. 96 of the Law Reform Act will also indicate that variation of a custody order must be premised on a material change.

[32] In the present case, the chronology of events was crucial. The conversion of the children from Hinduism to Islam occurred in July 2020, whereas the custody order was granted in March 2021. There was no material change to warrant an application for variation, let alone leave to file an application to vary.

[33] The proposed intervener contended that the custody order was granted on misrepresentation or mistake of fact, as the court was not apprised of the fact that the children had been converted from Hinduism to Islam.

[34] I was not convinced that there was a misrepresentation or mistake of fact in obtaining the custody order in March 2021.

[35] The proposed intervener contended that this court should prioritise the welfare of the children, which should be viewed holistically. In support of such contention, the proposed intervener relied on the case of *In Re McGrath (Infants)* [1893] 1 Ch 143, where it was stated by Lindley LJ:

> The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not be measured by money only, nor by physical comfort only. **The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being.** Nor can the ties of affection be disregarded. As regards religious education it is settled law that the wishes of the father must be regarded by the court, and be enforced, unless there is some very strong reason for disregarding them. (emphasis added)

[36] Although I would agree with the proposed intervener that the welfare of the children should be viewed holistically and should include the children's welfare, the present case, unlike *In Re McGrath (Infants)*, was one where the proposed intervener was a stranger to the family and had nothing to do with the children. As such, disallowing this application would, in fact, fortify the welfare of the children.

[37] The proposed intervener had further urged the court not to consider the actual merits of the variation application at this stage, as the issue before this court was merely an application for leave to seek a variation of the custody order, and that the threshold for leave should be lower.

[38] In my view, despite the low threshold for leave, the proposed intervener had failed to meet it. I have always maintained that an application for leave is akin to asking the court, as the dinner host, to unlock the door, in order for a guest to enter the home, and in this case, to eventually sit at dinner with the family. The host, in this case, who is the Family Court, has to be cautious of the guest it invites to dinner, as there are children in the house who need to be protected. If this court is sure that the guest knocking at the door is not on the guest list for dinner, it is then pointless to unlock the door or even allowing them to enter at this stage, as that would be a waste of the time for the guest as well as the host.

[39] In the final analysis, and in a nutshell, my decision is as follows – even if the children are Muslims, this application was dismissed as the proposed intervener had failed to show that it is an interested person.

[40] At this juncture, I am compelled to remind parties that the relationship between parent and child is sacred and should not be subject to intrusion by third parties who have no interest in their welfare. In the present case, the petitioner was reunited with the children just a few months ago and any unwanted intrusion by a third party would be most pernicious to their journey which should embody healing and restoring, rather than scrutiny and surveillance.

[41] The proposed intervener's intention may be noble but this court has to prioritise the welfare of the children, and in doing so, should be cautious of any such application by any third party for that matter.

Conclusion

[42] In the upshot, therefore, and based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, including written and oral submissions of both parties, this application was dismissed, with costs.