RODGER SIBANDA

Versus

CASENEGE THANDIWE SIBANDA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 28 & 30 SEPTEMBER 2021

Urgent application

Mr. C. Nyathi with Ms S. Ndlovu, for the applicant
Respondent in person

DUBE-BANDA J: This is an urgent application. This application was lodged in this court on 21st September 2021. It was placed before me on the 22nd September 2021 and I directed that it be served on the respondent together with a notice of set down for the 28th September 2021. The application is opposed by the respondent. Applicant seeks an order couched in the following terms:

> Terms of the final order sought
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. The Provisional order be and is hereby confirmed.
> 2. The applicant and the respondent be and are hereby ordered to abide by the final outcome of the application filed in the Magistrates Court at Bulawayo on the 21st September 2021, for a variation of maintenance order under case number M197/21.
> 3. That the respondent be and is hereby ordered to pay the costs of suit on an attorney and client scale.
>
> Interim relief sought
> Pending determination of this matter, the applicant is hereby granted the following relief:

1. The respondent be and is hereby ordered to withdraw the minor children X and Y from Riverside Stimulation Centre within 48 hours of the granting of this order.[1]
2. The respondent be and is hereby ordered to reenrol the minor children X and Y at Usher Primary School.
3. The respondent be and is hereby ordered to withdraw her report of September 2021, to the Provincial Magistrate against the applicant until the finalisation of the application for variation of a maintenance order under case number M197/21.

Service of provisional order

That a copy of this provisional order shall be served on the respondents by the applicant's legal practitioners of record.

Factual background

This application will be better understood against the background that follows. The parties are married in terms of the Marriages Act [Chapter 5:11], and the marriage still subsists. The parties are on separation pending he finalisation of their divorce matter. There are two minor children of the marriage. The respondent has the custody of the children. She instituted maintenance proceedings at the Magistrates Court under case number M197/21. On the 5 July 2021, the Magistrates Court made an order, couched as follows:

1. The respondent (applicant herein) be and is hereby ordered to pay maintenance of $7 700 ZWL in respect of the two minor children X born 21 October 2013 and Y born 23 June 2015 with effect from 31 July 2021 and is payable every last day of the month until each child attains the age of majority or is self-supporting whichever comes earlier through applicant's A/C NMB 210318787.
2. The respondent be and is hereby ordered to pay school fees in respect of the two minor children at their current school or any with an equivalent value.
3. The respondent be and is hereby ordered to buy school uniforms as required by school. (*sic*).
4. The respondent be and is hereby ordered to maintain medical insurance for the minor children.

[1] The names of the minor children withheld to protect their identity.

The minor children are six and seven years old. They were initially enrolled at a school called Riverside Stimulation Centre. It appears that sometime in 2020, the children were transferred to a school called Usher Primary School. When the maintenance order was granted the children were boarders at Usher Primary. When schools opened for non-examination classes on the 6 September 2021, respondent transferred the children from Usher Primary to Riverside Stimulation Centre. There is a dispute between the parties as to which school, between Riverside Stimulation Centre and Usher Primary is best for the children. Respondent avers that it is not in the best interests of the children to enrol them at Usher Primary, her reasons are these: it is a boarding school located about 70 km on the Bulawayo-Plumtree road. The children are young aged six and seven years and not ready for boarding school life. The children complain about bullying at school and poor diet. It is for these reasons that she transferred or returned them to Riverside Stimulation Centre. According to respondent applicant was made aware of the decision to transfer the children from Usher Primary to Riverside Stimulation Centre. Applicant avers that he was not informed of the decision to transfer the children.

Respondent avers that Riverside Stimulation Centre is cheaper than Usher Primary. Her contention is that the RTGS 67 000 demanded from applicant is the total amount for the two children, while Usher Primary fees are set at RTGS 40 871. 80 + USD 100 top-up and a further USD$200.00 per child. Respondent further contends that she has purchased school uniforms for the children, all she wants is that respondent to pay school fees in terms of the maintenance order. She avers that when applicant paid the sum of ZWL 7 442.00 at Usher Primary on the 18 September 2021, he already knew that the children were at Riverside Stimulation Centre. That applicant was indeed aware of this position is clear. In his founding affidavit he avers that on the 6 September 2021, respondent unilaterally withdrew both children from Usher Primary and enrolled them at Riverside Stimulation Centre in Bulawayo. She argues that this payment was made in preparation of filing this application, which application was filed on the 21 September 2021, barely three days after the payment.

This application has been triggered by the following: respondent has filed a complaint with the office of the Provincial Magistrate that applicant is not complying with the maintenance order, in that he has failed to pay school fees in the sum of RTGS 67 000.00. In consequence of the complaint, applicant has received a letter from the Provincial Magistrate

calling on him to clear the arrears within seven days, failure of which a warrant of arrest will be issued against him. He avers that he cannot afford to clear the arrears of RTGS 67 000.00 in seven days. He is in danger of being prosecuted for defaulting in his maintenance obligations. He contends that he has applied for a variation of the maintenance order, such application is pending before the Magistrates Court. In her opposing affidavit respondent took a point *in limine,* regarding the lack of urgency of the application. It is against this background that applicant has launched this application seeking the relief mentioned above.

The law and the facts

During the hearing of this matter I asked Mr *Nyathi,* counsel for the applicant whether the provisional order sought in this application was competent at law. Counsel kept recycling the argument about the best interests of the children, the contention being that it is in their best interests that they be enrolled at Usher Primary. However, in passing, on the facts of this case one may be forgiven to conclude that applicant is pursuing his own interests, i.e. to avoid an impeding warrant of arrest, under the guise that he is protecting the children. On the crucial issue of whether the provisional order sought was competent at law, I did not receive appreciable assistance from counsel.

I raised this issue with counsel because applicant approached the court seeking a provisional order. However, the provisional order sought has all the hallmarks of a final relief. The provisional order ought is this: that the respondent be and is hereby ordered to withdraw the minor children from Riverside Stimulation Centre within 48 hours of the granting of this order. That she be ordered to reenrol the minor children at Usher Primary School.

My view is that once the children are withdrawn from Riverside Stimulation Centre and enrolled at Usher Primary School applicant would have achieved his goal. This is the final relief that he is litigating to achieve. His mission would have been accomplished. I have some difficulty envisaging that which would happen on the return day of the so-called provisional order. See: *Chikafu v Dodhill (Pty) Ltd and Others* SC 16 / 2009. Applicant would have achieved this milestone under the guise of a provisional order.

The definition and purpose of a provisional order is diametrically different from that of a final order. In *Chiwenga v Mubaiwa* SC 86/20, the Supreme Court quoting C. B Prest in his book *The Law and Practice of Interdicts* defines and explains the purpose of a provisional order as follows:

> A provisional order is a remedy by way of an interdict which is intended to prohibit all *prima facie* illegitimate activities. By its very nature it is both temporary and provisional, providing (*interim*) relief which serves to guard the applicant against irreparable harm which may befall him, her or it, should a full trial of the alleged grievance be carried out. As the name suggests, it is provisional in nature, as the parties anticipate certain relief to be made final on a certain future date upon which the applicant has to fully disclose his, her or its entitlement to a final order that the interim relief sought was ancillary to.

In *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368 the court established the test for distinguishing a provisional order from a final order. In that case MALABA DCJ as he then was had this to say at p 376:

> To determine the matter one has to look at the nature of the order and its effect on the issues or cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect of which relief is sought from the court…

A provisional order must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the proceeding. In *casu* applicant seeks a final order disguised as a provisional order. It is settled law that the standard of proof for a provisional order is different from that of a final order. A provisional order is established on a *prima facie* basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date**.** On the other hand a final order is obtained on the higher test of a clear right because it is final and definitive as it has no return date. Applicant seeks to obtain a final order on a *prima facie* proof, such is impermissible. See: *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368; *Chiwenga v Mubaiwa* SC 86/20.

The provisional order sought is final in nature. The impropriety of such an approach has received ample emphasis in this jurisdiction. The seminal case is *Kuvarega v Registrar General & Anor supra*, where at 193A-C, CHATIKOBO J appositely cautioned:

> The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case … if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case.

This applies with equal force in this application. Although applicant has labelled his draft order as interim relief, it has all the hallmarks of a final relief. A proper reading of the interim relief sought reveals that applicant seeks a final relief. There is nothing interlocutory about the interim relief sought apart from its label. The provisional order sought in this application is incompetent and bad at law.

Again, applicant seeks an interim relief that respondent be ordered to withdraw her report to the Provincial Magistrate against the applicant until the finalisation of the application for variation of a maintenance order under case number M197/21. Respondent has a right to lodge a complaint with the office of the Provincial Magistrate. It is lawful for her to lodge such a complaint. Applicant is seeking an order from this court whose net effect is to interfere with proceeding pending before the Magistrate Court. This is a court of law, it cannot interdict lawful proceedings in another court. See: *Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture and Rural Resettlement & Others* 2004 (1) ZLR 511 (S). If applicant has a defence, he must present himself before the court, i.e. the Magistrate Court which has jurisdiction to enquire into his alleged default in his maintenance obligations and present his version there. It is incompetent and disingenuous to seek an order to direct a litigant to withdraw her complaint. The court expects legal practitioners to place before it, cases that are founded on sound substantive and procedural law, not to seek orders that are patently incompetent. See: *Chiwenga v Mubaiwa* SC 86/20. This application amounts to a text-book case of an incompetent order sought. It must fail at this stage without determining the points *in lime* raised by the respondent in her opposing papers.

Having found that the order sought is incompetent, this disposes of the matter and I am of the view that it is unnecessary to consider the point *in limine* regarding lack of urgency of the application. What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which

persuade me to depart from this rule. Accordingly, the applicant must bear the respondent's costs.

Disposition

As the applicant's claim is incompetent and a nullity at law, this court finds that it is not properly before it and it ought to be struck off the roll. In the result, I make the following order: this application is and hereby struck off the roll with costs.

It is so ordered.

Matatu, Masamvu & Da Silver-Gustavo, applicant's legal practitioners