KWANELE NTINI

Versus

SOVIET MZAMO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 15 AND 23 FEBRUARY 2012

Advocate H M Moyo, FOR THE APPLICANT
N. Nkala, for the respondent

Judgment

NDOU J: In this case the applicant seeks a provisional order in the following terms:

"Terms of the final order sought

That you show cause why a final order should not be granted in the following terms:

1. That the respondent is not vested with any custodial rights over the minor child I.N., a boy, born on the 29 January 2007 [*sic*].
2. That the respondent be ordered to restore the said minor to the custody of the applicant.
3. That the respondent pays the costs of this application.

Interim order granted

That pending the final determination of this application, it is ordered that:

4. The respondent be and is hereby interdicted from removing the said minor child from Zimbabwe.
5. The respondent be and is hereby ordered to surrender the said minor child forthwith to the applicant together with the said minor child's passport and any other travel documents in her possession failing which the Deputy Sheriff of this honourable court be and is hereby authorized to remove the said minor child from the custody of the respondent and place him in the custody of the applicant."
[Minor child's name abbreviated]

The background facts of the matter are the following:

The applicant and the respondent's sister, Nomathamsanqa Mzamo were married to each other at Bulawayo on 31 December 2005. The said marriage was dissolved by a decree of the Family Court of Australia on 1 June 2010. At the time of the dissolution of the marriage applicant and Nomathamsanqa were both resident in Australia. The applicant has since returned to Zimbabwe while Nomathamsanqa continues to reside in Australia.

One minor child was born of the erstwhile marriage namely I.N. This child is subject matter of these proceedings. The above-mentioned Australian Family Court did not make a specific order for the custody of the minor child. At the time of the divorce the minor child had been living with the respondent in Zimbabwe. The minor child started living with the respondent, its maternal aunt, from the age of eighteen months to date when the child is now about five (5) years old and attending school.

The applicant returned to Zimbabwe permanently in July 2011. He took custody of the child. In order not to destabilize the child, he did not remove the child from the school it had been enrolled by the respondent. The child remained generously accessible to the respondent. On 15 December 2011, the respondent filed an urgent ex parte application in the Juvenile Court in terms of which she sought the custody of the minor child to her immediately. A rule *nisi* was issued ex parte. In pursuance of this order by the Juvenile Court, the respondent collected the child from the applicant's home in the presence of police officers. The applicant was away in South Africa at the time. At the time the respondent applied for the rule nisi she had with the assistance of the mother of the child, obtained visas for herself and the child to travel to Australia without the applicant's knowledge. The respondent had made plans to travel to Australia with the child on 4 December 2011. The respondent could not travel on that date because the child was with the applicant.

The return day for the rule *nisi* was 11 January 2012. After having filed his opposing papers, the applicant duly attended court on that date. The respondent and her legal practitioner failed to arrive on time resulting in the rule nisi being discharged. The respondent and her legal practitioner arrived some time later on that date and the legal practitioner made some submissions to the Juvenile Court. The applicant was present but he was not represented by a legal practitioner. The matter was postponed to the following day for continuation of the hearing. On the latter day the matter was postponed *sine die* for the applicant to seek legal representation. When applicant got legal representation this application was filed. A lot was said on behalf of the applicant on whether the Juvenile Court rescinded the earlier order discharging the rule *nisi* after hearing the respondent's legal practitioner. There is no need for me to deal with this issue. The parties should have sought clarification from the Juvenile Court. I cannot be expected to deal with this issue in an urgent application. The conduct of the

Juvenile Court was to a large extent criticized by the applicant. The simple issue is that I cannot review the decision of the Juvenile Court in an urgent application. A lot of other legal issues were raised and I do not think this is the proper forum to deal with them. It is common cause that the child's mother has since filed application for custody of the said minor child under HC 276/12. So the substantive issue as to which parent should have custody will be determined in that application. In essence the issue here is who should have custody of the minor child between the parties pending a final determination of the issue of custody. *In casu*, the minor child has lived with maternal aunt *i.e* respondent since the age of eighteen months until five (5) years as alluded to above. In this period the respondent was *de facto* his parent. In cases involving custody or access this court is sitting as an upper-guardian of the minor child. In this regard I find the words of RUMPFF JA in *Shawzin* v *Laufer* 1968 (4) SA 657(A) instructive. At pages 662H-663A the learned Judge commented as follows:

> "To the court, as upper guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to be applied, namely the predominant interests of the child. The singularity of the subject is evidenced by a number of features … the court need not consider itself bound by the contentions of the parties and may, in suitable cases, notwithstanding the fact that the onus is on the applicant to show good cause, depart from the usual procedure and act *mero muto* … irrespective of the wishes of the parties." –see also *Dolby* v *Lewis* S-34-87 and *Masina* v *Chikowore & Anor* 2002 (2) ZLR 457 (H).

I accept that the applicant's right of access to the child would be reduced if the child was to be removed to Australia even for a short period, so his consent was relevant. The respondent attempted to remove the child outside the country without consulting the applicant. There is a need to guard against such occurrence in future. The respondent's legal practitioner has conceded that there may be need to impose a restriction to prevent such occurrence in the future. I am prepared to grant the provisional order to deal with this mischief. But I do not think it will be in the interest of the minor child to take him away from the home he has known for the past three years or so just to satisfy the interests of the father.

Accordingly, I grant the provisional order in terms of the amended draft on pages 37 to 38 of these papers.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
Cheda & Partners, respondent's legal practitioners