MICHAEL MANDAZA
versus
MELINDA AMON
and
THE PROVINCIAL MAGISTRATE, CHIGUMBA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 20 July 2010 and 24 February 2011

CIVIL REVIEW

C Mavhondo, for applicant
N Chikono, for the first respondent
No appearance for the second respondent.

CHITAKUNYE J: This is an application for the review of the second respondent's decision to award custody of a minor child to the first respondent. The basic facts were to the effect that the applicant and the first respondent were married in terms of customary law. Their union was blessed with a minor child born on the 18 April 2007. The marriage was dissolved on 24 August 2009 in terms of customary law.

On 15 June 2009 the first respondent had a final protection order granted in her favour under case number DV 147/09 in the Magistrates Court. The protection order had the effect of, *inter alia*, granting custody of the minor child to the first respondent. On 28 September 2009 the applicant applied for variation of the protection order so as to be granted custody of the minor child. The applicant's grounds for seeking variation included that:-

"(1) The first respondent is an adulterous person and it would endanger the social best interest of the child as the minor would not be brought up in a cultural and religious environment.
(2 The first respondent was living in an over crowded environment where there was no electricity and water for over a year exposing the minor to water-borne diseases like diarrhea.
(3) There was danger that the mother would abscond with the minor as she was facing serious criminal charges of robbery at Rotten Row Magistrates' Court."

The first respondent opposed that application. Despite her opposition, on 12 October 2009 the presiding magistrate granted the application. In that regard he ordered that:

> "The application for variation be and is hereby granted only to the extent that the custody of the minor child be given to the applicant until such a time the respondent has accommodation and has been cleared of her pending cases."

On 20 October 2009 the first respondent filed a Notice of Appeal against that judgment at the High Court under CA 417/09.

Whilst the appeal was still pending, on 29 October 2009, the first respondent applied for the variation of the order granted in favor of applicant on 13 October 2009. Whilst in her other applications and court appearances she had been represented by a legal practitioner, on this occasion she was a self actor. Her application was set down for hearing on 3 November 2009 before the second respondent.

On 3 November 2009 both the applicant and the first respondent appeared before the second respondent. The applicant indicated to court that his legal practitioner was unwell and so he sought a postponement.To confirm that he tendered a letter from his legal practitioners' law firm to that effect but the second respondent refused to accept the letter. The applicant's application for a postponement was dismissed. The applicant was there and then ordered to serve his notice of opposition and opposing affidavit which he did.

The applicant's grounds for opposing the application included, *inter alia,* his contention that in the light of the first respondent's appeal, the second respondent had no jurisdiction to hear the matter. Further that there had not been any change of circumstances to justify a hearing for variation.

As regards the events of this day the applicant summarizes them as that:-

> "I applied for a postponement of the matter on the basis that my former legal practitioner was unwell. I attempted to hand over a copy of a letter by my former legal practitioner to that effect but the second respondent refused it… My application for postponement was arbitrarily dismissed at the end. Ultimately this was tantamount to denying me legal representation. When I sought the permission of the court to address it on merits, the second respondent summarily denied me that opportunity. This was grossly irregular."

He further on said that:-

> "On the same day, during the hearing of the matter, the second respondent asked me to hand over and serve my notice of opposition and opposing affidavit in court, of which I did. My opposing affidavit clearly stated that the court had no jurisdiction to entertain the matter as the proper forum for the matter was the High Court since the first respondent had already filed an appeal in the High Court…."

In her response the first respondent indicated that they in fact got married in June 2005 and not 2007. In May 2009 the applicant gave her parents a divorce token signifying the dissolution of their customary marriage.

The first respondent confirmed that when she applied for variation as a self actor her appeal was still pending. It was only after being granted custody that she instructed her then legal practitioners to withdraw the appeal. She however confirmed the sequence of events pertaining to the protection order and custody of the minor child.

As regards the events leading to her being granted custody on 3 November 2009, the first respondent confirmed that she appeared in person and presented her case. The applicant sought a postponement which was denied by the second respondent. The reason for the dismissal was that the second respondent said it was for the best interest of the child. The first respondent went on to say the applicant was given ample time to argue his case on the merits. It was only after such arguments that the second respondent made her decision.

After she had obtained custody of the child as a result of that order she instructed her then legal practitioners to withdraw her appeal. As things stand there is no appeal pending. Thus the first respondent did not deny filing and arguing her application whilst the appeal was pending.

Faced with the two sides I perused the record of proceedings. The certified copy of the proceedings of 3 November 2009 is very brief. On the points raised by the applicant the record shows that the applicant indeed advised court of his predicament whereby his legal practitioner had fallen ill and thus unable to come to court on that day. The second respondent's response was to the effect that she was not going to postpone the matter in the best interest of the minor child. She there and then asked the applicant to serve his opposing papers. The first respondent, who was the applicant, then addressed court after which the second respondent passed her ruling. It is clear that apart from being asked to handover his opposing papers the applicant was not given an opportunity to address court on the merits of the case, yet the other party was given such opportunity. The record of proceedings in my view confirms the applicant's version as the more credible.

It may also be noted that in her ruling the second respondent did not address her mind to the grounds raised by the applicant. She instead referred to the reasons why the protection order had been issued in the first place and used that as a basis to reverse the decision by her fellow magistrate. Thus she did not state on what basis she felt she had jurisdiction to entertain

the matter when the case was a subject of appeal. In the circumstances the applicant was justified in believing that his reasons for objecting to the application for variation were totally ignored.

The second respondent did not indicate if she had found any changed circumstances warranting her to entertain the application. She clearly ignored the basic tenets required of her to consider before entertaining an application for variation of a protection order and of custody of the minor child. I am of the view that the manner in which the second respondent handled the matter left a lot to be desired. It was incumbent upon her to give the parties equal opportunity to present their cases and to thereafter give reasons for opting to vary the order.

Section 26 of the High Court Act, *Chapter 7:06* grants this court reviewing powers in the following terms:

> "Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe."

The grounds upon which a party may bring proceedings for review are as outlined in s 27 of the said Act. These are:-

> "Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be-
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> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (b) interest in the cause, bias, malice, or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c) gross irregularity in the proceedings or the decision."

In *casu* the applicant's grounds for review were couched as follows:-

1. The learned magistrate was biased as she denied the applicant legal representation and the applicant was not allowed to be heard in court.
2. The learned magistrate had no jurisdiction to set aside the decision of another magistrate as she was not an appeal court.
3. It was grossly irregular for the magistrate to grant custody to the first respondent when the first respondent had not alleged and established changed circumstances warranting the applicant to be dispossessed of the custody of the minor child.

The grounds raised by the applicant are well supported by what took place as evident from the record of proceedings. The applicant‘s allegation of gross irregularity and bias cannot be faulted at all.

In this case it is unfortunate that a child of tender age has been tossed from one parent to the other in circumstances were no proper inquiry was made to ascertain the suitability or non-suitability of either of the parties to have custody. In cases involving children of tender age it is imperative to note that the best interest of the child will not be properly served by ignoring the basic tenets of justice. In *casu* had the presiding magistrate given both parties equal opportunity to present their cases and then seriously considered submissions by the parties and then given her ruling taking into account all those submissions, she could easily have come to a decision in the best interest of the child.

On the way forward, s 28 of the High Court Act (*supra*) provides that:-

> "On a review of any proceedings or decision other than criminal proceedings, the High Court may, subject to any other law, set aside or correct the proceedings or decision."

In the circumstances the decision will be set aside. However in order to serve the child from being further traumatized by being tossed around before a proper inquiry the child will remain in the custody of the mother pending a proper hearing of the applicant's application preferably by a different magistrate.

Accordingly it is hereby ordered that:

1. The decision of the second respondent of 3 November 2009 be and is hereby set aside.
2. The first respondent's application shall be heard before another magistrate.
3. The first respondent shall, however, have interim custody of the minor child pending the determination of the application.

Sawyer & Mkushi, applicant's legal practitioners
Mhiribidi, Ngarava & Moyo, first respondent's legal practitioners