MILDRED MAZOKERA
and
ZEV PIERRE NDLOVU (A MINOR)
versus
SILINGANISO NDLOVU
and
SHARON MITCHELL MHIZHA
and
AND HIS WORSHIP MILTON SERIMA NO

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 25 October & 18 November 2013

Urgent Chamber Application

B.M. Bhala, for the applicants
S. Mahuni, for 1st & 2nd respondents
No appearance for the 3th respondent

MAWADZE J: On 25 October 2013 I declined to hear this application on an urgent basis and gave my brief reasons *ex tempore* to the legal practitioners of the parties. On 5 November 2013 I was informed by the Registrar as per the letter written by the applicant's legal practitioners dated 5 November 2013 that the applicants have filed an appeal to the Supreme Court against my decision for refusal to hear the matter on an urgent basis. I was enjoined to provide the reasons for that decision. Here they are:-

Before I deal with the reasons I need to give a brief factual background as to how I dealt with this matter.

The urgent chamber application was filed on 17 October 2013 and the matter was allocated to me on 22 October 2013. I perused the papers filed of record relevant to the urgent chamber application and on the same day 22 October 2013 declined to deal with the matter on an urgent basis.

The brief reasons I gave as endorsed on the record are captured as follows.

"1. Applicant has not shown that this is a matter to be heard on urgent basis.

2. The requirements for an interim interdict are not apparent on the papers filed.

3. Interim relief sought is a final order and difficult to appreciate".

On 23 October 2013 the applicants' legal practitioners as per a letter dated 23 October 2013 requested audience with the court to argue on the urgency of the matter. The applicants' request was acceded to and on 24 October 2013 I proceeded to set down the matter for hearing on 25 October 2013 for the parties to argue on the question of urgency of the matter. Meanwhile the first respondent and the second respondent had filed a notice of opposition and opposing affidavits. After hearing arguments from counsel for the applicants and the respondents I still held the view that the matter is not urgent. Consequently on 25 October 2013 I granted the following order:-

"The matter is not urgent".

In order to appreciate the basis of my decision to decline to deal with the matter on an urgent basis I need to give the background facts of the matter.

The first applicant and the first respondent entered into a customary law union in 2006 which union was blessed with one minor child Zev Pierre Ndlovu aged about 6 years (born on 11 April 2007). The parties separated in either 2008 as per the first respondent or 2009 as per the first applicant. There is a dispute between the parties as to whether the customary union is still valid. The first respondent's position is that the union ended when the parties separated in 2008 and he advised the first applicant's parents as per custom. The first applicant insist the union is in existence as the first respondent is still to fulfil certain cultural requirements as demanded by her parents in order to terminate the union. The first respondent is however now married to the second applicant Sharon Mitchell Mhizha. They entered into a customary law union in August 2013.

The first applicant is employed as a lighting technician at H_2O Night Club in Borrowdale Harare and puts her income at US$1000 per month although she did not attach her proof of earnings. The first respondent had not employed for a long time (he gave this as one of the reasons the first applicant decided to dump him) but recently got employed as a voluntary worker at Celebration Ministries Borrowdale on a fixed term contract which expires on 31 December 2013. The first respondent's net income is US$478-73 and he attached his payslip.

In September 2013 the lady luck smiled at the first respondent and he won a State lottery jackpot of US$155 208-00. The money was deposited in the first respondent's ABC Bank Account on 12 and 13 September 2013 by Mashonaland Turf Club in batches of US$80 000 and US$$20 000 on 12 September 2013 and US$55 268 on 13 September 2013 giving a total of US$155 268-00. The first respondent started to make several withdrawals from 18

September 2013. The first respondent's Bank statement reflects some of the withdrawals as follows:-

DATE	AMOUNT
18 September 2013	US$ 7000-00
19 September 2013	US$10 000-00
23 September 2013	US$ 6 000-00
25 September 2013	US$ 5 000-00
1 October 2013	US$ 6 500-00
3 October 2013	US$ 3 500-00

The above amounts are just some of the major withdrawals the first respondent made. On 4 October the first respondent made an RTGs transfer to his wife the second respondent of US$110 000. The first respondent alleges that this was for purposes of purchasing an immovable property as the first respondent did not own a house. As at 7 October 2013 the first respondent's ABC Account had a closing balance of US$1 034-26.

The events leading to this urgent application are as follows:-

On 25 September 2013 the first respondent filed a maintenance application in the Harare Magistrate Court claiming payment of US$1 500 per month for the minor child Zev Pierre Ndlovu and US$500 per month as spousal maintenance for the first applicant. The whole maintenance inquiry proceedings in the magistrate Court are attached as some of the Annexures to the first applicant's founding affidavit. The main reason given by the first applicant as to why the first respondent had the means to pay maintenance was that the first respondent had won the lotto jackpot prize of US$155 268-00 and could now comfortably look after his minor child and the first applicant.

The maintenance application was opposed by the first respondent who filed an opposing affidavit and the ABC Bank Statement. The first respondent indicated that he is now married and has two children. He disputed that he had a duty to maintain the first applicant as the customary union between them had ended in 2008. The first respondent was also of the view that the first applicant is a person of means and is able to look after herself as she is employed earning much more than the first respondent. The first respondent confirmed winning the state lottery jackpot but stated that as per the attached ABC bank statement as at 7 October 2013 the closing balance was just US$1 034-26. The first respondent attached his proof of earnings showing a net income of US$478-73 and outlined his liabilities or expenses. The first respondent's position was that the maintenance claim can only be based

on his salary and not the lotto money which is no longer available. The first respondent offered to maintain the minor child from his net income.

The hearing of the maintenance inquiry commenced on 3 October 2013 and judgment was handed down on 9 October 2013. In a 7 page well-reasoned judgment the trial magistrate made the following findings;

(a) that the court was unable to say with finality whether a customary law union still exists between the first applicant and the first respondent although the parties separated in 2008 or 2009 to date.

(b) that the first applicant is only 29 years old, able bodied and employed hence is able to maintain herself from her income. The trial magistrate's view is that the claim for spousal maintenance by the first applicant is motivated by malice and greed with the sole aim of laying her fingers on the first respondent's lottery windfall. The maintenance claim in respect of the first applicant was dismissed.

(c) that the first respondent's bank statement shows the withdrawals and transfers made by the first respondent and that the first respondent had satisfactorily explained those transactions. It was the trial magistrate's finding that the lottery money is no longer available

(d) that the first respondent can only maintain the minor child Zev Pierre Ndlovu on the basis of his proved regular income of US$478-73. An award of US$150 per months was made as the first respondent's contributory maintenance for the minor child.

The first applicant, dissatisfied with the judgment of the magistrate court filed a notice of appeal with this court on 15 October 2013 against the whole maintenance order granted. It is important at this stage to quote notice of appeal.

"THE HIGH COURT OF ZIMBABWE HELD AT HARARE

IN THE MATTER BETWEEN

MILDRED MAZOKERA - FIRST APPELLANT

and

ZEV PIERRE NDLOVU (A MINOR) - SECOND APPELANT

and

SILINGANISO NDLOVU - RESPONDENT

NOTICE OF APPEAL

Take notice that appellant notes an appeal against the whole of the maintenance order granted in favour of the second appellant by Worship Magistrate Milton Serima sitting at Harare Civil Magistrate Court, Fourth Street in Court No 6 on 9 October 2013.

1. GROUNDS OF APPEAL

   1.1 The court *a quo* erred at law in holding that the first applicant was not, on the evidence before it, entitled to be maintained by the respondent.

   1.2 The court *a quo* erred at law in its refusal to order lump sum maintenance when the unchallenged evidence showed that the respondent had received a windfall of US$155 268-00.

2. RELIEF SOUGHT

   The applicant prays for the following relief:

   2.1 That the maintenance order granted by the court *a quo* in favour of the second applicant be set aside.

   2.2 That the respondent shall pay lump sum maintenance for first and second applicants calculated at three-eighths of US$155 268-00.

   2.3 That the respondent pays the costs of appeal. (*sic*)".

While it is not my brief at all to deal with or comment on the merits of the appeal I cannot avoid to note that the minor child ZEV PIERRE NDLOVU has been cited as the second appellant. It is trite law that a minor child has no legal capacity to sue as to be sued in his or her own right. How this the basic knowledge escapes the first applicant's legal practitioner's mind is shocking. It is even disheartening to note that the minor child is cited as the second applicant in the urgent chamber application. While the minor child's interests were adequately dealt with in the Magistrates Court while represented by the first applicant as the custodial parent, I am surprised why suddenly this would change in the notice of appeal and how suddenly a minor child would have capacity to institute proceedings in the urgent chamber application.

I now turn to urgent chamber application.

After noting the appeal on 15 October 2013 the applicants (I am constrained to use that term as the minor child cannot be an applicant in her/his own right) on 17 October filed an urgent chamber application seeking the interim relief whose terms are couched as follows:-

"INTERIM RELIEF GRANTED

Pending the finalisation of the first and second applicants appeal against the determination by third respondent in Case no HC App 164/13 it is ordered that:

1. That the first and second respondents be ordered to reinstate the sum of $110 000-00 into the first respondent's Bank Account at African Banking Cooperation, Heritage House Branch.

2. The first and second respondents be interdicted from using, transferring disposing or dealing in any other way with the said sum of $110 000-00.

3. That the Deputy Sheriff be and is hereby directed to place under attachment the said $110 00-00 and hold the same under his custody pending finalisation of the appeal by the applicants of third respondent's maintenance order in case no HC App 164/13.

SERVICE OF THE PROVISONAL ORDER

This Provisional Order shall be served on the respondents or their legal practitioners by the applicant's legal practitioners". (*sic*)

The terms of the final order sought are stated in the following terms:-

"TERMS OF FINAL ORDER

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. The interim order be and is hereby made the final order.

2. First and second respondents are ordered to pay jointly and severally the one paying the other to be absolved, the costs of this application on the scale of legal practitioners and own client" (*sic*).

One of the reasons why I declined to hear the matter on an urgent basis is the poor manner in which the papers are drafted. Legal practitioners have a duty to ensure that all papers filed in court meet the basic required standard. This is even more important in urgent applications where the court has to deal urgently with the matter and the other party may not

have sufficient time to file relevant papers. In *casu* the minor child is cited as the second applicant. I have already addressed the impropriety of citing a minor child in his or her own right. The learned magistrate who dealt with the maintenance application in the Magistrates Court is cited as the third respondent. The mind boggles why the learned magistrate who is now *fuctus officio* and whose order is being appealed against is being cited in this proceedings. Other than harassing the learned magistrate I find no other reason for citing him in this application and no plausible reasons is given. It is also not clear why the second respondent is cited in the urgent chamber application and what obligation at law she has in respect of the application.

After I had ploughed through the first applicant's founding affidavit and the papers attached thereto I was not able to appreciate the urgency of the matter.

The question of what constitutes urgency in my view deserve no further comment as it is now settled in our law. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 at 193 (H). I cannot do more than refer to the remarks of KUDYA J in *Gifford* v *Muzire & Ors* 2007 (2) ZLR 13 at 134 (H) in which the learned Judge in dealing with what constitutes urgency said:-

> "All that the applicant has to show is that he cannot wait the observance of normal procedures and time frames set by the rules of the court for ordinary applications without rendering nugatory the relief that he seeks".

My view is that the matter is not urgent because the court is being asked to grant an incompetent order in the form of a provisional order or interim order when in fact the order sought is final. It is therefore wrong for the applicant to seek interim relief which is exactly the same as the substantive relief sued for. This is averse to the whole object of interim protection. The so called interim relief sought by the applicant is in effect a final order which cannot be granted at this stage as all what applicant would have proved is a *prima facie* case.

The other reason as to why I hold the view that the matter is not urgent is unclear nature of this cause of action vis-a-vis the interim relief sought. I have already explained at length the background facts of this case.

As per the certificate of urgency para 6 – 5 it is said the relief sought by the applicants is provided for in s 11(1) of the Domestic Violence Act [*Cap 5:16*].Reference to this provision is not only irrelevant to the application but is misleading as s 11(1) of the Domestic Violence Act [*Cap 5:16*] deals with contents of a protection order.

The basis for the alleging urgency in this matter is captured in para 13-15 of the first applicant's founding affidavit. According to the first applicant the urgency arose on 4 October 2013 when the first respondent transferred US$110 00-00 to the second respondent which transaction the first applicant became aware of on 7 October 2013. It is therefore surprising that the first applicant only filed the application on 17 October 2013, 10 days later. The ruling by the trial magistrate was pronounced on 9 October 2013 and all parties to these proceedings were aware that only US$1 034-26 was the available balance in the first respondent's account as at 7 October 2013

I am constrained to comment on the merits of this application but I need to state that in deciding on the question of urgency I was unable to establish the nexus between the proceedings in the Magistrate Court which are appealed against and the new issue of US$110 00-00 which now seems to be the basis of this urgent application.

The first applicant cannot be heard on an urgent basis because from the papers filed of record she has not shown that she has a legal interest which should be protected by way of an urgent application. See *Document Support Centre (Pvt) Ltd* v *Mafuvire* 2006(2) ZLR 240 at 243E-F.

In *casu* it is not even clear as to the nature of the interim relief sought. It is also not clear at law what rights the first applicant has in respect of the US$110 –00-00, an amount not even being held in the first respondent's Bank account and what obligations at law would the second applicant have in respect of the first applicant. The cause of action is muddled up and unclear.

All I can say is that the papers filed of record show that there is a court order by the Magistrate Court which on the face of it is extant. All that the first applicant can do, as she has done, is to appeal not to create unfounded urgency in a bid to lay her hands on some US$110 00-00 part of the first respondent's God given windfall which he has long transferred to his other wife.

I did not make an order as regards costs as Mr *Mahuni* for the first and second respondents decided not to ask for costs on account of concessions made by Mr *Bhala* during the hearing on urgency on the plethora of problems which confronts this application.

It is for this reasons outlined that I hold the firm view that this matter is not urgent.

Mundia & Mudhara, applicant's legal practitioners
Mahuni & Matatu, 1st and 2nd respondents' legal practitioners