Judgment No. HB 77/06
Case No. HC 943/06
X Ref 2854/04; 3451/04;
1528/05;

MICHAEL DAVID MOON

Versus

LOIS DYLISS MOON

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 18, 19 JANUARY & 27 JULY 2006

Adv S M Sibanda for applicant
Adv P Dube for respondent

The Background

BERE J: On 27 November 2003, my brother judge CHEDA J granted an order for divorce and other ancillary relief to the two parties. Included in that order and most relevant to these proceedings was the award of the custody of a minor child M. D. M. (then aged 10 years) to the respondent.

On 27 April 2004 the applicant lodged an application to this court seeking an order for the variation of the custody order made by CHEDA J. The relief that the applicant sought was in the following terms:

"It is hereby ordered that:

1. Custody of M. D. M. awarded to the respondent (in HC 1985/01) be and is hereby varied and custody of the said minor child be and is hereby awarded to the applicant.
2. The respondent be and is hereby ordered to bear costs of suit."

The respondent took the initiative to have that matter dismissed for want of prosecution and the matter was so dismissed. The applicant then sought rescission of that judgment premised on *inter alia* alleged abuse of the minor child.

In a carefully reasoned judgment my brother judge NDOU J dismissed the application for variation with costs pegged on attorney-client scale. That judgment was handed down on 29 September 2005.

On 3 May 2006, the applicant filed an urgent chamber application in this court. Counsel decided to heard the application "Application for directions" in terms of order 23 rule 151.

The following is the remedy as described in the draft:

"It is ordered

1. That the order awarding the custody of the minor child M. D. M., in case number HC 1985/01 be and is hereby ordered to be reviewed to determine the suitability or otherwise of the respondent as a custodian parent in view of her ill health and thus physical disabilities.
2. That it is hereby ordered that two government medical practitioners, be engaged to independently examine the health condition of the respondent and submit their reports to the honourable court as to their findings.
3. That it is hereby ordered that two welfare officers be engaged to conduct an inquiry and examine both the applicant and the respondent to determine and report on their suitability as custodian parents of the minor child, due regard being paid to the disabled condition of the respondent.
4. That the same two welfare officers are to conduct an interview of the minor child so as to assess his preference of the custodian parent. The same to be conducted in the absence of any of the interested parties, that is the minor child should be all by himself, unaccompanied during the course of the interview.
5. That upon the submission and filing of the said reports, the said minor child be brought before the presiding Judge in chambers on his own so as to enable the Judge to make his own assessment of the child's preference of the custodian parent and why he does not want to live with his mother, the present custodian.
6. That the Judge may make such other orders or give such other direction as to his view and assessment as the judge considers

most appropriate in the circumstances.

7. That there shall be no order as to costs. Each party shall bear his or her own costs."

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In counsel's heads of argument it was repeatedly emphasised that this application was being made in terms of order 23 rule 151 of High Court of Zimbabwe rules. I was also referred to the case of *McCall* v *McCall* 1994/3 SA 201 as precedent for the relief sought. I will come back later in this judgment to deal with the authorities referred to.

The respondent has vehemently opposed the latest bid by the applicant arguing *inter alia* that there is absolutely nothing new in the arguments being raised by the applicant as he keeps on recycling the same issues that this court has already determined. It was also forcefully argued on behalf of the respondent that what the applicant was asking this court in the instant application was for the court to give him advice as to whether he should or should not prosecute the intended application for variation.

A day before this matter was heard applicant's counsel addressed a letter to the Registrar of this court subtly dissuading me from hearing this matter as he felt my brother judge – Justice Ndou who had earlier on dealt with this matter in August and September 2005 would be better positioned to deal with the same matter. What counsel overlooked though was that on 30 August 2005 I dealt with this same case and granted the respondent a provisional order after ploughing through a pile of court files which were referred as cross-reference files in case number HC 1528/05.

I did not find merit in counsel's preference for the matter to be heard by my brother judge Ndou J. I want to mention in passing that it is not normal for legal

practitioners to choose the judges they prefer for whatever reason. In fact, doing so would create chaos in the operations of our courts and the request by counsel was in my view misplaced.

I must now deal with the substantive issues in this matter.

The relevance of Order 23 Rule 151 of High Court of Zimbabwe Rules 1971

For clarity's sake order 23 rule 151(1) reads as follows:

> "151(1) In any action after pleadings are closed or by leave of a judge after appearance has been entered, either party may make a chamber application for directions in respect of any interlocutory matter on which a decision may be required." (my emphasis)

The rule requires no interpretation. It is couched in simple grammatical terms. It presupposes that if directions are to be sought in terms of this rule pleadings would have been closed or appearance to defence would have been entered. It is my appreciation that it is only at this stage that a chamber application for directions in respect of any interlocutory matter can be sought. There does not appear to be any provision in this particular order for a party seeking fresh litigation to seek directions from the court or worse still a party wishing to get advice from the court as what appears to be the case in the instant case.

That the applicant is seeking advice from this court is articulately admitted by his counsel in his heads of argument filed in this court on 2 June 2006 when he stated;

> "It is submitted, with respect that indeed this is a matter that falls squarely within the ambit of order 23 rule 151(1). In fact in paragraph 4 of his affidavit Mr Longhurst correctly stated what essentially is the purpose of this application, he states, "It is my opinion that what the applicant is asking in the instant application is for the court to give him advice as to what to do." That of course is true."[1] (my emphasis)

1 Paragraph 5 of applicant's heads of argument filed on 2 June 2006

I have already dealt with order 23 rule 151(1). I am satisfied that applicant's invoking of this rule is misconceived and does not accommodate the application he ascribed to it.

As rightly argued by *Advocate P Dube* it is clear from the heads of argument and the draft by the applicant that what the applicant is in fact asking the court to do is to give him legal advice and to assist him gather evidence that he might want to use in future in his application for variation of the existing order for custody.

I must state it loud and clear that it has never been, and will never be the function of this court to assist a litigant gather evidence for future prosecution of his or her case. It is also not the primary function of this court to give lawyers legal advice to assist them to decide whether or not they should initiate litigation on behalf of their clients.

The motive behind the application by the applicant is made clearer in paragraph 2 of applicant's supplementary heads of argument filed on 18 July 2006 when his counsel states;

> "The present application before his Lordship is not an application for a variation order. It is strictly an application for directions in respect of the assertions that the child <u>is deadly opposed and therefore is against the court's custody order, placing him under the custody of his mother, the respondent."</u> (my emphasis)

This issue was adequately addressed by NDOU J in his judgment on page 4 of his judgment when he stated:

> "What minors prefer is not always in their best interest. What is important is to embark on a process whereby all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed in the determination of the best interests or welfare of the minor."

The learned judge then proceeded to consider the material evidence that was presented to him and made a determination. If the applicant was not happy

with that determination he should have appealed against that decision and not to bring the same case but camouflaged as an application for directions.

I was referred to the case of *McCall* v *McCall* 1994(3) SA 201 as authority supporting the procedure adopted by applicant in this matter. I have since acquainted myself with this decision. In my view that case has been referred completely out of context.

In the first place, that case dealt with at the Cape Provincial Division cannot be precedent in this country. At best it can be regarded as some persuasive authority.

Secondly, whilst conceding the case sets out in fairly elaborate form the criteria to be used in determining the best interests of a minor child it must be understood that in that case, the non-custodian parent had brought before the court a fully-fledged application for variation of an earlier order of custody. There was no application for directions made as a precursor to the main application for variation of custody as in this case and it is therefore clearly distinguished from the instant case.

What is particularly of concern to the court in this matter is that a wrong procedure has been used. In my view if the applicant is of the firm view that ever since the order of custody was granted, circumstances have changed all he needed to have done was merely to file an application for variation of custody and nothing

more.

Secondly, the court is equally concerned the applicant keeps on recycling the same arguments which were dealt with and determined by this court. That is no doubt an abuse of court process and it screams to be dealt with by an appropriate order for costs.

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The respondent has asked for costs on attorney-client scale. In the light of my observations I am satisfied that the respondent is on balanced feet. She has been dragged to this court on numerous occasions and on the same issue.

I have had to exercise great restraint in not awarding cost *de bonis propis* in this case. Counsel's salvation is only that counsel for the respondent did not ask for such costs.

Accordingly the application is dismissed with costs on attorney-client scale.

Advocate S K M Sibanda & Partners, applicant's legal practitioners
Ben Baron & Partners, respondent's legal practitioners