GORDON DUNCAN
versus
KIRSTY LOUISE LOUW

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 24 February 2015

Urgent Chamber Application

M D Hungwe, for the applicant
F A Rudolph, for the respondent

MATANDA-MOYO J: The applicant is seeking the following order:

"TERMS OF FINAL ORDER SOUGHT

1. The respondent be and is hereby barred, interdicted and stopped from removing the minor child F from within the borders of the Republic of Zimbabwe.

2. The applicant be and is hereby declared and confirmed to be the sole custodian of the minor child F as ordered by the children's court under case number JCC 371/11.

3. …….

INTERIM RELIEF GRANTED

1. The respondent is interdicted, barred and stopped from removing the minor child F from within the boarders of the Republic of Zimbabwe.

2. In the event that the respondent has already removed F from Zimbabwe, the respondent is hereby ordered to return the child to Zimbabwe immediately.

3. Respondent to immediately surrender the minor child F's passport to the Registrar of the High Court until finalisation of this matter.

SERVICE OF THE PROVISIONAL ORDER

The applicant's legal practitioners are hereby given leave to serve this order on the respondent."

The brief facts are that the applicant is the father of a minor child born out of wedlock F born on 29 June 2007. The applicant and the respondent stayed together for two years after F's birth and separated. Upon separation the respondent took custody of the minor child. On 15 November 2011 the magistrates court granted custody of the said minor child to the applicant – case no JCC 371/11 refers. Aggrieved by that ruling the respondent on 12 December 2011 sought and obtained a provisional order from this court which granted her custody of the minor child pending confirmation of the order. On 6 August 2012 such order was confirmed by consent. This put to rests the question of who is the custodian of the minor child. It is clear that in terms of the High Court order of 6 August 2012 HC 11 389/11 the respondent is the custodian of the minor child. The applicant has access rights to such minor child in terms of this court order HC 4747/12 granted on 22 May 2012.

The respondent has applied for and been awarded visas for herself and the minor child to reside in Australia until October 2017. The respondent intends to travel to Australia on 23 February 2015.

Firstly, in bringing this application, the applicant is labouring under a misconception that he is the custodian of the minor child. He relied on an order by the magistrates court JCC 371/11. However, subsequent to that on 12 December 2011 this court granted an interim order that:

> "The applicant (respondent herein) shall have custody of the minor child F (born 29 June 2007), pending the confirmation or discharge of this matter.
>
> ……"

On 6 August 2012 the provisional order above was confirmed by consent of both parties. It effectively meant the respondent herein was confirmed the custodian of the minor child. This court had earlier on on 16 July 2012 granted the applicant herein access rights to the said minor child.

The applicant attempted to argue that there was an appeal filed against the decision of the magistrate which granted custody rights to the applicant, which appeal the applicant submitted was dismissed. Based on that purported dismissal of the appeal the applicant argued that he is the custodian of the minor child. Unfortunately, there is no proof before me that there was such an appeal pending before this court. Our law places the onus of proof on he who alleges. The applicant has failed to place any evidence before me in support of his submission.

Without any substantive evidence the court threw out the submission as baseless, leaving me with the conclusive evidence of the confirmation order by this court of 6 August 2012 which conferred custodianship of the minor child upon the respondent. It is my finding therefore that the custodian parent of F is the respondent and not the plaintiff. The applicant could therefore only approach this court as a parent with access right and not custodian rights. Any submissions by the applicant purportedly as the custodian of the minor child automatically fell away.

The applicant made an application for deferment of the matter to Monday 23 February 2015 to enable him to file the appeal papers. I dismissed such application. An applicant who approaches a court on an urgent basis should make sure he or she has all the information relied upon. The applicant in an urgent matter is saying with all the information in my possession the matter cannot wait. To file piece meal applications firstly tend to show that application is based on suppositions and postponing the matter would defeat the whole purpose of urgency. Secondly, there was no mention of the appeal case number and I was convinced that postponing the matter served no purpose. By 23 February 2015 the applicant would most likely not have the papers. Besides a litigant who fails to place evidence within his possession on each before the court should not find mercy from the court, unless he adequately explains why such information could not be presented on the outset.

The applicant submitted that as a parent with access rights to the minor child as determined by this court, the respondent had no right to remove the child to Australia without his consent. The applicant also submitted that he had no intentions of settling in Australia. The child should be close to both parents and that could only be achieved if the child is kept in Zimbabwe. He also submitted that his means do not allow him to visit the minor child in Australia. It was his argument that the right of custodian that the respondent had was limited to his right of access.

There is generally a presumption in favour of the custodial parent's right to relocate with a child. The burden is on the non-custodial parent to show that such relocation is not in the best interest of the child. The court will only interfere with the decision of the custodial parent where such removal would prejudice the rights or welfare of the child. This is so because the child's relationship with the custodial person is the most important factor affecting the child's welfare. The courts have generally recognised that the well-being of the child is fundamentally interrelated with the well-being of the custodial parent and that the custodial

parent is the best person suited to make decisions affecting the child, such as where they would reside. Judicial interventions should be limited in these matters except in extreme cases where the child's interests are most likely to be adversely affected.

In this case the applicant has a burden to establish any risk of harm to the child that may arise from the relocation to Australia. Instead the applicant herein concentrated on his own circumstances like, that he did not have the financial capacity to visit Australia. The applicant has not placed before the court any evidence which showed that the move was not in the best interest of the child and was designed to frustrate his access rights.

In *Cruith* v *Manuel* 1999 (1) ZLR 7 (S) at p 14 F-G MUCHECHETERE JA said:

> "The trigger that warrants any interference must therefore be an allegation that, the rights are not being exercised properly and it is therefore in the interests of the child that those rights be interfered with. The welfare of the child in cases of this nature only becomes an issue when there is an allegation that the exercise by the mother of her rights causes some concern……"

The court cannot substitute its own decision for that of a custodial parent where such person has not been shown to be incompetent to make such a decision. The question to be answered is whether the applicant has provided some basis to conclude that the court should usurp the functions of the respondent in making crucial decisions that affect the minor child.

The respondent submitted that the decision to move to Australia is in the best interest of the child as there are more opportunities for the child than opportunities presently here. I fully agree with her. The respondent referred me to a plethora of cases which streamlines the occasions where courts may interfere with the lawful decision of a custodian parent like. *Samudzimu* v *Ngwenya* 2008 (2) ZLR 228 @ 232 D – E *Bailey* v *Bailey* 1979 (3) SA 128 (A). The courts will generally look at the best interests of the child.

The respondent submitted that she informed the applicant of the relocation to enable him to enforce his access rights. The respondent submitted she is prepared to enter into a consent order regarding such access rights as the applicant may require. I do not see any ill intentions on the part of the respondent in exercising her rights as the custodian of the minor child. There is no proof that her relocation to Australia is meant to place impediments in the way of the applicant's rights to access. The applicant has not discharged the onus on him to show that the relocation is meant to frustrate his access rights. See *Hardy Skaramangas* 2000 (1) ZLR 196 *and Hughson and Anor* v *Greyling* 2000 (1) ZLR 434.

I have considered the applicant's submissions that he lacks the means to exercise his access rights once the respondent relocates with the minor child to Australia. Case law has been clear that it is the duty of the parent with access rights to exercise those rights using his own means. Such consideration has never been used to allow court to interfere with the custodian parent's rights to determine where she and the child lives.

Accordingly, I am of the view that the applicant has failed to discharge the onus placed upon him to give this court powers to interfere with the relocation. The application accordingly fails.

The respondent requested costs on a higher scale. I do not believe these circumstances warrant such costs. The applicant indeed has access rights to the minor child and approached the court to protect such rights. Such application was not frivolous and I see no reason to punish the applicant for trying to protect his rights.

In the result the application is dismissed with costs.

Kadzere, Hungwe and Mandevere, applicant's legal practitioners
Scanlen and Holderness, respondent's legal practitioners