CHAWAPIWA SITHOLE
and
DICKSON SITHOLE
and
ROSEMARY SITHOLE
and
MRS CHIGUMIRA

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 29 June and 11 August 2004

Urgent chamber application

A M Gijima, for the applicant
J C Muzangaza, for the respondents

GOWORA J: The applicant and the first respondent are husband and wife. They are currently on separation. The marriage was blessed with two girls, twins aged about thirteen. The applicant and the first respondent left the country in 1999, where both have established a home. The children were left in the custody of the second respondent who is the mother to the first respondent.

On 30th March 2004, the applicant approached the Juvenile Court on an urgent basis and obtained an *ex parte* order in the following terms;

> "A rule *nisi* be and is hereby issued calling upon the 1st and 2nd Respondents to show cause to this honourable court on 8 June 2004 at 8 am or so soon as the matter may be heard why:
>
> 1. Custody of the minor children Lindani Rosemary and Lindiwe Vena should not be awarded to the applicant;
> 2. 1st Respondent should not be ordered to release to Applicant at 1st Respondent's expense the minor children's clothing items and passports.
> 3. 1st Respondent should not pay the costs of the application.

INTERIM RELIEF GRANTED

Pending the determination of this matter on the return day, the following interim relief is granted.

1. 1st respondent be and is hereby directed to deliver to Applicant at 1st respondent's expense all the minor children's clothing items in her possession and the minor children's passports within 24 hours of service of this order.
2. In the event of 1st Respondent failing to comply with paragraph 1 above, any attested member of the Zimbabwe Republic Police be and is hereby authorized to take all necessary steps to give effect to this order."

At the time that the applicant obtained this order, the first respondent, cited in those proceedings as the second respondent, was in the United Kingdom. The order thus granted was anticipated by the current second respondent, hereinafter referred to as Mrs Chigumira and she convinced the Magistrate who had issued the rule nisi to issue the following order on 1st April;

"IT IS ORDERED :

1. That the part of the order of this Honourable Court dated the 30th March 2004 requiring the 1st Respondent to hand over to the Applicant the passports of the minor children Lindani Rosemary Sithole and Lindiwe Vena Sithole, be and is hereby suspended pending the following;

a) formal service of the application on the 2nd Respondent ; and thereafter

b) the finalization of the issue of the minor children's custody as between the applicant and Respondent.

2. That any party wishing to anticipate the return day of the aforesaid order may do so on giving 72 hours notice to the other parties."

The applicant has noted an appeal against that judgment with this court and the appeal is still pending. The applicant was however not content to await the determination of the appeal On 7 April 2004, under case no HC 4226/04, she filed a chamber application under a certificate of urgency for an order requiring as interim relief the delivery to her of the

minor children's passports. As part of the final relief she sought an order that she be permitted to take the children out of the country to England where she is currently residing. The application was heard before UCHENA J who dismissed the application with costs. In his judgment the learned judge said that the matter was not urgent and that the urgency being alluded to in the application was in relation to the circumstances of the applicant and was not concerned with the interests of the minor children. He also stated that the papers before him had not shown that it was in the interests of the minor children that they be taken from Zimbabwe to England. I am reliably informed that the applicant has evinced an intention to appeal against the judgment, although I am unable to state whether or not an appeal has been noted.

The applicant was not at all pleased with the outcome of the application heard before UCHENA J and on 14 May 2004, she filed an identical application with this Honourable Court under case no HC 5805/04 seeking the same relief. The application was opposed by the two respondents, and on 20 May 2004, the applicant filed a notice of withdrawal and tendered costs.

This application was filed, again under a certificate of urgency, on 21 June 2004. The relief being sought was final and was to the following effect;
IT IS ORDERED THAT:

1. The appeal noted against the ruling of the Honourable Magistrate Mrs Chigumira has the effect of suspending execution and rendering of no force and effect the order she made on the 1st April 2004.
2. The applicant is given leave to take the minor children Lindiwe Vena Sithole both born 17th June 1991 to the United Kingdom.
3. The 1st and 2nd respondents shall deliver to the passports of the minor children to the applicant within 24 hours of this order being made failing which the Deputy Sheriff is hereby authorized to attend to(sic)

their residence or any other place that they keep the passports and search such place uplift them and deliver them to the applicant.

4. The noting of an appeal shall not suspend the operation of this order.

5. The 1st respondent shall pay the costs of this application on the ordinary scale and the second respondent shall pay the costs of this application on the legal practitioner and client scale and both shall be liable to pay costs jointly and severally with the one paying the other being absolved.

In answer to the application both respondents filed written submissions as opposed to opposing affidavits. Whilst I appreciate that the application was filed as an urgent application and was also set down for hearing soon after it was served upon them, nevertheless it is my view that where a party wishes to oppose relief in a matter which is particularly contentious as this appears to be, it would be of assistance to the court to have on record by way of affidavit the reasons for and the basis for the opposition. In this case several applications had been filed and the respondents had filed opposing papers in respect of the earlier application. The responses filed therein were not sufficient to answer the averments by the applicant in *casu* as new issues which had not been put in dispute before were raised.

The first in contention raised by the respondents was the lack of urgency of the application. I will therefore decide on the issue of urgency before discussing on the merits of the application.

URGENCY

As is customary in our courts, the papers have attached to them a certificate of urgency which has been signed by the applicant's legal practitioner of record. He certifies that the application is urgent for the reason that the applicant who is the mother of the minor children of the marriage, whose statutory right to have custody of the children had been

confirmed by the juvenile court. He stated that she was the only parent of the minor children who was in gainful employ, and she might lose her job if she was not able to return to England in time due to the custody dispute. He also certified that it was in the best interests of the children that the matter be heard as a matter of urgency because they had already obtained places in the United Kingdom to attend school there. There was therefore no time for an ordinary court application to be filed and completed or for the divorce proceedings to be determined, which proceedings in any event seemed to have been initiated primarily to defend the application for custody. He stated that delaying their departure to England would be in the event detrimental to them.

The same submissions appear in the heads of argument filed on behalf of the applicant, that the matter is urgent because the twins need to travel with their mother to the United Kingdom for her to start her job. There is in addition a submission that the first respondent is now ill and it is in the best interests of the children that that they be quickly given leave to depart and their father continues his treatment for the mental ill-ness.

The respondents contend that the matter is not urgent in that the situation adverted to in the applicant's affidavit has been in existence since the year 2001. The respondents submitted further that UCHENA J had found in the previous application that the matter was not urgent at all, and this was when the applicant had indicated to the court that she wished to travel on 12th April 2004. The respondents further contend that the children had started school for the second term and the second respondent had paid their school fees.

Although the applicant avers in her founding affidavit that she has found a school for the children there is nothing in her papers to prove that. She has attached a letter from her prospective employers in relation to her employment but nothing in respect of the children. There is an agreement

relating to the lease of premises which appears to have expired. I am informed by Mr *Gijima* for the applicant that it has since been renewed. I have no reason to doubt that statement. In relation to the school I am again informed from the bar that a place has been secured but the children would need to be interviewed before they can be confirmed as students. There is no indication of how long the process would take or how soon the children can start school if indeed they secure places at the school. In his judgment in case no HC 4226/04 UCHENA J stated that the matter was not urgent as the urgency related to the applicant personally and not the children. I find the same in *casu* as the urgency that is being referred to relates to the applicant's need to return to England within the deadline set for to assume her new position. The urgency that she alludes has nothing to do with the situation of the children which without doubt is the same as it was in 1999. They were left in the custody of their grandparents and they do not seem to be any the worse off.

The applicant however was granted rights of custody over the minor children by the Juvenile Court and she must exercise those rights. The first respondent by not filing an affidavit has placed the court in some difficulty as there is no response on record as to what his health status us is. The applicant has stated that of the two parents she is the only one in gainful employment. That has not been disputed by the respondent. In addition, the applicant has contended that the first respondent has no abode of his own and that in fact he is staying with the second respondent so effectively the children will be in the custody of the second respondent. That has not been disputed. The applicant has averred that the first respondent needs to return to England to continue his treatment, and that in fact his passport has been detained by the hospital authorities and as a result in order for him to come to Zimbabwe he had to obtain an emergency travel document. Again that has not been disputed. Even if the urgency averred on the

papers relates to the applicant's personal situation in my view the matter is urgent, more particularly in view of the fact that the applicant has now been confirmed as the custodian parent of the twins.

I turn now to determine the matter on the merits.

WHETHER THE MATTER IS *RES IUDICATA*

Before UCHENA J the factors relied on for having the matter dealt with on the basis of urgency were almost the same as the ones relied on in *casu*, in that the applicant stated that she had to travel to the United Kingdom to meet the deadline set by her employer for the resumption of her employment. It was also made an issue of urgency that the first respondent had to return to the United Kingdom for purposes of having his treatment continued and that his rights of access would not be affected at all.

On page 2 of his cyclostyled judgment UCHENA J stated thus with regard to the question of urgency:

> "In view of Miss Chakasikwa's concession that the urgency is not grounded in the children's best interest and that the children's best interests were not considered at all dismissed the application on the ground that it was not urgent and also that even if it were urgent this court as upper guardian of all minors can not grant applicant leave to take the children out of its jurisdiction without the applicant indicating whether she has made arrangements for their accommodation and education. In shirt the applicant's application was for her own personal interests. It had nothing to do with the best interests of the minor children.
>
> The relief sought was the release of passports and the grant of leave to take the children out of the court's jurisdiction. Granting the relief would result in the children being taken out of the country even without leave as the applicant has exhibited a resolve to take the children out of the country.
>
> I am of the firm view that it is not in the children's best interests for the applicant to take them out of the country without proving that it will be in their best interest."

In *casu,* the applicant has attached a lease agreement in respect of accommodation, which would suffice for herself and the children. She has indicated that the children are assured of places, and that all that would be required is that they be interviewed. I have no reason to dispute those statements. More importantly the first respondent has himself not seen it necessary to dispute those averments on oath. The applicant has now addressed, in my view, the very pertinent concerns raised by UCHENA J as regards the best interests of the minor children. In addition the children themselves have deposed to affidavits in which both state that they want to go with their mother.

The requisites for a plea of *res judicata* were described as follows by SANDURA JA in *Banda & Ors Vzisco* 1999(1) ZLR 340 at page 341G – 342B;

> "The requisites for a plea of *res judicata* have been set out in a number of previous cases. In *Pretorius v Barkly East Divisional Council* 1914 AD 407 at 409, SEARLE J, set them out as follows:
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> > 'As to the first point, the requisites for a plea of *res judicata* have several times been laid down in this court.
>
> The three requisites of a plea of *res judicata*, said the CHIEF JUSTICE in *Hiddingh v Denyssen & Ors* (1885) 3 Menz 424, quoting Voet (44.2.3), are that the action in respect of which judgment has been given must be between the same parties or their privies, concerning the same subject matter and founded upon the same cause of complaint as the action to which the defence is raised…….
>
> In order to determine the cause of complaint, the pleadings and not the evidence in the case must be looked at.'"

The leading authority in our jurisdiction on the question of *res judicata* is the case of *Wolfenden Jackson* 1985 (2) ZLR 313B-C where GUBBAY JA as he was then stated as follows;

> "The *exceptio rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority

> vested in judicial decisions be given effect to, even if erroneous. See *Le Roux en' Ander v Le Roux* 1967 (1) SA 446(a) at 461H. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or in the case of a judgment in *rem,* any other person) are not permitted to dispute its correctness."

The parties appearing before me are the same as appeared before UCHENA J, The subject matter that he was requested to deal with is the same as the one before me, and most importantly was founded on the same cause of complaint. Can it be said therefore that the matter is *res judicata*. It is clear that UCHENA J did not proclaim a definitive judgment. The learned judge did not decide the matter on the merits, he in fact dismissed the application on the basis that the applicant had not satisfied him as to the need to have the matter dealt with on the basis that it was urgent. His expressed view was that the urgency being alluded to related to the applicant's situation and her expressed need to exercise her custody, rather than the interests of the minor children and what was best for them. The issue to be determined is whether or not the applicant should be granted leave to take the children out of the court's jurisdiction and to that effect be granted an order whereby the children's passports are handed over to her. That issue was clearly not decided by UCHENA J when the matter was set down for hearing before him. In my view the matter is not *res judicata* and I can decide it on the merits.

How successful the applicant is on the question of the leave to take the children out of the country will also resolve the issue of whether or not she should be given the children's passports as prayed. The resolution of this issue is determined by what would be in the best interests of the minor children. It is accepted by both applicant and the first respondent that the two are now officially separated. In fact the first respondent has issued summons for divorce and ancillary relief against the applicant. It is not my intention to delve into the claim for divorce as that is not before nor can I

as submitted by the applicant make a finding that the issue of custody is likely to be decided in favour of the applicant. Although I must consider the probabilities of the eventual custody order being made in her favour, all I have to decide is in this application, is whether or not it is in the best interest of the children to go to England with their mother, who is now the custodian parent according to the order from the Juvenile Court.

It is contented by the applicant that education and life in the United Kingdom has more promise for the minor children. It was contended further that both parents in recognition of the factors had made concrete plans that their children join them in England and live with them. It was contended further that the second respondent did not dispute this, all she seemed intent on was that the children and the parents should live as a unit, which sentiment she has expressed on a number of occasions. It is contended further that the second respondent has been in that endeavour been using the children to achieve her ends, which attempted alienation is, it was submitted harmful to the interests of the minor children. The second respondent through the submissions of her legal practitioner denies influencing the children. It was contended that in terms of s 5 of the Guardianship of Minors Act [*Chapter 5:08*] sole custody *pendete lite* vests in the mother until the father of the said children proves to the court that was in their best interests for custody to be awarded to him.

The respondents in opposing contend that what in fact the applicant is seeking is a performance interdict, and that in order to succeed in the relief sought she is required to satisfy the requirements of an interdict which are as follows:

a) the existence of a right which is clear or *prima facie*
b) proven injury to that right; or alternatively reasonable apprehension of an injury about to take place
c) the absence of an effective alternative remedy; and

d) the possibility of permanent injury to one's interests; and

e) the balance of convenience.

In substantiation of these submissions, it was contended on behalf of the respondents that the applicant indeed had a right to custody of the children but that such right was tempered with by (*sic*) considerations of the minor children's best interests and the right of the other parent to such custody and access. It was further contended that by virtue of the right to custody during the separation of the parents as the mother of the minor children the applicant had virtually unfettered rights to take the children wherever she wished without the consent of the first respondent, even outside the borders of our country. However, it was argued in the instant case there had been no infringement of the applicant's rights. Indeed she was the one who wished to injure the rights of the first respondent to have access to the children by taking them to an uncertain environment when back in Zimbabwe they were well settled and had a home and a father. According to the respondents, it is better to leave the children where they are in the proximity of a father who is willing to be with his children and has not been alleged to be a danger to them in any manner. It was the view of the respondents that it would be more convenient to the parties and to the judicial system for the children to be left in the situation that prevailed before 26TH March 2004, as the first respondent would be staying in the country permanently in the future and that it would in fact be more convenient for the applicant to come to Zimbabwe to see the children.

As I have previously mentioned the first respondent did not file an opposing affidavit in this matter. He and his mother have sought to rely on the opposing affidavit filed under case no HC4226/04, in which only the second respondent deposed to an affidavit. It is not stated why the first respondent did not file an affidavit, but as this is an application that concerns the interests of minor children and the parents rights vis-a-vis

those children I will accept the second respondents as representing opposition from the first respondent.

In her opposing affidavit the second respondent mentions that the relief that is being sought which in substance is the same as the instant case, was the subject matter of an appeal before this Honourable court. The further contention was that there was now pending before this Honourable court a claim for divorce in terms of which custody of the children had been made an issue. It was suggested by the second respondent that for this court in those circumstances to grant an order in terms of which the applicant was allowed to take the children out of the jurisdiction would be pre-emptive of the divorce claim.

This court is fully alive to the respective claims of the parties to the divorce, and consideration is given to the rights of each of them. The unfortunate circumstance is that the father of the minor children has not sought to advise the court of his reasons for opposing the relief sought. He has not advised the court of his plans for the children, where they are going to live, whether he is in employment, how he is going to fend for them. He has not denied the suggestion by the applicant that he is a psychiatric patient who must return to England in the near future to finish his treatment. In the event that he returns to England then neither he nor the applicant would have custody of the children. I accept as stated by the second respondent that the children are in school in Zimbabwe but it is my view that the question of their attending school in Zimbabwe is not the only or overriding consideration in determining what is in their best interests. It cannot be ignored that a removal of the children from the jurisdiction would disrupt the lives of the children, who are in school, but this is a factor that is to be looked at in conjunction with other factors to determine whether it would be in their best interests to be allowed to go and live with their mother as opposed to remaining here.

What constitutes the interests of the minor child has been described as:

> "The term 'interest of the minor' must, it is considered, be taken in its widest sense. It is not only the physical well-being nor merely the material welfare, but the minor's interests generally and in all respects, including economic, social, moral and religious considerations. Affection is also a relevant factor, and the wishes of older children may have to be taken into account."[1]

I agree with the suggestion by the applicant that the children if they are to remain with the first respondent would in effect be under the custody of the second respondent and not the father as she is the one who has the means in this country to provide for the children-*vid* the submission that she had paid their school fees. This in fact would militate against the order of interim custody already granted to the applicant by the Juvenile court. In addition, the children themselves have already indicated that they wish to go with their mother. They are aged thirteen and I believe they are at that age mature enough to discern what they want in life. In addition, the first respondent is clearly not in a position to be a parent. He appears to be suffering from a mental incapacity as alleged by the applicant, which allegation has not been refuted. He is not in employment nor does he have an abode, as he is staying with his parents. If he is in such an incapacitating state how would it be possible for him to supervise guide monitor and advise his children. He cannot even fend for himself. In *Galante v Galante* HH 177/02 SMITH J in considering an application for custody said the following;

> "In determining what is in the best interests of the child there are many factors which must be taken into account. In *McCall v McCall 1994(4) SA201 C) at 204-205,* KING J said in relation to the criteria to be used-
> In determining what is in the best interests of the child, the court must decide which of the parents is better able to promote and

[1] Per E Spiro Law of Parent and Child 4 ed page 282.

ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following –

(a) the love, affection and other emotional ties between parent and child and the parent's compatibility with the child;
(b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
(c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
(d) the capacity and disposition of the parent to give the child the guidance which he requires;
(e) the ability to the parent to provide for the basic physical needs of the child, the so-called 'creature comforts' such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
(g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
(h) the mental and physical health and moral fitness of the parent;
(i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
(j) the desirability or otherwise of keeping siblings together;
(k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
(l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father; and any other factor which is relevant to the particular case with which the Court is concerned".

It cannot be gainsaid that in the circumstances, taking into account the factors referred to above, that the applicant, would be in a better position to care for the children than would the first respondent. She would be better able to assess the needs and requirements of the children than

would the first respondent. She is better able to communicate with them than he, incapacitated as he is would. She would have the financial means to cater for their material wants and needs than would the first respondent as he has no income at all. She would be able to provide for their secondary as well as tertiary education as she clearly has the means to do so. She is mentally and physically fit and would be better able to attend to their physical and social well-being than the first respondent. The other consideration is that they are both female who are at the threshold of their puberty, and would obviously be more comfortable with their mother rather than their father in matters concerning female issues.

I am satisfied that the interests of the twins would be better placed if they were living with their mother as opposed to their father.

However, before coming to a final determination in this matter there is an issue that I raised with Mr *Gijima*, in relation to the appeal which is still pending before this Honourable Court. The applicant has noted an appeal against the order of the Juvenile court suspending a portion of the order it had granted, with particular reference to the passports being handed over to the applicant. My concern expressed to Mr *Gijima* was whether or not this court in determining the same issue, which was the subject matter of the appeal, was not in fact bypassing the appeal process. Mr *Gijima* was not in a position to address me authoritatively on the issue. Mr *Muzangaza* also on his part apart from stating that the appeal was still pending made no further meaningful submissions. It is not clear from my understanding of the submissions made on behalf of the respondents whether or not they sought to rely on the defence of *lis pendens,* in any case as I have already stated Mr *Muzangaza* for the respondents did not make any forceful submissions in respect of the same. I am therefore fortified that I am able to determine the matter before me.

The first paragraph of the order sought is a *declaratur* that the noting of an appeal by the applicant has the effect of suspending execution of the order granted by the Juvenile Court rendering the same of no force and effect. In my view once the merits of the application have been examined and determined, this would be an unnecessary exercise as the operative part of the order would determine the relief that the applicant would have been granted. To issue a *declaratur* would in my view be stating the obvious which in the circumstances would appear to be unnecessary especially as the court has now determined the matter on its merits.

I therefore make an order in the following terms ;

1) That the applicant be and is hereby granted leave to remove the minor children Lindiwe Vena Sithole and Lindani Rosemary Sithole from Zimbabwe to the United Kingdom

2) That the first and second respondents shall deliver the passports of the minor children to the applicant within 24 hours of the service of this order failing which the Sheriff for Zimbabwe or his lawful deputy is hereby authorized to attend at their residence or any other place that they keep the passports and search such place, uplift them and deliver them to the applicant.

3) That the noting of an appeal shall not suspend the operation of this order.

4) That the respondents shall pay the costs of this application.