LK
versus
KRM
and
THE CHIEF IMMIGRATION OFFICER

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 8 & 28 October 2015

Urgent Chamber Application

H Mazarurwa, for applicant
S Vas, for 1st respondent
EP Ruziwa, for 2nd respondent

MUSHORE J: The facts in brief are that the applicant is the mother and the first respondent is the father of a minor child born out of wedlock in South Africa on 18 January 2010. The child is approximately 5 years old. The applicant resides in South Africa. When the child was about six (6) months old, and with the applicant's cooperation and consent, the parties obtained a South African abridged birth certificate and a temporary passport for the minor child, both of which reflected the father, first respondent's surname. At that time the applicant resided in South Africa and the respondent resided in Zimbabwe. There appears to be some dispute between the parties as to how it came to be that the first respondent acquired *de facto* custody of the minor child from the applicant with the applicant alleging that first respondent stealthily and forcibly and thereby illegally removed the child from the applicant. However first respondent's version is that the exchange was done by consent and with the applicant having left the minor child with the first respondent. Be that as it may first respondent assumed physical *de facto* custody of the minor child since 2011 and has had *de facto* custody since then. Sometime in 2011 the first respondent paid for the applicant's visit to the minor child in Zimbabwe. Since then the applicant has never visited the minor child. Both parties agree that the relationship between them soured in 2011.

In April 2014 and in case number HC 3201/14, the first respondent applied for *de jure* custody and guardianship of the minor child. A default judgment was entered in favour of the first respondent when the applicant failed to file opposing papers. Eighteen months later, and on 30 September 2015, the applicant filed an application for rescission of that judgment in case number HC 3077/15. That application for rescission is pending.

This is an urgent application for a stay of execution of the default judgment. In this application, the applicant seeks an order for interim relief in the following terms:-

"TERMS OF FINAL ORDER

1. The execution of the default judgment granted in **case No 3291/14** be and is hereby ordered to be stayed pending determination of the Application for Rescission of Default Judgement filed under **Case No HC 9370/15**.

2. The 1st Respondent is hereby barred from taking the minor, **X** from the jurisdiction of the High Court of Zimbabwe until the determination of the Application for rescission of default judgment filed under **Case No HC 9370/15.**

3. Costs of suit in the cause of the Application for Rescission under **Case no. 9370/15.**

INTERIM RELIEF GRANTED.

1. Pending the determination of the application for rescission of judgment under **Case No HC 9370/15,** the execution of the order in **Case Number HC 3291/14**, be and is hereby stayed.
2. The respondent is hereby barred from taking the minor, X from the jurisdiction of the High Court of Zimbabwe.
3. 2nd respondent be and is hereby ordered to prevent the 1st Respondent from leaving the jurisdiction of the High Court of Zimbabwe with the minor child"

SERVICE

Leave is granted to the Applicant's legal practitioners to serve this order on the Respondents."

The second respondent's counsel advised the Court that it would abide by the determination made by the Court in this matter.

The application was fraught with problems.

The first respondent's counsel took a point *in limine* that the applicant was not before the court because the founding affidavit filed was sworn statement by the applicant's legal practitioner attested to on the basis of a Special Power of Attorney granted by the applicant herself to her attorney. The resultant fact was that the founding affidavit in this matter was a sworn affidavit from her attorney and not from the applicant. To further compound matters, applicant's attorney argued the matter and effectively acted as counsel as well as litigant. The

applicant's attorney was therefore wrongly wearing two hats. After much scrutiny applicant's attorney properly conceded the point taken by the first respondent's counsel and asked that the court allow her to proceed with the matter in a capacity other than that of the applicant's legal practitioner and as the agent of the applicant empowered by the Special Power of Attorney. The applicant's counsel relied on the case of *Zimbabwe banking Corporation Ltd* v *Ttrust Finance Ltd & Anor* HH 130/2006. Upon perusing the case the court delivered an *ex temporae* judgement clearly pointing out that the *Zimbank* case (*supra*) was distinguishable from the present case in that in the *Zimbank* case, the legal practitioner concerned had merely represented the litigant by virtue of the power given by the Special Power of Attorney, and in fact had not stood as counsel in litigation In its ruling on this point, the court found it to be in the best interests of the minor and for the sake of efficacy, that the matter continue and in that regard the court ruled that the applicant's counsel drop her legal hat and that she should make representations as an appointed representative of the applicant. In the result the point *in limine* taken was dismissed

Another issue followed in that Insofar as the issue of urgency, it is not clear what harm the applicant may reasonably apprehend or what circumstances are likely to eventuate if a stay for execution is to be denied. In order to hear the substantive argument regarding the stay, the court took a robust approach and applied its discretion by deciding to deal with the matter first in its totality and then make a determination on the issue of urgency and the substantive submissions.

The applicant contends that if the stay is not granted, she entertains a fear that the first respondent may remove the minor child from the jurisdiction of this court and settle elsewhere with the minor child. She argues that the balance of convenience weighs in her favour given the fact that the first respondent would not be prejudiced by a grant of the application for a stay. The applicant also argues that she has a *bona fide* defence in the rescission application by virtue of the fact that the judgment taken for guardianship and custody was taken in default because she had misfiled her opposing papers in the wrong file that is the record for the edictal citation he sought. To that end the applicant submits that her prospects of success are high in that she will be believed in her submissions pertaining to the error in filing.

The first respondent's counsel argues that the matter is not urgent. The first respondent contends that it is not the first respondent's intention to remove the minor child from the jurisdiction of this Court on a permanent basis as contended by the applicant. The first respondent also averred that even in the event that he may take the minor child out of the jurisdiction of this Court, the relief sought is unnecessary given the fact that the first respondent would still require the consent of the applicant to remove the minor child from this court's jurisdiction. In that regard the first respondent opines that the matter is not urgent as there stands no chance that the first respondent would even be able to make away or suddenly abscond with the minor child without the knowledge or consent of the applicant. Further the first respondent sought guardianship and custody of the minor child in order to be able to lawfully and unencumbered enrol the minor child in schools and do all that it required as a custodial parent of the minor child, bearing in mind the applicant's failure to show interest of the minor child's needs all the years that he has had de facto custody of the child, which is since 2011 and taking into account that the child was born out of wedlock, his ability to cater for the minor child's needs has been hampered by the lack of interest shown by the applicant.

Further the first respondent contends that the applicant left the minor child in his care and custody as far back as 2011 and that since then she has not been an active participant in the upbringing of the minor child and has since then remarried. According to the first respondent, the applicant even assisted him in obtaining the repatriation certificate so that he could leave South Africa with the child. Since 2011, it was the first respondent who encouraged the applicant to come to Zimbabwe to visit the minor child, a visit which he funded. Further to that I find the submissions of the first respondent's co-counsel regarding firstly, the applicant's assistance and co-operation with the first respondent when first respondent asked her to sign Canadian visa forms for the minor child and secondly her voluntary attendance at the Canadian Embassy for the minor child's, persuasive proof that the applicant had acceded custody for the minor child to the first respondent. Added to that her inaction in attempting to regain custody for the past five years is indicative of the negatives the urgency of this current application.

On the applicant's prospects of success in the rescission application, the first respondent submits that the applicant has not bothered to file a notice of opposition to in the

guardianship matter to-date and thereby she can hardly be expected to succeed in as the guardianship and custody case without such opposition. I tend to agree with this viewpoint added to the fact that by all intents and purposes the applicant has shown a lack of interests in the well being of the minor child. It can be inferred that the applicant has known that the needs and wants of the minor child are well vested with the first respondent and that the minor child is perfectly happy. The Court notes too that the applicant has been derelict in her duties as the concerned mother by her failure to enquire about the child or indeed to even visit the minor child. I am not convinced that it was for the lack of money that the applicant did not pursue her rights in the affairs of the minor child. The excuse is somewhat far-fetched.

I am also left questioning what the applicant's intentions are in her sudden flurry of interest in the minor child, but that question remains in the realms of speculation and is not significant into determining what the best interests of the minor child are at this juncture. I can safely conclude however that in light of the fact that there is no doubt in the first respondent's ability to look after the minor child in the manner that he has done since 2011, it would be perverse and not in the best interests of the minor child to interfere with this arrangement. But the rescission application will undoubtedly deal more introspectively and with depth into that issue which issue is unnecessary to be determine d to a final conclusion as this application for a stay rests upon its own considerations.

I am still unclear what it is that the applicant expects this court to "stay'. The order granted which sealed the guardianship and custody of the minor child is not actionable by the first respondent and it will not bring into play any change in the status quo bearing in mind three factors. The first of these being that it merely legalises the *status quo* that has been existent since 2011 and secondly it has the effect of providing the first respondent the ways and wherefores to continue his care for the minor child with more ease; and thirdly there is no proof whatsoever that the applicant has ever questioned first respondent's suitability as custodial parent or his ability to care properly for the minor child since his having assumed de facto custody.. Thus in my view, a grant of a stay in this application is rendered nugatory and of dubious effect. The apprehensions of the applicant have in no way been established particularly at this late stage. The applicant cannot be said to even know the minor child or to recognise the needs of the minor child. Certainly the applicant has been unable to prove that

without her consent, the first respondent will steal away the minor child without her knowledge and consent.

In applications or any litigation surrounding the issues pertaining to a minor child, the Court is focused upon the best interests of the minor child in coming to a determination.

In this case and from the facts which are common to the parties there is no dispute pertaining to the key factual issues such as which parent has had custody and control of the minor child all these years. The first respondent is the only parent that the minor child identifies with as custodial parent. The minor child has only known a life with her father and has not spent any periods of time with the applicant. In fact it could be said that the applicant, albeit she is the mother of the minor child has been absent from the child's life since 2011. On all these points the applicant has not been able to disprove the first respondent's contentions.

The courts approach matters such as these with an exercise of judicial discretion which strictly favours the well being of the child. To that effect, I have placed importance on arriving at a determination which will ensure that a minor child's life is not unnecessarily disrupted where that disruption can reasonably be avoided. The applicant has not alleged any wrongdoing regarding the manner in which the first respondent has been caring for the minor child; neither can the court find one. Of paramount consideration to the court is to guard as sacrosanct, the proper care of the minor child.

To this end, I disagree with the applicant's contention that the first respondents care of the minor child can be disrupted as of a right merely because the child was born out of wedlock. It cannot be said that the first respondent be deemed as a third party because by first respondent's conduct he cannot be treated as a third party because the first respondent has properly looked out for the bests interests of the minor child and he is a parent to the minor child. Conversely it is the mother who has not exercised her rights with respect to his care of the minor child at all. Following the reasoning in *Cruth* v *Manuel* 1999 (1) ZLR 7 (S*) in casu* the measure of the mother's care and interest in the minor child does not qualify for assessment as the applicant has never been present in the minor child's life. Thus this court is unable to explore that avenue as against the first respondent's care of the minor child in order to adjudicate that aspect. Thus I am persuaded to place regard on the first respondent's submissions that the Constitution of Zimbabwe (Amendment (Act 20) presents legally that both parents' rights should be considered *pari pasu* as concerns the minor child.

The facts *in casu* fail to display what it is that the applicant apprehends in denying a stay. The denial of a stay is neither here nor there. Granting or denying a stay will not cure the matter of the default judgment and the conclusion or result in the pending application for rescission.

On the issue of urgency, the applicant failed to proffer a convincing argument as to why she neglected to file for rescission timeously. In fact to that end I find the applicant's submissions to be tenuous and indeed questionable. In any event the delay by the applicant is so grave as to raise questions to her motivations in filing this application.

It is to that end that I conclude that the matter is not urgent and on the papers as they stand the application lacks merit.

Accordingly, the application is dismissed with costs.

Mutamangira and Associates, applicant's legal practitioners
Scanlen and Holderness, 1st respondent's legal practitioners