PAZVICHAENDA VALERIE MUNAKIRA
and
JAPHET MUNAKIRA
and
LORIET MUNAKIRA
versus
HARRY MANATSA
and
THE MESSENGER OF COURT MARONDERA N.O
and
THE PROVINCIAL MAGISTRATE MARONDERA N.O
and
MIDLANDS CHRISTIAN SCHOOL

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE: 15 July 2024

Urgent Chamber Application

T. Nyamidzi with *T Mashingaidze*, for the applicant
T.W. Mtetwa with *W.G. Viriri*, for the first respondent

WAMAMBO J: Parents have an obligation to their minor children in a very broad form. Children look up to their parents for love, care, affection, shelter, food and upkeep among others. The children also expect their parents to be able to meet their school and tuition fees along with stationery and other everyday needs. It is expected of them to be able to sit down and map a smooth and amicable resolution on the choice of school and payment of school fees, buying school uniforms, stationery and other requirements.

The challenge faced in this case appears to be appearing in a disturbing growing number of cases coming before the High Court.

Applicant and first respondent were customarily married for three years and separated in 2017. The now 9-year-old minor child was born of the union. The applicant is employed under the National Prosecuting Authority and is stationed at Karoi Magistrates Court while first respondent is a teacher who transferred from Lendy Primary School, Marondera to Midlands Christian School in Gweru.

The second and third applicants are the first applicant's parents who have been taking care of the minor prior to him being taken away by first respondent.

On 6 March 2024 first respondent applied for the custody of the minor child before a Magistrate sitting at Marondera. Applicant opposed the application. The Magistrate however resolved the matter by issuing an order in favour of first respondent. Applicant appealed against the order. On 14 May 2024 first respondent filed an *ex parte* application for the execution of the order pending appeal and the order was so granted.

First applicant supported by second and third applicants seek an order in the interim in the main for the return of the minor child to the applicant, the barring of the minor child from being enrolled by fourth respondent and the *ex parte* proceeding under MRDP CC 13/24 to be stayed pending finalisation of the appeal.

The application is opposed by the first respondent on the following grounds:

Applicants seeks to reverse an extant court order through an interdict. The applicants are not being candid with the court. Contrary to applicants' assertions the minor child is happy and comfortable at his new school.

The parties previously agreed that the minor child would benefit from his employment as a sports teacher which accords him the advantage of benefits wherein the minor child is enrolled under his employment benefits or scholarships. This facility was accessed by the minor child from infancy to date.

The first respondent also raised a number of points *in limine*. He avers that there is an extant court order which has been executed upon, that the interim relief is effectively final and is also the same as the final relief sought. It is also raised that there are other remedies in existence which applicants have not exhausted. Lastly first respondent raises the point *in limine* that second and third applicants have no locus standi to make this application. I will deal with the last point *in limine* first. The second and third applicants are grandparents of the minor child. Whether they were residing with the minor child at the request of the parents or were forced by circumstances to reside with the minor child is neither here or there. The parents of the minor are alive and they are the primary custodians of the minor child. They have literally entered into the boxing ring featuring the biological parents of the child. Their exclusion however still leaves first applicant who is a parent as a legitimate applicant with a direct and substantial interest in the application. The point *in limine* in any case does not dispose of the matter.

On the issue of whether the final and interim relief are the same, a reading of the draft order does not bear the first respondent's averments. The terms of the orders sought as interim and final relief are completely different.

I would agree however that the orders sought both in the interim and in the final order appear rather unusual, I however find the point unmeritorious and dismiss it. The point in limine raised of there being alternative relief is effectively an issue on the merits and I will deal with it in due cases when dealing with the requirements of an interdict.

I now turn to the merits. The requirements of an interdict are well established, KUDYA AJA (as he then was) in *Equity Properties (Pvt) Ltd* v *Alshams Global (Pvt) Limited and Another* SC 101/21 defined the requirements as follows: -

1. "A clear or definite right – this is a matter of substantive law.
2. An injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.
3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must be;
   (a) be adequate in the circumstances
   (b) be ordinary and reasonable
   (c) be a legal remedy and
   (d) grant similar protection"

The circumstances of this case reflect that first respondent applied for and obtained an order before the Magistrate.

The order before the Magistrate grants first respondent herein permission to enroll the minor child at Midlands Christian School and access to the minor child during the last weekend of the school holiday. Applicant filed an appeal. However, first respondent applied for and obtained leave to execute. This was by way of an *ex parte* application.

I am not going to determine the merits or otherwise of the manner in which the order was made. That is a matter for another day, another court. At this stage I am concerned with whether on the face of if applicant has established a *prima facie* case.

I also need to be practical in my analysis. It is not lost on me that the minor child was not staying with the mother. The draft order proposes that the child be returned to the applicant. There are 3 applicants and it is unclear to which applicant the child should be returned to. Is it to the first applicant who was not residing with the minor child in the first place? Or is it to the second and third applicants who were residing with the minor child? As I understand it, return means to take back where he originally was.

In the light of an extant judgment where both parties were heard and applicant was the losing party, the question is has she established a *prima facie* case. It is uppermost in my mind that the interests of the minor child are paramount. It is not the interests of the parents or grandparents that are of paramount importance. Clearly the parties are emotional, it shows in

the application and notice of opposition. In such circumstances exaggerations come to the fore. Considering the minor child's interests, I am not satisfied that a *prima facie* case has been established for the relief sought. It is unclear to whom the minor child is to be returned. The minor child is enrolled at a relatively good school with good facilities. The grandparent's interests can not rise above those of the minor child and his biological parents.

The matter is under appeal and with the rate at which appeals are being set down, the appeal will be heard in a reasonably short time. Moving the minor child from parent to grandparent or parent to parent may not be in the best interests of the child in the instant matter. In the circumstances I find that a *prima facie* case has not been established nor has irreparable harm been established. The minor child is enrolled at a school where his biological father is a teacher. It has not been proven that first respondent is an irresponsible father.

The balance of convenience favours the first respondent. If the order is granted, he will suffer more prejudice as he has an order in his favour and is currently with the minor child. The first applicant suffers no prejudice as she was not residing with the minor child in the first place. There are alternative remedies available in this case. The applicants can await the resolution of the appeal while first respondent takes care of the minor child in the interim. At the time of this application a few days were left before the return date. That was another alternative that was available to the applicants.

In the whole circumstances of this case, I find that the application was not only premature but was ill-advised and unmeritorious. On costs I find it unnecessary to burden either party with costs for the reason that a minor child is involved and either parent has concerns for him. I employ my discretion and find that each party should bear its own costs.

IT IS ORDERED AS FOLLOWS:

The application be and is hereby dismissed with each party to bear its own costs.

WAMAMBO J: .....

Muvingi and Magadza, applicant's legal practitioners
Muzorewa Law Chambers, first respondent's legal practitioners