MANDLENKOSI MLILO

And

MODDIE MLILO

Versus

CHRISTINE MANZINI

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 18 NOVEMBER 2021 AND 27 JANUARY 2022

Application for Condonation

Mr L Chimire, for the applicant

MOYO J: This is an application for condonation of the late noting of an application for review by the applicants of the decision of the juvenile court. This matter appeared before me on the motion roll of the 18th of November 2021 and I declined to grant the order for the simple reason that, no case had been made for the relief sought. The applicants have since requested for written reasons and here are the reasons.

It is trite that in an application for condonation of the late noting of an application for review, the applicant was to satisfy the requirements of such an application which are:

- the extent of the delay and the reasonable explanation for such a delay as well as the prospects of success in the intended application for review.

In this matter, whilst the applicants' reasons for the delay could not be faulted, it is the grounds for the review and the prospects of success on review that are found wanting.

To start with, there are no detailed reasons from the juvenile court on the order that was granted. Instead of either seeking review on the basis of lack of detailed reasons provided in the decision, the applicants decided to create reasons for the court and then attack them firstly, the applicants in paragraph 23 (i) attacked the learned Magistrate's order, submitting that he exceeded his jurisdiction by ordering the removal of the minor child from Zimbabwe. Looking at the decision of the court, on page 11 of the bound record, the learned Magistrate ordered that the minor child is not to be taken out of this country without proper

documentation. The learned Magistrate did not order that the mother could take the child to South Africa, but that she should not do so without proper documentation given that as a biological parent surely she has the power to travel in and out of the country with the child. She is empowered to do so as the father of the child is since deceased and she is now the sole guardian. It defies logic that when you are a parent, with all the power to travel and make decisions for a minor child, the court precludes you from exiting the country with the child. The court can only reasonably order that you do so within the confines of the law.

In paragraph 23 (ii) the applicants complain that the Magistrate adopted an adversarial system yet he was faced with a delicate matter and that he should have sought the involvement of the Master of the High Court or the department of Social Welfare to assist him ascertain the best interests of the child. Clearly the applicants want to create a non existent misdirection on the part of the court. It is the court that was seized with the matter and it is the court which was in a position to determine if it needed further investigations made by the department of Social Welfare. If the learned Magistrate was of the view that he/she could resolve the matter from the facts and the law then his decision cannot be attacked in that respect as the Social Welfare report was not mandated in the circumstances. In fact neither party even sought to apply that the Social Welfare department be involved and a report be done for the court. There is therefore no serious irregularity on this issue in my view as the learned Magistrate clearly used the facts tabulated before him by the parties. Other than to just shoot down applicants' averments on her employment status etc in South Africa, clearly the respondents in the court *a quo* did not have any proof that she is lying that she is gainfully employed and has sought asylum in South Africa. Whilst the respondents in the court *a quo* also sought to allege that she is homeless and of no fixed abode, she however provided proof of her rental statement. It is not correct therefore that the learned Magistrate slackened in assessing them.

In paragraph 23 (iii) the applicants allege that the learned Magistrate came up with a "strange" order not asked for by either party and that 1st applicant was being taken as a criminal after taking care of the minor child for 5 years. This is not apparent from the court record. The strange order is not alluded to neither is the aspect of the learned Magistrate taking 1st applicant as a criminal. It is a ground that has been stated with no basis whatsoever if one looks at the court record.

In paragraph 23 (iv) the applicants aver that the learned Magistrate exhibited serious bias against 1st applicant. The 1st applicant avers that the learned Magistrate exhibited hostility towards him during the hearing as if he was already a condemned man. There is no substance to this allegation at all. Firstly, the court record does not show that, and secondly even if applicant does have the details of the learned Magistrate's behaviour which is not in the court record, he should explain further. What is it that the learned Magistrate said to him which was hostile? What is it that the learned Magistrate said to applicant in the court *a quo* which showed favour? Otherwise the allegations of bias without flesh to substantiate same clearly stand unfounded. I would thus not grant an indulgence for the filing of an application for review which seemingly has no grounds at all, hence my finding that no case had been made for the relief the applicants were seeking as the criteria for granting condonation had not been met.

The applicants should have realised that whilst they are grandparents of the minor child whose best interests should be looked at in issues of custody, they were competing as third parties for custody with the mother of the child and that in such instances the courts would only award the custody in exceptional circumstances in the form of harm or danger to the minor child's welfare. In such disputes, involving 3rd parties and a biological parent over custody, the court would only award custody to the 3rd parties in exceptional circumstances and the court would have valid and cogent reasons to dismiss the biological parent's contentions. Clearly that applicant left the child to go and live and work in South Africa in the absence of proof would not qualify as child neglect. If applicants could not get the detailed reasons, instead of creating them for the court a quo, the correct approach would be to attack the proceedings for lack of detailed reasons not to assume the reasons for the court and then attack them.

It is for these reasons that I found that no case had been made for the relief sought and I accordingly refused the order.

Mutatu, Masamvu & Da Silva-Gustavo, applicants' legal practitioners
Ncube and Partners, respondent's legal practitioners