MICHAEL CRAFT
versus
SARAH CRAFT (nee MOSS)

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 7 & 8 April 2022

Urgent Chamber Application

D. Tivadar, with him *R. Stewart*, for the applicant
T. Mpofu, with him *M. Ndlovu* and *S. Bull*, for the respondent

ZHOU J: This is an urgent chamber application for an order allowing the applicant to travel to the United Kingdom with his two minor children from 13 to 25 April 2022 and to return the children to the respondent on 25 April 2022. Applicant also seeks an order interdicting the respondent from interfering with or impeding him from travelling with the same minor children to Nairobi, Kenya, to attend a wedding between 5 and 8 July 2022. The applicant seeks costs on the attorney-client scale against the respondent. The application is opposed by the respondent.

Background

The applicant and respondent are husband and wife. They are estranged. The respondent is the one who has custody of the two minor children to which the instant application relates. Until the dispute which has given rise to the present application arose, it seems that they were able to manage their rights *vis-à-vis* the minor children without serious difficulties other than the disgruntlement on the part of the applicant who blames the respondent's alleged infidelity for the breakdown of the marriage and the respondent's perception that the applicant does not accord her the respect which should be given to the mother of his children. Text messages exchanged between the two by telephone are on record. They reveal constructive engagement between the two on matters pertaining to the welfare of the children. In one instance the respondent was asking the applicant if he would remain with the children while she was away for some days, to which he responded affirmatively. In one text she apologised to him for having hurt him "so badly" and

urged that her wish was for the two of them to be able to move on with their lives and heal, and to become friends for the sake of their children.

On 18 January 2022 at 1456 hours, the applicant sent an email message to the respondent advising of his plan to travel to the United Kingdom with the two minor children. The email, which consists of one sentence, stated as follows:

> "Hi
>
> I am planning on taking Zach and Leah to see my mum in April 15th to 24th April – over their school holidays.
>
> Thanks"

On 26 January 2022 the applicant sent another email to the respondent advising her of an invitation to a wedding in Nairobi, Kenya. He advised of his intention to attend the wedding with the children. In addition to indicating in the email that the wedding visit would be between 5-8 July 2022, applicant advised the respondent that he wanted to "show the kids more of Kenya" during that visit.

There was no immediate response to the above messages from the respondent. Instead, the parties continued to interact as they had previously done, with the applicant being allowed access to the children. In fact, on 27 March 2022 the respondent sent a message asking if the children could go and stay with the applicant on the Thursday night of that week.

In an about turn of events, on 28 March 2022 the respondent's legal practitioners wrote a letter to the applicant's legal practitioners. The letter was delivered at the offices of the applicant's legal practitioners on the same day that it is dated. The letter states that it was a response to the two letters written by the applicant regarding the proposed trips to the United Kingdom and Kenya. On 29 March 2022 the applicant through his legal practitioners responded to the letter, threatening to institute court proceedings if the respondent insisted that the children would not travel with him.

The procedure adopted to bring the application

The respondent took issue with the seeking of a final order through an urgent chamber application. The respondent is correct that the correct procedure would have been to file an urgent court application and seek the concurrence of the court in truncating the *dies induciae* for the filing

of subsequent papers. The respondent does not, however, take issue with the matter being heard on an urgent basis as such. Although in the opposing affidavit there was mention of urgency the issue was not persisted with in argument.

Rule 57 (13) of the High Court Rules, 2021 provides as follows:

> "Without derogation from rule 8 but subject to any other enactment, the fact that an applicant has instituted –
>
> (a) a court application when he or she should have proceeded by way of chamber application; or
> (b) a chamber application when he or she should have proceeded by way of a court application;
>
> shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that –
>
> (c) some interested party has or may have been prejudiced by the applicant's failure to institute the application in the proper form; and
> (d) such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs."

The respondent was duly served with the application and filed opposing papers. The matter was argued extensively by counsel representing both parties. No prejudice was alleged or established. For this reason, the objection to the procedure cannot be sustained, and is dismissed. Likewise, no real purpose would have been served by seeking interim relief because the effect of such relief would be final as long as the applicant was asking to be allowed to take the minor children to the United Kingdom and Kenya.

The positions of the parties on the merits

The applicant's position is that it is in the best interests of the minor children that he be allowed to take them on holiday to the United Kingdom to see their ageing grandmother, the applicant's mother. He also contends that it is in the best interests of the children that they be allowed to travel to Kenya with him to attend the wedding of a family friend. The applicant stated that he has already put in place the travel arrangement for the trip to the United Kingdom.

The respondent advanced essentially three grounds of opposition. The first ground is that if the applicant is allowed to take the children to the proposed destinations he will "brainwash" them, thereby influencing them to have negative perceptions or views about her. Secondly, she

stated that the applicant would abduct the children, and would not return them to Zimbabwe. This ground was abandoned through the opposing affidavit wherein she stated that her concern that the children might be abducted has been allayed by the portion of the draft order directing the applicant to return the children to her on 25 April 2022. She says in para 5.2 of her opposing affidavit: "In light of the order that applicant seeks within which incorporates his obligation to return the children, my fear and anxiety in regard to that aspect is largely put to rest." In the absence of evidence suggesting that the applicant had an intention to abduct the children, the concern was not properly founded in the first instance.

The third ground of opposition, which was only raised by counsel for the respondent in argument, is that there are no facts from which the respondent could be expected to make a decision whether or not to consent to the children being taken out of the country. In other words, the argument was that no decision could be inquired into by this court because the applicant had not disclosed facts pertaining to such matters as the mode of transport to be used by the children, whether the respondent would be in a position to communicate with the children during that time and how that would be possible, the accommodation arrangements for the children, whether any medical insurance had been arranged for the children, among others. The other way that this argument was submitted was that the court could not interfere with the respondent's exercise of discretionary powers to decide not to allow the children to travel out of the country which she exercised based on the fact that she had not been given the full facts. For all these reasons which grounded the opposition, the respondent's contention as advanced by counsel, was that the principle of the best interests of the children did not arise and had no application in the instant case. According to the respondent, this is a matter that is purely governed by the provisions of s 5 of the Guardianship of Minors Act [*Chapter 5:08*], because the respondent in objecting to the children travelling outside the country is exercising her powers as the sole custodian parent.

The law

Children are a vulnerable group in society and the Constitution of Zimbabwe has recognized their special protection in at least three areas of the Constitution. Under the "founding values and principles", the issue of children's rights features as one of the principles of good governance "which binds the State and all institutions and agencies of government at every level".

See s 3(2) (i) (iii) of the Constitution. Section 19, under "National Objectives, provides as follows in subsection (1): "The State must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount." The Constitution of Zimbabwe has a comprehensive package of rights to which children are entitled. Of particular note is the constitutionalisation of the "best interests" concept as a fundamental right which, prior to the advent of the current Constitution was only contained in an ordinary Act of Parliament. Section 81 (2) of the Constitution entrenches this right as follows:

> "A child's best interests are paramount in every matter concerning the child."

Section 81 (3) emphasises the mandate of the court in protection of children as follows:

> "Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian."

The above provisions show that the best interests of the child is not only one of the values and principles which underpin the constitutional order; it is also a national objective and a fundamental right. As a value and principle and as a national objective, as well as a right, the concept permeates every activity, decision, conduct, etc. involving or affecting a child, including interpretation and application of laws. Thus, apart from being a right in itself, it is thus a principle that is applicable in the determination of the ambit, and can even limit the enjoyment, of other rights. See, for example, *De Reuck* v *Director of Public Prosecutions, Witwatersrand Local Division & Others* 2003 (3) SA 389 (W); I. Currie & J. De Waal, *The Bill of Rights Handbook* 6th ed. (Juta. Cape Town. 2013. Pp 619-620). The application of the principle is no longer limited to just questions of the guardianship and custody of minor children. It applies to "every matter" concerning children. Its scope is not limited to the matters prescribed in s 81 (1) of the Constitution, see *Minister of Welfare and Population Development* v *Fitzpatrick* 2000 (3) SA 422 (CC), para 17.

Application of the law to the facts

The submission by Mr *Mpofu* for the respondent that the best interests of the child is not an issue that arises or applies in this case cannot, therefore, be correct. It applies. It would apply even to the exercise of the custodian parent's rights. In this case the court is not concerned with the question of the custody of the minor child. The application is really about whether it is in the

best interests of the minor children that the father be allowed access to the children, and the exercise of such access by taking the children on holiday to the United Kingdom and to Nairobi.

In the case of the visit to the United Kingdom, the idea is not just as a holiday after the children were denied the opportunity to travel owing to the restrictions induced by the Covid 19, but also to allow the children to meet their grandmother. This visit augers well for the building and bonding of relations. It is clearly in the best interests of the children. It is also a refreshing moment to the children who are on school holidays. The applicant stated, and this was not disputed, that for about two years the children could not travel to meet their grandmother owing to the restrictions. This same reasoning applies to the visit to Nairobi which is an opportunity to meet and interact with family friends.

The assertion that the children will be "brainwashed" into developing negative attitudes towards the respondent is not based on evidence. The respondent has allowed the applicant to have access to the same children previously. In one of the texts she even inquires if he would be taking them to Mauritius. The submission is made in the respondent's papers that the period of less than two weeks in the United Kingdom and four days in Kenya would enable the brainwashing to take place. This is not a scientific or legal argument.

The submission that no sufficient facts were disclosed about the trip is vexatious. The applicant has disclosed by providing the documentary evidence the fact that the children will travel by air to the United Kingdom, and that they are visiting their grandmother. If the respondent had any questions regarding their accommodation she had two months from 18 January 2022 when she was notified of the proposed trip. She could have made the relevant inquiries during that period. She can still make those inquiries now. The applicant, through counsel, indicated that he would be able to respond to them. He even went out of his way to make undertakings through counsel to furnish those details outside court if the respondent needed them. The manner in which the applicant and respondent have been relating when it comes to the affairs of the minor children does not support the concerns being raised by the respondent that he might not take endanger their interests during these trips. I do not accept that these concerns are legitimate, let alone *bona fide*.

Accordingly, it would be in the best interests of the minor children that they be allowed to travel with the applicant on the proposed trips.

The costs

The applicant has sought costs against the respondent on the attorney-client scale. This is a punitive scale which is reserved for special cases, such as reprehensible conduct on the part of the litigant or the vexatiousness of a defence or other forms of abuse of the procedures and processes of the court. In this case the opposition to the application is clearly vexatious and lacks *bona fides*. In the first instance, the respondent waited for two months after being notified of the trip to express her objection to them. No explanation is given for that attitude. Significantly, prior to the writing of the letter of 28 March 2022 objecting to the children going on the trips, there had been a meeting to discuss the relations of the applicant and the respondent. The meeting was held by the parties' attorneys. The respondent never communicated or hinted on her objection to the trips during that meeting. Her explanation as contained in para. 4.7 of her opposing affidavit, is that: "I understood that whilst fully setting out my anxieties to Mr Stewart, my legal practitioner apparently omitted to mention the aspect of the pending trips." Yet on 27 March 2022, a day before her legal practitioners wrote the letter which triggered the dispute, the respondent had sent text messages to the applicant expressing her hope that he had had a good weekend and asking if the children could spend a night with him during that week. The way that the applicant is viewing the contribution of the respondent to the breakdown of their marriage seems to be the worry that affects her, and she wants that to have a bearing on his entitlement to access to the minor children. That cannot be a genuine ground for opposing this application. It is an abuse of the procedure of court to oppose an application because she would rather the applicant had a different view of her. For these reasons, this is a matter in which the special order of costs is merited notwithstanding the nature of the application.

The draft order

The respondent objects to the formulation of paragraph 1 of the draft order owing to the use of the word "confirm". Her complaint, which is trivial, is that it appears as if his communication of the trips was non-negotiable and that her views about it were irrelevant. Clearly, that is not the case. In any event, the draft order is merely a draft. The exact wording of the order is the ultimate responsibility of the court, as long as the substance of what is being claimed does not change and the relief sought is supported. What is clear from both the draft order and the

founding affidavit is that the applicant is asking to be allowed access to the children and to exercise such access by travelling with the children to the stated destinations. That is relief which is supported by the applicant's papers. The relief can be competently granted.

Disposition

In the result, **IT IS ORDERED THAT**:

1. The applicant be and is hereby authorised, without undue interference from the respondent, to travel to the United Kingdom with the minor children, namely, ZACH ANTONY CRAFT (born 15 December 2010) and LEAH REBECCA CRAFT (born 22 February 2013) from 13 April 2022 to 25 April 2022 for the purpose of a family holiday.
2. The applicant shall return the minor children referred to in paragraph 1 hereof to the respondent at Harare, Zimbabwe on 25 April 2022.
3. The respondent shall not interfere with or inhibit the applicant from travelling with the minor children referred to in paragraph 1 hereof to Nairobi, Kenya in July 2022 to attend the wedding to which they have been invited and whose travel dates are between 5 to 8 July 2022.
4. The respondent shall pay the costs of this application on the attorney-client scale.

Whatman and Stewart, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners