

- FRANK BUYANGA SADIQI**
v
(1) CHANTELLE TATENDA MUTESWA
(2) KILIAN KAPFIDZA
(3) COMMISSIONER GENERAL OF POLICE N.O.
(4) REGISTRAR GENERAL N.O.
(5) CHIEF IMMIGRATION OFFICER N.O.
(6) MINISTER OF JUSTICE LEGAL
& PARLIAMENTARY AFFAIRS
(7) SOUTH AFRICAN AIRWAYS

SUPREME COURT OF ZIMBABWE
HARARE, 16 JUNE 2021 & 18 OCTOBER 2021

J Chirabwe, for the applicant

S. M. Bwanya for the 1st respondent

B. Mutiro, for the 2nd respondent

O Zvedi, for the 3rd to 6th respondents

No appearance for the 7th respondent

CHAMBER APPLICATION

UCHENA JA

On 16 June 2021 I partly heard the applicant's, chamber application for condonation and reinstatement of an appeal in terms of r 70 (2) of the Supreme Court Rules 2018. On 11 May 2020, the applicant filed a notice of appeal, but failed to inspect the record within the time prescribed by the Rules. By letter dated 13 April 2021 the Registrar advised the

applicant's legal practitioners that the appeal had been deemed abandoned. It is that appeal the applicant wants to be reinstated.

At the hearing of the application, Mr *Bwanya* for the first respondent raised a point in *limine*. He submitted that the applicant should not be granted audience by the court because he is in contempt of court orders. He submitted that the applicant snatched the minor child from the first respondent at a shopping centre in Waterfalls Harare and took him out of Zimbabwe through an undesignated exit point. He further submitted that the first respondent has not seen the child since that incident.

Mr *Chirambwe* for the applicant submitted that the applicant should be heard as it is his constitutional right to have access to the courts. He initially could not say where the child was, but eventually conceded that he had been taken out of the court's jurisdiction and was staying in South Africa with the applicant.

Ms *Zvedi* for the third to sixth respondent though having indicated that her clients will abide by the decision of the court, as an officer of the court advised the court that the applicant is on the wanted list of Interpol and is a fugitive from justice.

On the welfare and best interest of the minor child, Mr *Chirambwe* submitted that the child was in good health and could be shown to the court virtually. Mr *Bwanya* submitted that it was not in the best interest of the child for him to be snatched away from his mother and

be kept away from her for 15 months. He submitted that the child should be brought back to the court's jurisdiction. He submitted that it was, the duty of the courts to protect minor children.

After hearing the parties, I gave an ex-tempore ruling, partly upholding the first respondent's point *in limine* and postponed the hearing of the application until the applicant brings back the minor child to the court's jurisdiction and present him to the court.

This morning, the Registrar brought to my attention the Constitutional Court's order to the effect that she should have ensured that my judgment was made available to the parties by 22 September 2021. She failed to bring the order to me before the 22 September 2021.

My reasons for partly upholding the first respondent preliminary point are as follows:

The rights of children should not be trampled upon by their parents. The rights of parents to exercise guardianship and access to their children must be exercised without adversely affecting the rights of the children. In this case, it was clear to me that while the applicant was entitled to have guardianship and access to his son he had to do so lawfully and if hindered, by resorting to the courts to enforce his rights. Snatching the child and fleeing the jurisdiction of the court with him through undesignated exit points is in my view not in the best interest of the child. I appreciate that the High Court had granted the parties joint custody and guardianship. Those rights should be exercised in terms of the law and in a manner which ensures that the child is not exposed to illegalities. The child should also be accessed by both parents to enable it to bond with both parents. The snatching away of the child and keeping him away from his mother for

15 months is not in the best interest of the child and is not consistent with the exercise of joint custody and guardianship. I did not think it prudent to completely deny the applicant audience because it is in the best interest of the child that his parent's issues over him be resolved by the courts. It is for that reason that I thought it prudent that the child be brought back to the court's jurisdiction for him to be protected by the courts according to the law, while his parent's issues are being dealt with by the courts.

These are the reasons why I partly upheld the first respondent's point in *limine*.

Manase & Manase, applicant's legal practitioners

Mutuso, Taruvinga & Mhiribidi 1st respondent's legal practitioners

Rubaya & Chatambudza, 2nd respondent's legal practitioners

Civil Division- Attorney General's Office, for 3rd to 6th respondents