JUSTIN TAONEHAMA SAMUDZIMU
versus
SITHANDIWE MIRANDA NGWENYA

HIGH COURT OF ZIMBABWE
KUDYA J
Harare, 12 September and 16 October 2008

Family Law Court-Custody

Mrs. *B. Mtetwa*, for the applicant
O. Mutero, for the respondent

KUDYA J: The applicant seeks interim custody of the two minor children on the basis that the respondent, who was by consent awarded custody on 16 June 2005, has denied him access to the children. In addition he averred that the respondent has relocated to South Africa and has left the children in the care of her mother in Bulawayo. The respondent did not only oppose the application but filed a counter application seeking authority to remove the children from the jurisdiction of this Court. The applicant also opposed her counter application.

In my view, both applications are premised upon the order of 16 June 2005. It reads as follows:

IT IS ORDERED BY CONSENT THAT:

1. The applicant restore to the respondent custody of the minor children in issue namely:-
    i. David Michael Nathan Samudzimu (born 5 March 2004) and
    ii. Danielle Alaina Janet Samudzimu (born 5 March 2004)
2. The said minor children shall be given to the respondent no later than sunset on this 16th day of June 2005.
3. The applicant shall be entitled to reasonable access to the said minor children, once a week on Saturdays between the hours of 10:00 hours and 17:00 hours.
4. The respondent shall be at liberty to remove herself and the said minor children to any place within Zimbabwe as long as this is done in a manner that does not impede on the applicant's rights of access to the said minor children.
5. The respondent shall seek the consent of the applicant before she removes the children from Zimbabwe, which consent shall not be unreasonably withheld.

6. The applicant shall bear the costs of this application.

The preliminary issue

The applicant sought to *prevent* the respondent from appearing before me to argue her opposition and prosecute her counter claim on the basis that she has dirty hands. The respondent disputed that contention.

Mrs. *Mtetwa*, for the applicant, contended that the respondent breached clause 3 of the order of 16 June 2005 in that she removed the children to Bulawayo with intent to, and did, impede the applicant's access rights granted in clause 3. The respondent achieved this by relocating the children to Bulawayo without notifying the applicant and when he found out their whereabouts, he was denied access to the children. She accordingly submitted that the respondent's conduct stained the clean halls of justice to the extent that she should be denied audience. She relied on the sentiments of DAVIDSON J in *Underhay v Underhay* 1977 (4) SA 23 (W) at 24E where the learned judge stated:

> "It is fundamental to Court procedures in this country and in all civilized countries that standards of truthfulness and honesty be observed by parties who seek relief."

She also referred to the case of *Barclays Bank (Dominion, Colonial & Overseas) v Volkskas Bpk* 1951 (2) SA 296 (T) at 307C where DOWLING J used the term "dirty hands" to describe the "type of misconduct which the Court penalizes by withholding its protection …….as conduct involving moral obliquity such as fraud or other form of dishonesty."

The principle that a litigant who has dirty hands should be denied audience in the halls of justice was also expressed by BARTLETT J in *Deputy Sheriff, Harare v Mahleza & Anor* 1997 (2) ZLR 425 (H). At 426 A-C he stated thus:

> "People are not allowed to come to court seeking the Court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the Court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions."

See also ***Ex parte*** *Rhoprops Ltd* 1975 (1) RLR 302 at 305A and *Mutetwa v Mutetwa* 1993 (1) ZLR 176 at 177.

The same concept was extended by CHIDYAUSIKU CJ in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity in the President's Office*

& Ors SC 20/2003 to include not only moral obliquity such as fraud or other forms of dishonesty but the defiance of a court order. At page 11 of the cyclostyled judgment the learned CHIEF JUSTICE stated that:

> "The Court will not grant relief to a litigant with dirty hands in the absence of good cause shown or until such defiance or contempt has been purged."

Mr. *Mutero*, for the respondent, contended that the respondent had not defied the order of Court and submitted that the dirty hands policy had no application in the present matter. He contended that the respondent operated within the confines of clause 4 of the order of 16 June 2005. She removed the children to Bulawayo and notified the applicant of their whereabouts.

Clearly, there is a dispute of fact on what actually transpired between the parties as regards the removal of the children. Clause 4 was drawn by the parties. It did not spell out the minute details concerning the delivery and collection of the minor children. The applicant did not state how he used to exercise his access rights before the children were taken to Bulawayo. He, however, averred that he last had access in May 2007. He also stated that he was advised at Avondale police station in May 2007 that the children were in Bulawayo. He only sought to exercise his rights on 13 October 2007 when he went to Bulawayo. He did not say what he did between the time he learnt of their relocation in May and the receipt of the letter of 16 July 2007 from the respondent's legal practitioners. Neither did he state what he did to enforce his rights between May and October 2007. All we have on record are the respondent's averments of her attempts to bring the children to his house before she removed them to Bulawayo and his absence each time she did so. He appeared to have been disinterested in exercising his access rights when she was in Harare. GOWORA J quoted with approval the sentiments in Spiro *Parent and Child 4 ed p. 300* in *Makuni v Makuni* 2001 (1) ZLR 189 (H) at 193 B-C that the parent who is entitled to access must follow them at his own expense. The custodian parent is however not permitted to place impediments in the way of the non–custodian parent's access rights. The respondent, in my view, did what was expected of her in advising him of the relocation. It was incumbent on him not only to exercise but also to enforce his rights.

It does not appear to me that the respondent deliberately set upon to frustrate the applicant's access rights. The previous conduct of the parties which resulted in the order by consent created suspicion and mistrust between the parties to such an extent that they failed to communicate other than through their legal practitioners. They both failed to realize that the consent order could not supplant common sense, which required them to make personal contact in order to implement the agreement. Common courtesy required that the applicant to

make prior arrangements on how and where he would collect the children. It was disrespectful of him to simply bulldoze his way into the residence of the respondent with an entourage of police officers in tow. One would expect that the children would be advised by the custodian parent that their father was coming to collect them for them to make the necessary emotional preparations and adjustments. The custodian parent would need to make the necessary preparations and assist the children prepare for the collection. The absence of common sense in implementing the agreement resulted in the unfortunate innuendoes that each party leveled against the other in the pleadings. The parties must truly seek to work together for the emotional and physical well being of their children rather than seek to use them as missiles in an unfinished war between them.

The onus is on the applicant to show that the respondent has deliberately acted to frustrate his access rights. He has failed to show that she has denied him access to his children. She notified him of their whereabouts, according to him in May 2007 at Avondale police station and neither party thereafter made any attempt to streamline the implementation of the consensual agreement in a humane and practical manner.

I would, accordingly, dismiss the preliminary issue raised by the applicant.

The application in convention

The applicant seeks interim custody. The first basis is that he has been denied his access rights since 3 May 2007. He averred that the respondent "contemptuously violated and breached" his access rights and though "mindful of the fact that the respondent is in deliberate contempt of this Honourable Court's order" was not asking for an order of contempt.

The respondent denied that she ever violated his access rights and averred that she advised him of her move to Bulawayo.

It seems to me that the applicant implicitly contends that any movement from Harare necessarily violated clause 3 of the consent order. That contention is not borne out by clause 4 of the same order which allows her to take the children to any place in Zimbabwe. The only rider against doing so being that this should not impede the applicant's reasonable rights of access once a week on Saturdays between 1000 hours and 1700 hours. Obviously, once she moved from Harare, a variation of the applicant's access rights became inevitable unless the applicant was able to visit Bulawayo every Saturday. If he did so, he would only have been able to exercise his access rights in Bulawayo. The choice as I see it lay with him to seek a variation of his access rights. The duty was on him to exercise his access rights. The relocation, in my view, would not amount to a violation of his access rights.

His first ground for seeking variation fails.

The second is that she has relocated to South Africa and in the process left the children in Bulawayo with her mother. Clause 5 of the consent order contemplated the removal of the children from Zimbabwe. It seems to me that all that the respondent needed to do was to seek the applicant's consent. She sought that consent on 16 July 2007. The applicant declined to give his consent. He came to this Court on 23 October with the present application; in itself a demonstration of denial of such consent.

It seems to me that the applicant does not appreciate the legal powers that are vested in a custodian parent. She is in absolute charge of the day to day needs of the children. She determines were they go to school; which church they go to; which houses they visit; which friends they play with. She does not exercise these powers in consultation with anyone. As long as these are in the best interest of the children; they cannot be impugned. The extent of the legal powers of the custodian parent was dealt with in *Makuni's* case, *supra*, at 191B-D. He or she is vested with the power of nurturing, shaping and bringing up the minor children.

Her opposing papers demonstrate that she found a better paying job in South Africa. Her prospects are brighter in South Africa than in Zimbabwe. The improvement of her fortunes directly benefits the children and, in my view, is in their best interest.

The onus is on the applicant to show on a balance of probabilities that her relocation is not in the best interest of the children. The case of *Hackim v Hackim* 1988 (2) ZLR 61 (S) sets out what the non-custodian parent needs to prove in order to wrestle custody from the custodian parent. It is not adequate to aver that she has relocated to another country or that the non-custodian parent is economically better able to support the children and offer them the creature comforts of life. See *Zvorwadza v Zvorwadza* 2001 (1) ZLR 189 (S) at 409F. In *casu*, he cannot use the fact of her employment in South Africa as a changed circumstance which necessitates the variation of custody. She wrote to him on 16 July 2007 seeking his consent to remove the children to South Africa. He does not appear to have concerned himself with the need to renegotiate his access rights. He decided to wrestle custody from her and thus squandered an opportunity to negotiate new terms of access. His attitude meant that she could not take the children with her without a court order.

He has averred that the relocation is not in his best interests. He has failed to demonstrate how the relocation is not in the best interests of the children. The children are still very young and their mother is best suited to look after them. The views of BROOME J in

Dunsterville v Dunsterville 1946 NPD 594 at 597 that the maternal link, which is necessary for the physcological well being of children is formed earlier than the paternal link, is still true today. These views are similar to those expressed by ADAM J in *Mutetwa's* case *supra,* at 180D. In the present matter, the applicant entered into the consensual agreement in appreciation of the respondent's better qualities as a mother. That agreement allows her to take the children out of the country. He has not shown why her relocation should result in her loss of custody.

It is for these reasons that I would dismiss his application for interim custody.

The counter- claim

The respondent in the main matter counter claimed for the removal of the children and consequential relief to facilitate the removal. The basis of her application is grounded in the consent order which contemplated the removal of the children. It also required her to seek his consent. He was required not to withhold such consent without just cause. She seeks removal because she has found employment in South Africa for herself. She attached proof of her employment. She stated where she would reside and her future plans about the accommodation and education of the children. As the custodian parent she has the power to make these decisions. She is not required to seek applicant's approval on these decisions. All she has to do is to seek his consent. That consent is sought in my view for the purpose of ensuring that they come to some reasonable accommodation on his access rights. If he is able to exercise them in South Africa, then well and good. If he is not able to do so, then the order would need to be varied to allow him to have them in Zimbabwe at his cost on agreed terms. If both parties as the parents truly have the interests of the children at heart, then they should come to a workable compromise.

The access rights that the applicant has are comparable to those that Mr. Hackim had in *Hackim's* case, *supra*. The Supreme Court in that case left those access rights intact notwithstanding that Mrs. Hackim was permitted to permanently remove the child to the United States of America. One of the bases of the decision was that Mr. Hackim was a man of means who was able to implement his access rights. I have read both the applicant's answering affidavit to the main claim and opposing affidavit to the counterclaim to assess his response to his ability to exercise his access rights in South Africa. He has not disputed that he traverses the world on business and that he has the means to visit the children in South Africa. He has dwelt on possible administrative difficulties that he will have in obtaining a visa to South Africa and expressed his skepticism on his ability to enforce his rights in South Africa. These

are speculative fears which would not warrant denying the custodian parent the right to remove the children to South Africa. If the access rights prove to be onerous to him, then it is up to him to consider what action to take to make them more bearable.

The parties must realize that the Court cannot cover every foreseeable eventuality in its order. It expects the parties to be mature and reasonable in their approach. They should act in good faith and not in bad faith. They should respect the other parent's rights for bonding with the children.

The consent order was made by the parties. It may not work now that the two parents will be residing in two different countries. It is up to them to agree on the best way to make it work, bearing in mind that the children are still of a tender age. As they grow older and start primary school, the parties may arrange visitation rights that suit the age of the children.

In the premises, the counter application succeeds.

It is ordered that:

1. Justin Taonehama Samudzimu's application be and is hereby dismissed.
2. Sithandiwe Miranda Ngwenya be and is hereby authorised to remove the minor children David Michael Nathan Samudzimu born 5 March 2004 and Danielle Alaina Janet Samudzimu born 5 March 2004 from Zimbabwe to South Africa and stay with them in South Africa.
3. Justin Taonehama Samudzimu shall surrender the birth certificates and traveling documents of the minor children to Sithandiwe Miranda Ngwenya's legal practitioners within 24 hours of service of this order upon him.
4. Justin Taonehama Samudzimu shall pay Sithandiwe Miranda Ngwenya's costs of suit for both the main and counter application.

Mtetwa & Nyambirai, applicant's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners