

LLOYD MACHACHA
versus
PRECIOUS MHLANGA

HIGH COURT OF ZIMBABWE
MUNANGATI – MANONGWA J
HARARE, 27, 28 February & 7 March 2023

Urgent Application

Applicant in person
F Siyawareva and W Nziradzemhuka for the respondent

MUNANGATI-MANONGWA J: As parents tussle over custody of children they seem to be oblivious that the best interests of the children reign supreme over the parents' preferences. This court as the upper guardian of children will ensure that the duty placed upon it by the Constitution of Zimbabwe, and indeed the dictates of regional conventions such as the African Charter on the Rights and Welfare of the Child and international instruments such as the United Nations Convention on the Rights of the Child, being to safeguard the best interests of the children shall be undertaken without hesitation. Children are not chattels to be exchanged at will, held and used as pawns for parents' selfish ends either to settle scores or score a victory. Children have rights and are entitled to their dignity and humane treatment. In this case, three very young children ended up split between the parents. Two children have missed school because they do not have their uniforms, an undesirable situation which militates against the best interests of the children.

The father of the children, applicant herein, is a self-actor and he has approached this court on an urgent basis seeking the following relief:

INTERIM RELIEF SOUGHT

- a. That the respondent is ordered to return all the school uniforms, school satchels and other clothing items that she forcibly took away from applicant's place of residence within 2 hours of the granting of this order.

- b. That the respondent is ordered to return Tendeka Keighley Machacha (born 23 April 2017) and Abrielle Sarah Mutsa Machacha (born 14 October 2019) to No 17 Rufaro Road Marlborough within 2 hours of granting this order.
- c. That the respondent or anyone acting through her be and is hereby interdicted from visiting the applicant's place of residence that is No 17 Rufaro Road Marlborough and No 17B Rufaro Road Marlborough and the applicant's work place that is Kaguvi Building, 2nd Floor, office 241A, Harare.
- d. In the event that the respondent fails to comply with either paragraph (a) or (b), the Zimbabwe Republic Police is directed to enforce this order.
- e. The respondent shall pay costs.

Service of the Provisional Order

Service of this order shall be effected by the Zimbabwe Republic Police (ZRP)

TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this honorable court why a final order should not be made in the following terms;

1. The respondent or any person acting through her is hereby ordered not to unlawfully take any of the applicant's property.
2. That the respondent or any one acting through her be and is hereby interdicted from unlawfully snatching the minor children Tendeka Keighley Machacha (born 23 April 2017) and Abrielle Sarah Mutsa Machacha (born 14 October 2019).
3. That the respondent or person acting through her are permanently interdicted from visiting No 17 Rufaro Road Marlborough and No 17B Rufaro Road Marlborough and the applicant's work place being Kaguvi Building, Corner 4th Street and Central Ave Harare.
4. In the event that the respondent fails to comply with this order, the Zimbabwe Republic Police is directed to enforce the order.
5. The respondent shall pay costs

The application is opposed by the respondent who is the applicant's former wife.

Background facts

The parties separated and the respondent had custody of the two minor children Tendeka Keighley Machacha (born 23 April 2017) and Makatendeka Machacha (born 31 January 2013). There is an order of this court granted on 28 January 2020 under case no HC 588/20 which reiterated that the children be with the respondent. Ever since that time the respondent has been with the children with the applicant enjoying access. The respondent then instituted a claim for sharing of assets in this court under Case No. HC 3204/22. The parties entered into a deed of settlement which was filed in this court but the parties are agreed that the matter still has to be finalized. They thus await the reduction of the deed of settlement into a court order. A perusal of the file shows a consent order which is not signed. Suffice that in the deed of settlement the parties agree that the other child Mutsa Machacha (born 14 October 2019) being the youngest not covered by the earlier order shall also go to the mother. Thus all the three children's custody goes to the respondent thus reiterating what the order in case No HC588/20 provided in so far as the two eldest children are concerned. In December 2022 the applicant got the children for half the holidays starting from 17 December 2022 and the applicant was supposed to bring the children in time for school opening beginning of January 2023. The respondent did not do so. He proceeded as per his admission to approach the Children's Court on an urgent basis in case no CCC 02/23 claiming that he had intelligence to the effect that the respondent wanted to take the children out of the country. Equally he instituted proceedings in the same court under CCC 01/23 He got the following order:

“A prohibitory interdict is granted with the following terms:

1. That the Respondent be and is hereby interdicted from taking Makatendeka Kasey Machacha (born 31 January 2013) Passport No. AE272892, Tendeka Keighley Machacha (Born 23 April 2017) Passport No .AE273012 and Abrielle Sarah Mutsa Born 14 October 2019 Passport No.AE213011 out of the country without prior written consent of the children's father.
2. That in the interim, the minor children shall continue to stay at No.17 Rufaro Road, Marlborough where they are at the moment pending the disposal of the application for Joint Custody Case No. CCC 01/23 by the Children's Court.

SERVICE OF ORDER

3. This above shall be effected by the Zimbabwe REPUBLIC police.”

Using the above order which required the children to stay at his address he retained the children. It is common cause that the applicant later went on to withdraw his application for joint custody which was under case No 01/23. Suffice that his keeping the children at his address was subject to the disposal of the application for joint custody, which application he withdrew on 26 January 2023.

It is the events of 17 February 2023 which led him to approach this court on an urgent basis. The applicant alleges that he heard that the respondent had arrived at his home at No 17 Rufaro Marlborough forced entry into the yard and snatched away the children's uniforms, school satchels and other clothing items on the washing line. He alleged that the respondent grabbed two of the minor children Tendeka and Abrielle taking them into her custody. He alleges that the respondent threatened to kill his niece Gamuchirai Machacha and the helper Sithabile Moyo who were at home at that moment should they attempt to stop her. Out of fear they had to lock themselves inside the house and the respondent then started throwing objects at the roof and windows. He thus reported the cases at Marlborough Police. He thus alleges that the respondent resorted to self-help when there is an order of court delivered on the 17th February 2023 directing that the minor children shall stay at No 17 Rufaro Road Marlborough and there is no contrary order to that effect hence the children should continue to stay at that place.¹ He further alleges that due to the violent snatching away of the children the children have missed their weekend private lessons and in his submissions he indicated that the children are not going to school as the respondent had taken their passes and uniforms hence the court needed to urgently attend to the case. It is due to the foregoing facts that the applicant sought spoliation being the return of uniforms, school satchels and clothes, the return of the two minor children and that the respondent be interdicted from visiting his home or workplace.

In opposition thereof the respondent raised the following points *in limine*; that the matter is not urgent, that the applicant is coming to court with dirty hands because he never complied with the order granting the respondent custody and hence should not be heard. The respondent further avers that the applicant's affidavit is characterized by falsehoods and non-disclosure of

¹ See paragraph 14 of founding affidavit

material facts and hence the affidavit should not be relied on. That the order sought is final in nature and that the application is defective for want of compliance with the rules in that the application is not paginated hence the matter must be struck of.

I find that the matter is urgent in that the complaint arose on 17 February 2023, the applicant lodged the application on Monday 20 February 2023 hence acted with haste. The matter pertains to children and the allegations that children were violently snatched and were not going to school required the court to urgently look into the matter to prevent prejudice to the children. In any case, the court will be abrogating its duty as the upper guardian of minors if it were to refer this matter to the ordinary roll given the seriousness of the allegations *vis* the children involved.

On the fact that the applicant was coming to court with dirty hands as he failed to comply with the High Court order granting custody to the respondent, I enquired from the parties as to what happened when custody was granted to the respondent. It is agreed by the parties that soon after the order was granted the respondent took over the children and all along since 2020 until December 2022 the applicant has been enjoying access until he then got the aforementioned order from the children's court which said the children should stay at his address. I thus find that he cannot be barred from being heard as he was relying on an order from the children's court rightly or wrongly he believed he could have the children up to a certain point. I thus dismiss the point pertaining to dirty hands. The court record shows that the pages are paginated, whilst the copies for the respondent have got an index and are not paginated. That cannot be termed complete failure to adhere to the rules. I find that there was partial compliance in so far as the respondent's copy has an index. I will thus not strike the application on that basis. Equally the claim that the interim order sought is nearly similar to the final order sought cannot be the reason to dismiss the matter. After all, the order sought is a draft order and ultimately it is the court that gives the appropriate order. Thus all the points raised *in limine* be and are hereby dismissed and the matter proceeds to be heard on merit.

The applicant maintains that the respondent had violently snatched the children and their clothing and that all the children were not going to school. As he was in possession of the uniforms they ought to be returned to him as he was dispossessed. He submitted that there is a vacuum as to who should have the children given that the parties entered into a compromise by way of deed of

settlement in HC3204/20 after the granting of the initial order of custody in HC588/20. As regards the interdict the applicant submitted that the respondent had no right to threaten his family as that will result in irreparable harm if the persons helping him in looking after the children leave. He also fears damage to his property and he has no other remedy save the relief sought. The respondent referred to the affidavit of his niece Gamuchirai Machacha a 24 year old who indicated that the applicant had violently taken the children and threatened to harm and kill her if she did not open the door for the respondent to take the other child. He relies on this affidavit which also states that the respondent threw stones at the roof and the window. He thus submitted that he thus required the protection of an interdict.

On the merits, the respondent denied neither violently taking the children and their apparel nor threatening the applicant's family members. She explained in her affidavit that she visited the children and called the children to come to her. She admits asking them to take their clothes and uniforms. However the eldest child could not as she was then locked inside the house by applicant's relative. She states that she has been staying with the children as per the extant High Court order and the applicant has through his shenanigans held on to the children when he took them to enjoy access. She states that the children's court order states that the children were to stay at applicant's address pending the determination of his application for joint custody. The application for joint custody being case no. CCC01/23 having been withdrawn there was no reason for the children to continue residing at the applicant's place. She maintained that the applicant has no legal basis to stay with the children. She maintained that the children still go to the same school and they have been attending from her place of residence since 2020. She submitted that the current hindrance for the week is that the other child has no school pass which remains with the applicant and the other child has no school shoes. The respondent urged the court to dismiss the application of spoliation as the applicant was not unlawfully disposed anything.

The respondent denied that her continued stay with the children harms them. She states in her affidavit that applicant is a danger to the minor children as he has been sleeping on the same bed with the three female minor children the oldest of whom is 10 years old. This is because his residence only has two bedrooms one occupied by him and the children, and the other by his relatives.

It was submitted on behalf of the respondent that Applicant has been instituting application after application to frustrate the respondent's enjoyment of her custody rights and cited CCC01/23, CCC02/23, HC1176/23, HC6589/22 and the report to the police CR545/02/23 for kidnapping malicious damage to property which charges were dropped at vetting stage by the prosecutor. The respondent vehemently denied she threatened anyone and urged the court to dismiss the application for an interdict as it had no basis at all. She stated that the applicant seeks relief without pleading it, and that in fact it is the respondent who needs to be protected as she had to seek a protection order stipulated in the order which is still extant protecting her from the behavior and conduct of the applicant. With no basis for an interdict she claims that the application is motivated by malice and ought to be dismissed with costs on a client legal practitioner scale.

Given the nature of the accusations I decided to interview Makatendeka Machacha a ten (10) year old girl the eldest child of the couple. She was brought to court after 1.00pm by the school Registrar Mrs Maphosa. The child related what happened on the day when the two siblings were taken by the respondent. The child was at home when the respondent arrived. She stated that she and her siblings rushed to meet the mother and she asked them to take their clothes. Tendeka went to the ne and took uniforms whilst she started packing. She also removed some of the clothes on the washing line and gave them to Tendeka. The youngest child Abrielle Sarah Mutsa Machacha who is 3 years two months old rushed to the car and sat in the car. One Gamuchirai Machacha (the 24 year old relative) phoned the applicant and she told this witness that she had to remain in the house. She stated that she sneaked from the house to go and tell her mother that Gamuchirai had told her to stay in the house. When she returned into the house Gamuchirai locked her inside. It was her evidence that the mother came and pleaded that Gamuchirai release the child. The child denied that her mother was violent she stated that her words were "Gamuchirai unlock the door release my child, why don't you give birth to your own children?" She denies that the mother was violent and denied that respondent had thrown items at the property either the roof or the windows. She disputed that the respondent uttered any threats. She further stated that the respondent did not take Abrielle Sarah Mutsa Manchacha's bag as alleged by the applicant, the bag was in fact at home in Marlborough. As for the uniforms she stated that one dress for each child was taken and Tendeka's blazer the rest of the uniforms were at home.

The child also confirmed one disturbing aspect which had been alleged by the respondent that she together with her siblings Tendeka who is 5 years old and Abrielle Sarah Mutsa who is 3 years old sleep on the same bed with the father whilst Gamuchirai whom she referred to as “Gogo Gamu” sleep in the other room. This is cause for concern given that Makatendeka is 10 years old and a girl. The child looked composed and relaxed even telling the court that she wants to be a teacher when she grows up. I had no reason to disbelieve the evidence of the child given that she was brought straight from school after the registrar called the school in the presence of both parties and none of the parties had the opportunity to speak to her as it was an impromptu decision by the court to call the child.

ANALYSIS

It is not in dispute that the applicant whilst enjoying access between December 2022 and January 2022 decided to do an ex parte application to remain with the children at his home. The order given in CCC02/23 was interim pending finalization of his claim for joint custody in CCC01/23. The order is unequivocal as regards its operation. It reads:

“That in the interim, the minor children shall continue to stay at No.17 Rufaro Road, Marlborough where they are at the moment pending the disposal of the application for Joint Custody Case No. CCC 01/23 by the Children ‘s Court.” The applicant withdrew the application for joint custody and hence the interim order fell away as its existence depended on the disposal of the custody application. The High Court order granting the respondent custody remains extant. The deed of settlement that the parties signed in case No HC3204/20 (it is in the court record) still waits being reduced to a court order. It reiterates the position that the respondent shall have custody of the three children. Turning to the application, the applicant avers that the children were unlawfully taken from his home but the respondent is the rightful custodian. In essence the applicant has no legal basis to be having the children. The respondent denies using force to collect the children. The eldest child Makatendeka also confirmed that no force was used to pick the two children she left with and that she remained behind because she was locked in the house. Suffice that there is no illegality about the manner the respondent collected the children who she is entitled to have under her custody which custody she had already assumed before respondent got his ill-fated exparte interim order. Given that the respondent is the recognised custodian at law and that the court

disbelieves the applicant's version on the manner in which the children were taken, the applicant cannot succeed in his quest to have the children returned to his home.

Suffice that the applicant sought to mislead the court by averring in paragraph 14 of his affidavit that the order of the children's court 02/23 was still extant as there is no contrary order to it hence the children should continue to stay at No. 17 Rufaro Road when he was aware that that order had fallen away. I took the liberty of requesting the two court records being CCC01/23 and CCC02/23 from the children's court. It is clear from Case No. CCC01/23 that applicant appeared in person before Mashamba Esquire and withdrew his application for joint custody on 26 January 2023. Upon this court challenging him on what basis he wanted to continue holding to the children he indicated that there is a vacuum as pertains the issue of custody. There is no vacuum at all, there is an order giving the respondent custody which order has neither been varied nor appealed against. Equally the three uniforms that the children took with cannot be returned to the applicant as they belong to the children. Given that the court has refused the application to have the children returned to the respondent it follows that the uniforms will remain with the respondent as the children require them. In any case the requirements of spoliation were not satisfied that he was in peaceful possession of the items and the respondent unlawfully dispossessed him the same. There was nothing unlawful about the respondent asking the children to take their uniforms with. If the applicant has the children's interests at heart he should avail the remaining uniforms.

Nowhere in his application does the applicant make a case for a prohibitory interdict. Apart from the incident under scrutiny, nowhere in his papers does he refer to the respondent going to his home and workplace and causing trouble. When he refers to the requirement of a *prima facie* case it is in relation to the children. The same position was assumed when he referred to apprehension of harm. He states that the children are losing out on extra lessons and that the respondent's purported violent conduct "has irreparable harm on the moral, social and psychological development of the children". When he addressed the balance of convenience requirement and that he has no alternative remedy the evidence averred to pertain to the return of the children not visiting his workplace. Hence the respondent was correct when she stated that the

applicant cannot be granted relief which he has not pleaded to. In fact this court in case No HC588/20 (where respondent herein was the applicant) gave an order that “the respondent is interdicted and or restrained personally and through the agency of other person from unlawfully preventing the applicant from accessing the property known as 17 Rufaro Street, Harare.”

Thus the respondent has a right to access that property as there is no order to the contrary and no appeal was lodged against that order. It is only in argument that the applicant sought to say he would suffer irreparable harm if his helper is threatened and leaves. I do not conceive how the departure of a helper can cause irreparable harm given the facts.

I find that the application has no merit and the applicant is trying by all means to frustrate the respondent from enjoying custody rights much to the prejudice of the children. Respondent has had the children since 2020 as sanctioned by the court and applicant seeks to use every trick in the book to ensure that he gets the children to stay with him. This is certainly not out of love for the children. What emerges given the number of applications brought before the court, are actions playing havoc with the children’s interests, which children are still young and vulnerable. This is unacceptable, and this court will stand its ground in its duty to safeguard the bests interests of the children.

In the result it is ordered as follows:

1. The application is dismissed with costs.

James Majatame Attorneys at Law applicant’s legal practitioners