

SUSAN TAFENI  
and  
EDWIN EDWARD GUMBO  
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HIGH COURT OF ZIMBABWE  
WAMAMBO J  
HARARE, 28 February and 13 April 2022

### **Urgent Chamber Application**

*P Murove*, for the applicant in the main application and respondent in the counter application  
*R A Sitotombe with J Ndlovu*, for the respondent in the main application and applicant in the counter application

WAMAMBO J: There are two applications before me. Under HC805/22 (the main application) applicant therein made an urgent chamber application for the following order:-

#### **“FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. That Makanaka Noah Gumbo be and is hereby permitted by order of the High Court of Zimbabwe to travel back to the United Kingdom with the applicant who is his mother and custodian parent.
2. That the Respondent pays costs of suit.

#### **INTERIM RELIEF GRANTED**

Pending the determination of this matter on the return date the applicant is granted the following relief:

1. That the respondent be and is hereby ordered to return Makanaka Noah Gumbo's passport (born on 17<sup>th</sup> January 2018) to the applicant forthwith.
2. That the respondent be and is hereby ordered to sign all the relevant documents and affidavits required of him which authorize the applicant to travel with Makanaka Noah Gumbo (born on 17<sup>th</sup> January 2018) to the United Kingdom failing which the Sheriff of the High Court of Zimbabwe be and is hereby authorized to sign the documents in his stead.

#### **SERVICE OF PROVISIONAL ORDER**

This provisional order shall be served on the respondent by the applicant's legal practitioners or by a person in the employ of the applicant's legal practitioner or by the Sheriff of the High Court of Zimbabwe or his lawful deputy.”

Applicant avers as follows in her founding affidavit:-

She entered a customary law union with respondent which resulted in the birth of Makanaka (the minor child at the centre of the dispute). The parties separated in 2020. Applicant relocated to the United Kingdom with Makanaka. Upon a request by respondent she returned to Zimbabwe for respondent to spend time with Makanaka. Upon the expiry of the agreed visiting period respondent has refused to return Makanaka's passport. He has also refused to sign documents that will enable her to travel back to the United Kingdom with the minor child.

Respondent is opposed to the application. He avers *in limine* that the application is not urgent. The respondent attacks the grounds of urgency in some detail. Before examining the attack I need to state the grounds of urgency in the first place.

The applicant seeks to establish urgency in para 9 of the application. I will quote it in full hereunder.

“9. I respectfully aver that I have treated this matter with urgency and did not sit on my laurels. The respondent and I agreed that I would return to the United Kingdom after the agreed visit period ended in December 2021. I made a decision to do so shortly after our minor child's birthday on the 17<sup>th</sup> of January 2022 to enable him to celebrate his birthday with the Respondent. In fact I intended to leave Zimbabwe with our four year old minor child on 24<sup>th</sup> of January 2022. Notwithstanding that the minor child had stayed in Zimbabwe up to his birthday on the 17<sup>th</sup> of January 2022 when we should have left in December 2021, the Respondent has acted in bad faith and has refused to return our minor child's passport to me. I therefore approached this Honourable Court for urgent relief when the need to act arose and soon after applicant refused to return our child's passport.”

The starting point to consider is that this application was filed on 9 February 2022. The averments under paragraph 9 above are vague and contradictory. It is firstly alleged that the agreed visit period would end in December 2021. The next averment is a decision made after the minor's birthday on 17 January 2022. What decision that was is not clarified. What effect or relevance that decision has on this application is not said. When the respondent took the passport of the minor child is not stated. How and why he took the passport is again not stated. Exactly when the need to act arose is very murky when one considers the averments under paragraph 9 of the founding affidavit.

It is indeed up to applicant to establish urgency. Applicant should demonstrate the urgency in the founding affidavit. A further look at the relief sought and the grounds of urgency establishes

a missing gap. Applicant concentrates on the return of the passport. Applicant does not advert to the connection between the urgency of the matter and para 2 of the interim relief sought. The long and short of the application is that applicant wants to take the minor child with her to the United Kingdom. The final order seeks to have applicant permitted to travel back to the United Kingdom with the minor child.

The second paragraph of the interim order seeks to have respondent sign all relevant documents authorizing applicant to travel to the United Kingdom with the minor child. I particularly mention the broader and singular intent of applicant according to the draft order. This is because it reflects an intention to clothe the application in urgency when the interim relief and the final relief are basically the same.

I also note that under the interim relief the moment respondent is ordered to sign relevant documents enabling applicant to travel to the United Kingdom with the minor child, the need for a final order falls away. Once the relevant papers are signed there is and would not be any need for a final order permitting applicant to travel with the minor child to the United Kingdom.

The respondent has answered to three grounds establishing urgency. It would appear that they pick these from the certificate of urgency and not the founding affidavit. The certificate of urgency necessarily makes averments gleaned from the founding affidavit. In this case, the certificate of urgency contains more detail on urgency than the main pleading, the founding affidavit.

Perhaps the problem arose from the fact that according to the dates of signing appended on the two documents the certificate of urgency was signed a day before the founding affidavit. Where did the legal practitioner draw all the facts he attested to if the founding affidavit was not yet signed? I point the above out as a means to illustrate that there was an effort to manufacture urgency. I cannot say applicant acted when the need to act arose when I am not even informed by applicant on what date that need arose. I cannot stamp urgency on a matter where urgency is not established through the founding affidavit as already alluded to.

Some of the various defects in this application mirror ones that MAFUSIRE J dealt with in *Jim Kunaka v Minister of Health and Child Care and 2 Others HH46/21*. I agree with the findings therein in as far as the issues dealt with are relevant to the instant case.

I find therefore that urgency has not been established in HC805/22.

The respondent in HC805/22 has filed a counter claim seeking custody of the minor child. He is the applicant under HC911/22. Under HC911/22 the respondent therein raises the preliminary point that the counter application is irregular and improperly before the Court. A number of reasons have been advanced for this. The main reason given is that the said application being a counter application to an urgent matter should also have been made on an urgent basis. Further that the counter application should instead have been launched as an ordinary court application.

An application for custody is governed by sections 4 and 5 of the Guardianship of Minors Act [*Chapter 5:08*]. The High Court Rules S.I 202 of 2021 in Rule 61 (2) (b) provides that in any application in connection with a minor there has to be an appointment of a curator ad litem via a chamber application. The chamber application has to be served on the Master who should make a written report to a Judge. The curator ad litem shall be served with the chamber application and shall conduct necessary investigation and file a written report with the Registrar with copies served on applicant and all other interested parties. There is no curator ad litem appointed in this case. There is no Master's certificate nor *curator ad litem's* report filed.

The application clearly is irregular in the circumstances.

The above requirements are peremptory for a reason. The best interests of a child have to be explored in detail and at length including a consideration of impartial persons like the curator ad litem and personnel from the Master's office. See *Memory Minezhi v Boyland Boora HH201/20*. I cannot determine custody on the papers filed in response to an urgent application in the instant matter for the above reasons.

In *Constantine Guvheya Dominic Chiwenga v Marry Mubaiwa SC 86/20 at p17* the court said:-

“Biblical Solomonic wisdom however instructs that a child cannot be treated as common property in a tussle for custody between adults. For that reason, the lawmaker has laid out elaborate laws and procedures for the regularization of issues to do with custody and guardianship of minor children. The applicable law regulating the custody of children when their parents begin to live apart is to be found under s5 of the Guardianship of Minors Act.”

I find that the counter application filed under HC911/22 is improperly before me and should be struck off the roll. Both parties had asked for costs in the event of their success. Both

have in my judgement failed to do so. To that end I find no justification for an order of costs for either of them. Thus, each party shall bear its own costs.

In the circumstances I order as follows:

1. The application under HC805/22 is not urgent and is removed from the roll of urgent matters.
2. The counter application under HC911/22 be and is hereby struck off the roll.

*Scanlen and Holderness*, applicant's legal practitioners in main application and respondent's legal practitioners in counter application.

*Mtewa and Nyambirai*, respondent's legal practitioners in main application and applicant's legal practitioners in counter application.