BRETT LEONADES PISSAS
and
HELEN LOUISE PISSAS

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 26 and 28 March and 9 April 2008

Urgent Chamber Application

S G J Bull for the applicant
Miss N Tiago for the respondent

GOWORA J: The parties herein were formerly husband and wife. Two minor children were born from the union, namely Anthony Christie Pissas (born 8th March 1994) and Dean Alexander Pissas (born 13th October 1995). On 2 November 2006 this Honourable Court granted a decree of divorce in favour of the respondent herein. The respondent was awarded custody of the minor children. Prior to the decree of divorce being granted the parties had entered into a Consent Paper in terms of which other ancillary relief was provided for. The terms of the Consent Paper defined the right of access to the minor children by the applicant (described in the Consent paper as defendant) as follows

Defendant shall be entitled to exercise access to the minor children on alternate weekends, including alternate public holidays and school exeat weekends, and alternate school holiday periods.

The parties will alternate Easter holiday periods and Christmas/New Year periods (where the Christmas/New Year period will be from the morning of 24 December to the afternoon of 2 January.

On those occasions when it is the defendant's weekend for access he will collect the children every Thursday on termination of school activities and shall have them with him until he returns them to school the following Monday morning.

The parties agree that access periods will necessarily need to be flexible depending upon the personal and business commitments from time to time of each of the parties.

On 18 March 2008, GUVAVA J granted an order in favour of the respondent. The order is not before me but is common cause that the respondent had applied to this court for an

order permitting her to take the children out of this country on an urgent basis and relocate with them in the United Kingdom. The applicant had opposed the granting of the order but was unsuccessful. The applicant has noted an appeal against the order of the 18 March 2008. Subsequent to the appeal being noted the applicant sought an assurance that the respondent would not depart with the children before the appeal was determined. Notwithstanding the noting of the appeal, the respondent did not feel compelled to provide the undertaking sought by the applicant. He has learnt it was her intention to take the children out of the country on 26 March 2008. The applicant wishes to have the appeal heard and has filed an urgent application for relief which is in the following terms:

TERMS OF ORDER MADE

That the respondent show cause to the Honourable Court why a final Order should not be made in the following terms:

1. That pending the Appeal instituted by the Applicant in Case No SC /08 (Refer HC 1476/08) or the earlier written consent of the Applicant, the Respondent be and is hereby interdicted from removing the minor children ANTHONY CHRISTIE PISSAS and DEAN ALEXANDER PISSAS from Zimbabwe.

2. That the Respondent shall bear the costs of this application.

INTERIM RELIEF GRANTED

1. The respondent is hereby directed to forthwith deliver up all the passports of each of the minor children ANTHONY CHRISTIE PISSAS (born 8th March 1994) and DEAN ALEXANDER PISSAS (born 13th October 1995) to the Registrar of this Honourable Court who shall retain the said passports pending the outcome of the Applicant's appeal in SC /08 (Refer HC 1476/08) or the earlier receipt of Applicant's written consent to the release of the passports to Respondent.

2. The Applicant's legal practitioners, Atherstone & Cook, be and are hereby

authorized to serve this order on the Department of Immigration Offices in Liquenda House and on an Immigration Officer at Harare International Airport or any other point of entry to/exit Zimbabwe and to serve the Order on Respondent at the offices of her legal practitioners, Scanlen & Holderness.

3. This Order shall take effect upon the Respondent immediately upon issue without the need for service on her.

In his founding affidavit in support of the application, the applicant has averred that he had filed a notice of appeal to the Order granted on 18 March 2008. The Notice of Appeal is filed with his papers. He goes on further to state that whilst he does not object in principle to the children relocating to England, such relocation should be in circumstances where it is in their best interests to do so. He says further that there should be a proper infrastructure for the children's day to day care, supervision and stability, all living costs, education and medical transportation and proper arrangements for paternal access. He goes further to state that he had learnt that the respondent was due to depart this country with the minor children on 26 March 2008 and was then desirous of having her interdicted from taking the children away until the details on their livelihood had been established in a satisfactory manner.

In seeking to oppose the grant of this provisional order, apart from raising issues on the merits which I believe were dealt with by my sister judge, GUVAVA J, on which aspect I will advert to later, the respondent contended that the appeal had not been properly filed in the absence of leave from this court because the appeal was against an interlocutory order. Per contra, the applicant contends that the order although issued as a provisional order is final in effect due to the nature of the relief granted. The question as to whether the applicant required leave to appeal can be resolved in another way without the need for me to enquire into the nature of the order issued, be it interlocutory or final.

Although both parties went to some detail to justify their respective stances, it is my view that these are issues that were before the judge who granted the respondent the authority to depart from Zimbabwe with the children. For me to rehash them again would be akin to reviewing those proceedings. I will not do so. In my view the only issues for determination by me is whether or not the applicant required the leave of this court to note the appeal and whether having noted such an appeal, the Order of this court is as a result suspended. In

addition, the applicant has sought a temporary interdict pending the appeal. The temporary interdict is being sought as part of the final order and although it is not before me, I would still have to determine whether or not I should on the facts issue a Provisional Order incorporating as part of the final order a temporary interdict against the respondent.

In terms of section 43 the High Court Act [*Chapter 7: 06*] appeals from the court are provided for as follows:

1. Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.

2. No appeal shall lie-

a) ……not applicable

b) ……not applicable

c) ……not applicable

d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases-

(i) where the liberty of the subject or the custody of minors is at concerned;
(ii) where an interdict is granted or refused

(iii) …….not applicable.

According to *Mr Bull,* the applicant is entitled, by virtue of the provisions of the section, to launch an appeal directly to the Supreme without the need for leave, because not only did GUVAVA J issue an interdict, but the issue then before her Ladyship was concerned with question of the custody of the minor children of the parties. *Miss Tiago's* view is that what the applicant is seeking to ensure is that his access rights to the children are secured. She argues that access is not custody and as a result the exception provided in the section does not apply in this particular instance.

Access is an incidence of custody and in my view the two go hand in hand where there are rights of more than one parent at stake. It cannot have been the intention of the Legislature to accommodate parents who are engaged in issues relating to custody specifically to the

exclusion of anyone and to grant such parents an automatic right of appeal to the Supreme whilst not granting the right to parents wishing to enforce rights to access. Were access to be excluded in the exception to the section it would, in my view, lead to an absurdity such as would not have been the intention of the Legislature. In any event, as pointed out by *Mr Bull* the provisional order issued on 18th March 2008 was, in its final terms, to the effect that the respondent should retain custody of the minor children of the parties. It is obvious that therefore the appeal is properly taken as the court had been dealing with the custody of the minor children of the parties. The fact that what the applicant wishes to enforce is access and not custody would not in my reading of the section preclude him from being able to launch his appeal. My reading of the exception is that it would be No mention is made of the access rights of the applicant and it is to that extent that the applicant wishes to have the order appealed against.

In terms of the interim relief granted, apart from an authorization to remove the children from the jurisdiction, the respondent was granted an interdict in terms of which the applicant was restrained from preventing the respondent from removing the children from this jurisdiction. So assuming I am incorrect in finding that access is an incidence of custody and that on that basis the applicant would not have required leave to file the appeal, part of the order from the judgment appealed against was an interdict and on that basis the appeal would qualify under the exceptions referred to ss (2) (d). I find therefore that there was no need for leave to appeal and that therefore there is an appeal pending before the Supreme Court.

The next rung of my enquiry is whether or not the appeal filed on 25 March 2008 would have the effect of suspending the order of GUVAVA J. The noting of an appeal has the effect of suspending the order or judgment which is the subject matter of the appeal. The authority for that principle is the dicta by CORBETT JA (as he then was) in *South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd*[1]. What the learned judge of appeal had to say was to the following effect:[2]

> *"Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see Ruby's Cash Store (Pty) Ltd v Estate Marks and Another 1961 (2) SA 118 (T) at pp120-3), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically*

[1] 1977 (3) SA 534
[2] At 544H-545A

> *suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application."*

These remarks were quoted with approval by CHATIKOBO J in *PTC v Mahachi*[3] and by GILLESPIE J in *Vengesai & Ors v Zimbabwe Glass Industries Ltd.*[4] I humbly associate myself with the views of CHATIKOBO J to this effect:

> "*To me this statement is no more than an expose of the time honoured rule that the court has an inherent jurisdiction to control the operation of its own judgments"*[5]

The High Court is a Superior Court with inherent jurisdiction. Thus, it has the right to regulate its proceedings and judgments. This inherent jurisdiction includes the power to grant leave to have its judgments executed pending appeal. As submitted by *Mr Bull* it is trite that the noting of an appeal against a judgment or order of a superior court has the effect of suspending the judgment. The purpose of the rule was to prevent irreparable harm to an appellant either by the issue of a writ of execution or the execution of the judgment in any manner pending the appeal. In my view the noting of the judgment by the applicant had the effect of suspending the order issued by GUVAVA J until the conclusion of the appeal and the respondent is not entitled without having obtained leave to execute the judgment to remove the children from the jurisdiction of this court.

The applicant has however sought that the passports of the minor children be rendered to the Registrar of this Honourable Court pending the hearing of the appeal or written permission by the applicant for the removal of the children by the respondent. The removal of the passports from the respondent to the custody of the Registrar has the effect of interdicting the applicant from removing the children to England until the appeal has been determined. As the question of an interdict is part of the relief being sought in the final order of this application, it is not necessary in my view that I come to a firm view as to whether or not there exist factors entitling the applicant to such relief. My prima facie view of the matter is that the

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[3] 1997 (2) ZLR 71
[4] 1998 (2) ZLR 593.
[5] PTC v Mahachi at p73

applicant was awarded access rights which may be prejudiced by the removal of the children in the absence of a variation of those rights to accommodate their intended place of abode.

The respondent did not really raise a defence to the application before me as she sought to rely on issues of a technical nature. I am therefore inclined to grant relief as sought in the Provisional Order. In the premises there will be an order in terms of the Provisional Order.

Atherstone & Cook, legal practitioners for the applicant.
Scanalen & Holderness, legal practitioners for the respondent.