TENILLE MECHELLE WHITBY
versus
MARCEL HERBERT WHITBY
and
THE IMMIGRATION OFFICER
and
EVANS SIZIBA

IN THE HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 8 February and 7 May 2014

Urgent chamber application

T.C. Hungwe, for the applicant
Advocate *F. Girach*, for the 1st respondent
No appearance for the 2nd and 3rd respondents

MATANDA-MOYO J: On 8 February 2014 I dismissed the applicant's application as not urgent. I found that the urgency was self – created. I however realized that the interests of a minor child was at stake and decided to bring sanity to the matter by giving effect to JUSTICE GUVAVA J's (as she then was) order as follows;

a) That the physical custody of the child be returned to the applicant.
b) The ticket of the travelling of the minor child be handed over to the applicant to enable the applicant to comply with HC5759/12 order referred to above.
c) That the applicant travel to England with the minor child on KLM flight leaving Zimbabwe on that same day.
d) That should the applicant fail to avail herself at the airport that day the Sheriff be and is hereby authorized to remove the child from the applicant's custody into the 1st respondent's custody who would travel with the minor child to England.

The applicant has requested for reasons for the order. These are they.

Justice GUVAVA J as she then was issued an order in HC 5759/12 on 16 January 2014 as follows;

1) That the continued retention of the minor child, Allanah Isabella Whitby (born 24 January 2009) by the respondent (applicant herein) be and is hereby declared unlawful.
2) The respondent shall return the said minor child to the country of habitual residence namely England within 10 days of this order.
3) The applicant pays for the air fares in order to enable the respondent and the minor child to return to England.

The above order was granted on 16 January 2014. Applicant had ten days from the court's decision to return the child to England. She had up to 30 January 2014 to comply with the court order. She did not. However I took it that she was awaiting the tickets from first respondent to comply with the court order. In compliance with the court order first respondent bought tickets for applicant and the minor child to travel to England on 8 February 2014. The respondent however took physical custody of the minor child from the applicant. As a result the applicant on 8 February 2014 the applicant brought this application on an urgent basis seeking the following relief;

"INTERIM RELIEF GRANTED

1. In the interim, and pending the finalization of this matter it is ordered that the 1st and 3rd respondents be and are hereby ordered barred, and interdicted from removing the minor child namely Allanah Isabella Whitby (born on 24 January 2009) from the jurisdiction of this court.
2. That the 1st respondent shall forthwith return custody of this minor child to the applicant failing which, Sheriff or his assistant be and is hereby authorized and empowered to visit any place in Zimbabwe where this minor child may be housed and to take the minor child in the Sheriff's possession and to there and then hand over custody of this minor child to the applicant and in the event of resistance the Sheriff shall enlist any member of the Zimbabwe Republic Police to carry out that objective."

The final order sought was to stay the operation of the order granted by GUVAVA J pending appeal. As there was no appeal; filed before the Supreme Court the final order sought was incompetent.

Respondent challenged the urgency of this matter. He argued that an order of this court was issued on 16 January 2014. From then to date of hearing no appeal had been noted against the said judgment. The first respondent had purchased tickets in compliance with the court order and applicant sought to suspend the operation of the court order by approaching this court on an urgent basis. The applicant argued that she only became aware of GUVAVA J's order on 31 January 2014. She conceded she had not appealed against that order and that the judgment was

enforceable against her. However she argued that she was still within the ten day period and could still file an appeal on 10 February 2014.

I found that the applicant had failed to treat the matter with some degree of urgency. Since the order by GUVAVA J enjoined her to act within ten days, she should have immediately noted an appeal; or applied for stay of execution.

The need to act arose on 16 January 2014 and I found that the applicant did not intend to comply with court order nor to note an appeal. The urgency became self created after she was given her ticket to fly to England. See *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188(H) NO reasonable explanation was proferred for the delay.

I could have dismissed the matter on that basis alone. However the applicant counsel submitted that the purpose of the order they had sought was for the return of the physical custody of the minor child to the applicant was so as to enable the applicant to comply with the order of GUVAVA J. Counsel for the respondent indicated he had no problems with an order directing his client to return the child to applicant for purposes of complying with the order. In the interest of the minor child I then proceeded to give effect to the order granted by this court in case HC1042/14.

Chinyama & Partners, applicants' legal practitioners
Atherstone & Cook, 1st respondent's legal practitioners