

BRIAN CHIYANGWA
versus
SIBONGILE CHIYANGWA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 24 January, 2018 and 23 May, 2018

Urgent Chamber Application

A. Gurira, for the applicant
Ms J.B Mudhege & V Vera, for the respondent

MANGOTA J: Children do not apply to have a father and mother who marry and, after they are born, divorce. Children find themselves into a family which desirably is expected to be stable, loving, caring and accommodating of their welfare as well as their day-to-day needs. Where their parents divorce or, for some reason, go their own separate routes, the parents' disagreements do tend to adversely affect the emotional well-being of their children. These remain torn between the two parents as the latter's feuds are, more often than not, harsh, agonising and traumatic to their children.

The law recognised this inevitable fact of life. It was for the mentioned reason, if for no other, that it placed a duty on the court to be the children's upper guardian. Because of this fact, the court will always jealously guard against the infringement of the rights and / or welfare of these innocent souls who, not out of choice but natural course, find themselves at the mercy of parents who are at each other's throats when they are not, and should not, be involved in the dispute of those who brought them onto mother earth.

The above described passage fits squarely into the situation of the applicant and the respondent. These are the natural parents of their two minor children. The children comprise:

- a) one Ephraim Chiyangwa, a boy, born on 23 March, 2003 - and
- b) one Hossana Chiyangwa, a girl, born on 26 June, 2006.

The parents of the above mentioned children married under the Marriages Act [*Chapter 5:11*]. The date of their marriage remains unknown. It is not stated in the papers which are filed of record.

What is stated, however, is the parties' date of divorce. This appears in a decree of divorce which the applicant attached to the application as annexure A. the annexure incorporates some contents of the parties' consent paper. It is dated 6 July, 2017.

The decree of divorce shows that:

- i. custody of the minor children was awarded to the respondent – with
- ii. the applicant being entitled to have the children every two week-ends of every month during school terms and half of every school holiday – and
- iii. the applicant was to pay monthly maintenance for the up keep of the two children in the sum of \$1000 - as well as
- iv. the children's school fees and other school curriculum activities every term.

As can be gleaned from the record, the children were attending school at Heritage School when the decree of divorce was granted to their parents. They are at the same school todate.

The children's attendance at the mentioned school gave birth to the present application. It was the applicant's statement that, in 2017 he consulted the mother of the children. He said he wanted to transfer them from Heritage, to another, school. The purpose of the consultation was to enable both of them, as parents, to mutually look for an appropriate school for the children, according to him. His reasons for the transfer, he said, were based on two factors. These were the cost of school fees and the quality of education which the children were receiving at the school, he alleged.

The applicant stated that, on 31 October 2017, he advised Heritage School, in written form, that he was withdrawing the children from the same. He said he proceeded to look for the children's prospective new school because their mother who is the respondent *in casu* had rejected most of the schools which he had proposed. She had stated that the proposed schools were not suitable for the children's education, according to him. He averred that he secured a place for them at Littlerock International School, paid school fees of \$2030 as well as \$469 for the children's uniforms. He stated that on the opening day of school, he went to his ex-wife's home to pick the children and take them to school and she resisted his move. He moved the

court to compel the respondent to allow the children to attend school at Littlerock International School.

The respondent opposed the application. She insisted that the application was not urgent. She stated that what her ex-husband was doing was not in the best interests of the children. She gave a narration of the steps which she said she took with a view of not disturbing the children's schooling. She moved the court to dismiss the application.

There is a difference between an urgent application and one which is based on what is often referred to as self-created urgency. CHATIKOBO J defined the latter form of application in a very succinct manner in *Kuverega v Registrar General & Anor* 1999 (1) ZLR 188 at 193. The learned judge said:

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arrives the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules...” (emphasis added)

PARADZA J reiterated the same point in *Dexprint Investments (Pvt) Ltd v Ace Property Investments Co. (Pvt) Ltd*, HH 120/02 wherein he stated at pp 2 and 3 of the cyclostyled judgment as follows:

“For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with that matter on an urgent basis. Further, it must also be clear that the applicant did not on his own part treat the matter as urgent. In other words, if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis...” (emphasis added).

Applying the principles which were laid down in the abovementioned two cases, it is evident that the applicant waited for the arrival of doomsday. He refrained from taking action when the need to act arose. He also did not offer any explanation at all for the delay which he took to apply as he did.

The applicant does not state the exact date that he consulted his ex-wife whom he informed of his intention to transfer the children from their current to another school. He states in para 7 of his affidavit that he did so some time in 2017. He also does not state whether his consultation with the mother of the children was fruitful or not.

Annexures D1 and D2 which the applicant attached to his application are relevant. They constitute the letters which he addressed to the authorities of Heritage School whom he notified of his withdrawal of the children from the same. They are each dated 31 October 2017.

It is not known if the withdrawal of the children from Heritage School, as contained in the annexures, was the applicant's unilateral decision or was a mutual decision of the children's parents. The probabilities are that it was his own decision. If it was a mutually agreed position of the children's parents, this application would not have been filed.

The applicant states in para 9 of his affidavit that he proceeded to look for the children's prospective new school places. He avers, further, that his ex-wife had rejected most of the schools which he had proposed as not being suitable. He said time was running out and he approached Littlerock International School which accepted the children. He attached to his application a copy of the acceptance letter which he marked Annexure E. The annexure is dated 10 January, 2018.

It is evident, from the foregoing, that the applicant's disagreement with his ex-wife existed prior to the mentioned date. It is also clear that the disagreement on the matter did, in earnest, surface in or around October, 2017. He, therefore, made a unilateral decision, at that time, to withdraw the children from the school they had been attending all along. He, for reasons known to himself, does not explain why he did not file the current application at the time that he realised that his ex-wife was resisting what he intended to achieve.

It cannot, by any stretch of imagination, be suggested that a matter which arose in October, 2017 became urgent in January, 2018. Surely an explanation for the delay of four or five months is warranted under the circumstances of this application. Short of it, the applicant cannot be described as a person who treated his case with the urgency which the same deserved. The application falls more into the realms of self-created urgency than it complies with r 244 of the rules of this court.

That the parties' dispute continued from October, 2017 to date is evident from the statement of the respondent. She stated in para(s) 21.4 and 21.5 of her opposing affidavit as follows:

“21.4 On 6 December 2017, I advised the applicant via the whatsapp instant messaging platform that there is a possibility of a scholarship with Heritage, and implored him to explore that option as the school had indicated willingness to assist in that regard, the applicant was not moved and elected not to reply my chats;

21.5 I went on to indicate to him that the minor children were distraught by the uncertainty relating to their schooling and yet again the emotional well-being of the minor children did not move him and he did not bother to respond” (emphasis added).

The respondent's abovementioned assertions remain unchallenged. It is trite that what

is not denied in affidavits is taken as having been admitted (See *Fawcett Security Operations v Director of Customs & Excise*, 1993 (2) ZLR 121 (SC), *DD Transport (Pvt) Ltd v Abbot*, 1988 (2) ZLR 92).

The applicant states that his intention to transfer the children was motivated by the latter's best interests. His statement remains questionable. *A fortiori* when he moves the court to transfer children who are already two weeks into the first term of their schooling. It is, in my view, totally disruptive to the children's education to be moved to a new school when they have already started learning at their old school.

The applicant's conduct of wanting to take the children to a new school which he had secured for them is nothing else other than self-created urgency. If he intended to have the matter resolved as he claims he did, he would have applied prior to the opening of the first school term and not two weeks after the term had commenced. His conduct can be likened to that of a person who closes the stable after the horses have already bolted.

The application is completely devoid of merit. It stands on nothing. It cannot succeed. It is, accordingly, dismissed with costs.

Thondhlanga & Associates, applicant's legal practitioners
Tamuka Moyo Attorneys, respondent's legal practitioners