JEALOUS CEMENT
versus
MAUREEN CHIWESHE
and
DEPUTY MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 9 JUNE AND 29 JUNE 2017

Urgent Chamber Application

MOYO J: This is an urgent application wherein applicant sought the following interim relief;

1. The 1st respondent be and is hereby interdicted from changing schools for Chelsea Cement born on 18 January 2005 until the finalization of the application for custody under HC 1246/17.

2. In the event that by the time this order is granted such change has been done the Sheriff of the High Court is ordered to restore the minor child to Ambassador Academy Harare.

3. Pending the finalization of the custody matter temporary custody of the two minor children Christian Cement born on 16 November 2001 and Chelsea Cement born on 18 January 2005 is granted to applicant with reasonable rights of access to the first respondent.

At the hearing of this application I dismissed it and said I would give reasons later, here are the reasons.

The parties are divorced and are parents to the two children who are the subject matter of this dispute.

The basis of the application seems to be in paragraph 4.4 of the founding affidavit which reads thus:

> "The 1st respondent has now threatened to pull the second child out of that school as she has custody and take her to the same school she took her brother. This is not the first

time she has done this, as in 2014 I had secured a place for Christian at Petra High School herein Bulawayo after she had made the same claim that I should keep the kids since she had remarried. She then came and took him out of the school on the third day of the first term after I had paid $4500-00 in fees and uniforms for the child."

"4.6 what I now fear is that as she has custody of the kids in Murambinda she is already making preparations to transfer the child to a rural school which is not in the best interests of the child. Schools are opening on Tuesday and I am afraid that by then she could have changed places and moved Chelsea to Murambinda where she works."

This affidavit was sworn to on 9 May 2017. I will hasten to point out that in my view the allegations do not present any concrete evidence or a reasonable apprehension of fear. We are not told how the first respondent made the threat to pull out the child from school, we are not told to whom and where it was made. The facts laying down applicant's case are bare and are not presented in a manner with substance at all. On her own behalf first respondent says thus in her opposition, paragraph 4 thereof

"There is nothing urgent about this application. It was stamped on 16 May 2017, ten days after I had surrendered the children to him through his wife so that he could prepare them to go back to school he is alleging I want to pull the child out of."

First respondent disputes the facts as alleged by applicant. In fact the affidavit by applicant was sworn to on 9 May 2017, a day before schools opened nationally, first respondent was only served with this application on 5 June 2017 almost a month after schools have been open, meaning that the scant allegations by the applicant are indeed baseless.

According to applicant first respondent was to pull out the child at the time the schools opened. First respondent was not aware of this application and only became aware on 5 June 2017, and to that date, she had not pulled out the child. In any event, even if she had, applicant would have a remedy in this court in that an order can be granted to restore the *status quo.*

Applicant sought to attach a social worker's report in support of his application which report the court finds irrelevant to the issues at hand. In fact it is not prepared in the same manner that reports on children's welfare are prepared. All this social worker did was to call the children and ask them which parent they preferred to live with. That is neither here nor there because each child then answered to say they preferred living with applicant because he paid their fees.

Payment of fees is not the only criteria to assess the suitability of a custodian parent. There are obviously many other variables in such matters.

A parent of no means can nonetheless be awarded custody if its in the children's best interests with the financially sound parent paying for their upkeep. The social worker, if at all he wanted to assist the court in the main custody dispute should have investigated the circumstances of the children, where they live and with whom, interview their teachers and both parents. He would also be duty bound to explain that in the case of Chelsea, the child being the subject matter of this application, she is at a boarding school, with both parents having access during half the school holidays each meaning, that the aspect of custody really becomes technical as neither parent lives with the child.

The requirements for a temporary interdict are:

1) a right which, though *prima facie* established, is open to some doubt.

   As a parent applicant does have a right to interfere with the children's welfare circumstances as long as this is done in their best interest and is justifiable.

2) a well-grounded apprehension of irreparable harm.

This I have already pointed out that applicant has failed to lay a proper foundation for his case in this respect. Respondent disputes having threatened applicant in the manner applicant alleges she did and her conduct in not moving the child out of school from the time the schools opened to 9 June 2017 when the matter was heard shows that she never intended as such.

In any event, where the court is not fully satisfied with the version as presented by the applicant, like in the present case, and where respondent's denials cannot be found to be far fetched or clearly untenable, such that they should be rejected, the court can choose not to decide the dispute of fact and instead dismiss the application. Refer to the case of *National Union of Mine Workers* v *Free State Consolidated Gold Mines Cooperation Ltd* 1989 (1) SA 409 O at 415. It was also held in the case of *Die Dros* 2005 (4) SA 207 (C) at 217 that affidavits in motion proceedings must contain factual averments that were sufficient to support the cause of action on which the relief sought is based.

The third requirement for an interdict of cause is the absence of any other remedy and the fourth is that the balance of convenience favours the applicant.

Of course applicant must first succeed in showing a reasonable apprehension of harm before these two additional requirements would matter. I have already stated that applicant in this case has failed to do so.

It is for these reasons that I dismissed the application with costs.