JUSTIN TAONEHAMA SAMUDZIMU
versus
SITHANDIWE MIRANDA NGWENYA
and
CHIEF INSPECTOR ZULU
and
INPECTOR MATUTU

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 10 and 20 December 2013

**Urgent Chamber Application**

*F. Mahere*, for the applicant
*A. Chagonda*, for 1st respondent

CHATUKUTA J: This is an urgent chamber application wherein the applicant seeks the following interim relief:

"IT IS HEREBY ORDERED THAT:

1. Be and it is hereby ordered that 1st respondent and within one hour of service of this order, shall surrender the minor children namely DAVID MICHAEL NATHAN SAMUDZIMU and DANIELLE JANET SAMUDZIMU to Applicant at No. 9 Collins Avenue, Rolf Valley, Chisipite, Harare.

2. Pending the confirmation of the custody order or otherwise in favour of Applicant pursuant to the surrender by 1st Respondent to Applicant of such custody in 2008, be and it is hereby ordered that the living arrangement of the children shall not be disturbed within (*sic*) leave of this Court.

3. Provisionally and before the issue of custody is resolved in terms of paragraph 2 hereof, 1st Respondent shall be allowed access to the minor children in the following manner:-

    i. On alternate weekends;
    ii. During half a holiday when the children close school; and
    iii. On Public holidays and special occasions by prior arrangement".

The background to the application is that the applicant and the first respondent were once in a customary law union. They were blessed in March 2004 with two children who are the centre of the dispute between the parties. The two separated and the first respondent had custody of the minor children. It appears the applicant surreptitious took custody of the minor children. On 16 June 2005 an order was granted by consent ordering the applicant to restore to the first respondent custody of the said minor children.

In 2007, the first respondent left the children in the custody of her parents when she went to work in South Africa. The applicant, approached this court in 2007 in HC 5898/07 (HH 92-08) seeking interim custody of the children alleging that he had been denied access.

The application was opposed and the first respondent in turn sought an order to remove the children from Zimbabwe to South Africa. The application for custody was dismissed whilst the respondent's counter application was granted. Aggrieved by this decision, the applicant filed an appeal. It is common cause that the appeal lapsed and the applicant has not sought to resuscitate it.

In 2008, the applicant took custody of the minor children. The circumstances leading to this are in issue. The applicant avers that the first respondent's father permanently surrendered custody of the children. The first respondent avers that the surrender was temporary to allow her to relocate to Harare.

It is common cause that the children have been in the applicant's custody with the respondent's having access during that period. It is also common cause that in all the communication between the parties wherein the first respondent has sought the applicant's assistance in keeping the children, the respondent has always indicated that she is not surrendering custody of the children or relinquishing the rights accorded her in HC 2761/05.

The immediate facts giving rise to this application are that on 25 November 2013 the first respondent, with the assistance of the second and the third respondents unlawfully took the minor children from his custody. The applicant alleges that the three came to his house around 20:00 hrs. The second and the third respondents who were armed indicated that they were enforcing the order in HC 2761/05 and threatened to arrest him if he did not comply.

The first respondent stated that they went to the applicant's residence at around 7 p.m. and the second and the third respondents were not armed.

When the application was initially placed before me, I opined that the application was not urgent. I set down the application on the applicant's request.

The applicant submitted that the application was urgent because the first respondent's conduct is disruptive of the minor children's well-being and unlawful in that the police are not authorised to enforce court orders. The applicant urged the court as the upper guardian to restore the children into his custody.

The first respondent submitted that the application was not urgent as the applicant has been aware of the consent order in HC2761/05 and abandoned his appeal in HH 92/2008. It was further submitted that the order sought was final in nature and it was not competent to seek such an order.

I am inclined to agree with the first respondent. The applicant has been aware since 2005 that there is an order restating the first respondent's custodial rights. The order is extant. In 2007 the applicant unsuccessfully sought interim custody of the minor children. He abandoned his appeal against HH 92/2008 on the basis that he was the *de facto* custodian of the children. However, that fact did not alter the order in HC 2761/05 and the first respondent has remained the custodian parent. Had the applicant intended to have *dejure* custody of the minor children he should have sought a variation of the order in HC 2761/05. In fact, in HH 92-2008, the applicant had not been seeking permanent custody of the minor children. He was again seeking interim custody. The applicant has clearly waited for the day of reckoning to take action.

In any event, the relief sought, as submitted by the first respondent is not competent as it is final in effect. (See *Kuvarega* v *Registrar General* 1998(1) ZLR 188). The interim relief sought amounts to a variation of the order in HC 2761/05. This is confirmed by the very wording of the final relief sought. The final order sought reads as follows:-

"1. The interim order be and is hereby confirmed as final.

2. Consequently custody of the minor children be and is hereby awarded to Applicant with 1st Respondent having access to be exercised in the following manner:-

   i. On alternate weekends;

   ii. During half a holiday when the children close school; and

   iii. On Public holidays and special occasions by prior arrangement.

3. The order of this Court in case number HC 2761/05 be and is hereby varied to the extent of paragraph 2 hereof.

4. There shall be no order as to costs".

It would be remiss of me not to observe that children are not chattles that are moved between parents nilly willy. If the interim relief were to be granted and the final relief denied, the children would be shuttled back to the mother. As upper guardian of minor children, I do not believe that this would be in the interest of the minor children. An application to vary a custody order must, except in very exceptional circumstances, be on notice so as not to interfere with the children's rights as opposed to the parents' interests.

In the result the applicant cannot be successful. The first respondent had applied for costs on a higher scale on the basis that the application was devoid of merit. The application was opposed and the applicant submitted that there be no order as to cost as the first respondent took the law into her hands and sought the assistance of police to enforce a civil judgment. As stated in *Nel* v *Waterberg Landbouwers Co-operative Vereeniging* 1946 AD 597 cited by the applicant, costs on a higher scale are only awarded "by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party" (at p 607). I do not believe there are any special circumstances warranting the award of costs on a higher scale. The applicant's conduct cannot be said to be irreprehensible, vexatious or frivolous. At the same time, I do not believe that the applicant should not be ordered to pay costs at all. This is a matter that should not have been brought on an urgent basis given the reasons cited earlier.

In the result, the application is dismissed for want of urgency with costs.

*Mtetwa & Nyambirai*, applicant's legal practitioners
*Sawyer & Mkushi,* 1st respondent's legal practitioners