LITCHEL MANDIVEYI
versus
ADLAI MACKENZIE PAZWAKAVAMBWA
and
THE SECRETARY FOR THE MINISTRY OF JUSTICE,
LEGAL AND PARLIAMENTARY AFFAIRS (N.O)

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 22 February and 10 March 2022

Opposed Matter

B Mahere, for the applicant
M Nkomo, for the respondent

MAXWELL J:

BACKGROUND FACTS

On the 10th of January 2019, first respondent obtained a decree of divorce after obtaining applicant's consent as evidenced by a consent paper filed of record. Custody of a minor child, Soryn Nashe Pazvakavambwa (born on the 4th of November, 2012) was granted to the applicant with first respondent exercising reasonable access which included:

- "14 continuous days from the time the minor child finishes school on (sic) during the school holidays. Plaintiff will take care of the costs of the access if it is in South Africa where the Plaintiff sometimes works;
- Half of August school holidays, limited to 14(fourteen) days which maybe consecutive;
- Half of the December school holidays, limited to 14(fourteen) days which maybe consecutive;
- Reasonable telephonic contact."

The applicant asserted that from January 2019 to March 2020, the terms of the court order were observed by both first respondent and herself. The applicant stated that sometime in March 2020 she was surprised to receive a letter from first respondent's lawyers accusing her of denying first respondent access to the minor child. She further stated that the letter also demanded that she authorizes the child to travel to South Africa during the school holidays. She indicated that she respondent by disputing the allegations of refusal of access and allowed first respondent to take the child to South Africa. Subsequently the child was taken to South Africa and was not returned

after the school holidays. The first respondent indicated that the child would return when the covid-19 induced travel restrictions were allowing for travel.

The child was enrolled at a school in South Africa. On the 24th of November 2020 a Joint Custody Agreement (the Agreement) was signed in terms of which the first respondent would have custody during school days. The applicant alleged that she signed the agreement under duress. She submitted that she was allowed to see the child in December 2020 when she travelled to South Africa at her own cost. She accused first respondent of refusing with the child and allowing her limited telephonic contact with him.

THE APPLICATION

On the 16th of June, 2021, applicant filed the present application seeking a declaratory order in terms of section 14 of the High Court Act [*Chapter 7:06*] and an order compelling first respondent to release the child to her. She submitted that the said section should be read with Article 15 of the Child Abduction Act [*Chapter 5:05*] (the Act) which requires that there should be a ruling that the child's removal and detention in another jurisdiction was wrongful. I believe applicant meant to refer to section 10 of the Act or Article 15 of the Convention on the Civil Aspects of International Child Abduction. Applicant claimed that the child was illegally abducted by his father because the father deceived her and took the child under the guise of exercising his rights of access. She further claimed that duress and threats were used to induce her to sign the joint custody agreement. According to her, it is in the best interest of the child that he be returned to Zimbabwe.

The application is opposed. First respondent averred that the application is an abuse of court process as the removal of the child was not wrongful at all as the child was taken to South Africa with the written consent of the mother. Further that the child could not be returned to Zimbabwe promptly in 2020 due to the Covid-19 induced lockdowns and travel restrictions. The first respondent stated that it became necessary in the best interest of the child to enroll him in a private school in South Africa so that he would not loose precious learning time. He further stated that applicant and he later signed the Agreement in terms of which they agreed that it would be in the best interest of the child to stay with him in South Africa, with the applicant having reasonable access to him. The first respondent pointed out that the Consent Paper, in para. 11, countenanced mutual variation of its terms and conditions as long as the variation was reduced to a written

agreement and signed by both parties. Further that as the Agreement was signed by both parties, it is valid and does not derogate from the best interest of the child. The first respondent further pointed out that the child was enrolled in school in June 2020 and if that is when applicant realized that the child had been abducted, it is puzzling why she would wait for a whole year before instituting proceedings for the return of the child. Further that there is no evidence that she demanded the return of the child and that the demand was not acceded to. The first respondent disputed that any threats were made to the applicant. He further stated that it is not in the best interest of the child for him to return to Zimbabwe. He submitted that the standard of living and basic social amenities and services in South Africa are way better than in Zimbabwe. He further submitted that the child had settled in well, made new friends at home and at school and acclimatized to the living standards in South Africa. He prayed for the dismissal of the application with costs on an attorney-client scale.

In her answering affidavit, Applicant insisted that the child's removal and continued retention was wrongful. She pointed out that when the child was taken to South Africa there were covid-19 travel restrictions so that should not be an excuse for not returning him. She insisted that the Agreement was signed after she was threatened and is therefore not valid. In her view, that Agreement cannot change the position stated in a court order. She further insisted that it is in the best interest of the child for him to return to Zimbabwe.

ANALYSIS

The first issue to consider is whether or not the minor child was abducted from Zimbabwe. A helpful definition of abduction is found in the Code of Virginia in the United States of America. Article 18.2-47 thereof states that:

> "Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of 'abduction'."

It is necessary to consider whether or not the removal of the child from Zimbabwe was wrongful. The circumstances of this case, in my view, lead to the conclusion that the removal was not wrongful. On 19 March 2020 applicant responded to a letter from first respondent's legal practitioners. The letter is Annexure "E" to the Founding Affidavit. In the second paragraph she stated; -

> "The child will travel to the (sic) South Africa during the school holidays as per the divorce order. The government of Zimbabwe has directed that all children must be in school. Therefore the minor shall travel after schools have closed, and not any time prior to that."

This was confirmed in paragraphs 14 and 15 of the Founding Affidavit where applicant stated:

> "14. ……. I agreed to allow the first respondent to take our minor child to South Africa for the school holidays as per the Court Order….
> 15. The minor child left Zimbabwe for South Africa as agreed by the parties……."

It therefore follows that when the child left Zimbabwe, the applicant had agreed to his going to South Africa. No basis therefore exists for the Court to declare that the removal of the child from Zimbabwe was wrongful within the meaning of Article 3 of the Convention on the Civil Aspects of International Child Abduction as required in section 10 of the Child Abduction Act [*Chapter 5:*05]. The question that arises is whether or not the applicant was intimidated or deceived into agreeing that the child goes to South Africa. The answer is in para. 14 of the Founding Affidavit in which she indicates that she was complying with the Court Order. There is no indication that she was intimidated or deceived into so complying. However, that is not the end of the matter.

The next issue is whether or not the child is unlawfully retained in South Africa. The definition stated above makes it wrongful to detain another person with the intent to withhold him from any person lawfully entitled to his charge. The applicant's case is that the continued detention of the child in South Africa is wrongful as the agreement was that he was supposed to be returned when schools opened. The first respondent's position is that the continued retention of the child in South Africa was lawful and is sanctioned by the Agreement. The question that arises then is whether the Agreement is valid as applicant impugned it and alleged duress and threats. The applicant does not dispute signing the Agreement. It is trite that an agreement can be vitiated by duress but the duress has to be so severe as to negate any element of voluntariness. See *Arend and Anor* v *Astra Furnishers (Pty) Ltd* 1974 (1) SA 298, *Muza* v *Agricultural Bank of Zimbabwe Limited* SC 70/03. It has been held that for duress to be a defence it must be reasonable and the party alleging it has the onus of showing that the agreement would not have been concluded had it not been for the duress. See *Paragon Business Farms (Pty) Ltd* **v** *Du Preez* 1994 (1) SA 434. I find that applicant cannot be termed as a person who can easily be intimidated. To start with, from

the record, she is a person who is aware of her rights and how to enforce them. On the 19th of March 2020, she wrote in Annexure "E" to her Founding Affidavit; -

> "These accusations are baseless and premature. I will refer you to the divorce order for further clarifications. Your client is the one in defience (sic) of the order and I will prove otherwise in the court of law.
> And if this issue is set in court I will demand that your client pay all the legal cost for such proceedings in the punitive Attorney and Client scale."

The applicant also attached Annexure "G" to her Founding Affidavit in which she is alleged to have made two threats. The first was a threat of making a police report on allegations of abduction. The second was a threat to kill the first respondent. I am not persuaded that such a person can be easily intimidated by a threatened violation of a court order. Applicant has failed to make out a case for duress and I find that the Agreement is valid. No case has been made for the Court to declare that the retention of the child outside Zimbabwe is wrongful within the meaning of Article 3 of the Convention on the Civil Aspects of International Child Abduction as required in s 10 of the Child Abduction Act [*Chapter 5:05*].

The applicant argued that even if the Agreement is held to be valid it is not part of the terms of the consent paper and the divorce order. She argued that the court order was not varied or changed by another court order. Counsel for the first respondent submitted that it is permissible to vary agreements without reference to court. It is trite that lawful agreements freely concluded by persons of competent capacity are sacrosanct and therefore enforceable at law. Authorities show that it is permissible for parties to agree to vary such court orders without reference to court. BEADLE AJ, as he then was, remarked in *Exparte Boshi & Anor* 1978 RLR 382 (H) at 383 F that:

> "In matters such as this where the amendment can be of interest only to the parties themselves, I do not think the court would require formal amendment of the original order or consider it discourteous to the court if no formal amendment was applied for."

In casu, I have held that the Agreement is valid. The parties agreed to amend the original position stated in the consent paper in the best interest of their minor child. The issue of the custody of the child arising from that agreement could only affect none other than the parties themselves. That being the case, the parties were within their rights to amend the consent order regulating their divorce without reference to court. The agreement was therefore, lawful and enforceable at law

like any other contractual agreement. In the words of BEADLE AJ, as he then was, in *Exparte Boshi & Anor* (supra):

> "The parties having entered into an agreement, it may be enforced as an ordinary contract and to apply to court for the amendment seemed a waste of costs."

Courts of law are bound to honour agreements between parties that are entered into freely and voluntarily. In *Kundai Magodora & Ors* v *Care International Zimbabwe* SC 24/14 the Supreme Court stated this as follows:

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells v South African Alumenite Company* 1927 AD 69 at 73; Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H."

As argued for the first respondent, when the parties signed the Consent Paper, they anticipated consensual cancellation or variation of any terms and conditions thereof. As a result they included a clause that:

> "11.1 No consensual cancellation of this Agreement or any of the terms and conditions hereof, including this clause or any agreement at variance with the terms and conditions of this agreement shall be binding on either party unless reduced to a written agreement signed by both parties."

The Joint Custody Agreement is at variance with the provisions of the Consent Paper. It was however reduced to writing and signed by both parties as per the above clause. The applicant's argument is therefore untenable at law. The variation of the Consent Paper was done properly and lawfully. It follows that the continued stay of the child in South Africa is legal as it is sanctioned by the Agreement.

The last issue to consider is the best interest of the child in these circumstances. The welfare of a minor child is at stake. The best interest of the child is duly protected by the courts in terms of section 81 (2) and (3) of the Constitution which provides that:

> "(2) A child's best interests are paramount in every matter concerning the child.
> (3) Children are entitled to adequate protection by the courts in particular the High Court as their upper guardian."

The applicant is seeking an order for the release of the minor child to her in Zimbabwe forthwith, in any event, not less than 48 hours from the date of the order of this court. In her view, it is in the best interest of the child that he be returned to Zimbabwe. In her heads of argument she stated that where parents of a minor child live separately, custody should be granted the mother as the minor child needs natural love and affection of his biological mother. She referred to the case of *Chiwenga* v *Mubaiwa* SC 86/20. According to her natural love and affection of a biological mother cannot be replaced by a step mother, a housekeeper or a flamboyant lifestyle which the first respondent is offering.

In response, the first respondent argued that the law recognizes the child's right to parental care, not just maternal care. He pointed out that there are no special circumstances which put the applicant in a better place compared to him. He submitted that it is in the best interest of the child to continue in the new environment. I agree. In the *Chiwenga* v *Mubaiwa* case (supra) it is highlighted that the law presumes that at the time of separation of parents, it is in the best interest of the child that its custody be with the mother until the contrary is proved in a competent court and that that is a rebuttable presumption. As stated above, the child went to South Africa with the mother's blessing. At the time of the hearing of this matter, the child had been in South Africa for one year and eleven months. The child has been attending school in South Africa. I am of the view that the presumption that it is in the best interest of the child for his custody to be with the mother has been successfully rebutted. It is not in his best interest to order his return after close to two years. In any event the Applicant still has access rights.

DISPOSITION

The application fails and I make the following order:

"The application be and is hereby dismissed with costs.'

Phillips Law, applicant's legal practitioners
DNM Attorneys, first respondent's legal practitioners