Judgment No. HB 10/2003
Case No. HC 1696/2002

VIVIAN JERE

Versus

GERALD CHITSUNGE

IN THE HIGH COUT OF ZIMBABWE
CHEDA J
BULAWAYO 18 OCTOBER 2002 & 23 JANUARY 2003

K Phulu for the applicant
G Nyathi for the respondent

Execution Pending Appeal

CHEDA J: This is an application for leave to execute an order of this court granted in case number HB 48/02 pending the outcome of respondent's appeal against the said order.

Applicant and respondent are married under customary law and there is one minor child Geraldine Thandeka Chitsunge hereinafter referred to as "the child". Due to matrimonial problems the parties separated resulting in the applicant moving to England where she is presently working as a Physiotherapist leaving the child with her relative. Applicant applied to this court and was granted an order to remove the child to England. Respondent then noted an appeal with the Supreme Court against that decision. Applicant now applies that pending the outcome of the appeal she be allowed to execute her order.

Respondent through his legal practitioner has opposed this application on the basis that this will deprive him of his right of access and custodianship of his minor child. Our courts have set out three factors for consideration in deciding whether or not to allow execution pending appeal. These are:-

1. the likelihood of irreparable harm being suffered by the applicant if leave to execute pending appeal is refused.
2. The likelihood of irreparable harm being suffered by respondent if leave to execute pending appeal is granted.
3. The prospects of success on appeal

Applicant is now based in England where she is employed as a physiotherapist. She has been there earlier. The opportunity of her to be with the child has arisen and has been recognised by this court after careful consideration, see *V Jere* v *G Chitsunge* HB-48-02. The possibility of harm being suffered by both parties is indeed present. The question, however, is whether that harm is reparable. In the present case the said harm should not only be confined to the applicant but should also have a bearing on the child who is in the centre of the dispute. I propose to deal with that point below:

The likelihood of irreparable harm being suffered by respondent if leave to execute pending appeal is granted should also be considered in relation to the child. Then of course, the question of success or failure of the appeal will in my view crystallise itself as a result of the outcome of the two requirements *(supra).*

As already intimated above, applicant is based in England. Respondent's fear, which is quite normal is that if applicant takes the child away from Zimbabwe his right of access to the child will be curbed. While this is true, it should also be accepted that separation or divorce of the parties shakes the equilibrium of their lives and as such life can never be the same, thereby necessitating the parties to adapt to changed circumstances. While the parties themselves can easily deal with their emotions and grief, the court's paramount consideration is the interest of the child.

The interest of the child means, therefore, that the interest of the parents are secondary. The common practice is that if all else is equal, especially if the child is young the mother is likely to be given custody. The following in my view, is what the court should take into consideration in determining the interest of the child. The list is in exhaustive.

1. the fitness or otherwise of the custodian parent
2. the age of the child
3. the sex of the child
4. the length of time the child has lived with either party or his or her relative
5. the degree of emotional stress which the child will suffer in the event of the child being separated from the other parent
6. any risk of ill treatment by either party or member of his or her household.

In the present case, applicant has the following factors in her favour:

(1) She has found a job and is therefore comparably comfortable.

(2) The child is very young and a girl. Because of her age and sex it is only proper that during her tender age, it is the applicant who should look after her, being her natural bond. That bond is extremely necessary in both the normal mental and physical development of the child is to be achieved.

(3) The child has lived with applicant's mother for a reasonably long time and therefore there is a bond which should not easily be terminated it is likely to cause emotional stress on the child.
Respondent on the other hand has not had custody of the child before this issue came up. He is already married with a child. In as much as he like most men should prefer to bring up their children under one roof, it is not always possible as there is the problem of step-parenting. I make no determination as to the suitability or otherwise of respondent's wife as a parent. That is how far I can comment.
The above factors wholly favour the interest of the child as opposed to that of applicant.

If the mother, in the present case is allowed to take the child to England, it can not be properly argued that her departure to England is solely for her selfish interest, as it were. The fact, that she is going to further her career is in fact in the best interest of the child. See *Nash* v *Nash* 1973(2) ALLER 705 at 706b – c.

Respondent has vigorously opposed execution of applicant's judgment on the basis of irreparable damage to him in the event of success of his appeal. Our law now places the onus of proof of such irreparable harm on the claimant and will sympathise with such claimant where the suspension sought is for a judgment other than that sounding in money.

In *Santam Insurance Co Ltd* v *Paget* (2) 1981 (1) ZLR 132, where his Lordship GUBBAY J (as he then was) stated at 134G-H.

> "As observed by GOLDIN J, (as he then was), in *Cohen* v *Cohen* (1) 1979 RLR 184 (G-D) 1979 (3) SA 420 (R) at 423B-C,
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> The court enjoys an inherent power, subject to such rules as there are, to control its own process. It may, therefore, in the execution of a wide discretion, stay use of its process of execution where real and substantial justice so demands. See also *Graham* v *Graham* 1956(1) SA 655 (J) at 658. The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused to him or to express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice."
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> The learned judge went further and stated at p136B,
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> "I have already stressed that as a general rule execution will be allowed to issue where the judgment is for the payment of money (see *Geffen* v *Strand Motors (Pvt) Ltd* 1962 R & N 259 t 260H; 1962(3) SA 62 (SR) at 64A), but the court will, of cause, exercise its discretion according to the circumstances of each particular case."

The court has inherent power to control its own process, this therefore stands to reason that it has a discretion on the basis of real and substantial justice. The harm which respondent envisages will result if his appeal succeeds is in my view, is curable by the enforcement of the order which the appeal court would give. There is therefore no irreparable harm which can befall the respondent. On the other hand the

necessity to secure and protect the interests of the child is irreparable harm which can befall the applicant.

The stay of execution in our law also depends on the prospects of success of the appeal. Even if this court is not an appeal court, it is constrained to look at the grounds of appeal. Respondent has vigorously argued for joint custodianship. This argument is untenable, as the parties now live oceans apart as it were. If that ground is used, in my view his chances of appeal will be nil.

In granting the order CHIWESHE J in my view canvassed all the relevant issues and I totally align myself with his decision. I find that the prospects of respondent's success on appeal is very doubtful. Respondent on probabilities has failed to prove the possibility of irreparable harm to himself.

I accordingly order as follows that:

1. The respondent be and is hereby ordered to surrender the passport of the minor child Geraldine Thandeka Chitsunge to the Deputy Sheriff upon demand, or within 2 days of the Deputy Sheriff making such demand.
2. The Deputy Sheriff be and is hereby authorised and directed to demand, receive and/or collect the said passport from the respondent, and to deliver it to Messrs Coghlan and Welsh Legal Practitioners
3. The respondent shall pay the costs of this application.

Coghlan & Welsh, applicant's legal practitioners
Messrs Sansole & Senda, respondent's legal practitioners