Judgment No. HB 20/2003
Case No. HC 162/2003

VALERIE CLAIRE De MONTILLE

Versus

PAUL LOUIS De MONTILLE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 6 & 27 FEBRUARY 2003

J James for the applicant
Ms N Ncube for the respondent

Urgent Application

NDOU J: On 23 January 2003 CHEDA J ruled in favour of the applicant in HB-6-03 (HC 2794/02) in the following terms:

> "1. That the 1st respondent be and is hereby directed to sign section 5 of the application for a passport for Paul Declan De Montille, birth entry 08-2025594D 00 within two days of this order.
> 2. That 1st respondent be and is hereby ordered and directed to sign section 69 of the applicant's application for a student (temporary) visa pertaining to Australia within two days of the date of this order.
> 3. In the event that the 1st respondent fails to sign the aforesaid documents in paragraphs 1 and 2 within two days of the date of this order, that the Deputy Sheriff, Bulawayo be and hereby is directed and ordered and authorised to sign the aforesaid documents on behalf of 1st respondent.
> 4. That the 1st respondent pays the costs of this application on a legal practitioners an client scale."

The matter was placed before me by the consent of the parties and my brother judge who should have dealt with the application.

The full facts of the matter appear from HB-6-03. Briefly, the parties are married to each and the said marriage still subsists, although it is falling apart as evinced by the divorce proceedings that have commenced. During the happier times in their matrimony, they decided to go and settle in Australia. Preparations for their emigration culminated in the respondent obtaining a 5 year Australian visa. He

subsequently travelled to Australia. Their happy and mutual emigration was, unfortunately, not to be. Their matrimonial bliss came to an abrupt end resulting in a separation. During the separation, the applicant made her own arrangements to go to Australia with their son Declan for a initial period of a year. She enrolled herself at Queensland University of Technology for a B. ED (degree) one year in service training. She registered as a teacher in Australia and obtained a part time job as a lecturer. She secured a child care service for Declan at Kevin Grave Child Care Centre. She secured accommodation with a friend, with two other friends offering her alternative accommodation in the event of her first choice accommodation not materialising. The respondent did not seem to approve these arrangements. Although he initially seemed to co-operate, after he had in his possession Declan's passport problems developed resulting in the application before CHEDA J. The respondent has lodged an appeal against the above mentioned order by CHEDA J with the effect that the operation of the said order is suspended. This is what brought about the urgent application before me. The objective of this application is to ensure the execution of the order of CHEDA J pending appeal. The applicant submits that the appeal was lodged *mala fide* in order to delay the emigration of the applicant and Declan. *Ms Ncube,* for the respondent has no qualms with the relief that the latter facilitates that Declan obtains another passport but objects to his removal from Zimbabwe. The main thrust of the appeal is two fold. First, the respondent submits that there is an unusual father-son close relationship between him and Declan. Second, that the applicant has not made adequate arrangements for Declan's settlement in Australia. By failing to take these factors into consideration (and other factors articulated in the notice of appeal) the respondent alleges misdirection on the

part of the learned judges's order. These objections centre around parental responsibility. It is trite that this court has the common law power to look after the interest of all minors, and if necessary, to interfere with exercise of parental power. The interests of the minor in such matters are always the decisive factor – see *Fortune* v *Fortune* 1955(3) SA 348 (A); *Short* v *Naisby* 1953(3) SA 572(D); *September* v *Karriem* 1959 (3) SA 687 (C) and *W* v *W* 1981 ZLR 243. This is called the welfare principle in England. But how does one balance the wishes and claims of the father, as is the case in casu, with the welfare of the child.

In Zimbabwe, the attitude of the courts is that they will not readily deprive the mother of lawful custody without good cause being shown – see *More* v *Richardson* 1974(2) RLR 16 and also *Nugent* v *Nugent* 1978 RLR 66. This attitude prima facie favours the applicant's case. The mother enjoys built-in advantage - see Re W (a minor) (custody) (1982). As alluded to above, the respondent's concern is the intended removal of the child from Zimbabwe. He argues that it is not in the best interests of the child to go to Australia without adequate prior arrangements. Reading through the various documents filed and averments by the parties it seems that, initially, it was both parties' intention to move to Australia with the minor. The respondent now has second thoughts about the move and has made passionate pleas to avoid his separation from the minor. He dwelt more on his parental claims. The court has to be careful not to let such parental claims and interests overshadow the interest of the child. The question is one of relative weight to be given to the wishes and claims of the natural father against those of the minor. In the English decision of *J* v *C* [1970] A.C. 668 it was held that this involves a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other

circumstances, are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. This suggests that the claims of parent-hood are only relevant in so far as they indicate what will be best for the child.

The respondent's greatest fear seems to be that applicant will not return the child in the event that he is awarded custody in the pending matrimonial matter. It may be necessary to obtain suitable assurances or safeguards to ensure the return of the child. The nature of assurance or safeguard required will obviously depend on the circumstances of each case – for example see Menasche 1966 (1) PH B9 (C); Allan 1959 (3) SA 473 (SR) 476 and *The Law of Access to Children* by I D Schafer at pages 88 – 89. *In casu,* it seems to me that such fear is attended to in three main ways. First, the matrimonial case which in this jurisdiction may be used to provide the assurance that the child will be returned to Zimbabwe – see *S* v *Bezuidenhout* 1971 (4) SA 32 (T). Second, the facts reveal that the applicant has a house in Bulawayo, which, if need be, may be used as security – see the Menasche case *(supra)*. Third, the respondent himself has prepared to emigrate to Australia by August 2003. He has a visa and the requisite authority to reside in Australia. He has a valid ticket to Australia. Had it not been for the separation he had planned to emigrate to Australia with the applicant and the child.

The respondent also criticises the day care arrangement that the applicant made for the child. This arrangement should be seen in context. This is a half day arrangement when the applicant is teaching. On the issue of day care I am impressed by what author Brenda M Hoggett stated in *Parents and Children: The Law of Parental Responsibility* on page 20:

> "To many, day care, outside the home will seem the next best alternative. If the care is properly suited to the child's needs and he can retain and build a good relationship with his parents, there is little risk of harm. Indeed, it may be a valuable way of relieving stress in the home, or redressing material or social disadvantages."

The child is aged 3 years and some months. In cases of this kind a vital factor is the need to cause as little disruption as possible to the child's already disrupted life. The court has to take into account the child's need for stability and continuity, not only in relationships with parents, but also in physical surroundings, school, friends and above all brothers and sisters – see Re (a minor) (custody of child) (1980) 2 F L R 163 and *B* v *B* (custody of children) [1985] F L R 166. I have dealt extensively with these principles on the question of minors in order to apply these principles in the determination of the prospects of success of appeal.

I believe that even on appeal the welfare principle will determine the fate of the appeal. On page 6 of the cyclostyled judgment CHEDA J determined that the applicant was a custodian parent of the child in terms of section 5 of the Guardianship of Minors Act [Chapter 5:08]. From the facts this finding cannot be disputed. The learned judge rightly pointed out that the respondent himself intended to emigrate to Australia and in furtherance of this objective he sought and indeed obtained a 5 year Australian visa and has visited that country on an explorative basis. The respondent did not take the learned judge into his confidence on his current plans. On page 7 the learned judge applied the welfare principle and stated as follows:

> "The interest of the child takes precedent over those of its parents. In making a determination the courts should be guided by the arrangements and facilities each parent has made for the child. Applicant has shown that she has secured accommodation for herself and the child and teaching post, all these in my view are in the interest of the welfare of the child. Against that is the 1st respondent who is a safari operator and/or conservationist whose core business is interaction(sic) with the bush in most cases."

On page 5 the learned judge appreciated "the time honoured principle by our courts that children should not be disturbed from their accustomed environment unless that it is the best interest of the children to do so." He made reference to the judgment of CHATIKOBO J in *Kuperman* v *Posen* 2001 (1) ZLR 208. He carefully distinguished the facts of this case from those in the *Kuperman* case *(supra*). He weighed the circumstances of the custodian mother against those of the non-custodian father of this child who is just over three years old but still under four years. Children of this age, in my view, will not be greatly affected by the movement to another country like older children. On the one hand, the custodian mother produced a detailed plan of her intended emigration supported by documentary evidence. She was open and candid with the court on exactly what her emigration entails. On the other hand, the non-custodian father seems content with the criticism of the mother's arrangements. He does not give the court a candid explanation of his own plans. It is common cause he intended to emigrate to Australia and took steps in that direction. He does not tell the court whether he has abandoned these plans, and if so why. If that is not the case, he does not say what he intends to do in Zimbabwe and how his circumstances will accord with the best interests of the child. He was very emotional or passionate about his bond to this child. That bond is not necessarily the best interest of the child. He did not indicate in his evidence how he would deal with the situation of the child of such a tender age in light of the nature of his employment.

Coming to the specific grounds of appeal my observations are the following. First, the learned judge deliberately ordered the respondent to sign section 5 of the application for a passport. From his judgment he, obviously appreciated that the effect of the order is removal of the child from the jurisdiction of the court and

physical access of the non-custodian father. He gave his reasons for doing so. In this regard he cannot be faulted on appeal as he apparently applied the welfare principle correctly. There are no prospects of success on the first ground. Second, the learned judge actually found that the respondent had lost the child's passport. The respondent prefers to say he misplaced it. Be that as it may, it was only produced by the respondent after the order. This tends to support the learned judge's finding that such loss or misplacement was not bona fide on the part of the respondent. Third, the learned judge took into consideration the respondent's objection to the arrangements by the applicant. The order was made after hearing both parties and there is no misdirection. Fourth, the learned judge took into account the respondent's objection and nevertheless ruled in favour of the applicant and ordered him to sign the application for student permit. The nature of this application renders the ground of appeal against the award of costs at an enhanced or punitive scale unnecessary to consider at this stage.

I find that, from the foregoing there are no prospects of success on appeal. This is one of the exceptional case where execution of the order pending appeal is merited. I, accordingly, grant the application in terms of the draft.

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners
Lazarus & Sarif, respondent's legal practitioners