HB 97-17
HC 927-17
XREF HC 126-15
XREF HC 2187-14

THANDAZILE JUBANE (nee KHUMALO)
versus
KHUMBULANI JUBANE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 5 APRIL 2017 AND 13 APRIL 2017

Urgent Chamber Application

Ms D Phulu for the applicant
Ms A Masawi for the respondent

MATHONSI J: After hearing arguments from counsel in this matter, which for all intents and purposes took the countenance of a custody dispute involving a 5 year old girl, the daughter of the parties herein, I granted a provisional order in favour of the applicant the interim relief of which was in the following terms:

"Pending the finalization of the matter the applicant is granted the following relief:

1. The order of the court granted in default on 16 July 2015 in HC 2187/14 is hereby suspended to the extent that it awards custody of the minor child to the respondent.
2. The minor child, shall be returned to the United Kingdom by the respondent on 9 April 2017 failing which the applicant shall be at liberty to return to this court for an order compelling the return of the child to the United Kingdom.
3. While in the United Kingdom the parties shall approach the courts in that jurisdiction to determine the question of which of the parents should be awarded permanent custody of the said child.
4. In the event of their failure or inability to do so, either party shall be at liberty to approach this court for an order for permanent custody to be made.
5. Pending determination by the court of the permanent right of custody, the child shall be given to the applicant."

I said that the reasons for issuing that relief would follow. These are they. The applicant and respondent were married to each other at Bulawayo on 13 July 2001 in terms of the Marriage Act [Chapter 5:11] which marriage subsisted until it was terminated on 16 July 2015 in HC 2187/14, a termination induced by fraud perpetrated brazenly and indeed shamelessly in broad

day—light by the respondent. He used trickery and outright false hood to influence the court to grant him a decree of divorce and ancillary relief all tilted in his favour, uncontested.

During the subsistence of their marriage the parties were blessed with three children namely Z, a boy born on 26 December 1995 and has since attained majority status, Y, a girl born on 18 September 2000 and X, a girl born on 28 September 2011 who, at the time the divorce was granted was only 3 years old. It is the last born child whose custody forms the basis of this application.

The parties also acquired property together including immovable properties in both Zimbabwe and the United Kingdom where they relocated to as a family in 2001. They acquired British citizenship and in the case of X she was born in that country and is a British citizen by birth. What is relevant for purposes of the present matter is that at some point in 2013 while they cherished domicile in the United Kingdom their marriage ran into turbulence and they commenced living apart. The applicant complains bitterly that the respondent had commenced having an improper association with a Jamaican woman who led him astray. In no time he returned to Zimbabwe with the lady from the world of reggae music leaving her behind in the United Kingdom with the children.

In fact it is common cause that the applicant has retained custody of the two elder children but in respect of the youngest girl, the parties appear to have had some kind of shared custody. There is evidence that the respondent regularly brought the child to Zimbabwe where he even enrolled her at a preschool during the time she remained in Zimbabwe. It is apparent that the respondent alternates between Zimbabwe and the United Kingdom every year and when coming to Zimbabwe he regularly brings the child with him.

It was during one such visit to Zimbabwe that, self-acting, the respondent issued divorce summons against the applicant on 2 October 2014 in HC 2187/14. In the summons he gave the applicant's address as No. 7 Smith Avenue Northvale Bulawayo, which happens to be the parties' home in Zimbabwe and is occupied by the respondent himself whilst in Zimbabwe, except that at that material time the applicant was, to the knowledge of the respondent, firmly

based in the United Kingdom. In fact by his own admission the respondent left the United Kingdom for Zimbabwe in October 2014 and the applicant remained in that country.

That inconvenient geographical location of the applicant could not be allowed to stand in the way of an easy and uncontested divorce with all its attendant benefits of an order for custody in his favour and the election of matrimonial property of choice without the gramblings of the wife. Therefore even as he knew that the applicant was nowhere near Zimbabwe, the respondent sent the sheriff to serve the divorce summons at No. 7 Smith Avenue Northvale Bulawayo. On two occasions the sheriff attempted to serve the summons at that address and was informed by the general hand by the name Kabila that the applicant no longer resided at that address having left two years earlier. The sheriff submitted returns of service to that effect.

If one was wondering what that futile attempt at service of the summons at an address where the applicant was obviously not to be found was in aid of, the subsequent chamber application made by the respondent in HC 126/15 in which he sought an order for substituted service, is revealing indeed in that regard. In his founding affidavit seeking leave to serve the divorce summons on the applicant by publication surprisingly in the Herald, a newspapers circulating mainly in Harare, the respondent lied profusely. He stated:

> "1. I am the plaintiff in a divorce case HC 2187/14 and my address for service is No. 59 Nicoz House, 8th Avenue/Fort Street, Bulawayo.
> 2. Thandazile Jubane is the defendant in the divorce matter HC 2187/14 and her address is 7 Smith Avenue, Northvale Bulawayo.
> 3. The sheriff has twice attempted to serve the defendant in HC 2187/15 who is the respondent in this matter (see Annexure 'A' and 'B').
> 4. The respondent no longer resides at the address where I knew her to reside and as such am no longer able to serve her personally.
> 5. I therefore humbly ask this Honourable Court to grant me leave to serve the respondent (defendant in HC 2187/14) by publication in a local popular newspaper (The Chronicle).
> 6. I have attached the shortened version of summons which I will serve the defendant by publication in The Chronicle, a well locally circulated paper in this region of the country (see page 6)."

Of course rocket science is not required to show that the respondent could not have done all that on his own. His papers in that matter have all the footprints of a bush lawyer who was

aware of the procedure for substituted service and was obviously wallowing in the bush because of such unprofessional and dishonest conduct. In fact this court has, in recent history been inundated with such cases where Zimbabweans in the diaspora abuse the procedure for substituted service by claiming they have no knowledge of the whereabouts of their spouses in order to avoid service of summons and to obtain quick divorces fraudulently. It is despicable. While there is nothing wrong with, in fact it may be commendable, seeking greener pastures in the diaspora, these people must appreciate that this is a court of law which should not be subjected to abuse by the unscrupulous who no longer know how to act honourably. It is usually the dishonourable who associate with bush lawyers.

The application was paced before KAMOCHA J who queried why the respondent sought leave to serve summons in Harare when by his own evidence the respondent had stated that the applicant's last known address was 7 Smith Avenue, Northvale Bulawayo. The respondent quickly capitulated and effected an amendment to the draft order. That way he was granted an order for substituted service on 19 February 2015 allowing him to publish the summons in the Chronicle a newspaper circulating in Bulawayo.

He did not waste time quickly publishing the summons and as there was no way the applicant could have had notice of the summons when she remained patched in the comfort of Sheffield in the United Kingdom, the respondent romped to victory. A divorce order was granted in his favour in HC 2187/14 on 16 July 2015 as I have already stated. The ancillary relief was obviously tilted in his favour.

What is important for our purposes herein is that the respondent was awarded custody of the then three year old girl while the mother of the children, the applicant, was award custody of the elder children including that of Z who was already aged 20 years at the time. What informed the respondent's desire to have custody awarded even is respect of a boy who had long acquired majority status is not apparent from the record.

Whatever the case, without the knowledge of the applicant and through fraudulent means, the respondent obtained an order awarding him custody of a 3 year old girl who is a British citizen whose mother is also a British citizen and so is her two other siblings. The applicant says

those developments were not brought to her attention until recently. In fact she continued to exercise joint custody with the respondent oblivious that her status had changed.

In August 2016 she graciously released the girl to the respondent when he once again decided to return to Zimbabwe from the United Kingdom on the understanding that he would bring her back in two months' time. Once in Zimbabwe the respondent refused to return the girl and insisted on enrolling her at a local school. The respondent's new "wife" from the island that produced Bob Marley and other reggae greats would have none of it. She has constantly telephoned the applicant to reprimand her for giving away such a little girl and being a bad mother suggesting that she is unhappy with having to play the mother when the biological mother is alive and able to play her role.

It is considerations of that and other factors which then forced the applicant to save money for an air ticket to come to Zimbabwe to fight for her child. Upon arrival in Zimbabwe she says she engaged the respondent through his family only to be shown the divorce order. She was shell-shocked. She then made this application seeking an order allowing her to take the child back to the United Kingdom. She has filed an application for rescission of judgment in HC 926/17 to reverse the impact of the divorce order. Pending that she would want custody of X to be awarded to herself.

The application was strongly opposed by the respondent who said a lot of things. He stated that he has had *de facto* custody of the girl since 2013 when they commenced living apart. The applicant is not a good custodian parent because she works long hours as a caregiver in the United Kingdom. I do not intend to be detained by the lengthy affidavit of the respondent for two reasons. The first one is that most of what the respondent says is irrelevant. It only confirms that the parties have had shared custody of X since 2013. Secondly the respondent is demonstrably unreliable. This is a person who has lied and misled this court before as a result of which he obtained a divorce order by false pretences. His story therefore has no evidentiary value. It is trite that a witness who gives false evidence and lies about a particular incident or fact leads to an inference that such a witness is hiding something and is not to be relied upon.

See *Leader Tread Zimbabwe (Pvt) Ltd* v *Smith* 2003 (2) ZLR 139 (H); *Stohill Investments Properties (Pvt) Ltd* v *Mahachi and Others* 2014 (1) ZLR 533 (H) 547C.

Ms Masawi for the respondent challenged the urgency of the matter. She submitted that the certificate of urgency does not disclose urgency and that to the extent that the respondent has had custody since August 2016 with the applicant only acting now this is a classic case of self-created urgency. I do not agree. To begin with it must be understood that the decision to treat a matter as urgent and to grant interim relief involves the exercise of discretion on the part of the judge or court. Whether the matter should be treated as urgent and set down for hearing is entirely within the discretion of the judge upon being satisfied on the papers that it is indeed urgent. See *Triple C Pigs and Another* v *Commissioner General Zimbabwe Revenue Authority* 2007 (1) ZLR 27 (H) 30G, 31B.

I take the view that the circumstances of urgency vary from case to case and there can be no size fits all in that regard. I have stressed the point in the past that the issue of self-created urgency has either been misunderstood or blown completely out of proportion. In *Telecel Zim (Pvt) Ltd* v *Potraz and Others* 2015 (1) ZLR 651 (H) 659A I expressed the view that courts of law appreciate that litigants do not eat, move and have their being, as it were, in filing court process. They have other issues to attend to. Where they have managed to bring matters to court within a reasonable time they should be accorded audience. In this case the applicant is based in the United Kingdom. She became aware that the respondent was not going to return the child to her a couple of months ago and had to commence the task of looking for money and then buying and air ticket to travel to Zimbabwe. Under those circumstances, she acted within a reasonable time. Her only undoing was being presumptuous enough to buy a return ticket for the child even before obtaining a court order in her favour. For these reasons I exercised my discretion in favour of hearing the matter as urgent.

The situation obtaining in this case is almost the same as that which confronted MAWADZE J on *Vela* v *Magolis* 2013 (2) ZLR 611 (H), a case in which a man had hired a woman to pose as his wife and consent to divorce without the knowledge of his real wife who was a nurse based in the United Kingdom. The learned judge noted that there was a disturbing

increase in the number of cases of fraud of this nature in divorce proceedings and that there was a need for legal practitioners to be alerted of the prevalence of this "obnoxious practice, which threatens to erode confidence in our judicial system in unopposed divorce matters."

In our common law a judgment or order obtained through fraud may be set aside or rescinded. See *Vela, supra* at 618C-E; Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, pp939-940.

A party relying on the ground of fraudulent evidence to set aside a judgment must prove that;

1. the evidence was in fact incorrect;

2. it was made fraudulently and with intent to mislead; and

3. it diverged to such an extent from the true facts that the court would, if the true facts had been proved before it, have given a judgment other than what it was induced by the incorrect evidence to give.

See *Swart* v *Wessels* 1924 OPD 187 at 189-90.

I am not sitting to decide the rescission of judgment application but merely whether to grant interim relief to an applicant against whom judgment was obtained fraudulently. I am satisfied that the application for rescission of judgment it meritable and therefore that the respondent cannot benefit from his ill-gotten order.

It is clear that the parties have commenced to live apart and that the respondent has tried to use stealth in order to wrest the 5 year old girl from the custody of her mother in breach of s5(1) of the Guardianship of Minors Act [Chapter 5:08]. That subsection provides:

> "Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section four or this section or by a superior court such as is referred to in subparagraph (ii) of paragraph (a) of subsection (7)."

It has not been shown that the applicant is not entitled to the benefit of that provision. She has a right to sole custody until an order regulating the custody has been made. It is for these reasons that I granted the provisional order in terms of the amended draft order.

Vundhla-Phulu & Partners, applicant's legal practitioners
Mathonsi Ncube Law Chambers, respondent's legal practitioners