

LILIAN CHIDINMA IHEKWOABA  
versus  
CHIEF IMMIGRATION OFFICER  
and  
THE CO-MINISTERS OF HOME AFFAIRS  
and  
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
MUTEMA J  
HARARE, 10 October, 2011

### **Urgent Chamber Application**

*G Nyandoro*, for the applicant  
*T C Mudonhi*, for the 1<sup>st</sup> and 2<sup>nd</sup> respondents  
No appearance for the 3<sup>rd</sup> respondent

MUTEMA J: This application has its genesis in matters of immigration. The applicant is a Nigerian national. She was granted a single entry holiday visa to enter Zimbabwe on 30 January, 2008. That visa was to expire on 30 July, 2008. That document does not reflect that she accompanied any minor child.

The applicant has been staying in Zimbabwe ever since without lawful authority. This is common cause. She averred that on 3 October, 2011 the first respondent's officers raided her place of abode where they arrested her, her boyfriend Joseph Ikenna Osuji and her four year old daughter Mitchell Ihekwoaba.

On the same date, she explained to the first respondent's officers that her two year old son, Emmanuel Ihekwoaba was admitted in the paediatric intensive care unit Ward C1 at Harare Central Hospital, having undergone repair of bladder extrophy. Again this is also common cause. Doctor Banda authored a letter confirming that the child "is going to be managed in this ward for approximately two to three more weeks." The letter was written on 5 October, 2011.

On the basis of the applicant's explanation the first respondent allowed her to go home to attend to her son. When she reported at Immigration head office on 4 October, 2011 for further interviews she was told that she would be detained pending deportation to Nigeria. She in vain tried to explain that her presence at hospital to nurse her son daily and prepare the

special dietary food needed for his recovery were useful and also that she needed to be with her daughter Mitchell who remained at home with a maid and was surviving on the goodwill of Samaritans. She is currently detained at Chikurubi Female Prison.

While she admits that her stay in Zimbabwe is illegal and does not contest the same, she lodged this application so that she be released to enable her to attend to her ailing son and the daughter who is now living in the hands of strangers. The terms of the interim relief being sought in the provisional order are:

“Pending the return day, it is hereby ordered that:

1. The applicant shall be released from custody by the first respondent upon payment of a bond security with the Registrar of the High Court in the sum of US\$2 000-00;
2. The applicant shall be issued with a temporary permit whose further extension shall be subject to the medical outcome of her ailing child one Emmanuel Ihekwoaba who is currently admitted at Harare Central Hospital in the Intensive Pediatric (sic) Unit Ward C1; and
3. The costs of this application shall be in the cause.”

The terms of the final order sought are:

“That you show cause why an order in the following terms should not be made:

1. That the first respondent be and is hereby directed to release the applicant from custody pending the return date.
2. That there shall be no order as to costs.”

It behoves me at this juncture to utter some strictures that the terms of the first paragraph of final order sought are incompetent in that they are meaningless as they sound substantially the same as those in para 1 of the interim relief. If the order is a final one it defies logic that the applicant should be released from custody pending the return date. The final order is dealt with on the return date and is either confirmed or discharged! This is bad legal drafting on the basis of which an application can be dismissed without further ado.

The first and second respondents opposed the application as regards the order being sought and proposed, on humanitarian grounds that the applicant be granted periodic conditional releases from prison to go and see her son in hospital but as a detainee with the

first respondent providing a vehicle for the purpose during hospital visiting hours provided the applicant provides the fuel for the purpose. The applicant, through her counsel, declined the offer.

The main plank of the first and second respondents' opposition is premised on the following:

The applicant misrepresented to the first respondent when she entered Zimbabwe on 30 January, 2008 that she was on a 30 day holiday visit only to disappear until the day of her arrest – almost four years later. In her 2008 visa application, she claimed that she was coming alone but now claims that she was staying with a daughter called Mitchell. She does not disclose how this child came into the country from Nigeria, she alleges she left this child with a maid on her arrest yet in para 5.2 of her founding affidavit, the applicant avers that the people who were arrested by the first respondent's officers on 3 October, 2011 were herself, her boyfriend Joseph Ikenna Osuji and her child Mitchell.

The first respondent's officers never arrested, let alone saw this alleged child. (When, during the hearing, I asked the applicant's counsel to explain away the mystery surrounding this child, he declined to do so saying that he has no instructions to do so). The applicant was grossly irresponsible, to conceive a child with a "boyfriend" in a country in which she is a prohibited immigrant, thus giving the innocent child the status of a prohibited immigrant.

In her papers the applicant alleges that Joseph Ikenna Osuji, alias Joseph Ikechukwu Ihekwoaba – a family name also borne by her children and herself – is her boyfriend yet on 3 October, 2011 she deposed to an affidavit (annexure 'A' to the first respondent's opposing affidavit) stating that:

- a) One of her children (and must be the Mitchell) was born in Nigeria;
- b) Joseph Ikechukwu Ihekwoaba, also known as Joseph Ikenna Osuji is her husband and that they wedded in Nigeria – this is corroborated by annexure 'C' to the first respondent's papers, a copy of the marriage certificate whose original is with the first respondent;
- c) Her husband Joseph is also married to a Zimbabwean, one Abigail residing at 30 Mazowe Street, Harare.

The applicant is a devious character in that after having been allowed to go home on 3 October, 2011 to make travel arrangements for her deportation she came back the next day

reneging on her affidavit alleging that Joseph was only a boyfriend. This followed the pitching up of her legal practitioner alleging that the applicant was only a girlfriend to Joseph and also after she had been granted permission to confer with Joseph at Harare Remand Prison.

The first respondent will not deport the applicant soon for it is intended to secure a conviction against both the applicant and Joseph for illegal stay and harbouring a prohibited immigrant as well as bigamy and entering into a marriage of convenience respectively.

When the applicant and Joseph were arrested there was no child seen or arrested. The child's presence was only noted in the applicant's passport (annexure 'B' to the first respondent's papers) and on querying the child's whereabouts, the applicant was adamant that Mitchell Ihekwoaba was in Nigeria. It was only in her Founding Affidavit that reference to this child being arrested together with her was made.

The first respondent in the Opposing Affidavit stated that he visited the hospitalised child and was advised that the child is making steady progress and is being cared for by medical professionals and that there was no need for the applicant's presence the entire day as entry is only during visiting hours even by the applicant.

Due to her duplicity, evasiveness and sly character the applicant is a flight risk. She wants to use the sick child as a pawn to shirk the consequences of her actions when she has not exhibited traits of a mother who has the best interests of her child at heart.

In the case at hand, it is not in dispute that the applicant is a prohibited person in terms of s 14 (1)(i) of the Immigration Act, *Chapter 4:02* ("the Act"). In terms of s 8 (1) and (2)(b) of the Act an immigration officer is empowered to not only arrest but detain a prohibited person. This is what the first respondent's officers did in *casu*. The legality of the first respondent's actions is accordingly beyond caevil.

The applicant has approached this court asking it to show a humane face and grant the interim relief being sought. I remain alive to the time-honoured principle that this court is the upper guardian of minor children. However, sight must not be lost of the purpose of the Act as can be gleaned from its preamble as well as the requirements for an interim interdict.

The preamble to the Act provides:

"AN ACT to regulate the entry of persons into and the departure of persons from Zimbabwe; to prohibit the entry into and to provide for the removal from Zimbabwe of certain persons; to provide for the control of aliens; and to provide for matters incidental to or connected with the foregoing."

It must be pointed out at this juncture that immigration, as a concept, is not only sensitive but must be jealously guarded for the obvious reasons that it hinges on a country's security and well-being including that of its citizenry. This is the trend the world over.

With the foregoing in mind let me re-state the requirements of an interim interdict as laid down in *Enhanced Communications Network (Pvt) Ltd v Minister of Information, Posts & Telecommunications* 1997 (1) ZLR 342 (HC). These are they:

- (1) The right sought to be protected is clear; or
- (2) (a) if it is not clear, it is *prima facie* established, even though open to doubt; and  
(b) there is a well-grounded apprehension of irreparable harm if the relief is not granted and the applicant ultimately succeeds in establishing the right;
- (3) the balance of convenience favours the grant of the relief; and
- (4) there be no satisfactory remedy.

The rider to the above is that even where the requisites are established, the court still has a residual discretion whether to grant or refuse the remedy.

I will deal with the requisites in the above chronology.

### **CLEAR RIGHT/PRIMA FACIE ESTABLISHED**

According to the applicant, she wants to be released from detention so that she will be able to go to Harare Central Hospital to nurse her son who is admitted there. She has averred that she also wants to go back home (not to Nigeria) to take care of her four year old daughter Mitchell who remained there with a maid and is surviving on hand-outs from good Samaritans.

As regards the son in hospital it cannot be denied that motherly care and love is a clear right for a two year old who is recuperating in hospital following an operation. While the applicant added the appendage that she needs to prepare the special dietary food needed for the son's recovery this is not supported by annexure 'A' attached to her Founding Affidavit. That document states that the patient "is going to be managed in this ward for approximately two to three more weeks." It does not make any allusion to the mother being permanently required to be with the child or her being required to prepare any special dietary food. The child being admitted in the paediatric section means that he is in capable hands of professionals who are trained to nurse and feed him. The first respondent's contention that even if the applicant were to be released from detention she will only be allowed to see the

child during normal visiting hours has not be challenged. This will be taken to be the case. That being the case, the same result (of visiting the child during normal hospital visiting hours) can still be achieved via the first respondent's offer that arrangements can be made to ferry the applicant from Chikurubi to the hospital during those visiting hours which arrangement the applicant has surprisingly spurned. By spurning this offer I find no well-grounded apprehension of irreparable harm if the relief is denied.

Regarding child Mitchell, I have already alluded to the fact that in the applicant's visa application to come here this child was not included. The applicant therefore came alone or without her. When the first respondent saw the issue of this child featuring in the applicant's passport and queried it the applicant was adamant that the child was in Nigeria. The first respondent was surprised (understandably so) to read in the Founding Affidavit that the child had been arrested at Avondale together with the applicant and Joseph – paragraph 5.2 thereof. Had the first respondent arrested this child as alleged he would not have professed ignorance of her whereabouts. Having looked at the applicant's alleged shenanigans I am easily persuaded that that child is not in this country as is being alleged by the applicant unless she was smuggled into the country, which issue the applicant's counsel refused to comment on. In respect of this child no clear or *prima facie* right has been established and consequently no well-grounded apprehension of irreparable harm has been established.

### **BALANCE OF CONVENIENCE**

The balance of convenience in *casu* does not favour the grant of the relief sought. The applicant refused to visit her son from detention under escort for reasons best known to herself or her counsel. She has been staying in this country illegally for close to four years without detection by the law enforcement agencies, enjoying the hospitality and amenities of the country without entitlement thereto to the extent of even conceiving and bearing a child who is now two years old. Her failure to explain how Mitchell came into Zimbabwe (if ever she did) or her exact whereabouts (at first she said she is in Nigeria then changed alleging was also arrested by the first respondent and is here with a maid) coupled with her change of hymn after being coached by Joseph Ikechukwu Ihekwoaba at Harare Remand Prison - annexures 'A' and 'C' to the first respondent's opposing papers, viz her affidavit and marriage certificate respectively goes to show that she is a person to whom truth is alien. She depicted herself as a smart "Aleck" who can never be trusted let alone with a blanket release from detention.

### **NO OTHER SATISFACTORY REMEDY**

Regarding the son in hospital, as stated above, there is an alternative remedy. Medical professionals at the paediatric section of the hospital are already managing him. If it is desirable of the applicant to merely visit the son, the first respondent's offer to ferry her there and back to detention during normal hospital visiting hours constitutes an alternative satisfactory remedy which the applicant, however, spurned to her detriment.

As for the girl Mitchell, if ever she is here as alleged Social Welfare can easily be mandated to see to her well-being. The department of Social Welfare's services can also even be extended to cater for the well-being of the son on discharge from hospital. In fact it would be better and safer for the children that way instead of being with the applicant – a prohibited immigrant who smuggled a daughter into the country and illegally stayed here and had the pernicious temerity to bear offspring regardless of her illegal status.

The applicant has not disclosed whether she is employed or her source of sustenance in this country to show how she has been or will be looking after her offspring if released.

In view of the foregoing, even if the requisites for an interim interdict had been established I would be minded not to exercise my discretion in favour of granting it.

In the result the application be and is hereby dismissed with costs on the scale of legal practitioner and client.

*Hamunakwadi, Nyandoro & Nyambuya, applicant's legal practitioners*

*Civil Division of the Attorney General's Office, 1<sup>st</sup> and 2<sup>nd</sup> respondents' legal practitioners*

