

REPORTABLE (77)

ALLEN ALESKSEY GESSEN
v
PRISCILLA CHIGARIRO

SUPREME COURT OF ZIMBABWE
HARARE: 2 JUNE 2021 & 30 JUNE 2021

T. Zhuwarara, for the applicant.

Ms M. Musuka, for the respondent.

IN CHAMBERS

Judgment No. SC 80/21

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MATHONSI JA: This is an application for leave to appeal against a judgement of the High Court handed down on 1 October 2020. The applicant's initial appeal filed timeously was struck off the roll on 1 April 2021 for the reason that the notice of appeal was fatally defective.

FACTUAL BACKGROUND

The applicant is a citizen of the United States of America (USA) even though he was born in Russia. The respondent is a Zimbabwean citizen. The two met in 2011 in Harare Zimbabwe and commenced having a relationship which is said to have been upgraded to a customary marriage by reason that the applicant paid the bride price for the respondent. They never registered a legal marriage.

The parties' association was blessed with a boy child called Orrin who was born on 23 July 2013. During the period extending from 2015 to 2019, the applicant secured employment in Russia and as such became resident in that country. In 2016 the respondent and the boy child Orrin followed the applicant to Russia where the family took up residence.

It was during the period of their temporary residence in Russia that the couple decided to have a second child. Owing to some health challenges, the respondent could no longer carry the pregnancy. They decided to have the child through surrogacy and found a surrogate mother with whom a surrogacy agreement was entered into. It was signed by the applicant, the respondent and the surrogate mother on 2 March 2018.

The surrogacy agreement stated in pertinent part:

“We undertake to assume the equal rights and obligations of parents with respect to the children, born by ‘surrogate mother’ after embryo transfer to the uterine cavity of ‘surrogate mother’, in terms of their upbringing, **Judgment No. SC 80/21** **2**
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on family and marriage.”

In pursuance of that agreement, the surrogate mother carried the pregnancy for the parties and gave birth to the girl child, Elizabeth, now at the centre of the dispute, on 15 November 2018. Unfortunately the parties' relationship hit turbulence and a short while after the birth of the child they commenced living apart.

Although the surrogate mother had given her consent for them to register the child as their own as genetic parents, the Khamovhichesky Department of the Civil Registry of Moscow refused their application to register the child as they were not married. Acting together, they instituted a law suit against the Registry Office for their recognition as the parents of Elizabeth.

On 27 September 2019, the Meshchansky District Court of Moscow allowed the state registration of the child and for the respondent to be registered as its mother. The applicant was not so lucky. His application for registration as the father was rejected because, by then, he had had his employment in Russia terminated and had relocated to the United States of America. In doing so, the applicant took the boy child, Orrin, with him.

Although there is no convergence between the parties as to what their intentions were, the applicant says he relocated to United States of America with the respondent's consent, while the respondent's position is that the applicant abducted Orrin and deserted her and Elizabeth. It is however not in dispute is that the respondent and Elizabeth were left stranded in Russia. They had been in that country on the applicant's expired VISA.

The respondent and Elizabeth ended up living at the Zimbabwean embassy while processing documents to move to Zimbabwe. In due course, they moved to Zimbabwe in November 2019 where they have remained to this date. The applicant was aggrieved.

He brought an application to the High Court in terms of the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention). The Hague Convention has been domesticated in Zimbabwe and bears the force of law by virtue of s 3 of the Child Abduction Act [*Chapter 5:05*]. The basis of the applicant's case was that the removal of the child from Russia and its retention in Zimbabwe are unlawful.

The applicant sought a declaratory order to that effect. Consequent to that, the applicant sought an order that the child be removed from Zimbabwe and sent to Boston in the

United States of America or to Russia for a determination of the parties' parental rights in those jurisdictions. According to the applicant, Russia was the child's habitual residence. He asserted that the child had been in that country awaiting the processing of documentation which would have enabled it to migrate to the United States of America with the respondent in terms of their agreement.

The respondent opposed the application. According to her, the parties had agreed to return to Zimbabwe and settle here. She stated that an email she had written to the applicant's lawyer insinuating the existence of an agreement with the applicant for their relocation to the United States of America had been written under duress. The respondent asserted full parental rights over the child to the exclusion of the applicant as her rights had been settled by the court in Russia. According to her, the child was lawfully retained as a Zimbabwean.

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The High Court dealt with a number of approaches in seeking to determine the child's habitual residence for purposes of the Hague Convention. It concluded that, while the issue of the intention of the parties was key in determining habitual residence, the child's parents never formed an intention to settle in Russia. They travelled there for work only and for that reason Russia was not the child's habitual residence. It could not be returned to that country.

By the same token, the High Court found that it could not order that the child be returned to the United States of America given that doing so would not be in line with the Hague Convention's purpose of restoring the *status quo ante*. Finding the Hague Convention inapplicable, the High Court dismissed the application.

The applicant was dissatisfied. On 9 October 2020, well within the time allowed by the rules of court, the applicant filed an appeal to this Court. The appeal was defective in that the relief sought therein was incompetent. At the hearing, the appeal suffered the fate of all defective appeals. It was struck off the roll.

THE APPLICATION

The appeal having been struck off the roll, the applicant has filed the present application for condonation of the late filing of an appeal and the extension of time within which to appeal. The application before me was filed on 9 April 2021 just 8 days after the initial appeal was struck off. Clearly there was no material delay in seeking condonation.

The applicant's explanation for failure to comply with the rules is that right up to the date of the hearing of the appeal, he was labouring under the mistaken belief that he had filed a valid appeal. The explanation is actually given by the applicant's legal practitioner who takes ownership of the defective prayer in the initial appeal.

On the prospects of success on appeal, the point is made on behalf of the applicant that the High Court was wrong in dismissing the application on the basis that shared parental intent could not give rise to an application under the Hague Convention. The applicant would also want to contest the High Court's finding that Russia was not the child's habitual residence.

The respondent opposes the application. In doing so, the respondent asserts that the intended appeal enjoys no prospects of success because the applicant had sought the return of the child to Russia. That country could not possibly be said to be the child's

habitual residence in the circumstances of the case. Accordingly the High Court's decision cannot be assailed.

In the respondent's view the applicant ought to have appealed against the judgment of the court of Moscow which gave her sole parental rights over the child. She denies unlawfully retaining the child in Zimbabwe.

PRELIMINARY OBJECTIONS

Ms *Musuka* for the respondent raised two preliminary objections. Firstly, she submitted that the prayer in the heads of argument filed on behalf of the applicant was defective. It sought the dismissal of the appeal when what is before the court is an application for condonation. In counsel's view, such inattention has permeated the manner in which the applicant has dealt with this matter.

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Mr *Zhuwarara* for the applicant was down on his knees, so to speak, when he apologised profusely for that typing error. He promptly applied for the deletion of the prayer from the heads of argument. While such clerical oversights should not be done in papers filed by senior counsel for the benefit of a superior court, they cannot form the basis of a dismissal of an application.

Secondly, Ms *Musuka* objected to the filing of the applicant's answering affidavit out of time. In terms of r 43(5) the applicant should file his or her answering affidavit within 3 days of being served with the respondent's opposing affidavits. In this case the answering affidavit was filed on the 4th day.

In my view, no prejudice was suffered by the respondent by that marginal failure to meet the time lines set by the rules. This is more so given that the offending affidavit was filed on 22 April 2021 several weeks before the application was set down. I restate that such small indiscretions should not be allowed to stand in the way of the attainment of justice and the right of litigants to access the court. I condoned the late filing of the answering affidavit.

THE LAW

What the court has regards to in an application for condonation is now settled. The court has a discretion, which is exercised judicially, in considering an application of this nature. Relevant factors in this regard are the degree of non-compliance with the rules of court, the explanation for the failure to comply, the prospects of success on appeal, the importance of the case, the interest of the respondent in the finality of the judgment, the convenience to the court and the avoidance of unnecessary delays in the administration of justice. See *Maheya v Independent African Church* 2008 (2) ZLR 203 (S). **Judgment No. SC 80/21** Chamber Application No. SC 75/21

It is also settled that these factors have to be considered in conjunction with one another as they tend to be complimentary. While it is true that consideration of the factors generally boils down to having regard to the explanation given by the applicant for condonation for delay and the prospects of success on appeal, the lack of a satisfactory explanation for the delay may be complimented by good prospects of success on appeal. See *Khumalo v Mandeya and Another* 2008 (2) ZLR 203 (S).

APPLICATION TO THE FACTS

The judgment sought to be appealed against was handed down on 1 October 2020.

The applicant's putative appeal under case number SC 421/20 was struck off the roll on 1 April 2021. There was no delay in filing this application after the striking off of the appeal.

The applicant's failure to comply has been explained as the oversight of his legal practitioner who drafted a defective notice of appeal. I accept that this Court has stated in the past that there is a limit beyond which a litigant cannot escape the consequences of his or her legal practitioner's dilatoriness or lack of diligence. See *Musemburi and Another v Tshuma* 2013(1) ZLR 526 (S) at 529 E-H; 530 A-B.

I take the view, however, that this is not a case in which the legal practitioner's lack of diligence should be visited upon the applicant. This is so mainly for two reasons. The first one is that the infraction by the legal practitioner only related to the crafting of the prayer in the notice of appeal. It is a fault that cannot be said to be gross.

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The second is that I hold the view that the issues raised by the proposed appeal are arguable. They deserve the attention of the full bench of the appeal court, if for no other reason but that the Supreme Court has not authoritatively pronounced itself on them.

I can only refer to the manner in which the court *a quo* dealt with the issue of the agreement of the parties in coming to a conclusion that the Hague Convention's application was not triggered. For a matter to fall under the Hague Convention its article 3 must be satisfied. It provides:

“The removal or the retention of a child is to be considered wrongful where-

- a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention;
- b) At the time of removal or retention, those rights were actually exercised, either

jointly or alone, or would have been exercised but for the removal or retention.

The right of custody mentioned in subparagraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.” (The underlining is for emphasis).

In *Peacock v Steyn* 2010(1) ZLR 254(H) the court found that the existence of a custody agreement between the parents of minor children who are not married regulating their rights of shared custody, triggered the application of the Hague Convention. This is by virtue of article 3.

In the present case, the surrogacy agreement I have referred to above provided some kind of shared custody between the parties. That therefore presents the applicant with an arguable case on appeal. Apart from that, Mr *Zhuwarara* drew attention to an email written by the respondent on 11 November 2019 while she was still in Russia. He submitted that the letter affirms the existence of an agreement between the parties to move the child to the United States of America.

The email was addressed to the respondent’s legal practitioner instructing him to relay it to the applicant’s legal practitioner for the attention of the applicant. It reads:

“Please be advised that Elizabeth and I are finally ready to travel and are now able to make plans for next steps. As you have previously indicated you had gone ahead to America and we were to follow so that the children would be together and neither one of us would be deprived of his rights to both children. We will of course need to travel to Zimbabwe first in order to get visas and after that will proceed to America. Please may you send confirmation that this is indeed still the plan as well as confirmation that you will be buying tickets so that we are all reunited. I look forward to receiving your response and finally ending the current separation from Orrin.”

I am aware that there was a suggestion by Ms *Musuka* that the email was written under duress, the particulars of which were not clearly articulated. That is however immaterial for our present purposes. What is important is that the statement by the respondent suggests that an agreement for shared custody may have existed.

If that is the case, the applicant is entitled to argue on appeal that the retention of the child in Zimbabwe in breach of such agreement brings the case under the ambit of the Hague Convention. I am not sitting to determine the appeal but merely to consider whether it is arguable. I think it is. A case has been made for the grant of the indulgence of condonation.

Regarding the issue of costs, Mr *Zhuwarara* for the applicant tendered to pay the respondent's costs regardless of the outcome of the application. This he did upon a realisation that the application was necessitated by **Judgment No. SC 80/21** Chamber Application No. SC 75/2A. An award of costs will be made by consent.

In the result, it be and is hereby ordered as follows:

1. The application for condonation for non-compliance with r 38(1)(a) of the Supreme Court Rules, 2018 be and is hereby granted.
2. The application for extension of time within which to file and serve a notice of appeal against the judgment of the High Court handed down on 1 October 2020 as HH 620-20 be and is hereby granted.
3. The applicant shall file his notice of appeal within 7 days from the date of this judgment.
4. By consent, the applicant shall bear the costs of this application.

Mambosasa Legal Practitioners, applicant's legal practitioners

Karuwa and Associates, respondent's legal practitioners