GARIKAYI RIMBI
versus
EMILY RIMBI
and
TILDAH MAZHANDE N.O.

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 11 May and 23 June 2022

Review

M Moyo, for the applicant
T Chiturumani, for the 1st respondent
No appearance, for the 2nd respondent

MAXWELL J: On 4 October 2018, Applicant filed an application for custody of three minor children, Stephanie Ruvarashe Rimbi, a girl (born 30 November 2007), Ethan Gregory Rimbi, a boy (born 5 September 2012) and Ryan Tinomudaishe Rimbi, a boy (born 29 July 2016), (the minor children) in the lower court. In the alternative he sought custody of the two boys and that Defendant be awarded custody of the girl. He also sought that the non-custodian parent be granted reasonable rights of access. Applicant resides in Namibia. Respondent and the three minor children reside in Zimbabwe. On 15 October 2021, the application was dismissed. On 1 December 2021, Applicant filed the present application for review on the following grounds:

1. The judgment which was rendered by the Magistrates Court on 15 October 2021 sitting at Harare per her Worship Mazhande N.O (second Respondent herein) is vitiated by gross irregularity in the proceedings in that the second Respondent did not determine issues that had been placed and argued before her and further did not provide reasons for her judgment.
2. The judgment/decision aforesaid amounts to a gross irregularity in decision in that there is no reasonable foundation to it.
3. The judgment/decision aforesaid is grossly irrational in the sense of being so outrageous in its defiance of logic or of any accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at it.

4. The judgment/decision aforesaid amounts to a gross irregularity in decision in that in coming up with the decision, second Respondent went on a frolic of her own and placed reliance on a fact that had not been raised by either party.
5. The judgment/decision aforesaid amounts to a gross irregularity in decision in that in coming up with the decision, second Respondent disregarded factors that had been raised Applicant's favour (sic) on wrong and irrelevant considerations.

Applicant prayed for the setting aside of the decision of the lower court and the remittal of the matter for a determination on whether or not first Respondent had given up custody of the minor children to her parents, whether there are any factors justifying an award of custody to the 1st Respondent and which party is best suited to have custody of the minor children. In the alternative, Applicant prayed for the determination of the above issues by this court.

In his founding affidavit, Applicant stated that a decree of his divorce from the first Respondent was granted by the Namibian High Court on 3 December 2018 and prior to that first Respondent had assumed custody of the minor children in terms of s 5 of the Guardianship of Minors Act [*Chapter 5:08*]. He stated that one of the issues he raised in his application for custody was that first Respondent had surrendered custody of the children to her parents. He pointed out that a probation officer had confirmed this in a report which was before the court *a quo* in which he stated that the children were with the first Respondent's and that first Respondent was said to be away on a business trip in South Africa. Applicant argued that there were no factors or circumstances before the court *a quo* justifying custody in her favour. Applicant submitted that second Respondent did not make a determination on the issue in her judgment.

The application is opposed. Second Respondent's father, Cleopas Gazi, (Cleopas) deposed to the opposing affidavit on the strength of a power of attorney from his daughter. He stated that there are no procedural irregularities in the manner the proceedings were conducted. In his view Applicant ought to have noted an appeal if he intended to contest the decision of the Magistrate. Cleopas submitted that Applicant did not put across any point that proved that first Respondent is bad to the children and if she continues with custody their welfare and growth would be negatively affected. He further submitted that in the absence of such facts, the court *a quo* had no reason for taking away the children from the first Respondent. Cleopas pointed out that when first Respondent relocated from Namibia, she went to stay with her biological parents in Norton because she had

no place of her own. Her parents provided accommodation but she was the custodian of her children, Cleopas argued. He further argued that as at the time of the hearing of the custody application, first Respondent was living in Masvingo with her children, and since there was no evidence to the contrary, the court *a quo* was correct in ruling that first Respondent remains the custodian parent. Cleopas stated that at the time of the hearing of the custody application the divorce proceedings had been finalized but the court *a quo* was not advised of that fact.

In the answering affidavit Applicant reiterated that as first Respondent was a custodian parent by virtue of a default position in law, the proceedings before second Respondent were meant to produce a proper order regulating custody of the children after a consideration of circumstances of both parties. He argued that the court a quo was not provided with the circumstances of the first Respondent as the circumstances that were placed before the court were those of her parents. He further argued that the allegation that the children were now staying in Masvingo with their mother was not substantiated and therefore did not constitute *prima facie* evidence. He also argued that first Respondent who had raised the issue of the pending divorce had subsequently abandoned it and therefore 2nd Respondent ought to have sought clarity from the parties before relying on it.

GROUNDS FOR REVIEW

The First Ground for Review

Applicant faults the court *a quo* for not determining two issues. The first issue was whether or not first Respondent had surrendered custody of the minor children to her parents. In heads of argument Applicant referred to the cases of *Grain Marketing Board* v *Muchero* 2008 (1) ZLR 221 and *Afras Mutausi Gwaradzimba* v *CJ Petron & Company (Proprietary) Limited* SC 12/16 as authority that the failure to resolve a dispute or give reasons for a determination is a misdirection that vitiates the order given at the end of a trial. In first Respondent's heads of argument there is no indication of whether or not the court a quo determined the first issue as alleged by the Applicant. What first Respondent did was to give her response to the allegation that she had surrendered custody of the minor children to her parents. A perusal of the ruling of the court *a quo* confirms that indeed there was no decision on whether or not first Respondent had surrendered custody of the minor children to her parents.

The second issue was whether or not there were any factors to justify an order allowing first Respondent to retain custody. Again, the first Respondent pointed out factors in her favour

rather than respond as to whether Applicant was correct in his submission that the lower court did not consider the issue. The record shows that this issue was considered. The Magistrate observed that at the time of writing the judgment, three years had lapsed since the children left Namibia, and the children had settled in new schools, home and environment. She stated that there was need to bring stability in the children's lives instead of moving them from one country to another and back and forth. On the submission by Applicant that first Respondent's capacity to provide for the children was doubtful as she was unemployed, the Magistrate reiterated that it is not the duty of the custodian parent only to provide for the children, both parents have a duty to do so. The Magistrate also pointed out that if Applicant had issues of access to the children, a court order can regulate that. The Magistrate found no merit in Applicant's submission that first Respondent had no respect for law. What is clear from the record however is that first Respondent's personal circumstances were not availed to the court. It was submitted by her father that she was in Masvingo with the children. No assessment was done of the children's welfare in Masvingo. The first ground for review therefore succeeds.

The Second Ground for Review

Applicant alleges that there is no reasonable foundation to the judgment/decision of the lower court. From his heads of argument, Applicant seems to be referring to the same issue considered above, that there were no factors to justify an order allowing first Respondent to retain custody. He argued that the lower court decided the matter in favour of the first Respondent without her circumstances. As stated above, the court *a quo* considered every issue that Applicant raised against first Respondent and still concluded that it was in the best interests of the children for her to retain custody. In Herbstein & Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 2nd ed, it is stated on p 668 that:

> "Where the reason for wanting to have judgment set aside is that the court came to a wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where however, the real grievance is against the method of trial, it is proper to bring the case on review."

Clearly in this ground for review, Applicant is aggrieved by the substantive correctness of the Magistrate's decision in the given circumstances. Such an issue should be raised on appeal. I find no merit in this ground.

The Third Ground for Review

Applicant alleges that the decision of the lower court is grossly irrational in the sense of being so outrageous in its defiance of logic or of any accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at it. In heads of argument, Applicant seems to be making the same argument as above though in different words. He argues that the court *a quo* determined the matter without any factor justifying custody in favour of the first Respondent. Again, Applicant is aggrieved by the substantive correctness of the decision and should raise the matter on appeal. There is no merit in this ground as well.

The Fourth Ground for Review

Applicant accused the lower court of going on a frolic of its own and placing reliance on a fact that had not been raised by either party. He pointed out that when he filed for custody, the marriage between him and the first Respondent was yet to be dissolved. First Respondent had then raised the defence of *lis pendens* arguing that the issue of custody would be dealt with in the pending divorce matter. Applicant stated that first Respondent had then abandoned this argument at the hearing of the matter. Applicant argued that the lower court went on to rely on the supposed fact that the marriage was still pending. In *Nzara & Others* v *Kashumba N.O. & Others* SC 18/18 it is stated that:

> "The function of a court is to determine disputes placed before it by the parties. It cannot go on a frolic of its own. Where a point of law or a factual issue exercises the court's mind but has not been raised by the parties or addressed by them either in their pleadings in evidence or in submissions from the bar, the court is at liberty to put the question to the parties and ask them to make submissions on the matter."

The record of proceedings bear the Applicant out. The Magistrate did not seek clarity from the parties on this issue. However, the remedy is not the setting aside of the entire decision. In my view the remedy would be to strike out the portion of the judgment that was based on issues that had not been raised by the parties. In the record of proceedings that will be the last paragraph on p 169. It is evident from the record that the lower court had already made its decision prior to going "on a frolic of its own'. On p 168 of the record, it had already stated that:

> "The Respondent has not been proven to be a bad mother to warrant depriving her custody of her biological children in favour of a stepmother."

In the circumstances therefore it is neither here nor there that reference was made to an issue that was not raised by the parties. The Magistrate's decision had already been made. Though there is merit in this ground for review, the remedy is the striking out of the offending part.

The Fifth Ground for Review

Applicant accused the lower court of disregarding factors that had been raised in his favour on wrong and irrelevant considerations. In heads of argument Applicant stated that the observation by the lower court that Ms P Rimbi could not be preferred for custody over the Respondent, a natural parent was misplaced. In his view, the lower court had to consider the question of Ms P Rimbi in Applicant's life as a factor to support custody in his favour as he was the one who had applied for such custody. The judgment of the lower court shows that the Magistrate was alive to the fact that it is Applicant who was applying for custody, not Mrs P Rimbi. On p 168 the following appears:

> "In making this averment, applicant literally is asking this court to deprive a natural mother of her right of custody in favour of a third party. That third party is his wife with who he will exercise the right of custody."

I am of the view that once more Applicant is aggrieved by the conclusion reached by the lower court in the face of his submissions. Such a grievance ought to be taken up on appeal, not through a review. I do not find merit in this ground as well.

The best interests of the children

In light of the fact that the first ground of review succeeded, it is important to consider what are the best interests of the children in the circumstances of this case. Both s 5 of the Guardianship of Minors Act [*Chapter 5:03*] and s 81 (2) of the Constitution provide for the supremacy of the best interests of the minor child. Applicant correctly argued that the circumstances of the first Respondent were not placed before the lower court. It is necessary that the court makes an informed decision after considering the circumstances of both Applicant and the first Respondent. It is therefore important for probation officers to compile reports on the current circumstances of the Applicant and first Respondent. It is also important to have an assessment on the current welfare of the children in order to determine whether first Respondent retains custody or not. For that reason, the following order is appropriate:

1. The application for review partially succeeds.
2. The judgment of the court *a quo* be and is hereby set aside.

3. The matter be and is hereby remitted to the court *a quo* for it to:
    a) request probation officers' reports on the current personal circumstances of the Applicant and first Respondent vis-à-vis custody of the minor children.
    b) make a determination of whether or not first Respondent should retain custody of the minor children after an assessment of the Applicant and first Respondent's current personal circumstances.
    c) Taking into account all factors and circumstances raised in favour of the parties, which party is properly suited to have custody of the three minor children.
4. Each party bears its own costs.

Dube-Banda Nzarayapenga Legal Practitioners, for the applicant
Chiturumani-Zvavanoda Law Chambers Legal Practitioners, for the first respondent