Judgment No. HB 8/2004
Case No. HCA 116/01

VIRGINIA NDUNA

Versus

MOSES NDLOVU

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 20 JANUARY 2003 AND 12 FEBRUARY 2004

Appellant in person
Ms P Dube for the respondent

Civil Appeal

NDOU J: The appellant instituted proceedings in the Bulawayo Maintenance Court for upward variation of a maintenance order from $3 200,00 for both the parties' two minor children to $14 000,00 per month. She testified in the court *a quo* and adduced documentary evidence in support of the application. She was ably represented in the court and produced detailed evidence on the financial standing of both parties. She is employed as a teacher at Dominican Convent High School in Bulawayo and the respondent is an elected Member of the Parliament of Zimbabwe. The respondent was also represented. The proceedings were detailed and it seems everything that is relevant for such application was adequately articulated. In his judgment the magistrate in the court *a quo* rightly pointed out that the duty to maintain lies on both parents. He assessed all the evidence before him and dismissed the application for variation with costs. The appellant is not happy with the said judgment and has appealed to this court. In a nutshell the court *a quo* held that the appellant did not make a case for upward variation.

When she noted the appeal, the appellant was a self-actor. Her notice of appeal is defective in a number of respects. Ms *Dube*, for the respondent submitted

that the defects are gross and on that account the appeal should be dismissed. She relied on two cases in this regard. In *Jensen* v *Acavalos* 1993 (1) ZLR 216 (S) KORSAH JA stated in page 219H-220D –

> "The notice of appeal being bad for non-compliance with the rules, was not cured by the filing on 3 January 1990 of grounds of appeal without a prayer. Indeed, even if the grounds of appeal filed on 3 January 1990 had contained a prayer for relief, it would not have been effectual in validating the defective notice of appeal. The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *De Jager* v *Diner & Anor* 1957 (3) SA 567 (A) at 574C-D.
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> In *Hattingh* v *Pienaar* 1977 (2) SA 182 (O) 182 at 183, KLOPPER JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of Lord DENNING in *McFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I, every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."
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> In *S* v *McNab* 1986 (2) ZLR 280 (SC) at 284E DUMBUTSHENA CJ stated-
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> "I have dwelt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the rules will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice."

There is no doubt that the fact that the appellant lodged the appeal as a self-actor impacted on the quality of the notice of appeal. Her appeal goes under two hearings namely,

> "1. Unfair Handling of the Trial" and "2. Unfair Ruling." I propose to adopt these headings purely for convenience in this judgment.

Unfair Handling of the Trial

This relates to granting of two postponements to the respondent at his request. Both parties were legally represented and according to the trial magistrate the postponements were by consent so there is nothing unfair about the way the matter was handled in this regard. If the appellant had succeeded in proving "unfairness in the handling of the matter" still she would have used the wrong procedure. Appeal procedure cannot be used to remedy gross irregularity in the proceedings. Review of the proceedings of the maintenance of the court *a quo* would have been the correct procedure. Even then irregularity is not in itself a ground for setting aside a decision on review, the irregularity must be of such a nature that it is calculated to cause prejudice. *In casu* the appellant has not even alleged such prejudice – *Napolitano* v *Commissioner of Child Welfare, Johannesburg & Ors* 1965 (1) SA 742 (A) at 745H-746B. Under this heading the appellant is attacking the "irregular" granting of the postponements. In terms of the High Court Act the route open to the appellant to achieve this is one of review and not appeal – *Fikilini* v *Attorney-General* 1990 (1) ZLR 105 (SC) at 110B-G. What is being objected to by the appellant is the method employed by the magistrate in the court *a quo* in granting the respondent postponements. That can be corrected by way of review – *S* v *Sergeant Tom and Ors* 1981 ZLR 547 (SC). In this case the Supreme Court pointed out that, on appeal, the appellate court has to have regard to what appears on the record. If allegations are made of gross irregularities in the proceedings in the court a quo, the proper course for the dissatisfied party to adopt is to bring proceedings on notice of motion in the High Court in order to review the court a quo's proceedings. If there is something on the record to support allegations of such irregularities, the appellate court may take

the step of adjourning the appeal to allow the appellant to approach this court by way of review. As pointed out above, there appears not substance on the allegations of irregularity in the manner in which the postponements were granted, so there is no need to follow this route.

Unfair Ruling

In this one the respondent submits that it is grossly defective for non-observance of the rules in the following manner:

> "2.1. The notice reads like an affidavit accompanying an application for review. Thus Honourable Court's attention is drawn to aspects like "unfair handling of the trial"; unfair ruling" …
> 2.2. The complaints are clearly complaints that should be aired in a review application, rather than appeal.
> 2.3. The notice does not state the relief that the appellant seeks from the court."

Ms *Dube* is advocating for a strict observance of the rules. She submits that the application should be dismissed on account of the appellant's failure to strictly observe the rules. If this was an ordinary civil case I would fully agree with her as decided in *Jensen* v *Acavalos supra* and *S* v *McNab supra*. But we are here dealing with a maintenance inquiry. In such an inquiry the appeal itself is concerned to see that the interests of the child, subject to litigation, are safeguarded. This is crucial and impacts on the approach of the court in such matters. In this regard I refer to what LEWIS AJP said in *X* v *Y* 1973 (1) RLR 192 (AD) at 197G-198B-

> "Furthermore, the strict rules … in ordinary civil actions can, I think, be relaxed to some extent in relation to an inquiry of this nature, because this court as upper guardian of all minor children is particularly concerned with the welfare and interests of all minor children, and the fullest inquiry should be afforded … It is true that an appeal court will order a remittal where … I do not think that rule applies in the instance case because here the court itself is concerned to see that the interests of this child, subject of the litigation, are safeguarded …"

I agree with Ms *Dube* that the notice of appeal is defective but I do not agree that it is grossly so. The mere use of the heading "unfair ruling" does not mean the matter is reviewable. As a self-actor, the appellant may use the words inappropriately. What this court needs to do is to read the substance or body of the notice of appeal and determine whether it meets the requirements. In my view all that the appellant does in the notice is to assail the exercise of discretion by the court *a quo*. The appeal route is in circumstances, appropriate. Although she did so indirectly it is clear that she seeks reversal of the decision of the court *a quo* dismissing her claim and also objects to paying costs. With minimal articulation the appellant has pointed out where the court a quo erred or misdirected itself – *Emmerson & Ors* v *R* 1957 R & N 734 (SR) and *Du Toit* v *R* 1958 R & N 177 (SR).

The notice requires a precise statement of the points on which the appellant relies, so that the respondent may know on which points he must prepare a reply, and so that the appellate court may know on which points a decision is required. The trial magistrate must also be properly informed of the grounds on which the appeal is based so that he or she can comment thereon – *Killian* v *Messenger of Court, Uitenlage* 1980 (1) SA 808 AD; *Himuncholl* v *Maharom* 1947 (4) SA 778 (N) at 780; *Harvely* v *Brown* 1964 (3) SA 381 (E) and *S* v *McNab (supra)* at 281H-282H. *In casu,* I believe the respondent, the trial magistrate and this court are in a position to discern the grounds on which the appeal is based. The trial magistrate even made a concession on the question of costs. I will return to this issue of costs later. He commented on not less than five issues raised in the notice. The respondent does not say that he does not appreciate the grounds of appeal. In his heads of argument he shows clearly that he has appreciated the basis of the appeal. In the circumstances I

feel that the appeal has to be considered on its merits as far as this heading is concerned. As alluded to above the record reflect that in order to fully determine this matter, the court *a quo* heard oral evidence of the parties and exercised its discretion on the available facts. The appellant wants this court to interfere with such exercise of discretion. It has not been shown in the notice that the trial magistrate exercised his discretion capriciously. In an application for the increase of maintenance an appellate court will not readily interfere with the trial court's award, but there is a duty on it to do so where sound reasons for interference exist – *Mentz* v *Simpson* 1990 (4) SA 455 (A) and *The South African Law of Persons and Family La*w by D S P Cronje 3rd Ed at page 296. There are no such sound reasons *in casu*. Although the judgment of the court *a quo* is not as detailed as what the appellant prefers it certainly shows the trial magistrate appreciated the issues before him and determined them judiciously. The general principles are that a child of divorced parents is entitled to be maintained by them, and they are correspondingly obliged to provide it with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life. When an order is made by a maintenance court the rate is generally fixed on the basis of the needs of the child and the respective means and circumstances of the parents as they can be reasonably foreseen – *Herfst* v *Herfst* 1964 (4) SA 127 (W); *Kemp* v *Kemp* 1958 (3) SA 736 (D) and *Patrikios* v *Patrikios* 1953 (3) SA 252 (SR). The trial court arrived at a decision that there is no sufficient reason for upward variation of the maintenance order. This is based on its reasonable discretion with reference to all the relevant circumstances – *Chizengeni* v *Chizengeni* 1989 (1) SA 454 (2) (Z). There is no legal basis for interfering with the findings of the court *a quo* and the appeal must therefore fail.

Costs

The trial magistrate in his responses states "concedes that the costs order was misplaced and it may be quashed". This attitude has not found favour with the respondent. I agree with the appellant that these proceedings have to be seen in the context that she was acting on behalf of the minor children of the parties. The suit is between the minor children and their father and the mother is their agent. Visiting the custodial parent with an award of costs should only be done in cases of abuse of the process by such parent. Otherwise where she acts on behalf of the children the issue of costs should not arise. In terms of the Maintenance Act [Chapter 5:09] the state bears some of the costs for the issuance of process and enforcement of orders. In the circumstances the parents should also shoulder some of the costs of litigation instituted on behalf of the minor children. I do not feel that the appellant should have been ordered to pay costs for acting on behalf of the respondent's children against him.

It is accordingly ordered:

(a) The decision of Bulawayo Magistrates' Court in maintenance case 117/00 handed down on 2 July 2001 be and is hereby set aside and substituted as follows:

"1. The application for variation of maintenance order be and is hereby dismissed.
2. Each party will bear own costs."

(b) There shall be no order for costs of this appeal.

Cheda J ……. I agree

Coghlan and Welsh respondent's legal practitioners