

PAULINE MUBAIWA
versus
TRUST MAINZANISE CHIGWADA

HIGH COURT OF ZIMBABWE
UCHENA J

HARARE, 3, 4, 16, 17, 18, 22, September 2014, and 15, 19, 27 January and 3, 27, February, 6, and 19 March 2015

Civil Trial

W Nyika and M Baera, for the plaintiff
E Chatambudza, for the defendant

UCHENA J: The plaintiff and the defendant met in 1997. They fell in love and started living together before getting customarily married through an unregistered union. The plaintiff gave birth to their only child Z on 24 November 1999.

Their relationship has seen better days. It deteriorated leading to their separation. The plaintiff issued summons seeking orders for the distribution of their assets. She in her declaration indicated that they were in a universal partnership. The plaintiff also sought orders awarding her custody and maintenance for the minor child.

The defendant disputed the distribution of proper claiming that it was not acquired through a universal partnership. He at their PTC agreed that custody of the minor child be awarded to the plaintiff. He disputed the quantum of maintenance claimed by the plaintiff, pointing out that he is responsible for the minor child's school fees and all school related expenses. The plaintiff admits that the defendant should be granted access but for not more than two days during each school holiday. The defendant wants access for two weeks of every school holiday.

Distribution of Property

The plaintiff in leading evidence on their universal partnership told the court of how they borrowed money so that they could engage into an illegal foreign exchange business. She told the court of how they would sell foreign currency on the streets and in public toilets. She told the court that they bought some of the assets to be shared from proceeds of that business and used some of the proceeds to start a business from which further assets were acquired. It

became apparent that the court was being asked to distribute illegally acquired assets. Mr *Nyika* appreciated the damaging effect of the plaintiff's evidence and withdrew her claim for the distribution of assets. Mr *Chatambudza* agreed with the plaintiff's withdrawal of her claim for the distribution of assets. The trial, proceeded on the remaining issues, those of defendant's access to the minor child and maintenance for the minor child, which were not tainted by the parties' dirty hands.

Access

Mr *Baera* for the plaintiff conceded during the clarification of the parties' written addresses that the plaintiff's refusal to allow the defendant access to the minor child beyond that of two days per school holiday was unreasonable. He conceded that the minor child should be allowed to bond with both parents. The concession was properly made as the restriction of access was premised on what the plaintiff, claimed, was a strained relationship, between the defendant and the child. She said the child is so afraid of her father that she suffers a panic attack whenever she is in his presence. That view is not supported by Z, who I interviewed. She said she enjoys a good relationship with both parents and can comfortably stay with either of them. She is a 15 year old whose views must be taken serious. She should not be treated like a very young child who may not on her own know what is in her best interest. I am therefore satisfied that Mr *Baera* has correctly conceded that the defendant should be granted access to the minor child for two weeks during each school holiday.

Maintenance

The plaintiff wants maintenance for the minor child in the sum of US\$3000-00 per month. She says the amount is justified by the standard of life they were used to. The defendant said the maintenance claimed is beyond his means. He led evidence to the effect that he earns about US\$ 1300-00 per month, from his business. He gave a detailed account of how that figure is arrived at. The plaintiff said they used to operate that business jointly realising much more than the defendant said he is realising from it. The defendant said business is not as it used to be due to the prevailing economic hard times. The issue of the responsible person's means is an important consideration in determining maintenance applications. A dependant can only be supported by his or her responsible person's means. His or her needs must be adjusted to the responsible person's means. Section 6 of the Maintenance Act [*Chapter 5:09*] provides as follows;

“6 (1) At any inquiry referred to in section *five* the maintenance court may, subject to this Part, make an order against the responsible person for the periodical payment of such sum of

money **as it considers reasonable for the maintenance of the dependant** in respect of whom the complaint in terms of section *four* was made.

- (2) A maintenance court shall not make an order in favour of a dependant unless it is satisfied that—
- (a) the person against whom the order is sought is legally liable to maintain the dependant; and
 - (b) the person against whom the order is sought is able to contribute to the maintenance of the dependant; and
 - (c) the person against whom the order is sought fails or neglects **to provide reasonable maintenance for the dependant.**” (emphasis added)

In terms of s 6 (2) (a) to (c) three factors must be established before a court can make a maintenance order. It must be satisfied that the person against who the order is sought is legally liable to maintain the dependant for whom maintenance is being claimed. It must be satisfied that the responsible person is able to contribute towards the dependant’s maintenance. It must also have been proven that the responsible person is failing to provide reasonable maintenance for the dependant.

The legislature deliberately used the words “reasonable maintenance” and “contribute”. The use of the words “reasonable maintenance” was obviously intended to avoid unreasonable maintenance claims, and to ensure that what is granted can reasonably be expected to maintain the dependant and to be paid by the responsible person. The word “reasonable” is however coloured by the responsible person’s and dependant’s standard of living. It is further influenced by the means of the responsible person and possible contribution from the other parent. What is reasonable when there is no other parent to contribute may be unreasonable if the other parent can contribute.

In this case the plaintiff wants US\$3000-00 per month for a child who is in boarding school. Her school fees and all school expenses are paid by the defendant. She only comes home on holidays for about 3 months per year. The plaintiff on being asked how she would spend the US\$3000-00 per month paused to think and gave a delayed answer to the effect that she intends to withdraw the minor child from boarding school and will thus be staying with her on daily basis catering for all her needs. The decision to withdraw the minor child from boarding school had not been mentioned earlier. It was obviously triggered by the fear of not being able to justify the claim for US\$3000-00 per month for a child who spends about 9 months per year at a boarding school at defendant’s expense. This in my view is an example of an unreasonable maintenance claim, which the plaintiff had to quickly justify as it could not be sustained by the then existing facts.

The withdrawal of the minor child from boarding school should be in the best interest of the minor and not for purposes of enabling the mother to claim suspiciously high

maintenance on the pretext that it will be used for the child who will stay with her for at most about one and half months in a year. The plaintiff said the minor child was not doing well at school and thus justifies her withdrawing her from boarding school. The child's school report for the term ending 7 August 2014 was produced by the defendant as exh 8. It establishes the following facts. She was in form 2.4. She was number 3 in a class of 33 students. Her examination results in terms of marks and teacher's comments, were as follows; English Language 65% Good attempt, Shona 34% A more positive attitude is needed, Mathematics 14% A lot more effort is needed, Science 67% Good performance, Commerce 76% Good attempt, Geography 50% Aim higher, History 78% Good work keep it up, Computers 69% Good attempt and Art 51% Can do better. The plaintiff says she is performing badly and must be withdrawn from boarding school. The defendant says she is doing well and should remain in boarding school.

When I interviewed the minor child she said her performance is enhanced by her being a boarder which enables her to study during study time and at hostels. I during the clarification of the parties' written addresses asked Mr *Baera for the plaintiff*, to comment on the minor child's view. His view was the child's wish to remain in boarding school should be respected, as it is in her best interest. I agree. Mr *Baera* gave the issue a professional approach which is consistent with the Legislature providing for reasonable maintenance. It is certainly not reasonable to withdraw a child from boarding school, where her end of term result show significant progress. Mr *Chatambudza* submitted that withdrawing the child from boarding school may have the effect of demoralising her and burdening her with travelling to and from school a thing she is not used to. She will lose her study time to travelling time. I agree. As I have already said the issue of withdrawing the child from boarding school is, an after- thought, brought in to justify the claim of US\$3000-00 per month for a child who is in boarding school.

I will therefore consider the issue of maintenance on the basis that the child is a boarder, whose, fees, uniforms pocket money and all other school expenses are covered by the defendant. The only time when maintenance should be paid to the plaintiff for the sustenance of the minor child is when she will be in her custody for two weeks per school holiday. Mr *Chatambudza* submitted that each parent should maintain the child during the period she will be with him or her. Mr *Baera* submitted that the plaintiff has just come out of prison where she served 4 months of a 6 months term of imprisonment. He submitted that though she had in her evidence said she was establishing her own business from which she expected to raise an income of US\$2000-00 per month, she was presently without any income because she was only

released from prison in January 2015 and is still trying to find her feet. Mr *Chatambudza* then said the defendant was offering US\$100-00 per school holiday as the minor child's maintenance for the two weeks per school holiday she will be with the plaintiff.

Though the offer seems reasonable for the food the child may need for the two weeks per school holiday, sight must not be lost of the fact that we are considering maintenance of a girl child who will be getting all her needs from her father whom she may fail to talk to about her feminine needs. It is in my view reasonable to increase the amount to include the child's feminine needs which the mother should attend to during the two weeks per term the child will be with her. It, during the clarification of written addresses, became common cause that the child may need additional tuition during holidays in view of her poor performance in Maths and Shona. The defendant will be ordered to arrange and pay for her additional tuition.

The defendant told the court that he earns about US\$1300-00 per month. He in my view is well able to pay US\$250-00 per school holiday to cater for the minor child's food and other needs.

I therefore order that;

1. The plaintiff be, and is hereby awarded custody of Z born on 24 November 1999.
2. The defendant shall have access and stay with the minor child for two weeks during every school holiday.
3. The defendant shall pay school fees, buy uniforms twice per year, meet all the minor child's school needs including pocket money, holiday tuition and buy her casual clothes twice per year, until she attains the age of majority.
4. The defendant shall during every school holiday, pay maintenance to the plaintiff in the sum of US\$250-00 for the maintenance of the minor child, until she attains the age of majority.

Messers Baera & Company, plaintiff's legal practitioners
Messers Rubaya & Chatambudza, defendant's legal practitioners