LINDIWE CHIFAMBA
versus
ELIJAH CHIFAMBA

HIGH COURT OF ZIMBABWE
TSANGA and CHITAKUNYE JJ
HARARE, 28 October 2014 and 15 January 2015

Civil Appeal

C M Jakachira, for appellant
ER Samukange, for respondent

TSANGA J: This was an appeal heard by this court on the 28th of October 2014 against an order for maintenance granted by the Magistrate Court. The matter was remitted back to the Magistrate's Court for a proper enquiry to be made on the income and expenditure of the respondent and that of the applicant (who was appellant in this matter), where applicable.

The reasons for remitting the matter to the Magistrate Court are hereby explained so as to guide the Magistrate in re-hearing the matter taking into account the grounds that informed the appeal.

The brief facts are that the Magistrate Court awarded the appellant a sum of US$500.00 a month as maintenance against an original claim of $1475.00. The respondent had offered to pay $300.00. The respondent has custody of the minor child and is responsible for paying all expenses including those of another child who is attending University overseas. Taking into account these realities the Magistrate concluded that an offer of US$ 300.00 would be too little and that $500.00 would be justified since this was also what the parties had initially agreed to| at one stage when they attempted to broker an agreement regarding their divorce settlement. The agreement has however not been enforced and parties still have a pending divorce matter before the High Court which includes the division of the matrimonial assets.

The appeal against the Magistrate's decision was brought on the following five summarised grounds:

1. That the court misdirected itself by simply awarding a figure of US$500.00 per month without issuing a detailed judgment explaining how it arrived at the figure.
2. The court *a quo* misdirected itself by failing to make a finding that respondent deliberately refused to disclose his income as well as some of his expenditure.
3. The court *a quo* further misdirected itself by failing to appreciate the fact that the amount it awarded is inadequate to enable the appellant to meet her average monthly expenditure including accommodation.
4. The court *a quo* also misdirected itself by failing to address the appellant's claim for arrear maintenance notwithstanding the evidence adduced before the court on that aspect of the appellant's claim.
5. The court *a quo* erred by failing to address the question of costs notwithstanding the fact that they formed part of the appellant's claim.

The appellant's prayer was for the magistrate's decision to be set aside and for a sum of $1000.00 to be accorded to her as monthly maintenance. She also prayed for the sum of **$12 935.00** as arrear maintenance and for costs of application in the court below and for the appeal.

The matter is being remitted back to the same magistrate where practical to hear evidence relating to the first three grounds of appeal in particular in accordance with s 5 of the Maintenance Act [*Cap 5:09*] which requires the court to enquire fully into the matter of the complaint. The fourth and fifth grounds of appeal are disposed of by this appeal court as also explained more fully below.

Regarding the first ground of appeal it is indeed not clear from the record how the figure of $500.00 was arrived at as being adequate maintenance other than that the figure was initially proposed as part of a settlement claim which included the sharing of property but which was never implemented in accordance with the agreement.

On the second ground of appeal which centres on non-disclosure of earnings, the record does not indicate at all what evidence was placed before the court to reflect the Respondent's earnings or indeed if any effort was made to get the respondent to disclose his earnings. Indeed the only reference to the respondent's earnings in the record is made by his

counsel on p 13 where he says his client gets between $6000 and $7000 per month as an independent contractor. No evidence was produced to support this claim.

Section 13 (c) of the Maintenance Act makes it clear that the court has power "**to call for the production of any book or document and to examine any witness on oath"**. To the extent that the respondent is self-employed, the evidence of how much he makes through his business should have been placed before the court for a proper assessment to be made of his earnings. It is this that the magistrate must do in accordance with the law. Although the Applicant is unemployed her expenses must also be fully justified so as to arrive at an appropriate figure regarding her needs.

With regard to the third ground of appeal which essentially challenges the adequacy of the amount ordered, maintenance pending divorce is supposed, as much as possible, to allow a party to lead the lifestyle that they were accustomed to. In other words, the marital status quo is to be preserved as much as possible pending the final divorce which will resolve issues fully with regards to the sharing of matrimonial assets. It is not clear from the record how the magistrate arrived at $500.00 as being sufficient for all the applicant's needs including accommodation given that Respondent has exclusive use of the marital home together with the child in his custody. The applicant states that she is staying with her parents as a result of being unable to afford accommodation. Clearly it is not the legal obligation of her parents to provide her with accommodation and the magistrate should therefore make a proper assessment of how much is to be paid taking into account the major categories of expenses that the applicant will incur inclusive of accommodation.

The above are the three issues which the magistrate should give attention to in re hearing the matter.

The appellant also appealed on the grounds that arrear maintenance had not been granted by the court below. The issue of arrear maintenance for a spouse is one that is fairly settled as discussed in the case of *Keates* v *Keates* HH 89-95 in which ROBINSON J as he then was, explained the position as follows:

> "……..it appears that the applicant's claim for arrear maintenance founders on the maxim deriving from Voet 2.15.15 - "*non emim quisquam praeterium vivit aut alendus est"* meaning according to Gane's translation, "a person does not live nor have to be maintained in arrear"…….;

ROBINSON J discussed a number of local as well as South African cases that have dealt with and applied this principle. (See *Oberholzer* v *Oberholzer* 1947 (3) SA 294 at 298;

Woodhead v *Woodhead* 1955 SR 70 at 71; *Africa* v *Africa* 1985 (1) SA 792 (SWA) at 794 (d). In *Woodhead*'s case (*supra*) BEADLE CJ as he then was, stressed the existence of an agreement or a court order as a legitimate basis for seeking arrear maintenance.

Section 7(5) of the Matrimonial Causes Act permits the court in granting divorce to make an order in relation to distribution of assets and maintenance that is in accordance with the written agreement of the parties. In *casu* although the parties purported to enter into an agreement as part of their divorce settlement, the agreement was never operationalized and it has not been incorporated into any divorce settlement since the divorce remains pending and disputes remain concerning matrimonial assets. There can therefore be no finalised agreement to talk about. In fact on p 13 of the record the Respondent dismisses the agreement as an out of court settlement which has no bearing on him which is indeed true since the agreement has not been made into a court order. The applicant herself acknowledges on p33 para 7 of the record that the agreement has not been honoured and that she has not been receiving the US$500.00 a month which was supposed to be a part of the settlement.

But aside from the agreement not being incorporated as an order of court, s6 of the maintenance Act under which the claim was brought, which deals with the making of an order by the court, is clearly couched from the time the order is made going forward. It is in the present and the future and is not retrospective. Arrears are accumulated only in relation to an order so made by the court and not in relation to the past. So for example in *S* v *Frieslaar* 1990 (4) SA 437 (C) an accused had been arraigned for failure to pay arrear maintenance in respect of expenses incurred on behalf of the child before the order was made. On review it was held that the order under which he was obliged to pay was invalid in so far as it provided for him to pay arrear maintenance. It was also emphasised that in making an order for maintenance, a court could not make an order with retrospective effect. However as articulated by CONRADIE J in that case at p 440 B, failure to maintain is not entirely without relevance in seeking an effective maintenance order going forward. As he explained:

> "The more a claimant's resources have been depleted by a defendant's neglect in the past to contribute to maintenance, the greater her need for future maintenance might be. This means that although a maintenance order cannot be made in respect of the past it can take the past into account".

In light of the fact that a maintenance order does not operate retrospectively and that the agreement that the applicant purports to draw strength from has not been incorporated

into any divorce order and has also not been followed, the claim for arrear maintenance is dismissed.

The final ground of appeal to be addressed relates to the alleged failure by the court below to address costs. Maintenance matters are conducted in the form of an enquiry and the Act itself articulates the parameters within which expenses related to a maintenance enquiry are to be addressed. In s31 it allows for reimbursement of expenses where the court considers it just to do so. The section is couched as follows:

> "31 (1) Where, in terms of this Act, a maintenance court makes an order or direction or orders any variation, extension, rescission or discharge thereof or refuses to make any such order, direction, variation, extension rescission or discharge, it may, **where it appears just to do so,** in addition to the other order of the court, make an award of such amount as it may specify against any person in favour of another in respect of the reasonable expenses incurred by the latter, directly or indirectly, in connection with the proceedings concerned.
>
> Provided that in making such an award the maintenance court shall have regard to the means of the person against whom the award is intended to be made.
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> (2) An award in terms of subsection (1) shall have the effect of a civil judgment in the magistrates court, and the provisions of the Magistrates Court Act [*Cap 7:10*] and rules made thereunder relating to the enforcement of judgments shall *mutatis mutandis*, apply to such award.
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> The clerk of the maintenance court which has made the award in terms of subsection (1) shall, on behalf of the person in whose favour the ward was made, take all such steps for the civil enforcement of that award as may be necessary".

There are two issues which emerge from the above provisions. The first is that the award of expenses is at the discretion of the court where it appears just to do so, taking into account the means of the other person. What s 31 (1) suggests is that the award of expenses in a maintenance enquiry is not a *fait accompli* since s 31 (1) clearly uses the word *"**may**"* rather than *"**shall**"* in relation to the award of expenses. The second point is that subsections (2) & (3) of the above section bolster the point that a maintenance enquiry is very different from an ordinary civil matter. These provisions make it clear that it is where an award relating to expenses has been granted that such award of expenses is in the nature of an ordinary civil claim governed by the general rules as contained in the Magistrates Court Act. A maintenance enquiry is thus distinct from the rules applicable to other general civil matters - a fact which is of relevance to the approach of costs.

To enable the court to exercise its discretion on whether it is just to award expenses with respect to such enquiries, it would seem to follow that the party wishing such expenses to be reimbursed must fully bring the nature of the expenses to the attention of the court for it to make an informed consideration. The expenses referred to in relation to a maintenance enquiry are clearly not synonymous with costs that are awarded in civil matters where as a general principle a party who is successful is entitled to claim them. The purpose of awarding such costs to a successful litigant in civil matters is to recompense them for expenses that have been incurred initiating or defending litigation but these are not articulated fully before the court as distinct to the expenses envisaged under s 31 of the Maintenance Act. From the applicant's heads of argument, it is evident that the costs that counsel alludes to as not having been addressed by the court are costs in general civil matters which generally follow the cause.

The record does not show any evidence that expenses were brought to the attention of the court or that s31 was what was being alluded to in relation to the claim. Therefore the court below cannot be faulted for not addressing the issue of expenses in the maintenance claim since the relevant provision allows for an exercise of the court's discretion where it appears necessary and just to do so. It also has to be borne in mind that the evidence that was placed before the maintenance court was not of total neglect but rather a case where the applicant was more in quest of a consistent enforceable order.

Indeed in the South African case of *Dreyer* v *Dreyer* 1984 (2) SA 483 (0) it was emphasised that the intention of their Maintenance Act (also along the same lines as ours), is an enquiry and that the power to make an order for costs cannot be read into the Act where it has not been expressly provided for. In *Reid* v *Reid* 1992 (1) SA 443 (E) it was also emphasised that the maintenance court does not have the power to award costs but that on appeal such an order of a maintenance court is in the nature of civil proceedings and courts of appeal may in appropriate cases make orders regarding costs of appeal. Our s 27 (1) & (2) of the Maintenance Act stipulates that an appeal from a maintenance court which lies to the High Court is indeed in the form of civil proceedings.

On appeal the applicant as the appellant was successful on at least three grounds of appeal which go to the gist of her claim in the sense that this court has referred the matter back for a proper enquiry to be heard. As such the applicant is awarded the costs of appeal.

As earlier stated, for expediency the matter is being referred to the same magistrate who heard the matter. However, in the event that for any reason the matter cannot be heard by the same Magistrate, then it should be heard by any other appropriate Magistrate using the issues highlighted as guidelines for the conduct of a thorough hearing.

CHITAKUNYE J agrees ……..