ISRAEL GWATI
versus
ABIGAIL GWATI

HIGH COURT OF ZIMBABWE
MATANDA-MOYO & MWAYERA JJ
HARARE, 22 June 2016

Review Judgment

MATANDA-MOYO J: This is an application for review in terms of Order 33 r 256 of the High Court Rules, 1971. The applicant seeks review of the maintenance order on the following grounds;

1) That the court *a quo* erred in granting maintenance to a party without custody of the child. The applicant being the custodial parent has no obligations to pay maintenance to the respondent.
2) That the court *a quo* failed to give reasons for awarding maintenance in the sum of $600.00 per month.

The applicant seeks the setting aside of the maintenance order and a directive for the matter to be heard *de novo* before a different magistrate.

The brief facts are that the applicant and respondent have three children together. The respondent applied for maintenance for the children in the sum of $2 000.00 per month. After hearing evidence the court *a quo* awarded maintenance in the sum of $600.00. The court *a quo* found that the respondent earned $75-00 per month and collected rentals from a Marondera house in the sum of $150.00 making a total of $225.00. She then subtracted the amount from $600.00 and ordered the applicant to pay $380.00 per month.

Applicant complains that the trial court erred in awarding maintenance to a non-custodial parent. I have perused the record of proceedings and I am satisfied that, that issue was never before the court. The applicant only submitted that the respondent was working in Harare and that the children reside at house number 1279 Nyatsine Circle Marondera. The mere fact that the respondent is employed in Harare does not disqualify her as a custodial parent. Custodial parent

is the parent who is responsible for the minor child. The custodial parent need not stay at the same place with the child but is the one who designates where the child will actually live and makes decisions for the child's welfare. I am satisfied that there is nothing on the papers before me which suggests that the respondent is a non-custodial parent.

The applicant also seeks the setting aside of the order on the basis that the trial court did not give reasons on how it arrived at a maintenance figure of $600.00 per month. From a reading of the judgment by the court *a quo*, it is not very clear how the figure of $600.00 was arrived at.

The court *a quo* admitted that there was no information before it on how much the applicant received from his horticultural project and how much he received from the tractor hire. The trial magistrate did not even come up with the figures he believed the applicant was receiving from evidence adduced. It seems the figure of $600.00 was simply plucked from the air. Such was a misdirection by the trial magistrate. The trial magistrate did not even apportion amounts due to each child but simply made a blanket order of $600.00 for the three children. That in itself is a misdirection for the obvious reason that the needs of the children are different.

Section 13 (C) of the Maintenance Act gives the trial court powers "to call for the production of any book or document and to examine any witness on oath." The trial court had an obligation to call for evidence of earnings by the applicant who is self-employed and a pensioner. The court should make a proper assessment of the applicant's earnings.

I am of the view that the matter should be remitted to the same magistrate to re-hear evidence and interrogate the applicant's earnings and respondent's needs in aiming to reach a reasonable amount. I am not satisfied that the applicant placed any facts before me warranting re-hearing before a different magistrate. However, for administrative purposes in the event that the trial magistrate is not available the maintenance enquiry can be presided over by any other magistrate.

In *Chiwandire* v *Chiwandire*, it was stated that when it is evident from the record that there were shortcomings on how the magistrate dealt with the issues that were raised on appeal and that the factual findings of the magistrate were not supported by clear and convincing evidence on how the magistrate arrived at its conclusions, then a review court will naturally find that a proper enquiry has not been made in terms of s 5 and 13 of the Maintenance Act [*Chapter 5:09*].

The magistrate on hearing the matter should further ensure that all evidence in support of factual averments is laid before him or her. Where an applicant in particular claims specific sums to support alleged expenditures and a certain lifestyle, these should he supported by clear evidence. Expenditures cannot be based on mere assertions from which the magistrate then draws his or her own conclusions. The investigative role of the magistrate is emphasized. See *Hova* v *Tafamba* 1992 (2) ZLR 348. The formula applied in arriving at the final figure for maintenance must be apparent from the judgment. Where appropriate the magistrate must use the guidelines set out in cases such as *Hova* v *Tafamba*, *Gwachiwa* v *Gwachiwa* (S) 134- 86.

See *Lindiwe* v *Elijah Chifamba* HH 28/15.

In the result I order as follows;

1) That the matter is remitted to the same magistrate for a proper enquiry to be made on the income and expenditure of the applicant and the respondent where applicable. In the event that the trial magistrate is not available for any reason any other magistrate may hear the maintenance enquiry.
2) In the interim the applicant continues to pay the set maintenance of $380.00.

MWAYERA J agrees _____