

PHILIP JAMES
versus
CUTA SINALO

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 14, 21 May 2015 & 28 January 2016

Civil appeal

C K Tandi, for the appellant
Respondent in person

NDEWERE J: On 10 February, 2014, the appellant was ordered to pay maintenance to the respondent, his customary law wife in the sum of \$250.00 per month from end of February, 2014. He was also ordered to pay \$120 per month for each of his three minor children in the sum of \$120.00 per child per month, from end of February, 2014. The total amount payable for the children was \$360.00 per month. The respondent was further ordered to pay school and crèche fees for Yvette and Vernon James respectively at the beginning of each school term or crèche month as may apply. The order in respect of the children was to remain till the children turned 18 years or became self-supporting.

The appellant applied for the maintenance in respect of his wife to be discharged and that of his minor children to be varied downwards. On 20 March, 2014, the Magistrate's Court discharged the maintenance order in relation to the respondent after being satisfied that the appellant had since divorced his wife by giving her a divorce token. The maintenance order in respect of the children was not varied.

On 23 April, 2014, the appellant noted an appeal against the magistrates' judgement of 20 March, 2014.

The grounds of appeal were given as follows:

- “1. The learned magistrate erred grossly and misdirected herself in making a finding of fact that the illegal tuckshop business was still operating in circumstances where:
 - (i) Such finding was based solely on respondent's unsupported and uncorroborated allegation that the tuckshop was still operating; and
 - (ii) Such finding was made despite appellant's clear evidence to the contrary which evidence was corroborated and supported by the Local Authority.

2. The learned Magistrate erred in law by taking into account alleged earnings from an illegal activity in order to sustain the maintenance order, more so in circumstances where there was ample evidence to show that the illegal activity had, in any event, been discontinued.
3. The learned Magistrate erred and misdirected herself in fact by inferring that the appellant does not live a life of limited means firstly because he had paid off his arrear electricity bill in full instead of negotiating payment terms in circumstances where:
 - (i) it was undisputed that appellant had paid off the arrear electricity bill using a company loan that he would repay in instalments anyway; and
 - (ii) the learned Magistrate had not inquired whether the appellant had in fact failed to negotiate payment terms with the electricity supply authority and whether or not the electricity supply authority had been amenable to any payment terms as may have been proposed by the appellant.
4. The learned magistrate erred and misdirected herself in fact by inferring that the appellant does not live a life of limited means secondly and lastly because he had paid off the insurance and tax for his car for the whole year when it would have been cheaper to do so quarterly in circumstances where:
 - (i) it is common cause that the appellant had in fact used his annual bonus to discharge the annual insurance and tax requirements for his motor vehicle;
 - (ii) the total costs of the annual motor insurance and annual motor vehicle tax remains the same whether paid annually or quarterly- it is therefore not actually “cheaper” to pay the same quarterly; and
 - (iii) in any event, the learned Magistrate drew such inference without having duly inquired from the appellant his reasons for making the annual payment as opposed to quarterly payments”.

The relief which the appellant sought was for the court to:

“(a) Set aside the order of the Magistrate Court in its entirety and substitute it with the following order:

‘That the application for downward variation of the maintenance order be and is hereby granted.’

(b) The respondent shall pay the costs of this appeal.”

The appellant was represented by Mawere and Sibanda Legal Practitioners while the respondent represented herself throughout the proceedings. Both parties filed their heads of argument in December 2014 and February, 2015 respectively.

The respondent vigorously opposed the appeal for downward variation of the maintenance. Through this vigorous opposition, the court got appraised of the changed circumstances of the respondent and the children since the decision of the court *a quo* on 20 March, 2014. The respondent advised the court that at the time the children were awarded \$120 each as maintenance, she was living at the matrimonial home, 7160 Sebakwe Road, Zimre Park, Ruwa. She had since been evicted from that home together with the children by the appellant after he gave her the divorce token. She advised the court that because one of the children was attending school in Zimre Park, she had to find rented accommodation in

Zimre Park to avoid disrupting the child's education. She advised that she was renting one large room with an en-suite bathroom for \$150 00 per month. She also advised the court that the projects she used to do at the matrimonial home of selling chickens and running a tuckshop had stopped because she could not do such projects on rented premises.

The appellant himself, despite being legally represented, had not revealed this information concerning the children's changed circumstances due to the eviction from the matrimonial home. He did not dispute the respondent's assertions and indeed, he could not have done so because the papers issued in the eviction process, which the respondent opposed, are part of the court record.

The respondent also advised the court about appellant's additional rental income from 7160 Sebakwe Road, Zimre Park, Ruwa, which appellant was renting out to tenants following his successful eviction of the respondent and the children from the matrimonial home. Once more, the appellant, despite being legally represented, had not disclosed this new information to the appeal court. When confronted with the assertion of new rental income by the respondent, he could not deny that he was receiving rental income from 7160 Sebakwe Road, although he stated a smaller amount than that stated by the respondent.

The court wonders why appellant did not reveal this additional rental income, yet according to his tenant's affidavit, the tenant has been in occupation of the premises since December, 2014.

In his application for a downward variation of the children's maintenance, the appellant offered \$20 per month per child, coming to a total of \$60.00 per month for all the three children. When the appeal hearing started, the appellant increased his offer from \$20 per month per child to \$50 per month per child. He later further increased it to \$190.00 for all the three children. The respondent maintained her position that a downward variation was untenable as she starts by taking out \$150.00 for rental of the room she occupies with the children from the \$360, leaving her with a balance of \$210 for all the other requirements.

With regards to the first and second ground of appeal the magistrate's finding of fact was that the appellant was not being truthful in asserting that the tuckshop was no longer operating. The magistrate was convinced by the respondent's evidence that the closure of the tuckshop was stage managed by the appellant, just for one day, to "create" evidence to support his assertion that the tuckshop was no longer operating when in actual fact it was operating. As an appeal court, we do not have any basis to attack the magistrate's finding on

the lack of credibility of the appellant in this regard. The court *a quo* could see that the appellant's lifestyle and that of his ex-wife and children could not have been sustained only by a messenger's salary of \$561.00 as asserted by the appellant, but in the absence of full disclosure of the income, all it could do was to view the appellant's settlements of bills as another scheme to avoid paying maintenance. It cannot be faulted for doing so in view of the appellant's disposition to avoid full disclosure of income.

Furthermore, the magistrate's finding is strengthened by the fact that up to now, more than a year later it was confirmed during the appeal hearing that the appellant has not demolished the tuckshop despite being urged to do so by council in the letter of 25 February, 2014. The failure or refusal to demolish the tuckshop gives credence to the respondent's assertion that the tuckshop was closed temporarily, just to create a case for the downward variation of the maintenance order.

After disbelieving the appellant on the closure of the tuckshop, the magistrate cannot be faulted for including the earnings from the tuckshop as the appellant's income in circumstances where even council itself appears to have ratified or condoned the operations of the tuckshop by billing the appellant on a monthly basis. As the respondent correctly pointed out, even unlicensed vendors are maintaining their children from vending activities so if the appellant has income from the tuckshop, and council gets paid monthly for the operation why should the minor children be the only ones to lose out from that income? We therefore find no misdirection in the magistrate's decision to include earnings from the tuckshop as income after disbelieving the appellant's assertion that the tuckshop was no longer operating.

With regards to grounds 3 and 4, the difficulty which the magistrate had to contend with was an untruthful applicant who never disclosed all material facts to the magistrate upfront. The appellant is the one who should have truthfully disclosed all his income to the court *a quo* and not wait to react to the respondent's assertions. In the downward variation application he ought to have disclosed all his income upfront but he did not do so and gave the impression that all he had was his salary as a messenger.

Even during the presentation of the appeal, he did not disclose his rental income which we now know he receives. The rental income only came to light following an assertion by the respondent. Only after that did he confirm receiving a rental income. He filed an affidavit by his tenant which says he pays \$400 per month for the former matrimonial

home. The tenant goes further and states that he has been in occupation of the property since December, 2014. With regards to the relief sought, the court agrees with the rationale in the case of *Kazingizi v Dzinoruma* 2006 (ZWHHC) 106 that maintenance proceedings are not trials where one side emerges victorious and the other vanquished but are inquiries for the benefit of the minor children.

Consequently, in view of the changed circumstances of the children following the eviction of the custodian parent from the matrimonial home which were placed before us during the appeal hearing, we had to enquire further into the matter and we assumed an investigative role to ensure that the minor children get reasonable financial support. It is as a result of our inquiry that the appellant who had offered \$20 per child initially, increased this to \$50 per child during the hearing and later to \$190.00 for the three children.

Despite the appellant's overtures, we were not convinced that a downward variation was proper in circumstances where \$150.00 is needed for rental of the one room and bathroom required by the children and their mother following their eviction from the family home. We also felt that the respondent could not be expected to seek less expensive accommodation outside Zimre Park, when the school going child attends school in Zimre Park. Just like the court *a quo*, we were of the opinion that the appellant had still not fully disclosed all his income in view of what his ex-wife said about his mechanical prowess during the appeal hearing.

We also felt that the appellant could reduce his expenses and that of his new family by finding less expensive accommodation and save some of the rental income from the former matrimonial home for the children's upkeep. His ex-wife and three children were forced by their new circumstances to move into one large room for a rental of \$150.00 per month. We did not see why appellant could not do the same and move to smaller and less expensive premises in order to be able to give his children reasonable financial support.

The court further agreed with the respondent's assertion that the children have already been psychologically traumatised by the change of lifestyle and it would be unfair to vary downwards their already meagre maintenance.

Furthermore, the amount of \$120.00 per child which the appellant is paying is in line with the principle in the *Gwachiwa v Gwachiwa* case if we take into account the applicant's known income of \$561 and the \$400 accepted rental income and give two shares each to the applicant and his new wife and 4 child's shares for his first three children and the 4th baby

from his new wife. US\$120.00 is the child's share while the parents get \$240.00 each. This would amount to US \$360 for the three children.

In view of the above, the appeal is dismissed, with costs.

Chitakunye J agrees

Mawere & Sibanda, appellant's legal practitioners