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HIGH COURT OF ZIMBABWE

KWENDA J

HARARE, 14 May 2018 & 15 May 2018

**Urgent Application**

*C. C Mumba*, for the applicants

*T. K Takaindisa*, for the respondent

KWENDA J: The applicant approached this court on a certificate of urgency for a provisional order the terms of which are the following:-

FINAL ORDER SOUGHT

1. Maintenance order is granted against respondent in favour of first applicant as follows
2. Respondent to pay directly to Rhodes University fees amount, 60% (sixty *per* centum) of the total Rhodes University fees payable from time to time as appears on Proforma Invoices, issued by the Rhodes University within seven (7) days of being presented with the Proforma invoices by first applicant with after from February 2018.
3. Second applicant to reimburse the respondent his 60% portion of the money paid in terms of the Proforma Invoice at the beginning of the year but not debited on the final statement for first applicant’s fees at the end of the year and
4. Respondent to pay into first applicant account, 60% (sixty *per* centum) of all dependent’s other education related expenses which include but are not limited to travel expenses within (7) seven days of being presented with the Invoices by first applicant with effect from February 2018.
5. Respondent to pay into first applicant’s account $150 *per* month for first applicant’s personal upkeep with effect from February 2018.
6. Respondent be ordered to pay costs on a legal practitioner client scale.

INTERIM RELIEF SOUGHT

1. Respondent be and is hereby ordered to pay directly to Rhodes University, the sum of ZAR68 000.00 (sixty eight thousand rand) being the outstanding payment of 60% contribution towards total education expenses of first applicant who is a dependent of respondent.

First applicant is an adult. Second applicant is her mother and respondents’ wife. As will

morefully appear hereunder, this is a typical situation where parents in an acrimonious relationship selfishly use their children as pawns in their dirty war. The interests of the children are fronted to conceal the real motive behind actions. In the end the parents lose focus and fail to either, do what is the best interest of the children or fail to properly present the children’s plight.

There was absolutely no reason for the second applicant to be cited as the second plaintiff. What is clear is that she has a personal vendetta with respondent and the first applicant’s school requirements presented an opportunity for her to settle scores. The first applicant is an adult with the capacity to sue. Indeed, she successful sued respondent for maintenance in the maintenance court. The order of the maintenance court bears the names of first applicant and respondent only as the two parties. How the second applicant ends up a party in an application for variation of an order to which she is not a party boggles the mind.

Indeed the court is disappointed that counsel first the applicant allowed himself to be sucked into the mess. While he would be within his rights to prosecute client’s case with vigour, he must always remember that he has a duty to be professional and provide counsel to client against excesses.

Suffice it to say, the parties agreed that second applicant be struck off as a party and the matter proceed with first applicant as the only applicant.

Respondents counsel took issue with the certificate of urgency which he said does not meet the standard expected by the courts. As stated above the papers before me, especially those of the applicant, reveal a lot of emotion. As a result the certificate of urgency is unhelpful. It is unnecessarily long and winding. All that needed to be stated is that respondent is a responsible person *vis* *a* *vis* the first applicant, first applicant is still dependent on her parents, there is urgent need for her to pay fees at school (while stating the stage she has reached with her education), the existing maintenance order does not adequately cover for the urgent need, respondent having allowed her to enroll at the school is now delaying payment unreasonably, first applicant risks losing her place and there is no other remedy. The attempt to portray the second respondent as the more responsible parent who has now exhausted her credit was not necessary.

The first applicant also seems not to appreciate that what is of importance to her is that her education be funded. There was no need for her to associate herself with criminal proceedings that could result in the incarceration of her bread winner while arguing that an order which is clear means something else other than what its simple wording reveals. The magistrate, in awarding her maintenance emphasized that respondent was required to contribute towards tuition fees only. She had the option to either seek variation or appeal against that order if it did not meet her requirements. Instead it is the respondent who appealed because he believes the maintenance order is onerous.

Notwithstanding the observations which l make above. I decided to treat the matter as urgent. A certificate of urgency serves two purposes. Firstly, as soon as the Registrar of the High Court receives a chamber application supported by a certificate of urgency he/she has no discretion but to treat the chamber application as urgent and submit same forthwith to a judge. See r 244 of the High Court. Secondly, it must reveal the grounds of the urgency at a glance. It must therefore be helpful to the court.

There is no consensus on whether or not it is necessary that the certificate of urgency be submitted by a legal practitioner other than one working in the law firm which prepared the application. Some judgments persuasively state that rule 244 is clear and does not require that a lawyer from another law firm should certify the proceedings as urgent. A lawyer is a professional capable making a value judgment on the issue of urgency after considering the circumstances of the particular case notwithstanding the involvement of his law firm. Legal practitioners know, through training that they have a duty to assist the court. There is no need to burden a litigant with extra costs since the other legal practitioner is not likely to render service for no fee. See *Route Toute Bv* *& Others* v *Sunspsn Banans Pvt Ltd & Anor* HH 2710. The point made is that there is no need to read into clear provisions more than the plan meaning thereof. Equally persuasive is the view that it is desirable that a legal practitioner other than a legal practitioner working for the law firm that prepared the application to provide the requisite certificate since that guarantees objectivity. Such a legal practitioner would not be under the one over bearing pressure of client. He makes a value judgment based on his reading of the papers. See case of *Chafanza* v *Edgars Stores Ltd* HB 27/05. The cost to client would not matter as it is a natural consequence of legal representation. I will not try to express my opinion on the approach to be preferred. At the end of the day the Court decides whether a matter is urgent or not. I adopted the robust approach of going through the entire applicant’s papers in order to do justice to applicant’s case in light of my observation above that the conduct of applicant’s counsel betrays complicity with applicant’s mother to the extent that , that might have clouded his professional objectivity. My reason for treating this matter as urgent is the apparent risk that first applicant may be thrown out of school. I do not wish, however my approach to be considered as a precedent on the issue of urgency. If the papers do not reveal urgency and/or are non-compliant with the rules, the application must fail. The Court has no business articulating applicant’s case for her.

This is one case where if the procedure stated in case of *Chafanza* v *Edgars Stores Ltd* had been adopted, the lawyer would have raised a red flag. He would have noticed inadequacies and sought clarification on several issues to the benefit of the presentation of applicant’s case. However I managed to grasp that the applicant case is that the balance of her fees need to be paid urgently and she risks being thrown out of school because respondent , who is the person responsible for paying he fees is unreasonably refusing to do so.

An application for variation is made in terms of section 8 of the Maintenance Act [*Chapter 5:09*]. A maintenance order is not suspended by the noting of an appeal. See s 27 (3) of the Act. It is only correction which is prohibited in terms of the Magistrates Court Act. I do not have the record before me. I do not know the basis upon which the magistrate ordered as he/she did. I do not have the benefit of an enquiry into the respective means of the parties. In any event there is no need to approach the High Court for variation of an order of the maintenance court unless the High Court is exercising powers of either review or appeal. The applicant had ample opportunity to seek variation or appeal but did not do so. Applications in the Magistrates court are set down on seven days’ notice. See Order 22 r 1 of the Magistrate Court rules.

The applicant’s counsel submitted that he attempted to file an application on behalf of the applicant but it was not accepted. Such averment is not contained in the applicant’s papers. In any event there is no evidence of that. If an application is not accepted, a litigant can always approach the magistrate in charge of the station and correspondence to that effect would be proof of the attempt.

The applicant requested this court to resort to the High Court’s inherent jurisdiction and rule 4 (C), of the High Court rules. He submitted that a strict adherence to procedure will result in this application being non-compliant and yet the essence of the application is that there is dire need for this Court to assist her and the relief she seeks is an necessary urgent intervention while other processes take place. If the court does not intervene, the respondent who has already shown intransigence will not pay voluntarily. The argument is quite strong but it is not backed by evidence. The proforma invoice submitted in support of this application is dated in October 2017. It was before the Maintenance Court which singled out tuition fees. There is no correspondence from the school either confirming the amount due or that the applicant has a deadline to meet failure of which she will be thrown out of school. The proforma invoice speaks of a lee way to spread payments throughout the year. The applicant has not submitted a recent statement revealing that the amount due. As it turned out the amount due as at 8 March 2018 was ZAR50 999.05 applicant had not disclosed this. It also emerged during argument, that out of this the sum of ZAR50 999.05 due as at 8 March 2018 respondent has paid ZAR26 000.00 which the applicant again, had not disclosed. The applicant ought to have been candid with the court. I cannot exercise my discretion in favour of the applicant who has not been candid.

Even if one accepts that this application was erroneously couched as an application for review, the relief sought is in the form of a mandatory interdict i.e. an order compelling the respondent to pay out the amount stated in the interim order. Clearly there is no such right accruing to the applicant emanating from the Maintenance Order. Respondent is indeed a responsible person in terms of the Maintenance Act but what his responsibilities are spelt out in the maintenance order which he has obeyed. In addition the applicant has not adduced evidence of irreparable harm. It cannot be said the applicant is has no other remedy.

In the result the application cannot succeed.

I will not order costs against the applicant but just warn her that if she succumbs to the emotions at the expense of soberly advancing her interests the court may not be so lenient with her in future. She is a student already dependent on respondent and it would be absurd to order her to pay costs to respondent

In the result application is dismissed with no order as to costs.

*Chitewe Law Practice*, applicants’ legal practitioners

*T K Takaendesa Law Chambers,* respondent’s legal practitioners