ESTHER PAIDAMOYO MHIRIBIDI
versus
TADIOSI MUZOROZA

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 19 July and 24 August 2022

Civil Appeal

Mr *N Chikono*, for the appellant
Mr *M F Chapeta*, for the respondent

MUCHAWA J: This is an appeal against a decision by the magistrates' court in which the appellant had made an application for upward variation of maintenance in respect of the child Makomborero Setu Andre Mhiribidi from the subsisting amount of ZW$ 10 000.00 to ZW$ 50 000.00. The court *a quo* varied the amount of maintenance to ZW$ 25 000.00. The appellant and the respondent were in a relationship which led to the birth of the child in question on 23 October 2018.

The appellant was dissatisfied with the court *a quo's* decision and filed this current appeal on the following grounds;

1. The court *a quo* erred in finding that the respondent was not able to pay the requested amount without any evidence being placed before her and in light of the fact that respondent indicated that he was the one responsible for the upkeep and educational welfare of the other four children with other women.
2. The court *a quo* erred in ruling on the submission made by for counsel the respondent (*sic*) relating to the role played by other women without any evidence from such persons supporting that submission.
3. The court *a quo* erred in directing that the child be taken to a government school without directing the same about the other children and this amount *(sic*) to discriminating the minor child.
4. The court *a quo* erred in treating the application for variation as an ordinary application instead of treating it as an inquiry where the onus strictly rests with the applicant.

It is prayed that the appeal succeeds and that the decision of the court *a quo* be set aside and be replaced with an order varying the amount for general upkeep of the minor child to ZW$ 50 000.00 and that respondent pays 50% of the school fees for the minor child.

The appeal is opposed. We heard the parties and reserved our judgment. The only issue to be determined is whether the quantum of maintenance awarded by the court *a quo* was adequate, given the circumstances of the case and the provisions of the law.

WHETHER THE QUANTUM OF MAINTENANCE AWARDED BY THE COURT *A QUO* WAS ADEQUATE IN THE CIRCUMSTANCES

Mr *Chikono* submitted that there was a material misdirection in the court *a quo's* decision which warrants interference by this court of appeal, Reliance was placed on the case of *Cosmos Cellular (Pvt) Limited v PTC* 2004 (2) ZLR 196 (S). He further submitted that the court *a quo* made a finding which was not backed by the evidence on record particularly as no other woman attested that she was responsible for payment of school fees for their child. Instead, the respondent's opposing affidavit was pointed to as categorically stating that he was responsible for the general maintenance and payment of school fees for four other children. See page 168 paragraphs 6 and 7.

The court *a quo*'s reliance on submissions made by the respondent's counsel is alleged to be erroneous as it is not evidence and should have been backed by some form of evidence. At the very best, it was submitted that the respondent should have been made to testify under oath and subjected to cross examination. Without this, the conclusion of the court *a quo* is alleged to be unjustified.

Furthermore, it was averred that the appellant's evidence that the respondent's other children attended private schools was not disputed and the court should have ensured that the children be treated equally and should not have directed that the minor child in issue be enrolled at a government school.

The way the inquiry into the application for variation of maintenance was conducted, was also impugned. Such application was said to be *sui generis* as the best interests of the child are of paramount importance and the court should not have treated this as an ordinary application.

Mr *Chapeta* submitted that in paragraph 4 of his opposing affidavit, the respondent incorporated his opposing affidavit to the initial maintenance application which was filed on 21 October 2020. On page 41 of record in paragraphs 7.5 to 7.7, of that affidavit, it is the respondent's

evidence that the mother of two of his children who was employed as a nurse in England, was responsible for the children's luxurious lifestyle, including one child being enrolled at a British University as a British citizen. In this respect, ground 2 of appeal is said to be misplaced as counsel's submissions are said to be supported by the earlier affidavit.

Mr *Chapeta* also submitted that there was evidence placed before the court to show that the respondent had lost his employment with the Lands Commission. In support of this was reference to the suspension letter on page 43 of record of 3 March 2020 and a letter of 7 October 2020 on page 46 of record which set up a tribunal to inquire into the respondent's alleged misconduct. There is however no letter confirming the dismissal that the court was pointed to but the respondent makes this averment in his opposing papers.

It was further submitted that the duty to maintain the minor child should be shared by the appellant and respondent as per *K* v *K* 106/18. Mr *Chapeta* argued that the appellant should not look to the respondent to solely maintain the minor child.

Furthermore, it was submitted that there was an inquiry held by the court *a quo* as the appellant was allowed to make oral submissions in support of her written submissions.

Regarding the alleged discrimination of the minor child as compared to the respondent's other children who are allegedly enrolled in elite schools, it was contended that it is only because of the contributions of the mothers of such children to their maintenance. It was averred that the minor child in issue's maintenance can only be assessed in the light of the appellant and respondent's means only. The court *a quo* is said not to have erred by suggesting that the appellant should adjust her and the child's lifestyle particularly as the respondent was not employed at the material time.

A clear analysis of the evidence on record shows that indeed the respondent had earlier attested that the mother of two of his children was contributing to their maintenance. This was not reconciled however with his evidence on page 168. He stated as follows;

> "6. I have four other children whom I am also taking care of by paying school fees and accommodation, groceries, clothes and uniforms. Applicant is aware of this fact.
>
> 7. I am taking care of the following children whose birth certificates are attached and marked as Annexures A1-A4.
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> i. FADZAI AMANDA MUZOROZA born 25 December 2004.
> ii. TONGAI BENJAMIN MUZOROZA born 21 September 2004

iii. MUDIWA NATHANIEL NDORO born 20 February 2009
iv. TAKUDZWA MAPORISA born 8 February 2017"

Mr *Chapeta* explained that it was the child Benjamin whose mother was employed in England who was funding his education at an elite school. There was no evidence regarding how the other three children were being maintained by him as he alleged yet he claimed to have lost his job at the Lands Commission. Though Mr *Chapeta* tried to rationalize this by saying maintenance is a duty which falls on both parents, this is not what the respondent said in his evidence. On being questioned by the court, Mr *Chapeta* conceded that there was no evidence placed before the court by the respondent to show his source of income for meeting the four children's expenses. This is particularly so, if one has regard to the respondent's earnings and monthly expenses which he availed to the court in October 2020 which appears on page 51 of record. He basically said that he was earning a salary of ZW$40 000.00 and had total expenses of ZW$98 000.00. There was no thorough inquiry to establish the respondent's means and the only reasonable conclusion is that the respondent has some concealed source of income and he did not put the court into confidence to enable a proper assessment.

What the court *a quo* was seized with is set out in the case of *Nduna* v *Ndlovu* HB 8/2004 wherein it was held as follows;

> "In an application for the increase of maintenance an appellate court will not readily interfere with the trial court's award, but there is a duty on it to do so where sound reasons for interference exist – *Mentz* v *Simpson* 1990 (4) SA 455 (A) and *The South African Law of Persons and Family La*w by D S P Cronje 3rd Ed at page 296. There are no such sound reasons *in casu*. ----------The general principles are that a child of divorced parents is entitled to be maintained by them, and they are correspondingly obliged to provide it with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life. When an order is made by a maintenance court the rate is generally fixed on the basis of the needs of the child and the respective means and circumstances of the parents as they can be reasonably foreseen – *Herfst* v *Herfst* 1964 (4) SA 127 (W); *Kemp* v *Kemp* 1958 (3) SA 736 (D) and *Patrikios* v *Patrikios* 1953 (3) SA 252 (SR). "

In *Kakono* v *Kakono* HH 138/11 where the court found that there had been no proper inquiry and there were material disputes of fact calling for the parties to lead evidence in chief, it was held as follows;

> "The court *a quo* made a finding in terms of s 8(7)(b) the Act that the means or circumstances of the respondent have not changed since the making of the order on 18 March 2010. In the absence of reasons for this finding this court is constrained in deciding whether the decision arrived at by the court *a quo* is indeed correct and supported by the facts or evidence on record. This problem is further compounded by the fact that no evidence was led in much detail during the inquiry. The

> averments by the parties during the inquiry clearly indicated material dispute of facts which should have been properly dealt with by allowing the parties to lead evidence in chief and in cross-examination." (My emphasis)

Though the above finding dealt with the aspect of lack of reasons for the court's finding, my interest is drawn to the similarity in circumstances where the averments of the parties during the inquiry clearly indicate material disputes of fact calling out for having the parties lead evidence in chief and cross examination. In *casu* it was necessary to properly inquire into the respondent's means. In the case of *Kakono* v *Kakono supra*, the court went further to state what the proper course to be taken should have been as follows;

> "This is so because there is insufficient evidence on record to make an informed finding in that regard. The proper course to take in such circumstances is to set aside the order granted declining the upward variation of the maintenance order and to refer or remit the matter to the court *a quo* for a proper inquiry to be carried out by any magistrate of competent jurisdiction. In the interim the original order granted on 18 March 2010 remains valid."

An almost similar approach was taken in the case of *Kazingizi* v *Dzinoruma* HH 104/06. Therein the court found as follows,

> "There is however one other issue that exercised our minds during the hearing of this appeal. Due to the ravages of inflation, the amount of maintenance in dispute between the parties became irrelevant, as the sum of the order sought to be varied by the appellant was barely adequate to maintain one child at the date of the hearing of the matter. The value of the amount of the order has since further depreciated. In setting aside the decision of the trial court we are not suggesting that the amount of the maintenance set at $1 000 0000 was inappropriately high. Thus, in our view, it will make a mockery of the justice delivery system for us to direct at this stage that reasons for the decision be supplied. In this regard, we are guided by the fact 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 or dependents. Thus, where in a trial we would have remitted the matter to the trial court for reasons to be supplied, we are in this matter of the view that both parties should be granted leave to approach the court *a quo* for a fresh inquiry under section 8 of the Maintenance Act [*Chapter 5:09*] into the appropriate level of maintenance payable."

In *casu,* the court *a quo* indeed granted an upward variation from ZW$10 000.00 to ZW$ 25 000.00 and not the ZW$ 50 000.00 which had been sought. By today such amounts have been eroded by inflation. It is our finding that the inquiry for the benefit of the minor child was not properly conducted as it could have gone further to have evidence in chief led and cross examination being carried out to establish the respondent's means as the evidence on record points to some concealed source of income and clear material disputes of fact. Once a proper inquiry is

carried out, there will be sufficient evidence before the court to assess what a proper quantum of the maintenance should be. The question of what role the mothers of the other children are playing in their children's maintenance will be answered. Above all, the respondent's proper means will be before the court and the question of discrimination against the minor child will not arise. Both parties are obliged to provide the minor child with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life

In the circumstances of this case, the best way to cater for the minor child's best interests is to have the upward variation order of 21 April 2022, remain valid whilst granting either party leave to approach the court *a quo* for a fresh inquiry under section 8 of the Maintenance Act [*Chapter 5:09*] into the appropriate level of maintenance payable.

Accordingly, we order as follows;

1. The appeal partly succeeds.
2. The decision of the court *a quo* of 21 April 2022 which varied maintenance payable for the minor child Makomborero Setu Andre Mhiribidi to ZW$ 25 000.00 per month remains valid in the interim.
3. Either party is granted leave to approach the court *a quo* for a fresh inquiry under section 8 of the Maintenance Act [*Chapter 5:09*] into the appropriate level of maintenance payable.
4. There is no order as to costs.

MUCHAWA J----------

WAMAMBO J agrees----------

Moyo Chikono & Gumiro, appellant's legal practitioners
Antonio & Dzvetero, respondent's legal practitioners