

JUSTICE MAYOR WADYAJENA
versus
WADZANAI MUDARE

HIGH COURT OF ZIMBABWE
CHITAKUNYE and TSANGA JJ
HARARE, 14 & 21 October 2014

Civil Appeal

C. Phiri, for the appellant
J. Dondo, for the respondent

TSANGA J: This was an appeal against an order for maintenance granted by the Magistrate Court. The appeal was heard by this court on 14 October 2014 and the following order was granted:

1. It is ordered that the judgment of the court *a quo* is hereby set aside.
2. The matter is remitted back to the magistrate for a proper maintenance enquiry to be made.

The reasons for remitting the matter to the Magistrate Court are hereby explained as guidance to the magistrate in re-hearing the matter. The appellant, a business man and legislator was ordered to pay \$1 500.00 for his minor child whom he had before he married. He brought on appeal to this court on grounds that can be summarised as follows:

- (i) That it was not demonstrated that he had failed or neglected to support his child.
- (ii) The magistrate erred on evidence presented in concluding that \$1 500.00 should be paid.
- (iii) The Magistrate failed to pay due regard to the fact that the respondent also had a duty to contribute to the maintenance of the child.
- (iv) The magistrate erred in placing undue emphasis on ownership of luxury vehicles and that he was director of a company and a member of parliament (MP) when no evidence was placed to establish the dividend from the company.

This court's decision to remit the matter back to the Magistrate's Court is premised on the finding of failure on the part of the magistrate to conduct a careful enquiry in order to substantiate the various claims by the parties in the case. The evidence presented by both parties was highly deficient to support their various claims as will be illustrated. While it is indeed the duty of the parties in a maintenance claim to lay all evidence fully before the court, it is equally the duty of the magistrate to conduct a thorough and proper enquiry that is illustrative of how he or she has arrived at a particular conclusion. It is not the duty of the appellate court to carry out the enquiry which should have been done by the magistrate. (See *Hora v Tafamba* 1992 (2) ZLR 348 (S) at p 351A)

The failure on the part of the magistrate to conduct a proper enquiry relates specifically to the following issues:

- (1) Whether the Appellant as a responsible person in terms of providing support, had indeed neglected or failed to provide reasonable maintenance as required by the law so as to justify an order of the court to be granted compelling him to do so.
- (2) The failure to make full and proper use of the powers given to the maintenance court by the Maintenance Act [*Cap 5:09*] to call for evidence to support any claim. This includes calling witnesses and requesting for proper documentary evidence that may be appropriate to the case.

The first ground of appeal was that it was not demonstrated that the appellant had neglected or failed to pay. This goes to the root of any maintenance claim and it is an issue to be assessed fully by a magistrate in a maintenance case since it determines whether or not an order is justified. Section 4 of the Maintenance Act [*Cap 5:09*] is couched as follows with regard to failure to support:

“4. Summons to appear upon complaint of non-support

- (1) Upon a complaint on oath being made to a maintenance officer of a maintenance court that a responsible person fails or neglects to provide reasonable maintenance for any dependent of his, the maintenance officer may issue a summons requiring the responsible person to appear before a maintenance court to show cause why an order for the maintenance of the dependant should not be made against him”.

The evidence on record in this case showed that the appellant had custody of the child which he said he surrendered to the mother due to misunderstandings regarding her constant visits to the child's school. However when he had her in his custody he was solely responsible for the child's maintenance inclusive of her fees at an upmarket private school

where he was paying \$2 200.00 per term. It was not disputed that he continues to be responsible for the child's fees. The maintenance claim was made by the respondent within 5 days of the child being returned to her mother. The respondent's counsel argued on appeal that the time period should not be a factor for consideration since no arrangements in this case were made for the support of the child when she was returned to the respondent. In her comments on the appeal, the magistrate also stated that it was evident from the submissions by the applicant that he had stopped his support. Whether the appellant could be said within a five day period to have neglected his duty of support so as to justify an order against him needed to be canvassed more fully by the magistrate given that the magistrate presiding in a maintenance court is not just playing the role of an umpire in such cases.

Neglect and failure to maintain is at the core of a maintenance claim. Its factual existence or otherwise is thus an important part of the enquiry to be canvassed by a magistrate especially where the other party denies such neglect. While a maintenance officer can justifiably issue summons upon a complaint of non-support based on the *prima facie* evidence placed before such officer, the fuller details regarding such failure are to be canvassed by the maintenance court in hearing the matter. At the hearing of this appeal, the appellant conceded at the outset that he was abandoning his initial prayer that this appeal be upheld and that the Magistrate Court's decision be dismissed since that would not meet the justice of this case from the perspective of the child. He also abandoned the alternative prayer which was to be ordered to pay \$200.00 per month as well as the child's fees. Instead he sought remittal of the matter back to the magistrate for the matter to be heard fully before the magistrate. Upon being satisfied from the record that a case had indeed been made for a remittal, it is the considered view of this court that this will allow the maintenance court to engage more thoroughly with the purported claim of neglect as its point of departure.

In awarding the sum of \$1 500.00 as monthly maintenance for the child, the magistrate explained in the judgment that the court's finding was that the appellant was a man of means. Specific reference was made to the fact that he owns a transport company and that besides the amount of \$2 538.00 he said he earned as Director of his company, the benefits realised from profits also put him in a good position financially. This may very well be the case but there is no evidence in the record that the proof of his company's earnings were placed before the court in order for it to reach this conclusion neither is there any

evidence of him being compelled to do so if the court felt that he was being frugal with the truth regarding his financial position.

With regards to the respondent, whilst finding that her initial claim of \$11 600.00 was exaggerated, there is again no evidence of a thorough enquiry into how the magistrate arrived at the figure of \$1500.00 as being appropriate to keep up the standard of living the child had become accustomed to when living with his appellant. Granted, in the South African case of *Cullen v Haupt* 1988 (4) SA 39 (C) at p 41 I CONRADIE J observed as follows regarding expenses relating to children:

“As far as needs of children are concerned it is commonly accepted that what the court has to do is to make an estimate of what the needs of children in the particular social stratum and situation of the children concerned might be; it is seldom very helpful to look at documentation”.

However, as aptly observed in *Mgumane v Setemane* 1998 (2) SA 247 at 253F “such intelligent assessment can only take place once full and adequate information has been placed before the court”.

In *casu*, the information placed before the maintenance court by the respondent which totalled \$11 600.00 was a result of pure thumb-sucking. As such, realistic figures of expenditures on the child expenses need to be placed before the court. There is no reason for instance why rentals cannot be supported by concrete evidence of a lease agreement and payment details. Expenditure on medical aid for instance is also something that can be proven. Since the respondent also has a duty to support, evidence of her own income needs to be supported by concrete evidence in the form of her salary slip.

In essence, the enquiry that the Maintenance Act enjoins the maintenance court to undertake is one that ought to be taken very seriously by magistrates in terms of its thoroughness. Such attention to detail will also save litigants unnecessary expenses in having to appeal matters that they feel have not been thoroughly dealt with by the maintenance court.

Once it has been determined that the case is indeed a proper one for the court's intervention, s 5 of the Maintenance Act requires an enquiry to be conducted into the complaint. It is couched as follows:

5 Inquiry into complaint

- (1) On the day specified in the summons issued in subsection (1) of section four **the maintenance court shall enquire into the matter of the complaint.**

- (2) An enquiry referred to in subsection (1) shall be held in the presence of the responsible person or in his absence upon proof of the service upon him of the summons requiring him to appear.

Section 13 of the Act further outlines the procedure to be adopted at the enquiry regarding any claims and assertions made by the parties. This procedure is described thus:

13. At any enquiry in terms of this Part –

- (a) Any person may appear in person or be represented by a legal practitioner.
- (b) Save where provision otherwise exists in regulations made in terms of section thirty two, the proceedings shall be conducted in such a manner and on such principles as the maintenance court thinks best fitted to do substantial justice and **the maintenance court may call such witnesses as it considers necessary for the purpose.**
- (c) **The maintenance court shall have power to issue a subpoena for the attendance of any witnesses, to call for the production of any book or document and to examine any witness on oath** (*My emphasis*)
- (d) The maintenance court may direct that the proceedings be conducted in private.
- (e) A record of the proceedings shall be kept.
- (f) The maintenance court may adjourn the proceedings from time to time.
- (g) The proceedings may be held in the absence of the any person in whose favour an order or direction has been made or is sought, as the case may be, if the maintenance court is satisfied that such person or any other person having the care or custody of such person has been given notice of the enquiry.

It is the duty of the appellant to lay fully before the court all the necessary evidence regarding his income. It is also the duty of the respondent to support her claims in the court below with proof of her expenses. The magistrate in addition also has a clear duty to make a decision supported by evidence. An analysis of s 13 reveals that it is perfectly within the power of the maintenance court to call for evidence that will enable it to make an informed decision in a matter. The court is also empowered to adjourn proceedings from time to time and this therefore gives it leeway to ensure that it has all the evidence it needs before it can conclude a case. Therefore where a party against whom maintenance is being claimed owns his own company as in this case, there is no reason why the court should rely on merely hazarding a guess regarding the weight of his financial status. It can call for the requisite information and it can also call witnesses to provide it with evidence. A company has bank

account and bank statements are available. Records are kept regarding its income and expenditures and these could can be called for by the court if they have already not be provided in response to the application. There is also no reason why the company's bookkeeper or accountant should not be called to provide evidence if the court deems this necessary.

Accordingly this matter is being referred back to the magistrate for a full hearing on the matters that have been indicated.

CHITAKUNYE J: agrees

Machingura Legal Practitioners, appellant's legal practitioners
Dondo & Partners, respondent's legal practitioners