Judgment No. S.C. 93/99
Civil Appeal No. 103/99

JAMES ALAN CRONE vs MARY CATHERINE CRONE

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA
HARARE, SEPTEMBER 20, 1999 & MARCH 14, 2000

A P de Bourbon SC, for the appellant

F Girach, for the respondent

McNALLY JA: The parties were divorced on 23 February 1994. In terms of the divorce order Mrs Crone was to receive maintenance in the sum of $4 000 per month. However, there was a provision for an arbitrator to determine, once she moved into a new house, whether that figure constituted an adequate amount of maintenance.

The arbitrator awarded $7 000 per month with effect from 1 January 1995. Later she sought an increase to $10 000 a month. Mr Crone objected, and offered $8 000. They agreed to go back to the same arbitrator. He approached the matter on the basis that his earlier award was appropriate as at 1 January 1995. On this basis he awarded $10 000 per month with effect from 1 November 1996. It was based on the cost of living as at 1 January 1997.

On 16 July 1998 her legal representative wrote to his, seeking a further increase to $17 500 per month. There was some discussion, but no agreement.

Eventually, on 3 December 1998, she served on him an application for the increased maintenance to be paid to her, backdated to 1 August 1998. Presumably this date was chosen as the first day of the month following her letter of 16 July 1998.

Despite opposition, the learned judge in the High Court granted her prayer. The appeal is against that order, both as to the amount and as to the date from which it was ordered to run.

Let me deal first with the latter point. Arrear maintenance is a contentious subject. Mr *de Bourbon* contends that a maintenance order should be effective from the date on which it is made. At most, he says, it should be backdated to the date the application was made to court. But certainly not to any earlier date. Mr *Girach* argues for the order as made.

KORSAH JA in *Lindsay v Lindsay* 1993 (1) ZLR 195 (S) accepted that there was no reason in principle why a maintenance order should not be made effective from the date of the application. He pointed out that if she were not in need at the time she would not have made the application. I agreed with that decision, and I agree with that view.

But to backdate an award further than that is more problematic. I discussed the problem in *Muzondo v Muzondo* 1985 (2) ZLR 240 (S) and concluded that the law had been properly summed up in *Woodhead v Woodhead* 1955 SR 70 in the words:-

> "in the absence of any agreement or any court order, if she has succeeded in maintaining herself without incurring debts, she has no claim to arrear maintenance from her husband."

There is also the fact that the Matrimonial Causes Act [*Chapter 5:13*] makes specific provision, by means of a 1959 amendment, for arrear maintenance in respect of children (s 11) but makes no such provision under s 9 in respect of a former wife.

I agree with Mr *de Bourbon* that *Fluxman v Fluxman* 1958 (4) SA 409 (W) and *Strime v Strime* 1983 (4) SA 850 (C) are distinguishable. In *Fluxman*, far from ordering the payment of arrears of maintenance, the court absolved the husband from paying them. And in *Strime*, the husband had failed to pay what he had been ordered to pay, which is not the position in the present case. Finally in *Levin v Levin* 1984 (2) SA 298 (C) at 307 E-F, relied upon by Mr *Girach*, the court in fact ordered the increase to be effective from the beginning of the month following the institution of proceedings.

I conclude therefore that the order for increased maintenance should not have been backdated beyond the date of the application. For convenience, I will regard that date as being 1 December 1998, even though the application was apparently lodged two days later.

I turn then to the amount of the award. Mr *de Bourbon* has first criticised the speed at which her maintenance has increased from $4 000 per month on 23 February 1994 to $7 000 per month from 1 January 1995, to $10 000 per month from 1 November 1996 and now to $17 500 per month.

The answer to that criticism is twofold. First, we live in unusual times of very high inflation. Second, the award of $10 000 per month by the arbitrator was accepted by the parties and we cannot go behind it. Our starting point is that $10 000 per month was an appropriate award with effect from 1 November 1996. It was based, as the arbitrator said in making the award, on the cost of living as at 1 January 1997.

An increase in the cost of living is in itself "good cause" for an increase in maintenance. See *Marufu v Moyo* 1983 (2) ZLR 386 (S) at 387G.

Since the award was made by reference to the cost of living index, and since in the papers the parties have consistently referred to that index to support their arguments, I have no hesitation in saying that the Court may take judicial notice of the fact that the Government publishes a "*Quarterly Digest of Statistics*" which contains a section entitled "Consumer Price Index" based at present on the figure for the cost of living in 1990 as being 100. Of course, it is a general figure, not necessarily related to the particular items consumed in the lifestyle of the parties. But it is generally accepted as a rough guide to the rate at which the cost of living for everyone is increasing. It would be foolish to ignore it. See *Minister of State Security v Biti* S-19-99 (not yet reported); *Black v Black* 1987 (1) ZLR 133 (S) at 138G; and s 24(3) of the Civil Evidence Act [*Chapter 8:01*].

Reference to that *Digest* shows the cost of living figure for January 1997 to be 438.9. For December 1998 it is 757.2. A straightforward calculation shows that the equivalent purchasing power in December 1998 to $10 000 in January

1997 was $17 252,22. The figure claimed therefore is in no way out of line with the rise in the cost of living. Indeed it ignores the fact that the cost of living has continued to rise even more spectacularly since then.

One then looks to Mr Crone's income to calculate whether he can afford that amount. Were he a resident of Zimbabwe he too would have been adversely affected by the rising cost of living, and some allowance might have had to be made for that fact.

But the opposite is the case. Mr Crone is based in the United States of America. He was at the time of the hearing working on a job in Bangladesh. But his income is in United States dollars.

Another simple calculation, based on exchange rates accepted at the hearing, produces a surprising result. In November 1996, with effect from which date she was awarded $10 000 per month, the cost to Mr Crone was US$943 per month. He had no problem with that. When the latest order was made the exchange rate had fallen to such an extent that $17 500 was costing him US$473, and $10 000 a mere US$270. One may look at it another way. Had the original order been expressed in United States dollars (I do not say it should have been), he would have been paying $943 x 37 or Zimbabwe dollars 34 891 per month by now. He is paying only half that.

I stress that the Court does not rely on the change in the exchange rate as a positive reason for the increase in the amount of maintenance. But it is

reasonable to regard it as a factor negativing any argument that he cannot afford the "increase". He has not suggested that he is any poorer than he was before. His maintenance expenses, in United States dollars, are half what they were in November 1996. He should have no problem with that. Rather the reverse.

The new figure of $17 500 per month therefore gives Mrs Crone no more in purchasing power than the $10 000 she was awarded from November 1996, and costs him less. On that basis I find it impossible to disagree with the learned judge's conclusion in the court *a quo*.

It does not seem to me to be appropriate, in the circumstances, to haggle about the cost of newspapers, golf, or staff overtime. The overriding point is simply that to maintain her standard of living as at 1 November 1996 she needed about $17 500 in January 1998.

The same applies to the argument that she should use the interest on her English money to augment her income here. That may be an argument, if and when he retires. But it is clear that that is a nest-egg, and she is justified in saying that she wants to keep it, and its modest increase, in England, even though interest rates there are very much lower than they are here. It was clearly not envisaged, in the arbitrator's award, that she should have to draw on capital or interest, unless some crisis arose. And it is equally clear that Mr Crone has expressly conceded that, barring exceptional circumstances, he does not expect his ex-wife to work.

Overall, I would echo the remarks of KORSAH JA in *Lindsay supra* at 199 E-F that:-

> "regard must have had to what would be adequate as maintenance for a wife of a man in the husband's position, considering his ability to pay and all other circumstances".

I am aware that the comment was made in regard to maintenance *pendente lite*. But it is apposite also in this case. One has to be guided by the criteria set out in s 7(4) of the Matrimonial Causes Act. Those criteria are intended:-

> "as far as is reasonable and practicable … to place the spouses … in the position they would have been in had a normal marriage relationship continued between the spouses."

As far as costs are concerned, the appellant has succeeded partially on the point of law as regards the backdating of the order. The effective date has been moved forward four months, resulting in a saving of $30 000 to the appellant. I do not see this as a significant victory, given that the respondent's stance has been essentially vindicated, and, at the date of this order, she will already be entitled to over $100 000 more than he was prepared to allow.

The appeal is dismissed with costs, save that the effective date of payment is altered from 1 August 1998 to 1 December 1998.

EBRAHIM JA: A cardinal point which must always guide courts when dealing with applications for alteration of maintenance orders is a change in the financial circumstances of the parties.

It cannot be gainsaid that the devaluation of the local dollar effects an adverse alteration in the financial circumstances of each person, inclusive of artificial persons, in Zimbabwe. Labour appreciates the impact of devaluation, hence the demand for higher wages to cushion its effect. Employers acknowledge its devaluation on the living standards of the worker and enter into collective bargaining agreements to redress the issue. Government itself is cognisant of its effect on the financial circumstances of the individual and offers periodic increments in salary. It would be remiss of the court of justice to put the telescope to its blind eye when confronted with the effect of devaluation in a case such as this. It constitutes a change in financial circumstances. *Marufu v Moyo* 1983 (2) ZLR 386 (S) at 387G.

The appellant lives in the United States and is remunerated in the currency of that country. At the conclusion of their divorce proceedings in Zimbabwe on 23 February 1994 he was ordered to pay maintenance to the respondent in the sum of Z$4 000.00 per month. This amount was by arbitral proceedings adjusted to Z$7 000.00 per month commencing from 1 January 1995. The same arbitrator in further proceedings adjusted his award to Z$10 000.00 per month with effect from 1 November 1996 per month, based on the cost of living in Zimbabwe as at 1 January 1997.

On 3 December 1998, failing agreement for a further increase in maintenance to Z$17 500.00, the respondent launched proceedings in the High Court, for a variation of the maintenance order to the amount claimed by her.

McNALLY JA makes the telling point that the parties accepted the arbitrator's award of Z$10 000.00 per month with effect from 1 November 1996, without demur. The parties cannot resile from that award, and that should be our starting point.

As at 1 November 1996 the cost to the appellant of the award of Z$10 000.00 per month was the equivalent of US$943 per month. Now, with the devaluation of the Zimbabwe dollar, Z$17 500.00 is the equivalent of US$473 - a saving to the appellant of US$470. Had the maintenance awarded been expressed in United States dollars instead of Zimbabwe dollars, the respondent's financial circumstances would not have been adversely affected by the devaluation. Conversely, if the appellant had been resident in Zimbabwe and remunerated in Zimbabwe dollars while the respondent resided in the United States, his financial circumstances may have so deteriorated with the devaluation of the Zimbabwe dollar, that he could hardly be expected to pay to the respondent the equivalent of US$473 in Zimbabwe dollars.

This brings me to the second fundamental issue which has to be addressed in applications for variation of maintenance orders - the financial ability of the person ordered to provide maintenance to pay the increment sought by the applicant.

There is no evidence on record that the financial circumstances of the appellant, who could afford to pay maintenance equivalent to US$943 per month, has so altered that he is incapable of paying to the respondent the reduced equivalent of US$473 per month. To his credit, he does not say he cannot afford to pay such an amount, only that the percentage increments of 75% per annum were inordinate. But this factor must be placed against the backdrop of devaluation and how much it would cost the appellant in terms of United States dollars to provide such maintenance. As we have seen, devaluation has almost halved his financial liability to the respondent and he, therefore, has no cause for complaint.

Furthermore, in my view, since no additional financial stress is placed upon the appellant to redress the respondent's change in financial circumstances occasioned by devaluation, for which the respondent is not responsible, it is a distraction from the issue of maintenance to postulate that the respondent should have recourse to any other property available to her to ameliorate her change in financial circumstances.

I agree with McNALLY JA that the appeal, save for the backdating of the order, should be dismissed with costs.

MUCHECHETERE JA: I have read the judgment prepared by my brother McNALLY but respectfully disagree with it for the reason that it does not fully take into account the provisions of s 7, subs (4), of the Matrimonial Causes Act [*Chapter 5:13*] ("the Act").

The application in question was made in terms of s 9 of the Act and it was therefore incumbent upon the learned judge *a quo* to apply the provisions of s7 subs (4) of the Act.

In the above context I agree with Mr *de Bourbon's* submission that an application for an increment of maintenance by an average of 75% per annum - his calculation on percentage increment was not disputed - the learned judge *a quo* ought to have taken into account the two sources of income which were available to the respondent. The first one is that the respondent could work. Although it was accepted in the affidavits that the respondent did not have to work, I agree with Mr *de Bourbon's* submission that, whilst that might well not have been a consideration in the arbitration proceedings, when the matter came to be considered by the High Court it should have been taken into account. This is because the above provisions enjoin the High Court to take the matter into account when deciding the matter. As for the issue itself, the respondent does not suggest she is not able to work. She has, however, chosen the life of luxury, that is, preferring golf to work. And it is significant that she has increased her golfing activity - she added three extra golf rounds a month to her two rounds weekly.

The second issue is that the respondent has access to at least the interest on the £37 000.00 she has overseas. I do not doubt that if properly invested the amount could earn at least Z$15 000.00 a month as submitted. There is indeed no explanation as to why she cannot or should not use that amount to help meet her costs.

I also agree that the list of expenses proffered by the respondent shows gross extravagance. Not content with the fact that the appellant is to pay literally for each and every expense in her life, she seeks to add to the golf expense by adding three more rounds of golf, overtime domestics, temporary domestics, extra water charges (the main charges are paid for by the appellant), and extra newspaper contributions. I also am of the view that some of the figures such as domestic uniforms ($150.00 per month) and dog visits (vet) per month ($300.00) are inflated. And there was no attempt to justify that given what the appellant is already paying these were reasonable expenses even bearing in mind the standard of living of the parties.

I consider that the question as to whether the appellant can or cannot afford to pay the extra amount claimed - it was claimed by the respondent and held by my brother McNALLY that the appellant would, in United States dollars or British pounds, be paying now less than he was paying on the basic amount - can only be entertained after the respondent has satisfied the court that the extra amount she claims is necessary and reasonable. This, in my view, is the same with considerations of the consumer price index. In connection with the latter I agree with Mr *de Bourbon's* submissions that, whilst everyone knows that it is getting more expensive to live in Zimbabwe, this does not necessarily apply to every activity. And

that, in any event, everyone living in Zimbabwe has now to cut their cloth to meet their means. I fully endorse his sentiments that living in Zimbabwe cannot be a free holiday for the respondent, to be financed by her former husband.

Further, in matters of this nature I consider that the modern trend in awarding maintenance should be taken into consideration by the courts. In *Chiomba v Chiomba* SC-179-92 at p 2 of the cyclostyled judgment MANYARARA JA said:

> "Mr *Chatikobo* relied on a statement made in Hahlo's *South African Law of Husband and Wife* 5 Ed at pp 363-4 which is to the following effect:
>
> > 'It remains to be said that with the emergence of the "working wife" and "woman's liberation", the attitude of the courts towards the award of maintenance has been changing the world over. Cases where maintenance is awarded to the husband, while still rare, are no longer unknown. The idea that marriage ought to provide the wife with a "bread ticket for life" is on its way out. Not long ago, an "innocent" wife who obtained a divorce on the ground of her husband's misconduct could count on being awarded maintenance until death or remarriage almost as a matter of course. Today, the courts are no longer prepared to award maintenance to a young woman who has been working before marriage, and can be expected to work again after the divorce, at least if there are no young children of the marriage. At most, if she has given up her job, she will be awarded a few months' maintenance to tide her over until she finds a new one. Middle-aged women who have for years devoted themselves full-time to the management of the household and care of the children of the marriage are awarded "rehabilitative maintenance" for a period sufficient to enable them to be trained or retrained for a job or profession. "Permanent maintenance" is reserved for the elderly wife who has been married to her husband for a long time and is too old to earn her own living and unlikely to remarry. As MR JUSTICE MOORHOUSE remarked in the Canadian case of *Knoll* [(1969) 2 QR 580 at 584, 6 DLR (3d) 201 at 205]:
> >
> > > "In this day and age the doctrine of assumed dependence of a wife is in many instances quite out of keeping with the times. … The marriage certificate is not a guarantee of maintenance."
> >
> > At present, these trends may be more pronounced in Europe and America than in South Africa, but with the replacement of the "guilt"

with the "marriage breakdown" principle they are likely to become more marked in South Africa, too.'

Mr *Chatikobo* submitted that there is much in common between South African jurisprudence and our own and *Hahlo's* statement therefore applies to this case. The submission is valid in view of the well known provisions of subpara (3) of s 7 of the Matrimonial Causes Act 1985." (My emphasis).

In the result, I would have allowed the appeal with costs. The order of the court *a quo* would have been set aside and I would have dismissed the application with costs."

Ali Ebrahim, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners