NKOSANA MOYO

Versus

PRINCESS MOYO

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 4 & 11 NOVEMBER 2021

Urgent Chamber Application

K. Ngwenya, for the applicant
N. Sithole for the respondent

KABASA J: This is an urgent chamber application in which the applicant seeks the following interim relief:

> "1. That the operation of the judgment of the maintenance court sitting at Western Commonage Magistrates' Court under case number WCM 13/21 be and is hereby suspended.
> 2. That the applicant be and is hereby directed to pay an equivalent of US$100 at the prevailing Reserve Bank of Zimbabwe auction rate on the date of payment per child per month and pays all the school fees and school expenses for the two minor children, namely Hanganani Moyo and Tahanha Moyo."

In the event that the provisional order is granted the final order sought is in the following terms:

That you show cause why a final order in the following terms should not be made:

> "1. That the execution of the judgment of the maintenance court sitting at Western Commonage Magistrates' Court under case number WCM 13/21 should not be stayed pending determination of the applicant's appeal filed under case number HCA 49/21.
> 2. That the respondent pays the costs of this application."

The background to the application is this:

The respondent issued summons in the maintenance court seeking maintenance for herself and two minor children in the total amount of RTGS300 000,00. The applicant and respondent are married under the Marriages Act but the marriage has hit turbulent times. The applicant has since filed for divorce. After a drawn out hearing which was more of a trial than an inquiry in which both parties gave evidence and bulky documentary exhibits were produced, the maintenance court concluded that the applicant should maintain the two minor children at $180 000 per month with effect from 30 September 2021. The order was granted on 26th September 2021.

On 4th October 2021 the applicant filed a notice of appeal against the judgment. The import of that appeal is that the court *a quo* erred in holding that the applicant had failed to provide reasonable maintenance for his minor children and coming up with an amount of RTGS180 000 as maintenance for the two children.

This urgent chamber application seeking to suspend the judgment of the court *a quo* was subsequently filed on 27 October 2021.

The application is opposed. In opposing this application, the respondent took points *in limine*. This judgment is concerned with these points *in limine*. These are:

1. Forum shopping by opting to approach the High Court instead of utilizing the provisions under section 27 (3) of the Maintenance Act.
2. Dirty hands in that the applicant has not paid the RTGS180 000 as directed by the court *a quo*.
3. No urgency in that as at 29 September 2021 the applicant was aware of the court order and the payment was due on 30th September 2021 but did not seek to utilize the provisions in the Maintenance Act to vary or stay the order. The urgent chamber application was only filed about 30 days after the judgment of the Maintenance Court.
4. Incompetent relief sought in that the applicant seeks to have the order of the maintenance court varied or set aside contrary to the provisions of section 27 (3) of the Maintenance Act. If the order is granted the applicant would not need to pursue the appeal filed under HCA 49/21.
5. Defective certificate of urgency in that it does not state why there was a delay in filing the urgent chamber application.

I must from the onset express my disquiet at the manner in which the respondent deposed to the opposing affidavit. Such affidavit ought to state the

facts upon which the respondent relies in opposing the application. The respondent's affidavit is replete with expositions of the law and that is improper.

That said, I propose to deal with the points *in limine*, not in the order they were presented but in a manner that ensures I do not unnecessarily expend energy on all the points *in limine.*

1. Is this matter urgent?

Mr. Sithole submitted that the matter is not urgent. The maintenance order was granted on 27th September 2021 and the application was filed on 27th October 2021, close to 30 days later. The applicant sought the transcript of the record which process was irrelevant for purposes of the application and there is no other explanation as to why the application was not filed earlier.

In response *Mr Ngwenya* argued that the order was with effect from 30 September 2021 and an appeal was noted on 4th October 2021, which was the next working day. There was need to obtain a transcript of the record to allow the court to assess prospects of success of the appeal. The record is bulky and so that took time. Once it was availed, the application was then filed and the aspect of urgency ought not to be considered in relation to the number of days but the circumstances of the case.

In *Kuvarega* vs *Registrar General and Another* 1998 (1) ZLR 188 CHATIKOBO J had this to say on urgency:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is also urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action."

MAKARAU JP (as she then was) gave her own interpretation of what the *Kuvarega* case *(supra)* means in *Documents Support Centre P/L* v *Mapuvire* 2006 (2) ZLR 240:

> "I would understand CHATIKOBO J in the above remarks to be saying that a matter is urgent if when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then for in waiting for the wheels of justice to grind at their ordinary pace,

> the aggrieved party would have irretrievably lost the right or legal interests that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant."

Turning to the facts *in casu*, the judgment ordering the applicant to pay RTGS180 000 was granted on 26 September 2021, as can be gleaned from the date stamp thereon. The applicant was aware of the judgment before 30 September 2021, the date on which the first payment was to be made.

As at that time the applicant knew he needed to act in order to get some relief before his appeal was determined. He obviously knew as at that date that he wanted to appeal and did file such appeal on 4 October 2021.

Instead of filing the urgent chamber application he opted to have the bulky record transcribed. He gives the reason that it was because he wanted the court to appreciate that the appeal was not *mala fide*.

This explanation must be looked at in light of the provisions of section 27 (3) of the Maintenance Act, Chapter 5:09.

S27 (3) provides that:

> "The noting of an appeal in terms of this section shall not, pending the determination of the appeal, suspend the decision appealed against unless the maintenance court, on application being made to it, directs otherwise, and for such purposes the maintenance court may give such directions as it thinks fit, including but without derogation from the generality of the foregoing, a direction that, pending the determination of the appeal –
>
> (a) the whole or any portion of the maintenance be paid to or for the benefit of the dependent concerned; or
> (b) the whole or any portion of the maintenance be paid into court; or
> (c) payment of the whole or any portion of the maintenance be suspended for such period, as the court may specify.
>
> (4) On an appeal in terms of this section, the court may, if it allows the appeal, make such order as it thinks fit relating to the repayment of any sums of money paid towards the maintenance of any person pending the determination of the appeal."

The applicant was aware that the appeal did not suspend the judgment of the maintenance court. He was equally aware that the first payment was to be

with effect from 30 September 2021. *Mr Ngwenya's* attempt to interpret this to mean that with effect from 30 September 2021 meant a month from that date and so the payment was to be made on 30 October 2021 is totally at variance with the clear and unambiguous wording of the order. The ordinary grammatical meaning of this order allows for no other interpretation than that the first payment under the maintenance order was to be made by 30 September 2021.

It tends to reason therefore that the need to act arose on the very day the applicant uplifted the judgment. He however chose to note an appeal with urgency, which appeal did not have the effect of suspending the order he felt emasculated by.

Under the circumstances the need to act arose on 29 September 2021 and the urgent chamber application ought to have been filed on the day the applicant decided to note an appeal. Nothing would have stopped the noting of an appeal simultaneously with the filing of the urgent chamber application.

How can the applicant possibly throw his hands in the air in frustration and accuse the court of not granting him relief to his prejudice when he failed to act with haste in seeking such relief? Only an applicant who has exhibited urgency in seeking relief can be heard to so complain.

In the *Documents Support Centre P/L* case *(supra)* MAKARAU JP put it thus:

> "… urgent applications are those where if the court fail to act the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

The applicant *in casu* cannot possibly take the high ground and utter such a complaint given the circumstances of this case. The transcription of the record which is given as the reason for the delay was not necessary and could not have militated against the filing of the urgent chamber application.

The applicant fell short of the conduct envisaged in *Gwarada* v *Johnson* 2009 (2) ZLR 154 where it was said:

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat."

I hold the view that no such urgency was exhibited *in casu* and I say so regard being had to the particular circumstances of this case.

Mr Ngwenya contended that urgency is not about the number of days but the circumstances of the case. Depending on the particular circumstances of a matter that may well be correct but *in casu* the issue of time as well as the circumstances are relevant. This being so because the order's effective date was 30 September 2021 and the appeal did not have the effect of suspending that order, so time was of essence.

I am therefore of the view that this matter does not deserve to jump the queue. I am also fortified in holding this view when one considers that an application could have been made to the maintenance court in terms of section 27 (3) of the Act. A party desirous of urgent attention would not seek to look elsewhere and not to the law which provides an answer to the litigant's issue. If the Act provides for an avenue a litigant can use to seek relief in respect of a particular issue, the litigant must look first to that legislative provision.

The legislature in its wisdom decided that a maintenance order should not be suspended when an appeal is noted and the rationale can only be because maintenance is awarded to a dependent who requires such for sustenance. To allow an appeal to suspend the payment of maintenance would defeat the very purpose of a maintenance order. People would just routinely appeal as a way of defeating the order granted against them, to the detriment of the dependents in whose favour the order is granted.

The fact that the legislature saw it fit to allow an application to be made to the maintenance court to allow some relief pending the determination of an appeal is not something that can be lightly dispensed with and a litigant ought not to shun a clear provision of the law and seek relief elsewhere.

Counsel for the applicant sought to argue that the relevant provision of the Maintenance Act is not peremptory and so it means the applicant may approach that court. That 'may', in my view, is permissive in so far as it allows an applicant to utilize section 27(3) if they so choose. It is not every litigant against whom a maintenance order has been granted who would want to seek the relief provided in section 27(3). The use of 'shall' would therefore have suggested that every litigant should seek section 27(3) relief.

I come to the conclusion that urgency which stems from a failure by a litigant to utilise a clear provision of the law designed to give them the relief they

seek and opt to approach this court on an urgent basis amounts to self created urgency.

For completeness' sake I will look at the relief sought.

A reading of the relief sought in the interim and the one sought as the final relief shows that there is no difference between the two. They are the same in substance.

> "The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. … if the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day …" (per CHATIKOBO J in *Kuvarega (supra).*

I would say the same *in casu*, the interim relief seeks to suspend the maintenance order and to direct the applicant to pay what he considers fair and affordable.

The final order simply speaks to the same issue, just different wording. It simply says the respondent must show cause why the maintenance order should not be stayed pending the determination of the appeal. I do not see what interest the applicant would possibly have to pursue the final order once the provisional order which to all intents and purposes is final, is granted.

The relief applicant wants is to have the maintenance order suspended until the appeal is determined. The interim and final relief is therefore the same in effect. The relief sought is therefore incompetent.

It is my considered view that my determination of these two preliminary points make is unnecessary to consider the rest of the points. I therefore do not intend to unnecessarily exercise my mind on the other preliminary points. In any event the issues raised therein speak to more or less the same factors I have touched on in dealing with these two preliminary points.

The applicant prayed for costs at a punitive scale. I am not persuaded that the respondent's conduct warrants censure. It is understandable that he sought to rush to the High Court in a desperate bid to get some relief from paying an amount that on the face of it, appears huge.

Having ruled that the matter is not urgent and the relief sought incompetent the appropriate order will be to strike the matter off the roll of urgent matters. In the result I make the following order:

1. The application be and is hereby struck off the roll of urgent chamber applications.
2. The applicant shall pay the costs of this application at the ordinary scale.

T. J. Mabhikwa & Partners, applicant's legal practitioners
Ncube Attorneys, respondent's legal practitioners