CHRISTINE CHINGONO
versus
NABOTH MURAVU

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 25 January and 23 February 2022

Civil Appeal

E Dondo, for appellant
R Jekera, for respondent

MUCHAWA J: This is an appeal against the judgment of the magistrates' court which dismissed the appellant's claim for maintenance for a minor child who was four months old then, in the amount of US$3 500.00.

It was the appellant's case that she was customarily married to the respondent and they were residing in Thailand and were in Zimbabwe for a visit. At the hearing, the magistrate proceeded to carry out an inquiry to enable the appellant to establish a cause of action for her claim as it was not evident from her papers. She explained that they had been on separation from July 2021 to the 7th of September 2021 when she filed her claim for maintenance and that since July, the respondent had neglected to cater for the child's needs. She further stated that the respondent had adequate resources to cater for the US$3 500.00 claimed, had been catering for their lavish lifestyle in Thailand which was what they were used to and he should be ordered to continue. The resources for this were said to be from the respondent's formal employment and rentals from properties in Zimbabwe and also a business. The appellant was afraid that the respondent might relocate to the United States of America and leave her and the child destitute in Thailand as they would not be able to fend for themselves and maintain the lifestyle they had become accustomed to.

The application was vehemently opposed with the respondent denying that he was married to the appellant and producing a civil marriage to another. He pointed out that there had been no

averment of any neglect on his part which then led the court to carry out an inquiry. Reference was made to the appellant's affidavit wherein she pointed out that the respondent had been adequately providing for her in Thailand. The respondent stated that he was unable to meet the claim of US$3 500.00 as he no longer had the same benefits from his place of employment. He also produced evidence of having nine children who were all dependent on him, albeit, five of them having reached majority status. The respondent felt that the appellant's claim was borne out of malice and was meant to fix him and had nothing to do with the child having been neglected. Further, it was averred that the appellant should also contribute to the child's maintenance and not hide behind the child for her own claim of maintenance. It was pointed out that the appellant had not disclosed the money she made from a virtual network business. The respondent further stated that he had been fending for his family even when he had been hospitalized and had sent money to the appellant and attached proof of transfers. He also undertook to continue to fend for his four month old child.

The court *a quo* found that the appellant had failed to anchor her claim for maintenance on the grounds set out in s 4 of the Maintenance Act by alleging and proving that the respondent had failed or neglected to care for the minor child during the parties' stay in Zimbabwe. She found from the evidence, that the respondent had, in fact, been catering for the minor child, especially given that he had been hospitalized due to Covid during the relevant time.

It was the court *a quo's* considered opinion that the maintenance claim had only been lodged due to the appellant's fear that the respondent might relocate to the United States and neglect the child. A further finding was that the claim should not have been made in the United States dollar currency but the Zimbabwean dollar currency, in line with S.I. 142/90 which denotes the legal tender as Zimbabwean dollars. The claim was consequently dismissed.

Disgruntled, the appellant has lodged this current appeal on the following grounds:

1. The court *a quo* erred at law and failed to appreciate basic elementary principles of law that maintenance cases are not determined on technicalities. In this regard, the court did not value the best interests of minor child (*sic*).
2. The court *a quo* erred factually by holding that appellant failed to prove on a balance of probabilities that respondent is not a responsible person. The factual mis-

directions in this regard are so gross, irrational and defies (*sic*) logic considering that they are not backed by evidence on record.

3. The court *a quo* erred factually by holding that respondent is a responsible person and as such, there is no need to grant an order of maintenance. The findings of the court, in this regard are materially deficient.
4. The court *a quo* erred at law by holding that it was incompetent for appellant to claim maintenance in United States Dollars currency. In this regard, the court a quo held that the only legal and claimable currency in this jurisdiction is RTGS currency. There is an error of law given that at the time of issuing the proceedings, United States Dollar currency was an acceptable legal tender in Zimbabwe. As such, appellant is legally entitled to claim in that currency.

The relief sought is that the appeal succeeds, the magistrates' court judgment be set aside and be substituted with an order that the respondent pays maintenance in the sum of US$3 500.00 for the minor child until he reaches the age of eighteen or becomes self-supporting, whichever should occur first. The money is to be paid into appellant's specified bank account in Thailand.

The record was corrected to reflect that the minor child was only four months old at the time of the lodging of the claim and not four and half years as he was born on 9 May 2021.

At the hearing, Mr *Dondo* rightly abandoned ground 1 of appeal which had been criticized for not being clear and specific. On his part Mr *Jekera* did not persist with his criticisms of the rest of the grounds for being repetitive and going in circles, preferring to deal with the merits of the matter. We heard the parties and reserved our judgment.

There appear to be just two issues for determination in our opinion. These are:

1. Whether the appellant was able to prove that the respondent as a person legally liable to maintain the minor child, was able but had failed or neglected to do so at the rate claimed.
2. Whether it was legally competent for the appellant to lodge her claim in the United States dollar currency.

Whether the appellant was able to prove that the respondent was able to maintain the minor child but neglected to do so

In submissions before us, Mr *Dondo* seemed to concede that the appellant's particulars of claim had omitted to allege that the respondent had neglected to maintain the minor child hence the request for the court to *a quo* to conduct an inquiry. It was averred that the oral evidence given by the appellant had shown how the respondent had neglected to maintain the child. The appellant's oral evidence was to the effect that since her separation from the respondent in July 2021, he had not been maintaining the child. It was argued that such evidence was very clear. It was also stated that under cross-examination, the respondent had not disputed that he ceased to support the child in July 2021 and since this was not disputed, it should be taken as admitted.

The court *a quo* was impugned for being overly technical and seemingly requiring documentary evidence when the oral evidence was sufficient. It was further alleged that the court *a quo* seemingly did not consider the appellant's evidence. It was stated that there had been an over emphasis of the respondent's hospitalization due to Covid as the reason for his failure to look after the minor child and the court *a quo* had latched on this to excuse the respondent from his responsibilities yet no inquiry was done as to the period of hospitalization. Mr *Dondo* further pointed out that the evidence showed that the respondent had not maintained the child from July up to October when the matter was heard. It was also contended that the court *a quo* should have taken note of the appellant's evidence that any attempts at communicating with the respondent on the minor child's maintenance ended in verbal abuse. The request for further evidence to prove the alleged abuse was said to be unreasonable.

Mr *Dondo* contended that by holding that the appellant had failed to prove that the respondent was not a responsible parent, the court was making the opposite finding that he was a responsible parent. Regarding the quantum of the claim, the appellant stood by her papers and insisted that the respondent is a man of means who is well able to pay maintenance of US$3 500.00 and he earns in excess of US$14 000.00 per month excluding benefits.

On the contrary, Mr *Jekera* submitted that the appeal court can only interfere with a lower court's findings where an irregularity or misdirection is shown or where the exercise of discretion is so unreasonable as to vitiate the decision made. Reference was made to the Maintenance Act [*Chapter 5:09*] s 4 (1) thereof to argue that the basis for a maintenance complaint is that a

responsible person has failed or neglected to provide reasonable maintenance for a dependent of his. It was argued that both the oral and written evidence of the appellant did not establish that the respondent had neglected to maintain the minor child but was just the appellant being unreasonable and vindictive towards the respondent following the fall out in their relationship.

Mr *Jekera* pointed out that quantum claimed on record p 25 comes to US$4 547.00 and it is clear that the appellant was treating this as spousal maintenance and not maintenance for a four month old child. The court was referred to record pp 18 and 19 to show that even when the respondent was hospitalized and on a ventilator, he paid for appellant's accommodation. The appellant's founding affidavit on record p 25, para 10, was referred to show that the appellant acknowledged that the respondent had been catering for all monthly expenses whilst in Thailand. It was contended that the matter had therefore been correctly dismissed as the claim had been unfounded in the circumstances.

The law that guided the court *a quo* is s 6 of the Maintenance Act which I reproduce below:

> **"Making of order**
> (1) At any inquiry referred to in section *five* the maintenance court may, subject to this Part, make an order against the responsible person for the periodical payment of such sum of money as it considers reasonable for the maintenance of the dependant in respect of whom the complaint in terms of section *four* was made.
> (2) A maintenance court shall not make an order in favour of a dependant unless it is satisfied that—
> (*a*) the person against whom the order is sought is legally liable to maintain the dependant; and
> (*b*) the person against whom the order is sought is able to contribute to the maintenance of the dependant;
> and
> (*c*) the person against whom the order is sought fails or neglects to provide reasonable maintenance for the dependant."

The court *a quo* therefore had to satisfy itself that the respondent was legally liable to maintain the minor child, was able to do so but has failed or neglected to do so. Once satisfied, it would then make an order for the periodic payment of an amount it considered reasonable. In *casu* there was no dispute about the respondent's liability to maintain the child. On the ability there also seems to be no question, however not to the amount claimed. The question is whether the appellant discharged the onus to prove her allegation that the respondent had neglected to maintain the child.

In her founding affidavit, the appellant says she has been living with the respondent in Thailand and their monthly expenses are as follows:

a. Rentals	-	28 000THB (USD 865)
b. Full time child career	-	20 000THB (USD 620)
c. Part time child care	-	12 000THB (USD 370)
d. Food	-	25 000THB (USD 770)
e. Electricity	-	2 000THB (USD 61)
f. Water	-	200THB (USD 6)
g. Incidentals	-	15 000THB (USD 465)
Quarterly expenses for clothing	-	10 000THB (USD 310)
Yearly expense for child's round trip to Zimbabwe	-	35 000THB (USD 465)

She proceeds to say:

> "For the past years we have been living with respondent and he has been catering for these expenses. This is the life that respondent chose for us. He is well able to sustain the child."

In oral submissions on record p 18 the appellant states that the appellant had neglected to maintain the child since July when they separated. She however acknowledges that some money was sent through Western Union but qualifies this by saying she did not receive anything for the child. On p 19 she further says that the respondent had paid for an air BnB but nothing after she had moved to her parents' place. She also says the respondent had not paid for the maid in Thailand and in Zimbabwe. On p 20 she then emphasizes that the respondent has not contributed and she has been taking care of the child herself. The following exchange on record p 19 is important:

> "Q: So he has failed to maintain the child in Zimbabwe since you separated?
> A: He has not paid for the maid in Thailand and in Zimbabwe.
> Q: The amount claimed is for Thailand?
> A: Yes we live in Thailand."

The appellant is saying the neglect occurred in Zimbabwe and respondent was responsible whilst in Thailand to the extent of providing a lavish lifestyle. She does not show a breakdown of expenses related to a four month old child in Zimbabwe but provides Thailand expenses which relate more to the lifestyle for her and respondent. A four month old child would obviously have no idea of what kind of lifestyle that was. The respondent cannot be blamed for thinking that the appellant is thinking more of spousal maintenance given the breakdown of expenses. The motive for this claim is clearly laid out on record p 26 para 14 wherein the appellant states as follows:

> "There is a chance that respondent will soon relocate to the United States. If that happens, we will be destitute in Thailand. We will not be able to fend for ourselves."

Though the appellant claims to be in a customary law union with the respondent, this cannot be valid if it did exist as the respondent is in a civil marriage which cannot co-exist with any other form of marriage.

The court *a quo* correctly took note of the payments admittedly made by the respondent to the appellant and that there was a time he was ill disposed. The court *a quo* cannot be impugned for therefore finding that the appellant had not established the alleged neglect. In my opinion, it is not enough to simply allege that a responsible person has neglected to maintain a minor child without relating this to the aspects for which maintenance is due for the minor child in question in order to enable the court to carry out a proper assessment and decide on what is reasonable in the circumstances. Such neglect must not be for what one anticipates might happen in the future or be extended to a person for whom a respondent is not legally liable to maintain. This is what the appellant did. She feared she might become destitute and have to down grade the lifestyle she was used to, not so much for a four month old child. It is my considered opinion that the appellant did not adequately establish that the respondent had neglected to maintain the minor child. The conclusions of the court *a quo* on the facts cannot be said to be so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. See *Reserve Bank of Zimbabwe* v *Granger & Anor* SC 34/01 at p 6. There is therefore no merit in grounds of appeal 2 and 3.

If the appellant is so minded, she can still lodge a maintenance claim in the maintenance court and properly found her claim on clear evidence of neglect of the child without mixing this up with her own wish to maintain a particular lifestyle for herself. This would be in terms of s 4 of the Maintenance Act. She must therefore give clear particulars of the form of neglect of the child. Better still, such a claim can best be instituted in Thailand where the parties are resident.

Whether it was legally competent for the appellant to lodge her claim in the United States dollar currency

Mr *Dondo* submitted that the court *a quo* made an obvious legal error in holding that the legal tender in Zimbabwe remains the Zimbabwe dollar. This was said to be partly correct and partly wrong in that the United States dollar is also legal tender. Statutory Instrument 185/20 was

said to have ushered in dual currency and reference was also made to S.I. 127/21. He conceded however that there must be provision for one to use the local currency at the prevailing interbank rate. In addition he made a sweeping reference to there being many judgments in this court and the lower court which have given judgments denominated in the United States dollar, albeit with a provision for one to pay at the interbank rate.

Mr *Jekera* quoted from s 2 (1) of S.I. 142 of 2019 which provides that the Zimbabwe dollar is the sole currency for legal tender purposes. Statutory Instrument 185/20 was said not to have amended the provisions of S.I. 142 of 2019 nor circular number 3, of 2020, of the Reserve Bank of Zimbabwe. Therefore the legal tender was said to be the Zimbabwe dollar.

Turning to S.I. 142 of 2019, the relevant provisions for present purposes are contained in subs (1) and (2) of s 2, which stipulate as follows:

> "(1) Subject to section 3, with effect from the 24th June 2019, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever shall no longer be legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe.
> (2) Accordingly, the Zimbabwe dollar shall, with effect from the 24th June 2019, but subject to section 3, be the sole legal tender in Zimbabwe in all transactions."

Statutory Instrument 85/20 is the Exchange Control (Exclusive Use Of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 in s 2 provides that any person may pay for goods and services chargeable in the Zimbabwe dollar, in foreign currency using his or her free funds at the ruling rate on the date of payment.

Statutory Instrument 185/20 is the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 deals with the dual pricing and displaying, quoting and offering for services. In s 7 (1), it provides as follows:

> "Any person who provides goods or services in Zimbabwe shall display, quote or offer the price for such goods or services in both Zimbabwe dollar and foreign currency at the ruling exchange rate."

There is agreement that S.I. 185/20 did not amend SI 142/19. As correctly found by the court *a quo*, the Zimbabwe dollar remains the sole legal tender. The maintenance claim does not fall into the category of goods and services and in paying for goods and services one has an option to either pay in Zimbabwe dollar currency or foreign currency at the prevailing rate. *In casu* Mr *Dondo* was not helpful in pointing the court to maintenance claims where the parties are both

resident outside Zimbabwe and their claims were considered to fall under the purview of "goods and services" so as to entitle the payee to receive in foreign currency.

I find that the court *a quo* was spot on in its conclusion that the Zimbabwe dollar was the legal tender in a claim such as this one. This may be the more reason why the appellant should consider lodging her maintenance claim in Thailand where she is resident and where the alleged ongoing neglect is happening.

There is no merit in this ground of appeal too. Mr *Jekera* indicated that they are not claiming costs as this matter has to do with the best interests of a minor child.

Consequently, the appeal is dismissed in its entirety with no order as to costs

WAMAMBO J agrees:……...

Messrs Saunyama, Dondo Legal Practitioners, appellant's legal practitioners
Ganya Law Practice, respondent's legal practitioners