LINCOLN TAFADZWA USHAMBA
versus
DAMSON ZUWA
and
THE PROSECUTOR GENERAL
and
THE PRESIDING MAGISTRATE
ESQ MS. E. MASHAVAKURE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 2 August 2022

Urgent Chamber Application

N Mugiya, for the applicant
D Zuva, for the 1st respondent
C Kangai, for the 2nd respondent

CHITAPI J: The applicant seeks a provisional order in the following terms:

TERMS OF FINAL ORDER SOUGHT

1. The 3rd respondent's sentence under CRB 3039/22 against the applicant be and is hereby suspended pending the finalization of the appeal under case No. CA 205/22, App 38/22.
2. The respondents to pay costs of suit jointly and severally, one paying the others to be absolved.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the provisional order, an interim relief is granted on the following terms –

1. The sentence of the 3rd respondent against the applicant in case No. CRB HREP 3039/22 is suspended pending the finalization of this matter.
2. The 3rd respondent is interdicted from issuing any warrant of arrest against the applicant in default of its sentence under CRB HREP 3039/22 until this matter is finalized.

When the application was placed before me I read through it before directing that it be set down. the facts upon which it was founded appeared simple enough until the 1st respondent filed her notice of opposition and supporting documents. It was then that I appreciated that the

history of the case fraught with several court cases involving the failure to pay maintenance and defaulting court enquiries as well as variation of maintenance applications which were bungled by the magistrates who dealt with them. I noted as well that the main matter for maintenance case No. M9/20 is filed in the Bulawayo Maintenance Court. On querying why this application was not filed in the High Court, Bulawayo the applicant's counsel submitted that the case in which the applicant seeks a suspension of the operation of the judgment was determined at the Harare Magistrates Court. The High Court in case no. HC 2910/21 by judgment HH 452/22 had also dealt with the matter. I agreed to exercise jurisdiction in the application instead of referring the application to the Bulawayo High Court as I considered the explanation given by the applicant to be reasonable. The respondents did not argue otherwise.

The salient facts of this application are these and they were dealt with by the court in case No. HC 2910/21 by BACHI-MZAWAZI and DEME JJ in judgment case No. HH 452-22. The applicant sired a child with the first respondent when they enjoyed a love relationship. The child is called Khloe Damson. She was born in May 2009 and is only 13 years plus. The first respondent filed a maintenance claim against the applicant in the Bulawayo Maintenance Court claiming maintenance for the upkeep of the said child. In this respect, I directed parties to provide a paper trail of how matter in M9/20 evolved. The paper trail shows that there were other court orders made in regard to maintenance orders for example M75/19, dealt with by the court at Harare; M731/14 dealt with by the Magistrates Court Bulawayo; M58/18 dealt with by the Lupane Court and the subject case of the current dispute M09/20 dealt with by the Magistrates Court Bulawayo.

Case No. M09/20 evolved as follows. The court dealt with an application for variation of maintenance. It appears that in all the cited cases above the first respondent applied for variation of the initial order of maintenance which had been granted on a date which is not clear but in 2010 or 2011. From the paper trail supplied to the court, there was produced to the court, the order dated 4 August 2011 in case No. M75/10 which was a variation wherein the Magistrates Court at Harare ordered as follows:

> "Upwards variation application is hereby granted in the following terms:
>
> (1) Defendant to pay maintenance in the sum of $150.00 up from $100.00. The $150.00 is inclusive of the medical aid for the minor child.
> (2) Defendant is also ordered to pay school fees in the sum of $670.00 per the school invoice filed of record. Any school additional fees to be catered for by the applicant.

(3) Defendant is also ordered to pay for clothes twice a year in May and December. That is clothing for $75.00 for May and $75.10 for December school fees arrears to be shared equally. Each party to pay 50%."

Trouble started after this order. On 23 January 2020, the first respondent applied for variation of the order in case No. M75/10. The applicant was in default. The court granted an order as follows:

"…..IT IS ORDERED THAT

1. The order for maintenance order (sic) granted in favour of the applicant Case No. M9/20 be and is hereby varied upwards so that the respondent pay the sum of 50% of the school fees that is tuition fee and boarding fee of every term, 50% of school uniforms; winter and summer.
2. The respondent to pay $5 000.00 upkeep per month.
3. The respondent to pay school fees in full on or before the first day of the beginning of each school term and also the school uniforms. The upkeep to be paid on the last day of the month.
4. No order as to costs."

The applicant filed an application for rescission of the default judgment granted on 23 January 2020. The court dealt with the application on 17 June 2020. The first respondent was in default. The court granted an order as follows:

"IT IS ORDERED THAT

1. The default judgment granted against the applicant in case No. M9/20 be and is hereby rescinded.
2. The clerk of court is ordered to set the matter down for enquiry within 7 days of granting of this order."

For reasons of expediency, I will refer to this order as the order of *Ncube* and the one of 23 January 2020 as the order of *Tashaya*. These were the learned magistrates who dealt with the matter and issued the orders concerned.

Upon learning of the rescission of the default judgment order the first respondent filed an application to rescind that rescission order of *Ncube*. In essence the first respondent sought an order for rescission of the rescission order of *Ncube*. The first respondent's application was set down for hearing and disposed of by the court per *M. Ndlovu*, a learned magistrate who granted an order on 6 July 2020. The ruling given was as follows:

"The application by the respondent Zuwa Damson is hereby granted as she was not served in terms of the rules of the court. The default judgment granted in her favour therefore stands."

It must be remembered that the *Ncube* judgment sat aside the *Tashaya* judgment through a rescission of judgment brought about by application filed by the applicant. The effect of the *Ndhlovu* judgment was to set aside the *Ncube* judgment. To put it in even simpler terms, the *Ndhlovu* judgment had the effect of what may be described as making an order that the *Ncube* judgment was wrong. Judicial officers of like rank do not have power to set aside each other's judgments. This can only be done by the superior courts on appeal or review. It was therefore incompetent for the learned magistrate *Ndhlovu* Esquire to determine declare that the default judgment which had been rescinded still stood. The scenario became one of conflicting judgments given by the same court on the same subject matter.

The applicant filed an application for review of the order of *M. Ndhlovu* esquire under case No. 2910/21. The review application was heard by BACHI-MZAWAZI and DEME JJ. The learned judges concurred that the judgment of *M. Ndhlovu* Esquire was irregular. They set it aside. They made a declaration that the order of *Ndhlovu* Esquire dated 6 July 2020 be set aside and that the only valid order was that of *Ncube* Esquire dated 23 June 2020. The learned judges ordered that the case be set down for determination of the rescinded judgment of *Tashaya* Esquire within 7 days of the court's order which was granted on 5 July 2022.

In order to cater for the interests of the child in the interim and taking into account that the order of *Tashaya* Esquire had been rescinded thus leaving the effective order of maintenance as the last order made before the vacation granted by *Tashaya* Esquire, the court ordered that the applicant should pay monthly maintenance of $15 000.00 pending the reset down of the application for variation. The learned judges gave reasons for their judgment ref HH 452-22 and I agree with the *ratio decidendi* thereof and in particular and for purposes of this application that the order which is valid in case no. M9/20 is that *Ncube* Esquire as found by the learned judges to be the position. It is common cause that the first respondent has since filed an appeal against the judgment HH 452-22 under case no. SC 301/22 filed on 7 July 2022. The appeal does not bar me from coming to conclusions which coincide with the findings made by the learned judges.

The paper trail as set out will be invaluable to the determination of this application. The applicant as accused in case No. 3039/22 Harare Magistrates Court was charged with the offence of failure to pay maintenance as defined in s 23(1) of the Maintenance Act, [*Chapter 9:01*]. The details of the charge was that the applicant breached the order of the maintenance court dated 23 January 2020 which obliged the applicant to pay maintenance of

$5 000.00 per month for the minor child as well as 50% of school fees for the period of October 2021 to December 2021. The arrear maintenance was alleged to total $15 000.00 and school fees arrears amounted to $477 000.00 for the first term. The total unpaid maintenance was therefore the aggregate of the $15 000.00 and $477 000.00 making a total of $492 000.00.

The trial of the applicant commenced on 19 April 2022. On 1 June 2022, the applicant was convicted as charged. He was sentenced to 5 months imprisonment wholly suspended on condition that he pays the sum of $477 000.00 to the first respondent through the Clerk of Court, on/or before 30 June 2022. On 7 June 2022 the applicant noted an appeal against both conviction and sentence to this court under case No. CA 205/22. Mindful of the legal position that the appeal did not automatically suspend the operation of the sentence unless suspended by the court, the applicant on 23 June 2022 applied for the suspension of the operation of the sentence. The application was dismissed whereupon the applicant applied for an extension of time to pay and was granted until 15 July 2022 to pay the $477 000.00. Just a day before the deadline, the applicant filed this application.

The first issue which arises concerns the nature of the application. The background facts as set out shows that the applicant made an application for suspension of the sentence before the convicting magistrate and the application failed. The convicting court took account of the pending appeal noted by the applicant under case No. CA 205/22 and determined that the appeal had no prospects of success. In consequence the convicting magistrate refused to suspend the operation of the sentence, save to extend the period of repayment to 15 July 2022. In the final order in this application, the applicant seeks that the court must make the same order which was prayed for before the convicting magistrate and refused. It is incompetent and irregular to seek the same relief already refused in one court from another court. Once a decision has been made, then the dissatisfied party must if advised to take the matter further, apply for a review of the decision or note an appeal. The interim relief sought is essentially the same as the final relief in effect. The applicant prays for a final order in the interim relief since he prays for a suspension of the sentence in case no. CRB HREP 3039/22 pending the finalization of this matter. There is however nothing for the court to finalize because the main relief was sought and refused. The matter is *res judicata* save if the decision of the convicting magistrate be reviewed or relooked at on appeal. This application is neither a review nor appeal. To that end, the application is incompetent and procedurally fatally defective.

It follows that there is no proper application before the court upon which a determination can be made. The second respondent's counsel submitted that the applicant was still obliged to pay the $477 000.00 because the amount was due before the High Court set aside the judgment of 23 January 2020. Arguments were also made in relation to whether or not the appeal of the first respondent suspended the judgment of the High Court in relation to the interim order of payment of $15 000.00 as maintenance. I choose to leave these and any other issues which may arise for argument in a properly settled application of which the current one is not.

Another issue which needs to be glossed over in passing was one of urgency of the application. The issue was not really persisted in by the respondents. My view is that cases involving maintenance of minor children should be prioritized because it is the children who suffer from the delays which would be experienced were such matters to be dealt with on the ordinary roll. The prioritization of a maintenance case as I have submitted would still be subject to the principle that the circumstances of each case determine whether, despite the need to give precedence to the maintenance matter, the particular matter is urgent. *In casu*, in the exercise of the court's discretion to agree to hear the application on the urgent basis, I was inclined to enroll the matter on the urgent roll.

That aside, I determine that this application is fatally defective. Having noted an appeal against the judgment of the trial or convicting court, the applicant applied for the suspension of the sentence pending appeal. The application was dismissed. That order stands. *In casu*, the applicant does not seek a review and setting aside of that order nor has he noted an appeal against that order. He simply wants the court in the final relief to grant an order which conflicts with the magistrates order without following the procedure for setting aside an extent order of the magistrate's court refusing to suspend the sentence.

Even though the interim relief which I am asked to grant simply seeks that I suspend the sentence pending the return date and finalization of this application, the interim relief cannot be granted upon a foundation of an irregular application. In this regard, upon the consideration of whether a *prima facie* case has been established on the papers as provided for in r 60(9), in which case, if established the judge must issue the provisional order as prayed for or as varied, the starting point should in my view be to consider the legality substantively and procedurally of the main relief which is sought on the return date. The question is whether or not there is a valid *causa* to be protected or regulated by a provisional order pending the return date. If the main relief that will be prayed for has no legal recognition or validity then a

provisional order cannot be granted since it cannot be founded on a nullity. The well celebrated case of LORD DENNING namely *Leornard Benjamin Macfoy* v *United Africa Company Ltd* (1961) 3 All ER 1169 at 11921 comes into play, where it is stated:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. Any every proceeding which is founded on it is also bad and incurably bad. You cannot put something on it and expect it to stay there it will collapse."

The above dicta has been followed in this jurisdiction and the position is trite - See *Mutyasira* v *Gonyora N.O. & Ors* 2010 (1) ZLR 489 H wherein CHITAKUNYE J (as he then was) referred to the above authority and several cases decided in this jurisdiction where the *Macfoy* principle as it is commonly referred to was applied. It is therefore important for litigants to adopt the correct procedures in seeking relief from the court lest their claims which may have merit are not determined on the merits for procedural irregularity. This is what has happened in this application.

I accordingly make the following order:

1. The application be and is hereby struck off the roll.
2. The applicant to pay the wasted costs.

Mugiya and Muvhami Law Chambers, applicants' legal practitioners
First respondent in person
National Prosecuting Authority, second respondent's legal practitioners