PARENTS HWATA
versus
CAROLINE ZVINGWE

HIGH COURT OF ZIMBABWE
CHITAKUNYE & TSANGA JJ
HARARE, 30 October 2014

Civil appeal

Appellant in person
Respondent in person

CHITAKUNYE J: This is an appeal from a judgment by a magistrate sitting at Rusape maintenance court. In that judgment the trial magistrate ordered the appellant to pay maintenance in a total sum of US$220 in respect of the parties' two minor children.

The brief facts are that: - In the year 2009 the appellant and respondent started living together as husband and wife. Their union was blessed with two minor children born on 11 March 2009 and 16 November 2011 respectively.

In January 2014 the respondent left the matrimonial home. She took with her the parties' minor children.

On the 29th of January 2014 respondent issued summons in the maintenance court against appellant in terms of s 4(1) of the Maintenance Act [*Cap 5:09*] seeking maintenance in the sum of US$220.00 for the two minor children.

In his response to the summons appellant denied that he had neglected his family. He contended that he has been providing for his children to the best of his abilities. He also indicated that his income is such that he cannot afford the sum being claimed. He instead offered a sum of US$40 per month for the two children.

After hearing the parties the trial magistrate in a very brief ruling granted respondent maintenance in a sum of US$75 per child making a total sum of US$150 per month.

It is that decision that the appellant has appealed against. The appellant's grounds of appeal can best be summed up as that:-

1. The learned magistrate erred in not considering the appellant's evidence that he is not fully employed and thus cannot afford the sum claimed;

2. The magistrate erred in deciding in favour of respondent when respondent had not proved on a balance of probabilities that the appellant earned the monthly income she alleged; and

3. In the circumstances the magistrate erred in making a finding that the appellant is able to pay USD150 per month.

The major issue is whether the trial magistrate erred in her assessment of the evidence before her and in coming to the decision as she did.

A perusal of the record of proceedings shows a lack of adequate evidence upon which court could have made a meaningful decision.

The respondent's claim was for a total sum of US$220-00 for the two minor children. Her list of expenses was as follows - rent 40; lights and water 15; food and groceries 60; crèche fees 65 per month; clothes (uniforms) 25; clothes (casual) 20; total 220 per month. Apart from the bald mention of the figures there was no justification for any of the sums claimed. There was no indication that prior to the separation such had been provided as part of their standard of living. The same trend pertained to the income she alleged appellant earned. There was no indication as to how she arrived at such a figure as appellant's income.

Section 4(1) of the Maintenance Act provides for the summoning of a responsible person upon complaint on oath that he /she is failing or neglecting to provide reasonable maintenance for his/ her dependants. Section 5(1) states that on the day specified in the summons issued in terms of subsection (1) of section *four* the maintenance court shall inquire into the matter of the complaint.

The inquiry envisaged in s 5 is an investigative inquiry so as to be seized with adequate evidence upon which to make a credible determination.

In *Hora* v *Tafamba* 1992(2) ZLR 348(S) at p 350 F-G McNALLY JA alluded to the role of a magistrate in such an inquiry in these words: -

> "Generally, the duty of a magistrate in a maintenance application, more particularly where the parties are unrepresented, is that of an investigative magistrate. He is not merely an umpire in a dispute between two sides. He is the upper guardian of the most

> important party, the child. He must therefore seek out the relevant facts. He must ask whatever questions are necessary to enable him to give an adequate judgment. He must aim to give the child reasonable financial support without placing an unfair burden on either parent."

In casu, apart from the contents of her written statement on oath, respondent's submission to court on appellant's income and ability to pay was that: -

> 'Appellant gets more than US$300 a month. He juices US$10 in airtime a day. He buys and sells computers. He has state of the art machinery to repair cell phones. He has been paying US$65 for a child at crèche.'

These are the submissions that led the trial magistrate to make his decision.

The appellant on the other hand contended that he realises about US$150-00 per month from the cell phone repair business. He denied that he earned US$300-00 per month from the business. He also indicated that the money for their child who attends crèche is in fact provided by his young brother.

The record of proceedings does not show that either party was asked to justify their figures; it was a question of each party merely stating their position.

It is my view that the magistrate ought to have made an effort to establish the veracity of the statements on the income and expenditure of the parties. The standard of living of the parties when they were living together ought to have been inquired upon so as to determine the standard of living the children were expected to enjoy. In the absence of such an inquiry clearly, the magistrate failed to come up with a figure that appellant could afford without compromising the children's standard of living.

In view of the dearth of evidence we allowed the parties to make submissions on pertinent issues relevant to ascertaining the ability of appellant to pay and the need for the children to be adequately catered for.

It was clear from the submissions that since the making of the order on 10 February 2014, the appellant has been failing to pay. He has been incarcerated on about two occasions for failure to pay the amount ordered. On each of the occasions of incarceration he was bailed out by relatives. It was clear to us that his ability to pay was not properly assessed. He did not impress us as someone who was just stubborn and so willing to go to prison despite being able to pay. The source of his income was unstable. It was clear that appellant did not earn the sum alleged by respondent. The respondent could not say how she came up with the figure of US$300 per month as she was not involved in appellant's business. The figure appeared more of her estimation without a sound basis.

It was also clear that the standard of living she wanted the children to have was not the one the family used to have. On the crèche fees for their child she did not dispute the fact that they were in fact being assisted by appellant's brother who shares the same name as that child. To this effect she did not dispute the various receipts of money sent by that brother for the child's fees. Thus whilst the court *a quo* may have considered the payment of US$70 for crèche fees as indicative of appellant's ability to pay, this was in fact not so. The parties themselves could not afford to pay such school fees.

The documents produced showed that appellant had fallen in arrears in respect of some service providers. The respondent could not deny that this was probably because of the limited revenue from appellant's business.

Upon a careful analysis of the submissions made by the parties we are of the view that appellant cannot afford the sum of US$150 per month.

Whilst appreciating the need to provide reasonable maintenance for the children, we are of the view that the sum must take into account the ability of the responsible person to pay the sum and also the standard of living of that responsible person. A maintenance order is not supposed to be punitive in nature. It must however provide adequately for the children within the appellant's standard of living. We are however of the view that the appellant's offer of US$ 40-00 per month for the two minor children is inadequate. The appellant should be able to pay more than that from his meagre income.

In the circumstances, we are of the view that a sum of US$50 per child per month would be within appellant's means.

The appeal thus succeeds to the extent that the order by the court *a quo* is hereby set aside and is substituted by the following:-

The appellant is hereby ordered to pay maintenance for the two minor children in the sum of US$ 50-00 per month per child with effect from February 2014 until each child attains the age of 18 years or becomes self supporting whichever is earlier. The maintenance amount shall be deposited into respondent's bank account as provided by her.

TSANGA J agrees ……..