APARNA WATERS
versus
IAN ROSS WATERS

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 4, 9 and 19 March 2015

Urgent Application

Mrs *B Mtetwa*, for the applicant
R M Fitches, for the Respondent

UCHENA J: The applicant and the respondent were married at Harare on 3 December 2005. They were blessed with three children, Keyan Ross Waters born 17th December 2006; Aydan Ian Waters born 29th February 2008; and Quilan Rohit Waters born 11th September 2010. Continuous acrimony between the applicant and the respondent's mother led to the applicant leaving the matrimonial home and her filing this urgent application seeking maintenance *pendete lite* for herself and their minor children and contribution of costs for the applicant in respect of their divorce case number HC 1081/13. The applicant alleges that she had to leave the matrimonial home together with the children because of what she calls intolerable living conditions she has been subjected to by the respondent and his mother. She is currently staying in her Legal practitioner's cottage. This application is intended to enable her to secure her own accommodation and enable her to live independently pending the determination of their divorce in HC 1081/13. She added to her urgent application an application for contribution of costs which Mrs *Mtetwa* admitted is not urgent but urged this court to consider in-spite of its lack of urgency. The applicant therefore seeks the following provisional orders for maintenance *pendete lite* and contribution of costs.

1. Applicant's application for interlocutory relief pending the divorce action in HC 1081/13 be and is hereby granted.
2. Consequently it is hereby ordered that Respondent shall pay to applicant the amount of US$1500-00 (One thousand five hundred United States dollars per month for rent and accommodation expenses in respect of applicant and the minor

children born of the parties' marriage.

3. Respondent be and is hereby ordered to pay the sum of US$2,500-00 (Two thousand five hundred United States dollars only) per month being maintenance for the minor children.
4. Respondent be and is hereby ordered to pay to the Applicant the amount of US$45,000-00 (Forty five Thousand United States dollars only being contribution towards Applicant's legal costs already incurred in the matter HC 1081/13.
5. Respondent be and is hereby ordered to pay to Applicant the amount of US$36, 750 (Thirty six thousand seven hundred and Fifty United States dollars only) being Applicant's estimated costs for the divorce trial action in HC 1081/13.

Mr *Fitches* for the respondent raised a point *in limine* on the issue of urgency. He submitted that the applicant created the urgency she is relying on by kicking her mother in-law who has since reported the assault to the police. He submitted that she can come back home as there are no intolerable living conditions to justify her departure with the children. He submitted that there is no urgency in respect of the application for contribution of costs as the issue of divorce has been, on-going since 2012. Mrs *Mtetwa* in response pointed out that the applicant was previously assaulted by the respondent's mother who has again assaulted her but rushed to the police to file an assault charge against the applicant. She conceded that the issue of contribution of costs is not urgent. She suggested that the court can refer it to the opposed roll. Mr *Fitches* submitted that the issue of contribution of costs should be dismissed for lack of urgency. It is however trite that a case cannot be dismissed for lack of urgency, as urgency does not deal with the merits or preliminary issues which go to the roots of a case. Urgency is merely an issue to determine a litigant's right to urgent access to the courts in order to be head ahead of other litigants. Therefore a case which is not urgent can either be removed from the roll or be referred to an appropriate procedure of accessing the courts.

It is common cause that there has been counter allegations of assault between the applicant and her mother in-law. The applicant previously laid assault charges against her mother in law and the respondent for which they were acquitted. It is not in dispute that the applicant and the respondent's mother have had another misunderstanding over the use of kitchen appliances leading to both remaining with visible injuries. Respondent says applicant was injured on the hand as he closed the door to separate the applicant and his mother. This

proves there was a physical confrontation which called for respondent's intervention. It is not in dispute that the applicant has an unexplained visible bruise on the leg. This was a recurrent incident justifying the applicant's view that her stay at the matrimonial home has become intolerable. It is on record that the applicant was staying in a downstairs wing with the children to which she would retreat as early as 5.00 PM, as per the respondent's opposing affidavit. This is clear evidence of difficult living conditions which coupled with the recent assault allegations must have forced her out. There is no doubt that both ladies do not enjoy each other's company or presence in the same house. The respondent said his mother is afraid of staying with the applicant in his absence as she seeks accommodation elsewhere in his absence. Though the house now belongs to a family trust it was the respondent's mother's house which she donated to the trust. She seems to have an upper hand over it than the applicant. I am satisfied, that the issues of maintenance *pendete lite* in respect of accommodation and general maintenance is urgent and must be heard without delay. The issue of contribution of costs is not urgent, and will be referred to the opposed roll as it calls for closer scrutiny of the figures claimed. It should not delay the determination of maintenance *pendete lite*.

The issue of maintenance *pendete lite* became clearer during the hearing when the occupation of the Monavale house which the respondent had offered was withdrawn. This left the applicant without any other option besides accepting the offer to come back home, which the respondent extended, or to move into rented accommodation. I have in considering urgency commented on circumstances which makes it difficult, for, the applicant, to go back home because of what is a clear unpleasant relationship between the applicant and respondent's mother. In fact Mr *Edkins* who is Mr *Fitches* instructing legal practitioner in his letter to the Court dated 12 March 2015, on costs of accommodation which the court had asked both parties to verify and advise it on, said;

> "Mrs Mtetwa suggested a figure of US$800. Our inquiries indicate that it is presently a "tenant's market" and that rentals are depressed and that US$700- US$800 in Avondale and surrounding vicinity will secure an upmarket flat, (with garage and small garden, and some even including utilities). Today's Bambazonke Nhasi website indicates an upmarket 3 bedroom flat in an Avondale complex for US$800 per month and a 3 bedroom flat in Greystone Park (furnished) for US$700 per month, **excluding levy of US$130 per month.** There are, many number of flats in the press in less upmarket low density suburbs at rentals below US$800 per month. **Our client wishes Mrs Waters to return home but, if that is not to be, is prepared to accept a rental figure of US$700- US$800 in order to assist in the completion of this matter and feels US$ 750 would be a fair compromise."** (emphasis added)

In her letter dated 11 March 2015, Mrs *Mtetwa* for the applicant said;

> "Further to the hearing of this matter on the 9th March, 2015, we have since considered the rentals in respect of flats using advertised properties in The Herald of 10th and 11th March, 2015 and the price range in Avondale and the Avenues for a two bedroomed flat is between US$800-00 to US$1200-00 per month. Although no flats were advertised in the Northern suburbs, two estates agents have advised that flats in the Northern suburbs in fact fetch more by way of rentals than houses and that three bedroomed flats range between $1200-00 to $1500-00."

This information which I am entitled to use in terms of s 5 of the Maintenance Act [*Chapter 5:09*], which authorises a court to inquire into a maintenance claim, gives a useful basis for the determination of the amount to be awarded for the applicant and children's accommodation. In the case of *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (SC) @ 199 Korsah JA commenting on how the court should assess maintenance *pendete lite* said;

> "A court is, of course, entitled to make an assessment of the maintenance required, based on its own experience as well as on such information as is furnished by the parties: Glazer v Glazer supra at 931A-E; *Barass* v *Barass B supra* at 386A-B; *Stone* v *Stone* 1966 (4) SA 98 (C) at 105G-106B; *Acutt* v *Acutt* 1990 (2) ZLR 220 (S) at 225C-D; *Hodgson* v *Hodgson* S-190-92 (unreported). Such an assessment would not be interfered with on appeal unless the court had misdirected itself, or the assessment is grossly excessive or substantially inadequate: *Acutt* v *Acutt supra* at 225 E-F; *C Hodgson* v *Hodgson supra* at 3.

Both parties agree that US$800-00 could be the upper or lower limit of rentals for upmarket accommodation. During the hearing both parties agreed that rentals indicated through advertisements are negotiable meaning the figures mentioned by both parties can be negotiated down wards. I am therefore satisfied that the respondent's offer to pay US$750-00 as rentals for the applicant and the children is reasonable. This does not however include costs for utility bills, and other accommodation related expenses like domestic worker's salaries, which must be factored in. In my view a normal house hold of four can spend about US$450-00 on utility bills and a domestic worker's salary. I am therefore satisfied that an amount of US$1200-00 can adequately cover the applicant and the children's accommodation related expenses.

The applicant sought an award of US$2500-00 for the children's maintenance. She in the body of the application applied for her own maintenance *pendete lite* but did not include it in the provisional draft order. In the application she complained about being given US$50-00 for vegetables and having to go to respondent's company to sign for fuel. She complained about not having access to money she can independently manage as even groceries are bought by the respondent. She was previously offered US$600-00 per month for six month, as post-

divorce maintenance. She said that was insufficient. When considering the applicant's maintenance *pendete lite* I will bear in mind the fact that her and the children's accommodation and accommodation related expenses have been separately determined. That provision must be considered in determining the amounts to be allowed for general up keep for the applicant and the children. Maintenance should be subject to the responsible person's means. It should also be reasonable. The applicant in her affidavit and through her Counsel's submissions indicated that she is not familiar with living expenses as the respondent was taking care of that aspect. This I believe led to her seeking maintenance in the sum of US$2500-00 for the 3 children, which by far exceeds the respondent's Zimbabwean salary. I am aware that the respondent has access to funding by the trusts into which he divested himself of his assets. This was demonstrated by his staying in a house owned by a trust and offering to accommodate the applicant and the children in a house owned by a trust. He used to get fuel for the applicant from his trust run companies. His ability to access funds and assets from his trust run companies gives him a substantial undisclosed means. He also has a South African income from which he buys groceries in bulk and is able to maintain his assets in that country. He hired a psychologist from South Africa whom he accommodates at Meikles Hotel. This shows he has substantial means from which he is able to afford a comfortable life for the applicant and the children. I will therefore consider him to be a man of reasonable means which justifies the applicant and the children to enjoy a life style commensurate with his status. In the case of *Galante* v *Galante* 2000 (2) ZLR 453 (SC)at 454 C-H to 455 A-B McNally JA commenting on what the court should consider in assessing maintenance *pendete lite* said;

> "Before considering the particular facts of this case, I think it may be useful to set out certain general considerations which a court takes into account in dealing with applications for maintenance *pendente lite*.
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> "1. **Maintenance pendente lite is intended to afford temporary relief; thus the courts do not insist on the claim being presented with the same degree of precision and exactitude as is afforded by detailed evidence** (such as in a claim for maintenance after divorce): *Acutt* v *Acutt* 1990 (2) ZLR 220 (S) at 225C; *Hodgson* v *Hodgson* S-190-92.
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> 2. **The court must endeavour to arrive at a figure within the payer's means which will allow the continuation of a comparable standard of living to that formerly enjoyed:** *Acutt supra and Barrass* v *Barrass* 1978 RLR 384 at 386B.
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> 3. **The court will make an assessment based on its own experience as well as on such information as is furnished by the parties.** This exercise of discretion will not be interfered with on appeal unless the court has misdirected itself, or the assessment is grossly excessive or substantially inadequate: *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (S) at 199B. F
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> 4. When the court is dealing with the wife of a very rich man it will take the view "that she is entitled to be maintained *pendente lite* upon the basis of being the wife of a very rich man,

not as a person who had no means or possibly very limited means, before she married him": *Glazer* v *Glazer* 1959 (3) SA 928 (W) at 930F. G

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7. Two things follow from the above considerations. **First, that the court will be prepared to adopt a more robust approach to assessment of an appropriate level of maintenance *pendente lite* than it will in the case of maintenance after divorce. Second, that a wife prior to divorce is entitled, other things being equal, to continue to live in the style to which she has become accustomed; whereas maintenance for a former wife may be subject to other consideration,** namely, those set out in s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*]." (emphasis added).

After taking the respondent's means and the needs of the applicant and the children, into consideration, which must not be unreasonably lowered by this change of circumstances I am satisfied that maintenance *pendete lite* for each child must be set at US$400-00 per child per month. The applicant's maintenance *pendete lite* will also be set at US$400-00 per month. The respondent will continue to pay for their school fees and all school related expenses.

In his response the respondent sought an order for access to the minor children. It is trite that a child parent bond must be maintained. The disputes between the parents must not be allowed to interfere with a child's right to interact with either parent. The bitterness and resentment between adult family members must not be extended to them. They should be left to grow like normal children. The respondent sought access during every weekend between Friday afternoon and Monday morning when the children must go back to school. The request is reasonable and can ensure that the children get a balanced relationship with both parents in preparation of their continued interaction with them into adulthood.

In the result I make the following orders;

1. Applicant's application for interlocutory relief pending the divorce action in HC 1081/13 be and is hereby granted.
2. Consequently it is hereby ordered that Respondent shall pay to applicant the amount of US$1200-00 (One thousand two hundred United States dollars per month for rent, accommodation and domestic help expenses in respect of applicant and the minor children born of the parties' marriage.
3. Respondent be and is hereby ordered to pay the sum of US$400-00 (four hundred United States dollars) per month per child being maintenance for the minor children pending the determination of that issue under HC 1081/13.
4. Respondent be and is hereby ordered to pay the sum of US$400-00 (four hundred United States dollars) per month being the applicant's maintenance, pending the

determination of that issue under HC 1081/13.

5. The respondent shall continue to pay school fees and all school related expenses for the minor children, including the provision of adequate fuel for the applicant to drive the children to and from school, pending the determination of HC 1081/13.
6. The issue of contribution of costs for the defendant in HC 1081/13 is referred to the opposed roll.
7. The respondent shall have access to the minor children, every week end from Friday afternoon after school, when he should pick them from school, to Monday morning when he drives them back to school.
8. The respondent shall pay the applicant's costs of suit.

Messers Mtetwa & Nyambirai, applicant's legal practitioners
Messers Coghlan, Welsh & Guest, respondent's legal practitioners