KUDZAI MIDZI
versus
TSITSI MIDZI

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 15 March, 2016 and 9 November 2016

Civil appeal

H Chitima, for the appellant
O T Sanyika, for the respondent

CHITAKUNYE J: This is an appeal against the granting of an upward variation of a maintenance order against the appellant and a dismissal of the appellant's own application for a downward variation of the maintenance order.

In this regard the appellant seeks an order that:-

The judgment of the court *a quo* be set aside and be substituted by the following:

1. The application for upward variation be and is hereby dismissed with each party bearing its own costs.
2. The appellant's counter application for downward variation of maintenance in Case No. MC1784/13 be and is hereby granted.
3. The appellant is ordered to pay US$ 700-00 per month as maintenance to respondent and the two minor children of the marriage namely Nokutenda Midzi and Mudiwa Midzi.

Background

The circumstances of the case are that in May 2013 the appellant and the respondent entered into an Order by Consent wherein the appellant was ordered to pay maintenance for the two children in the sum of US$ 1000-00 per month. The appellant commenced the payments.

It is common cause that the appellant was also paying the minor children's school fees in full as per agreement by the parties. In December 2013 the appellant unilaterally started paying half of school fees for their second child and respondent found herself having to pay the other half. The appellant continued paying school fees in full for the first child.

As fate would have it on the 4th January 2015 appellant sent an e-mail advising respondent that he was no longer able to pay school fees for both their children and so could she do so from the US$1000-00 he was paying as maintenance. This came as a bolt from the sky. No explanation was proffered as to why appellant was not able to pay the children's school fees as he had been doing

It is this change that prompted respondent to apply for an upward variation of the maintenance order. From a situation where the US$1000-00 was for the children's non-school fees requirements, she was suddenly expected to pay school fees from that same amount without the parties having discussed how that would be possible and what would happen to the other provisions that the sum was originally intended for.

The appellant in his response did not deny that at the inception of the order by consent he had been paying the children's school fees in total and that he had thereafter stopped in the manner alleged by respondent. His contention being that his financial circumstances had changed and he was no longer able to pay the children's school fees. He thus made a counter application for a downward variation of the maintenance order from the US$ 1000-00 to US$ 700-00.

After a full inquiry in which evidence was given and documents tendered in support of the testimony the trial magistrate concluded that variation was necessary to cater for the children's school fees which the original order had not catered for as appellant was paying the fees.

After an informed calculation of the school fees and uniform requirements for the two children the trial magistrate concluded thus:-

> "Court is of the view that it shall be fair and equitable if Respondent is ordered to contribute the $846.50 fees + $122.33 uniforms per year*(sic)* which is $968.83.
> $968.83 will cover for all the school fees and uniforms for the two minor children.
> In addition to this Respondent should contribute at least $600-00 per month which is $ 300-00 per child per month towards the upkeep of the minor children. Court has thus lowered the $1000-00 per month he was contributing for general upkeep to $600-00 per month considering the current financial challenges respondent is paying (*sic*) at his work place."

The appellant being dissatisfied by the order appealed to this court.

The grounds of appeal were couched as follows:-

1. The court *a quo* erred in that it ignored a relevant consideration in an application for upward variation of maintenance. The court granted upward variation of a maintenance order when there was no evidence that Appellant's circumstances had changed in way that warranted such upward variation.

2. The court *a quo* also erred in that it acted on a wrong principle. It was wrong for the court to grant the upward variation on the basis of the need to ensure that Appellant maintained all his three children in equal measure. (i.e Appellant's two children with Respondent and Appellant's own son with another woman).

3. Having correctly found that Appellant's means had diminished the court *a quo* further erred in granting an upward variation when instead his diminished means warranted a downward variation. The court thus ignored a relevant consideration in the sort of application before it.

4. The court *a quo* also erred in that the order it granted directed Appellant to pay maintenance beyond his means. The court thus failed to pay heed to a consideration relevant in maintenance matters.

It is from these grounds that appellant asked for the judgement of the court a quo to be set aside and relief granted in his favour as already cited above.

It is pertinent to appreciate that an appellant court is not at liberty to willy nilly interfere with a trial court's judgment just at the asking or on the mere pointing out of some error. The exercise of judicial discretion by the trial court may only be interfered with on limited grounds. The test for interference with the lower court's decision was laid down in *Barros and Another* v *Chimponda* 1999 (1) ZLR 58(S) where at62G- 63A GUBBAY CJ stated that:-

> "These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

It is thus important that appellant shows that the court *a quo* erred in the exercise of its discretion such that no reasonable person could have arrived at the decision it did given the same factors. (*Nyahondo* v *Hokonya & Others* 1997(2) ZLR 475)

Applications for variation of maintenance orders granted by a maintenance court are provided for in terms of s 8 of the Maintenance Act, [*Chapter 5:09*]. Subsection (7) thereof provides that:-

> "If the maintenance court holding an inquiry in terms of subsection (6) is satisfied that-
> (a) ….
> (b) the means or circumstances of any of the parties have altered since the making of the direction or order or any variation thereof, it may vary the direction or order subject to

> subsections (3),(4),(5),(6) and (7) of section *six* which shall apply, *mutatis mutandis*, in relation to any such variation"

In ascertaining whether there has been a change in circumstances of either or both of the parties it is pertinent to first ascertain what the circumstances were at the time the order to be varied was made.

In *casu*, it is common cause that at the time the order for $1000-00 was made the Appellant had been paying the children's school fees. The total fees were about of $3 386-00 per term. It was not disputed that he continued doing so for some months. Thereafter he unilaterally started paying only half of the school fees for one of the children whilst continuing paying full school fees for the other child. At the end of 2014 he stopped altogether paying school fees for the children and asked respondent to utilise the $1000-00 he was paying as maintenance to pay the school fees.

This was a change in the circumstances of the parties. It must be borne in mind that in terms of the Maintenance Act an application for maintenance is made on the allegations that a responsible person is not providing for his dependants, in this case his children. What is asked for is that which he is not providing. In the circumstances of this case appellant was paying school fees for the children hence the order granted did not cover school fees and uniforms. What was granted was for those needs of the children he was not providing, that is, for their upkeep and well being. When appellant now required respondent to pay the children's school fees from money meant for other needs of the children it meant he was no longer providing for them. Such a change needed the maintenance order to be revisited to ensure that children's basic needs were catered for.

The circumstances that obtained at the time of the application for variation had thus changed.

The manner in which the change affected the parties was that for appellant he was now not providing for the children's' education whilst respondent was now being asked to use the money meant for the children's other basic needs to pay school fees. The children were also affected in that they were now being denied what they had been used to in terms of basic needs.

Clearly in my view the trial magistrate was justified in finding that there was a change of circumstances. In fact this issue should have been accepted as common cause.

The next issue was thus to ascertain whether the change of circumstances necessitated an upward or downward variation since both appellant and respondent were seeking variation in their favour.

The appellant's counsel argued that the variation should have been a downward variation since his income had diminished. He argued that no evidence was tendered to show that his income had increased. He further stated that it was for respondent to demonstrate that appellant's income had increased to warrant an upward variation.

With all due respect, counsel seemed to forget that the cause for the application for variation was appellant's withdrawal of school fees he had been paying for the children. Had he been sincere that his income had diminished he probably would have been the first to apply for variation but, alas, it was respondent upon realising that appellant was no longer providing school fees for the children. The respondent's role was to point out the sources of appellant's income and assert that these were still available. It was then upon appellant to show that those sources had dried up. In this case appellant's company, KFM, of which he said respondent was a director, was going through tough times. Unfortunately the documents he tendered to court from the company do not have respondent's name as director. This, as stated by respondent pointed to lack of *bona fides* on the part of appellant.

It is also interesting to note that the documents from the company, with which appellant intended to show that the company was facing trying times, were only tendered at the instance of the trial magistrate well after parties had testified. Had appellant been sincere in his assertion he would have tendered those documents in his testimony as evidence of diminished income. His failure to do so on his own volition does not augur well. Appellant was not candid with court in this regard.

In *Lindsay* v *Lindsay* 1993(1) ZLR 195 @202B KORSAH JA had this to say on how court must assess earnings of a party in such circumstances:

> "The Court must take a pragmatic view of the means of the husband, and not be misled by appearances, especially when the husband is being exceptionally frugal with the truth. The Court must ascertain not only what monies the husband admits to having, but also what monies could reasonably be made available to him if he so wished."

In casu, the appellant seemed eager to make the court believe that he relied on his salary only when that is not so. Besides KFM Company he has another company, Chitemamhiwa Investments, which collects rentals from one of the parties' immovable properties. The incomes from the two companies should have been disclosed without much ado.

In any case appellant was all along aware that the maintenance sum that had been granted by consent did not include school fees for the children. So when he stopped paying school fees he ought to have realised that an adjustment was inevitable to ensure children's school fees and uniforms are catered for.

The appellant's counsel further argued that the court *a quo* acted on a wrong principle in arriving at an upward variation. In his reasons for judgement the trial magistrate stated, inter alia, that:

> "However, court noted that Respondent is well able to contribute around $513.75 for school fees and general upkeep of his major son, Takunda who is at Africa University, respondent must thus sacrifice to also maintain his own children using money around that range because he ought to treat all his children fairly. If he is able to run around and get school fees for a son who is at a private college, why can't he do the same for his 2 minor children?"

It is this reasoning that appellant took issue with. Despite the above statement the trial magistrate did not impose those figures to this order. Instead he used actual school fees for the 2 minor children and costs for their uniforms. Upon calculating the total school fees per year, which he found to be US$10 158-00, he divided it by 12 to get the monthly contribution by appellant. On uniforms he did the same. In this way he came to a school fees figure of $846.50 per month and school uniforms figure of $122.33 per month. Upon adding the two figures $ 846.50 and $122.33 he came up with $968.83 to cover for all the school fees and uniforms for the two minor children.

I am of the view that the manner he worked out the school fees and uniform monies for the minor children cannot be faulted. What should be interrogated is whether in view of his acceptance that appellant had financial challenges was it appropriate to order appellant to continue footing the entire school fees and uniforms account on his own.

I am of the view that as it was common cause respondent is gainfully employed and earning a decent salary she should have been asked to also contribute towards this account. It is in this aspect I find that the trial magistrate erred. The error is such that this court is at liberty to review that aspect and correct it.

Upon taking into account the means of the parties as noted I am of the view that respondent should meet a third of the school fees and uniforms account whilst appellant meets two thirds. This translates to a figure of US$646-00 towards school fees and uniforms for the two minor children per month. The appellant will thus be ordered to pay US$323.00 per month per child towards school fees and uniforms.

As regards the sum for general upkeep of the children I did not hear appellant to contest the reduction from $1000-00 to $600-00 so that will be maintained save to say he wanted that money used for the children schools fees without him providing an alternative for their general upkeep. It must be borne in mind that the children are expected to enjoy the same standard of living as they had been used to or as their parents are living. So the sum for general upkeep cannot be done away with as children have a standard of living to maintain.

Accordingly the appeal is allowed in part.

The judgement of the court a quo is hereby set aside and is substituted by the following:

1. The application for upward variation in case No. MC 1784/13 is hereby granted.
2. The appellant is hereby ordered to pay US$623.00 per month per child towards the maintenance of the two minor children of the marriage until each child attains the age of 18 years or becomes self-supporting whichever is earlier.
3. Each party shall bear their own costs of suit.

NDEWERE J. I concur ……

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners
Matipano and Matimba, respondent's legal practitioners

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