

EVENGELINE EVELINE TAKAWIRA
versus
ISAAC GEORGE TAKAWIRA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 24 February 2020 & 5 March 2020

Chamber Application

E Nyakunika for the applicant
S. M Hashiti, for the respondent

MANZUNZU J: This is an opposed chamber application in which the applicant seeks an order to revive a superannuated judgment.

The simple and undisputed facts are that on 4 May 2006 in HC 924/97 this court issued an order in the following terms:

- “1. A decree of divorce shall issue.
2. Custody of the minor child Nyasha be and is hereby awarded to the plaintiff.
3. The immovable property at Stand 2010 Section D, Bluffhill Harare be and is hereby awarded to defendant.
4. Plaintiff is to pay the sum of \$100 000.000 *per* month as maintenance with effect from 30 April 2006 till defendant dies, remarries or cohabits with another man.
5. Defendant’s counter claim is dismissed with costs.
6. Defendant is to pay the plaintiff’s cost of suit.”

The present respondent was the plaintiff in that case and the applicant was the defendant. The applicant alleges the respondent defaulted in paying maintenance as *per* para 4 of the order. As a result, she has registered the order with the Maintenance Court under Case No. M 2502/19. She intends to enforce the order but cannot do so on a superannuated judgment. She seeks the revival of the judgment to allow its enforcement. She stated in her founding affidavit what she considered to be arrear maintenance calculated in US dollars.

The issue is whether or not the judgment of 4 May 2006 should be revived.

The application is opposed. It is not clear from the reading of the opposing affidavit the basis upon which the respondent opposes the application. His defence does not come out clear. Instead he narrates his personal circumstances which includes his present financial means. He blames it upon the applicant for her failure over the years to enforce the judgment against him. He said due to lapse of time and the fluidity in the economic situation of Zimbabwe it was undesirable to revive the judgment as it would result in unjust enrichment on the part of the applicant. He claimed to have effected certain payments in 2006, 2009, 2010 and 2019. He does not dispute that he fell into arrears.

Respondent does not explain why he did not take action to attend to the variation of the order in line with the economic changes or his personal circumstances. The order for maintenance is extant, it applies until applicant dies, remarries or cohabits with another man.

The issue of the judgment being superannuated was raised by the respondent before the Magistrate's Court at the hearing of the application for the registration of the maintenance order. This prompted the applicant to bring the present application. The respondent's view is that revival of the judgment served no purpose because enforcement would be futile.

It was argued for the respondent that due to lapse of time it was undesirable that the judgment be revived. As authority the court was referred to *Sulaman & Co v Vahed*, 1928 49 NLR 492.

The issue of the currency at the time the order was granted in 2006 having become moribund was also used to resist revival. There was further argument on the issue of introduction of a mono currency having a bearing to the application. In my view I do not see its relevancy because any change in currency is capable of conversion. This order relates to maintenance which must be paid until applicant dies or remarries or cohabits with another man. Revival of such an order cannot be said to be futile.

In *Mafoko v Alcatel Lucent South Africa (Pvt) Ltd and Another*, 2015 ZALCTHB 240 it was stated that;

“It is trite law that a court has the discretion to either abide to an application for revival or to refuse it. A court will not revive an old judgment if, on the facts before it such revival would be futile, will only lead to useless litigation, and would not give the applicant any real remedy. It therefore follows that in order for the present application for revival of the judgment to succeed, it must be shown the judgment debt remains outstanding, either in whole or in part. Otherwise revival of judgment would be futile and academic.”

In *casu*, it is common cause that the judgment debt remains outstanding, whether in whole or in part is for another day. It was argued that the correct procedure was for the applicant to bring a fresh maintenance claim whose cause of action is based on the superannuated judgment. I disagree. No authority was cited for this proposed procedure.

The court is not called upon to determine the arrears of maintenance. The court is to decide whether or not the judgment must be revived. The applicant has given an explanation why she delayed in the enforcement of the judgment. She stated that it was because the respondent was based outside Zimbabwe most of the time. All the respondent could say was that he was available in the country at the alleged times. This is despite the documents attached to his opposing affidavit showing his physical address in South Africa. I find applicant's explanation for failure to enforce the judgment as reasonable.

In the circumstances the application must succeed. The applicant did not ask for any costs and such will not be granted.

It is ordered that:

1. The judgment of the High Court under case No. HC 924/97 be and is hereby revived for the purpose of enforcement.
2. No order as to costs.

Dondo & Partners, applicant's legal practitioners

Messrs Sinyoro & Partners, respondent's legal practitioners