AUDREY RUNGANO CHIMOMBE (nee MAGUME)
versus
TAPIWA MARK CHIMOMBE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 13 September 2012 & 13 October 2021

Urgent chamber application

J Ndhlovu, for the applicant
MS *F. Mahere*, for the respondent

MUREMBA J: The parties who are married are currently involved in divorce proceedings. However, trial has not yet commenced. The applicant filed an application in HC 6196/20 for maintenance *pendente lite* for herself and the parties' three minor children. I granted it on 10 May 2021. I ordered the respondent to pay the sum of US$ 2000 per month with effect from 1 May 2021.

Aggrieved by the decision, the respondent made a chamber application for leave to appeal which I granted on 16 July 2021 in HC 2323/21. The respondent subsequently filed his notice of appeal in the Supreme Court under SC 27/21 on 30 July 2021. The appeal is pending determination.

After noting the appeal, the respondent stopped paying maintenance. Apparently he had only paid maintenance in June and July 2021. He did not pay in May and August 2021.This prompted the applicant to file the present urgent chamber application for leave to execute pending appeal. In her founding affidavit the applicant addressed the issue of urgency. She made averments as to why she says the matter is urgent. The application is also accompanied by a certificate of urgency. The legal practitioner who prepared it gave his opinion as to why he believes that the matter is urgent. I will deal with these averments by the applicant and the legal practitioner later on in the judgment.

In response to the application, the respondent raised three points in *limine* including the point that the matter is not urgent. The other two points in *limine* were abandoned at the hearing. So, argument was made in respect of the issue of urgency only.

It is the respondent's contention that the matter is not urgent for the following reasons. The need to act arose on 2 August 2021 when the applicant was served with the notice of appeal which had been filed in the Supreme Court on 30 July 2021. It was clear when the respondent filed the application for leave to appeal in this court that he was not happy with the order of this court granting maintenance *pendente lite*. Therefore when the appeal was noted, that ought to have raised alarm to the applicant. That is when she ought to have acted, but for a month she did nothing. Now she seeks to create urgency importing convoluted meaning into a simple letter that was written by the respondent's legal practitioners. The certificate of urgency is deficient for it does not relate to the import and significance of the notice of appeal. The legal practitioner ought to have identified the date of the noting of the appeal as the date when the need to act arose. The original order which the applicant seeks to execute was granted in the ordinary course of legal proceedings on the ordinary roll. The order to execute the same order cannot therefore be sought on an urgent basis. The respondent prayed for the removal of the matter from the roll of urgent matters.

Ms. *Mahere* argued on behalf of the respondent that a matter is not urgent if the situation complained of has been in existence for a long time without being addressed. She submitted that the situation between the parties had been existing since 2020. The respondent filed his notice of appeal on 30 July 2021. Thereafter the applicant sat for 37 days before filing the present application on 6 September 2021. Citing the case of *Kuvarega* v *Registrar General & Anor* 1998(1) ZLR 188(HC) Ms. *Mahere* submitted that the delay in filing was not explained in the certificate of urgency or in the applicant's founding affidavit. Ms *Mahere* submitted that under the circumstances the matter can wait.

In the founding affidavit the applicant had made the following averments with regards to the issue of urgency. The matter involves three minor children whose interests are at stake and their lifestyle has been affected adversely. Their current standard of living is incomparable to the conditions before the divorce proceedings. The respondent's failure to contribute towards their maintenance as per this court's order has negatively impacted on their best interests. Therefore, this court as the upper guardian of minor children must endeavour to deal expeditiously with a matter involving minor children. If execution is stayed until the appeal is determined, the minor children will suffer in that they are not living the standard of life that they are accustomed to.

The applicant further averred that she did not sit on her laurels. She did not file the application earlier because all along she was under the impression that the respondent would pay

maintenance as per the order of this court. It was in the respondent's letter of 1st September 2021 that he made it clear that he would not be paying the arrears for the months of May and August 2021 and that he stopped paying maintenance with effect from 30 July 2021 when he filed his notice of appeal. The applicant averred that on this basis the need to act on her part arose on 1st September 2021 when she received the respondent's letter.

The applicant further averred that the respondent is not even paying US$1 337.00 which he had tendered to pay at the hearing of the application for maintenance *pedente elite*. It is not disputed that this is the amount the respondent receives from his employer monthly as spousal and children's allowances. He is withholding this money from the applicant and the children who are the beneficiaries thereof. The applicant further averred that due to the Covid-19 pandemic, the courts have been on lockdown and a backlog has been created. As a result, it is unlikely that the appeal will be heard anytime soon, yet the children need to be maintained in the interim.

The certificate of urgency reiterated what the applicant said in her founding affidavit with regards to the issue of urgency. At the hearing Mr. *Ndhlovu* for the applicant submitted that the need to act on the part of the applicant arose on 1st September 2021 when the respondent communicated that he would not be paying maintenance following the noting of the appeal. Mr. *Ndhlovu* further submitted that all along the applicant believed that the respondent would continue paying maintenance on the basis of s 27 of the Maintenance Act [*Chapter 5:09*] which says that a judgment of the Maintenance Court shall not be suspended by the noting of an appeal. The applicant relied on this provision until the communication of 1st September 2021 which was made by the respondent through his legal practitioners to the effect that he had stopped paying maintenance on the basis of the appeal which he had noted.

It is common cause that in that letter by the respondent it was pointed out that an order of maintenance granted by the High Court is suspended by an appeal and the authority for this proposition is the case of *Donald Juan Chakras* v *Sooraya Chakras* SC 30/2002.

In the case of *Donald Juan Chakras* v *Sooraya Chakras* it was held that the provisions of s 27(3) of the Maintenance Act apply only to appeals against maintenance orders issued by the Magistrates Court. The provision reads: -

> "27 (1) Any person who is aggrieved by the decision of a maintenance court in respect of any direction, order or award made in terms of this Act … may appeal against such decision to the High Court.
>
> (2) …
>
> (3) The noting of an appeal in terms of this section shall not, pending the determination of the appeal, suspend the decision appealed against unless the maintenance court, on application being made to it, directs otherwise".

In the *Chakras* case it was submitted by counsel for the respondent that once the High Court ordered the appellant to pay maintenance to the respondent, that order became an order issued in terms of the Act, and that in terms of s 27(3) of that Act the obligation to pay the maintenance was not suspended by the noting of an appeal against the order to pay the maintenance. SANDURA JA disagreed with that submission because both subss (1) and (3) of s 27 concern an appeal against the decision of a maintenance court, and "maintenance court" is defined in s 3 of the Act as follows:

> "Every magistrate's court shall, within its area of jurisdiction, be a maintenance court for the purposes of this Act."

SANDURA JA held that,

> "It is, therefore, clear that the provisions of s 27(3) apply only to appeals against maintenance orders issued by the magistrate's court. The enforcement of a maintenance order made by the High Court, notwithstanding the noting of an appeal, is done in terms of the inherent jurisdiction of the High Court upon application, and not in terms of s 27(3) of the Act. See *Natverial Bhagubhai Laxman* v *Bhanumati Laxman* S-177-90 (not reported) at p 6 of the cyclostyled judgment."

It follows therefore that *in casu*, the noting of the appeal suspended the operation of the maintenance order that this court granted. This means that the need to act on the part of the applicant arose on the date she was notified by the respondent that he had filed a notice of appeal in the Supreme Court. She did not dispute that she was notified on 2 August 2021 after the notice to appeal had been filed in the Supreme Court on 30 July 2021. Therefore the need to act arose on 2 August 2021 and not on 1st September 2021 as she indicated. However, what is clear is that the applicant acted under the erroneous belief that s 27 (3) of the Maintenance Act was applicable to this case. She believed that the noting of an appeal had not suspended the maintenance order granted by this court pending the determination of the appeal. She averred that all along she was

under the impression that the respondent would pay maintenance as per this court's order until he made it clear in his letter of 1 September 2021. In the applicant's letter addressed to the respondent's legal practitioners through her legal practitioners, dated 31 August 2021 she made it clear that she believed that, "the noting of an appeal does not suspend the maintenance order." See annexure AC7 in para 3.

Notwithstanding the fact that the applicant's view about the applicability of s 27 (3) of the Maintenance Act to the present case was erroneous, the applicant explained the reason for the delay in filing the present application. In my considered view the explanation is reasonable. It shows that the applicant was not sitting on her laurels. She was labouring under the mistaken position of the law. Considering that this is a matter which affects the day to day welfare of the minor children I will dismiss the point *in limine* that the matter is not urgent. Yes, there was a delay of 37 days in filing this application, but despite the delay the matter remains urgent since the need to maintain the children is a continuous process. They need money on any given day for their upkeep for as long as they are alive. So, the fact that there was a delay in bringing this application cannot be used as a basis for saying that the matter should not be heard on an urgent basis. The argument that there was a delay in filing the application would have worked if the applicant was claiming arrear maintenance. This is not the case though. The applicant is seeking maintenance for the day to day upkeep of the children until the appeal is heard. This being a need which is ongoing, it is clearly in the best interests of the minor children that the matter is heard on an urgent basis.

There is no rule of law which says that if the original order which the applicant is seeking to execute pending appeal was not granted on an urgent basis, leave to execute pending appeal cannot therefore be sought on an urgent basis. What matters in my view are the circumstances of each case. If the circumstances are such that leave to execute pending appeal ought to be determined on an urgent basis, I do not see why the court should not hear the matter on an urgent basis. The present case, for the reasons already discussed above, is one such case.

In the result, I dismiss the point *in limine* that the matter is not urgent.

The merits

In an application for leave to execute pending appeal the applicant ought to satisfy the following requirements.

i) that there is a potential of irreparable harm or prejudice if leave is to be denied.

ii) that the appeal has no prospects of success.

iii) that the balancing convenience favours the application to be granted.

The applicant made the same averments that she made in her application for maintenance *pedente lite* which are basically that the respondent was not adequately providing for the children. When all was well in the marriage the respondent who is working outside the country was sending her US$2 000, 00. per month. In May 2020 he unilaterally stopped. He did not communicate his reasons for the stoppage. He started sending varying amounts that were inadequate for the children's upkeep. In response to the application the respondent also repeated the same arguments that he made when he was opposing the application for maintenance *pedente lite*. His argument was that he had not failed to maintain his children and submitted that as such no order therefore ought to have been granted. He did not dispute that when things were well between him and the applicant he was sending US$2 000, 00 per month for the upkeep of the family. He did not dispute that when things went wrong he stopped paying this amount and started paying lesser amounts which would fluctuate from month to month. His argument was that he had found out that the applicant was having extra marital affairs and spending money on boyfriends. He averred that he started paying directly for utilities, and other important family expenses hence he reduced the amount of cash he was now sending to the applicant. The applicant simply wanted to receive an amount that she could use for the children's upkeep in a manner that enabled them to maintain the same standard of life that they were used to. She vehemently denied the accusations that she was having extra marital affairs.

Notwithstanding the accusations levelled against the applicant, I ordered the respondent to pay US$2 000.00 per month pending the finalization of the divorce. This was because it was not possible to hold a full inquiry into the matter because of the absence of the respondent. The respondent's counsel had applied for the matter to be postponed to a much later date to enable the respondent to travel from the Philippines where he was based, yet this was during Covid-19 lockdown. There were travel restrictions. The children's welfare being at stake, the matter needed to be finalized expeditiously. I thus took a robust approach in the matter and decided the matter on the papers, despite the existence of material dispute of facts which would have ordinarily needed a full inquiry and the giving of *viva voce* evidence by the parties to resolve. I settled for the amount of US$ 2 000, 00 per month on the simple basis that this was the amount the respondent had been paying to the applicant for her upkeep and the upkeep of the children before the marriage went

sour. That was common cause. That amount would enable the applicant and the three children to live in a similar lifestyle they had always enjoyed when things were well in the marriage. I did not need under the circumstances to determine the amount with exactitude as if I was determining the final maintenance order in divorce proceedings between the parties. Considerations for a temporary maintenance order are different from the considerations that are made at divorce. It was just and proper to simply order the parties to maintain the *status quo ante* until their divorce proceedings were finalized. In *Malango* v *Malango* HC 203/25 BERE J said,

> "In considering an application by the wife for maintenance *pedente lite* the court has to make a value judgment based on the income and assets of the respective parties in an endeavour to arrive at a figure which will enable the wife to maintain a standard of living reasonably comparable to the standard that she maintained when she lived with her husband and which figure is within the husband's means." (my underlining for emphasis)

The case speaks about the need for the spouses to be able to maintain the same standard of living they were used to pending divorce. In *casu* the applicant and the children had always been maintained by the respondent at the rate of US$2 000, 00 per month. I did not even need to make value judgment since this figure was common cause to the parties. This amount was later withdrawn by the respondent, not because he could no longer afford it, but because he started accusing the applicant of misusing the money.

When the respondent applied for leave to appeal against my judgment I granted him the leave. This was not because I did not have faith in my decision. I mainly considered the approach that I took in resolving the matter, which approach I have discussed above, and decided that since the respondent was disgruntled, I ought to give him a chance to be heard by a superior court, lest I erred in my approach. I decided that on that basis it was an arguable case and that this court will also benefit from the wisdom of the Supreme Court, it being a superior court. This being a case which involves the welfare of minor children, I did not believe that the respondent who was claiming through and through that he was a responsible person, he would on account of having noted an appeal, stop paying maintenance for his children pending the determination of the appeal. Whilst s 27 (3) of the Maintenance Act does not apply to maintenance orders granted by the High Court upon an appeal being noted, it is common cause that the whole idea for its purpose is to ensure that the children continue to be maintained pending the determination of the appeal. The children's needs do not cease because an appeal has been noted. They remain in existence. The children will still need to eat and require other provisions. Taking a cue from s 27 (3) of the

Maintenance Act, I will grant leave to the applicant to execute the order of this court pending appeal. The welfare of the minor children is at stake. They need to maintain the same standard of living they used to enjoy before the respondent stopped paying US$2 000, 00 to the applicant. The irreparable harm that the applicant and the children will suffer is that they will not be able to maintain the same standard of life they were used to. The balance of convenience favours the granting of the application. Due to Covid-19 lockdowns there might be a delay in the Supreme Court determining the appeal. It is in the best interests of the children that the respondent continues to maintain them as per the order of this court until the appeal is determined.

In the result, it be and is hereby ordered that: -

1. The application for leave to execute the judgment of this court granted on 10 May 2021 under HC 6196/20 pending appeal against that judgment noted by the respondent under SC 27/21 be and is hereby granted.
2. The respondent shall pay the applicant's costs.

Mtetwa & Nyambirai, applicant's legal practitioners
Mhishi Nkomo, respondent's legal practitioners