

FORWARD MHLANGA  
versus  
EVELYN MHLANGA

HIGH COURT OF ZIMBABWE  
CHITAKUNYE & TSANGA JJ  
HARARE, 18 September & October 22 2014

### **Civil appeal**

*S. Machingauta*, for appellant  
*T. Nyahuma*, for respondent

TSANGA J: This is an appeal against a magistrate's court decision awarding the respondent the sum of \$2000.00 as maintenance. Of this sum \$1 500.00 is for the respondent and \$500.00 for the minor child.

The facts that were placed before the magistrate in the application for maintenance were these. The parties who are currently now pursuing a divorce, were married on 2 March 2012. At the time of marriage here in Zimbabwe, the husband was working for the Zimbabwe Embassy in Iran. The plaintiff thus joined him in December of that year together with their minor child born in July of that year. Sometime in September 2013 the parties came to Zimbabwe ostensibly for a funeral. However, it was the respondent's contention that the appellant then deserted her and the minor child here in Zimbabwe and informed her that she would not be going back to Iran with him. It was within this context that she found herself back in Zimbabwe with insufficient means to support herself and the minor child. At the time that the application was made she was also five months pregnant.

In her application for maintenance she sought a lump sum of \$10 591.00 to purchase new household property since she said she had sold everything when she went to join him in Iran. She also sought to cover maternity costs. In addition, she sought \$2 675.00 as monthly maintenance to cover groceries, accommodation, clothing, medical expenses and other day to day expenses. The court *a quo* upon hearing the evidence in the application dismissed the

lump sum claim for a number of reasons. Her quest for money to buy furniture was dismissed on the basis that she had been offered furniture which she had declined as being substandard. Furthermore, as the parties were in the process of divorcing, the court did not think it appropriate for them to be buying new property. As regards the claim for lying in expenses the court noted that the Maintenance Act [*Cap 5:09*] does not make any provision for these. However, as regarding the claim for monthly support, after reducing what it considered to be exorbitant claims, the court awarded her US\$2000.00 for herself and the minor child. This was on the strength of the appellant's earnings which the court found to be US\$5056.00 per month based on the salary slip provided by the appellant's employers, the Ministry of Foreign Affairs.

The grounds of appeal are that the Magistrate erred by 1) holding that there was a pay slip from the Ministry of Foreign Affairs, 2) in holding that the appellant earns \$5056.00 and 3) in failing to take into account that the appellant is a civil servant and earns US\$460.00 per month. It is said that what the court relied on are allowances which are meant to take care of the appellant whilst in Iran and not in Zimbabwe.

The appellant asserts that he earns \$460.00 and not \$5056.00 yet there is nothing in the record to confirm that he earns \$460.00. Our courts have in various cases emphasised the need for litigants in maintenance case to place their financial position fully before the courts to enable the court to make an informed decision regarding the appropriate level of maintenance to be paid. Indeed the following cases were cited by the respondent in support of this contention; *Lindsay v Lindsay* 1993 (1) ZLR 195@ 197, *Koumides v Koumides* HH 116/10, *Nyaude v Nyaude* HH 197/14.

Having placed before the court as his proof of earnings, payment vouchers which showed his earnings varying from month to month from as low as \$900.00 to as high as \$5056.00, the Magistrate made a concerted effort to clarify the real figure by asking for a salary slip from the appellant's employer. It is from this that the Magistrate made the determination whether or not what the respondent had applied for in the court below was reasonable and whether the appellant would realistically be able to pay.

In maintenance claims, the court's role is to ensure that those who need maintenance get it if the evidence produced supports the claim. Financial needs and resources, as well as the standard of living that the parties are accustomed to, are all factors that are taken into

account in determining an appropriate order of maintenance. As such, an award for maintenance which has been heard fully on the facts by a trial magistrate will not be lightly reversed in the absence of compelling reasons to do so which are also supported by evidence that was placed before the Magistrate in the court below.

There is nothing from the evidence placed before the court and from the court record itself that supports the claim that the magistrate erred in holding that there was a payslip from the Ministry of Foreign Affairs. The pay slip was requested by the court. It was duly stamped as authentication by the Ministry. It shows that the appellant was earning a salary of \$3745.00 per month; a food and clothing allowance of \$749.00 per month and a transport allowance of \$562.00 giving the total of \$ 5056.00 per month. The Magistrate therefore did not err in finding that the appellant earns this amount. The appellant failed to produce a single shred of evidence in support of his claim that he only earns \$460.00 per month as a civil servant. The Magistrate can therefore not be faulted for dismissing his claim that these are his earnings. The vouchers that he produced as exemplifying his earnings were not his salary. The respondent's explanation that these denote amounts paid to him in Iran from the \$5056.00 would seem to explain why the amounts vary as they are determined by his requests. They could also be basically travel and subsistence claims as the vouchers also seem to suggest but whatever they are, these vouchers are certainly not his confirmed monthly salary slip.

In this appeal, appellant also places emphasis on the case of *Rabvukwa v Rabvukwa* 2004 (1) ZLR p530 at p535 for the argument therein that with the emergence of equality, young women can no longer expect maintenance for life as a result of their marriage. It is emphasised that this is more so where a woman has worked before and is young enough to obtain employment. The appellant's argument is that the respondent falls squarely into this envisaged bracket where maintenance for herself is not called for and infringes the concept of equality.

While self-reliance is to be applauded and accords with the principle of equality between men and women as a core constitutional value, the approach to equality must always be one which aims at achieving substantive rather than mere formal equality in light of the circumstances of each case. Interpreting equality to always entail a gender neutrality approach that emphasises sameness between men and women as counsel for the appellant

advocates in this case, can lead to the very inequality which the constitution enjoins the courts and society to guard against. Such an approach does not distinguish between men and women in any way and neither does it recognise the unequal power dynamics that may be inherent between the parties that may to a large measure, be largely contributory to the dispute in question.

Whilst an approach to equality founded on women's sameness with men clearly has its uses depending on the circumstances to be addressed, it is however not the only approach to achieving equality between the sexes. It is not always appropriate for all issues. Equality is a fundamental constitutional principle but the methodological approach to its actual achievement is by no means through a singular constant such as sameness and the courts should not treat it as if it were. There are other pertinent approaches that the court can embrace in giving effect to equality such as the "difference approach". There is also the "disadvantage approach". These two approaches were equally manifest in the matter in the court below.

For example, the respondent framed her quest for a lump sum payment for pregnancy related expenses using an alternative approach to equality which emphasises difference between the sexes as evidenced by women's child bearing role. Although her claim may have been dismissed on the basis of not being covered by the Maintenance Act, it is undisputable that "difference" as an approach to equality finds expression in other areas of our law such as in the recognition of maternity rights as contained in the Labour Act

The third approach which appears to have been the one that permeated the magistrate's judgment in the court below albeit unwittingly rather than as expressly stated, lays emphasis on achieving equality by recognising the differential effects of power between men and women that arise within a particular context and that may place a woman at a disadvantage compared to a man. In awarding the respondent \$1500.00 as maintenance for herself, the lower court appears to have been guided by her relative "disadvantage" at having joined him in Iran as a spouse temporarily forgoing the opportunity to advance her own career. She had to put this on hold when she joined him. Moreover in a display of power by the appellant over the respondent, he had simply told her that she would not be going back with him to Iran after a funeral in Zimbabwe. She was pregnant. In addition she had a young child. She had no job. She had no income. He withheld adequate support having to be

dragged to court to be compelled to do so. To suggest that equality between the two means treating the same under the circumstances that were placed before the court, and to seek to deny her even bridging support on the pretext that she can work, is to miss the point that is manifested by real life situations that can lead to inequality. In the face of lack of meaningful gains for women as a marginalised group using sameness as the standard of equality (*de jure equality*), the reality is that increasing emphasis is being placed the role of power play and power dynamics between the sexes in understanding the failure to achieve equality in real life settings, (*de facto equality*).

The reality therefore is that the order was made in the context of the respondent presently having no earning capacity and therefore being in a considerably weaker and disadvantaged economic position compared to the appellant. Currently without means to support herself, the respondent is not in a position to lead a life commensurate with the standard she was leading when the parties were in Iran. Moreover the amount ordered was arrived at on the basis of a legitimate pay slip.

The Magistrate's order is also not an order for life. Maintenance orders can be varied when circumstances change.

In sum, the appeal lacks merit and is hereby dismissed with costs.

CHITAKUNYE J agrees \_\_\_\_\_

*Tavenhave & Machingauta, appellant's Legal practitioners*  
*Takawadiyi & Associates, Respondent's legal practitioners*