HILDA KIRIMI
versus
ROY NYABVURE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 31 January 2017 & 5 July 2017

Civil appeal

Ms *C Danha*, for the appellant
S Rugwaro, for the respondent

MUSHORE J: The appellant is seeking the setting aside of an order of the Magistrates' Court whereby the respondent successfully obtained a downward variation of maintenance set aside.

The parties are the parents of three minor children, namely Tapiwanashe Ruby Nyabvure (born on the 24th January 2005), Tadiwanashe Nyabvure (born on the 27th March 2007) and Tendekai Rihama Nyabvure (born on the 8th February 2002. The eldest minor child is currently 15 years old. It is common cause that the parties lived together from 2004 until 2013 during which time the children were born. After they parted ways, on the 9th January 2012, appellant retained custody of the minor children and obtained an order of maintenance which reads:-

> Court order r p 55
>
> "IT IS ORDERED THAT:-
> Respondent in default. Judgment ordered on 23rd December 2011 varied to read:-
> Respondent is ordered to pay US$300-00 for 3 minor children with effect from 31st December 2011 until the children attain the age of 18 years or become self-supporting whichever occurs first. In addition respondent is ordered to pay fees termly for the children until the order is varied or discharged. Money is to be garnished into applicant's (appellant) bank account with effect from, January 2012. In addition applicant (appellant) is to continue residing at the matrimonial home, number 631 new Adylin, Westgate, Harare together with the minor children. Application for garnishee is hereby granted in the sum of US$300-00 with effect from January 2012. Arrears to be deducted at the rate of US$50-00 until cleared."

Sometime later, the appellant obtained a High Court Order which specified that the children remain at Twin Rivers School, thus bringing clarity on the issue of which school that

the children were to attend. Twin Rivers is a private school and the High Court found that the appellant was able to pay for the children to be privately schooled. The termly fees at Twin Rivers were US$900-00 *per* term for two children.

It is common cause that respondent twice unsuccessfully applied for variation downwards in terms of s 8 (4) of the Maintenance Act [*Chapter 35*] in the same court. He succeeded in obtaining a downward variation on his third attempt. On a third attempt, the court varied the maintenance order downwards resulting in the respondent being ordered to pay maintenance in the amount of US$210-00 monthly for the three minor children, and a termly sum of US$150-00 per child for school fees.

The appellant has raised four grounds of appeal which are predicated (as simplified in her Heads of Argument) upon her belief that the court *a quo* misdirected itself in allowing the downward variation, where in fact respondent had failed to demonstrate that his circumstances had changed.

On the other hand, respondent argues that he was and would still be unable to meet his obligations in terms of the maintenance order of the 9th January 2012 due to a reduced income after all his liabilities have been taken into account. He stated that his income was irregular because of his employer's financial constraints and that he received his salary intermittently. He added that he had accrued financial obligations which made it difficult for him to pay school fees at a private school. He also submitted that because appellant is a qualified and registered nurse, she ought to contribute to the maintenance of the children. The appellant submitted *a quo* that she lost her job in 2012 and is presently medically unfit to be in employment. She said she has sought the assistance of relatives to catch up with maintenance arrears to keep the children in school and that she has rented out the main house of the property where she resides, in order to realise an income of US$200-00 per month.

It was common cause that prior to the hearing *a quo*, there was an existing warrant for respondent's arrest which was issued because of respondent's failure to pay maintenance as ordered by the court. [*Record p 53*]. The court *a quo* paid no heed to the irregular state of affairs and instead it entertained the application nevertheless and thereby erred. Further, the court *a quo* disregarded the fact that the respondent had ignored the High Court order which ruled that the children were to be educated at Twin Rivers School and that respondent had enrolled the children into a government school without a court order entitling him to remove the children from Twin Rivers School. It follows therefore that when the application was made and heard, respondent was in contempt of the High Court order, thus the court *a quo*

ought not to have entertained the application. The court grossly misdirected itself in proceeding with a hearing where the respondent had clearly approached the court *a quo* with dirty hands.

The court *a quo* erred further by its failure to conduct an essential enquiry into whether or not the application was frivolous and vexatious.

In *Smit* v *Smit* 1994 (2) ZLR 149 (S), the Supreme Court held as follows at pages 149 [F-H] to 150 [A-B]:-

> The enquiry under the Act is two-tiered. Firstly, the court must consider whether the application is frivolous and vexatious. If it is, then the application is dismissed. If it is not, and there appears to have been a change in means and circumstances, the court then investigates the alteration to satisfy itself whether the variation is justified. The evidence placed before the court must be such as would assist the investigation of the party's means and circumstances. While full disclosure must be made, this does not obviate the duty to investigate. If there is evidence suggestive of a failure to make full disclosure of some means and circumstances representing a change, the clear duty of the court is to enquire or investigate and take into account such means or circumstances in the light of which the financial arrangements were made and, if so, to determine what would be the appropriate adjustment to make. In such an exercise, the court must take into account not only what monies the husband admits to having but also what monies could reasonably be made available to him if he so wishes'.

The first enquiry, which the Magistrate should have made, was to find out the reasons why the previous two attempts by the respondent to obtain a downward variation of maintenance had failed, bearing in mind that the papers were the same on all three attempts. Such an enquiry was essential to determine whether or not the application before him was frivolous or vexatious. The magistrate did not do so and to that end he misdirected him.

Secondly, the court *a quo* erred by its failure to understand what was required to be proven by the respondent for him to qualify for the downward variation on the basis of 'a change in circumstance' when it said in its judgment:

Record p 21:-

> 'A changed circumstance, as elsewhere in this judgment explained, is an occurrence or information that did not exist or taken into account when the order sought to be varied was made'.

The court *a quo*'s understanding of changed circumstances is extremely misleading and wrong. It is not meant to cover unlimited and all-encompassing occurrences and information. The guiding principles on what is deemed to be a change in circumstances do not include self-inflicted changes in circumstances.

In *Lindsay* v *Lindsay* 1993 ZLR 195 (SC) it was held by GUBBAY CJ, that:-

> "Self-imposed penury cannot be a factor to defeat a legitimate claim by a wife of her own maintenance'.

In *Dawe* v *Dawe* 1979 RLR 395, GOLDIN J said at p 398 [B]:-

> "Generally speaking, a person cannot embark upon a course of conduct, or voluntarily assume financial responsibility which inevitably renders it difficult or even impossible for him to meet the existing obligations to a former wife and children of that wife, and then invoke such consequences as justification for a variation of a maintenance order"

Thus the court *a quo* misdirected itself by accepting appellant's legally unacceptable self-imposed obligations and liabilities as being proper obligations for the purposes of changed circumstances. By way of example the court *a quo* erred when it found that respondent's nephew's school fees in the sum of US$1,200-00 per annum; his new wife and children's' upkeep; and respondent's university fees at Midlands Science University constituted a change of circumstances. The following *dicta* by GOLDIN J at p 143 of *Dawe*'s case where on appeal the court made several observations in the same regard, offers guidance on the issue:-

> "It is furthermore clear that his means have not altered. The real position is that by reason of his remarriage the amount available to him, after deducting the sum that he agreed to pay as maintenance, does not enable him to live at the same standard as he would otherwise be able to do. In other words, by remarrying he has undertaken fresh responsibility, resulting in a reduction of his standard of living.
>
> Moreover it appeared that his new wife's sister is also residing with him; she is 14 years of age. He is able to cope with her in modest ways:
>
> > **"with scrimping and saving can just pay maintenance but I do not consider she requires it. I also want to build up savings for holidays etc."**
>
> This fortifies the view that his main cause of complaint is that by remarrying he has to live at a reduced, but manageable scale. He also supports his sister-in-law, which, while commendable, he is under no obligation to do, certainly not at the expense of the standard he could have obtained without doing so. On the facts of this case, this benefit must be enjoyed without reducing the income of his former wife"

Thirdly, the Magistrate also fell short of meeting his duty to investigate the parties' means and circumstances. He did not try to establish for himself whether respondent's contention that his salary was erratically paid was true or false. The court *a quo* had a duty, which it neglected to conduct an enquiry (to name a few) on:-

a. The allegation made by the appellant that she was unfit to work bearing in mind that the same court had accepted her evidence that she was not in good health because of respondent having injured appellant;
b. The respondent's previous arraignments for failing to pay maintenance for the children and the reasons he had given;
c. The suggestion that the respondent was receiving a considerable income from the consultancy company which the parties used to run and which the respondent still ran;
d. The suggestion that respondent was receiving money by way of rentals from properties in Hillside, Marimba Park and Chikurubi.

To that end, the court *a quo* fell into error by rejecting the averments made by respondent in favour of those made by appellant and thereby did not investigate "*what monies the husband admits to having but also what monies could reasonably be made available to him if he so wishes*" *Smit*'s case {*supra*}.

Fourthly, the court *a quo* erred in its lack of appreciation that the allegation by the appellant that she had had to resort to begging for assistance from friends and relatives to assist her with maintaining the children, ought to be met with criticism to the respondent. *Dawe's* case at p 198:-

> "…he is not entitled to resist doing so on the grounds that the respondent should seek employment, or continue to rely on assistance from friends and relatives, or on the ground that she was not incurring expenditure for some of the items claimed when the reason for her not doing so was that she had been deprived of the funds necessary for her to do so"

Interests of the children.

The court a *quo* rejected the very idea that it had the duty to take the bests interests of the children into account and thus erred most egregiously. Such a serious misdirection by a Regional Magistrate is unacceptable. This is what the magistrate said:-

Record p 18, judgment

> "On being requested by the court to provide any provisions of the law in support of this application (for arrear maintenance), the applicant's (appellant's) legal practitioner was not forthcoming, save to state that it is being done in the interests of the children…. To use this concept of best interest of the child in this case would be stretching it too far in my view…. The interest at play here would be those of the applicant (appellant) as she is the one who is being owed by the respondent.
>
> Accordingly, I find that the application is not supported by the Act or any provisions of the law. In the result it is hereby dismissed".

That error warrants this Court setting aside the conclusion reached *a quo*. Section 81 of the Constitution of Zimbabwe Amendment (No. 20) Act enjoins the lower courts not to exclude the interests of the minor children as being of primary consideration in all matters concerning minor children which reads:-

> "(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right-
>
> (f) to education, health care services etc..
>
> (2) A child's best interest are paramount in every matter concerning a child.
>
> (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian".

The highlighted portion specifies that the lower courts are not excluded from their duty to protect children' rights in the manner that the High Court as upper guardian of all minors does.

By way of emphasis, the meaning of paramount is 'more important than anything else' 'critical' or 'burning' in the *Cambridge English Dictionary* or 'dominant', 'preponderant' or 'of superior importance' in the *Merriam-Webster Dictionary*.

Having thus, discounted the best interests of the children, the court *a quo* fell into grave error, which was exacerbated by the court wrongly concluding that it was proper for the appellant to have prioritised his own interests and those of his newly acquired family and of his nephews as being superior to that of his existing obligation to the minor children in this matter. Put differently, the Magistrate failed to ascertain if there were "*cogent, material or just reasons"* [*Dawe's* case] for varying the maintenance.

In the result I find that the appeal has merit. Accordingly I rule as follows:-

1. The appeal is allowed with costs
2. The order varying maintenance downwards of the 5th July 2016 be and is hereby set aside.
3. The order of maintenance granted in favour of appellant on the 9th January 2012 be and is hereby reinstated.

HUNGWE J agrees ……

Mugwadi & Associates, appellant's legal practitioner
Messrs S. Rugwaro & Associates, respondent's legal practitioners