Judgment No S.C. 119\2001
Civil Appeal No 265\2000

ERIKANA JOSIAH MAPANDA v CHIPO MAPANDA

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & MALABA JA
HARARE NOVEMBER 13 2001 & FEBRUARY 7, 2002

R.K. Mapondera, for the appellant

N.P. Munangati, for the respondent

MUCHECHETERE JA: This is an appeal against the judgment of the High Court, Harare, on 6 September 2000 in which the court granted a decree of divorce. Custody of the three minor children of the marriage, namely, Betty Rufaro Mapanda, born on 19 March 1990; Stanley Blessing Mapanda, born on 17 September 1992 and Tatenda Aeneas Mapanda born on 12 March 1999 was awarded to the respondent. The appellant was ordered to pay maintenance for the children and the respondent as follows:-

> "Fourthly the Defendant (Appellant) is to pay maintenance for the three minor children for a total of $4 000,00 per month for the period the 1st December 1999 to the 1st August 2000 …
>
> Fifthly, Defendant is to pay maintenance for Betty Mapanda and Stanley Mapanda in the sum of $1 800,00 per month from 1st of September 2000 and maintenance for Tatenda Mapanda in the sum of $1 500,00 per month from

> the 1st September 2000. The maintenance is to increase by a percentage equal to the net percentage increase of any salary, pension or gratuity increase received by the Defendant from the month such increase is paid to the Defendant."

The appellant was also ordered to pay to the respondent 25% of the value of Stand 14991 Zengeza 3 Extension, Chitungwiza ("the stand") by 15 November 2000. And that should the appellant fail to pay 25% of the value by 15 November 2000 the stand shall be sold by 31 December 2000 "for the best possible price by an estate agent appointed by agreement between the parties or in the absence of such an agreement by an estate agent appointed by the Registrar and plaintiff shall be paid 25% proceeds of such sale. The appellant was also ordered to make a contribution of $4 000 towards the respondent's costs.

The appeal is made on two grounds, that is that, the learned trial judge erred in making the following orders:-

> "1. The order that appellant should pay arrear maintenance for 5 months in the sum of $4 000,00 per month from December 1999 to August 2000 that is to say a total of $36 000,00.
>
> 2. The order that in the event of any net increment to appellant's income the maintenance must automatically increase by the same proportion as the net increment."

In connection with the first order I agree with Ms *Munangati's* submissions for the respondent. These were to the effect that, it is trite that in issues of maintenance the court *a quo* has a wide discretion and that this Court can only interfere with the court *a quo's* decision where it is shown that the court misdirected itself or that its assessment of facts was not proper as to amount to an injustice being done to the party appealing.

In this case the learned trial judge considered all the relevant facts. Some of these were that the appellant had not paid any maintenance from the time the respondent instituted the action for divorce and ancillary relief to the date of hearing and that he had, in fact, ceased paying maintenance prior to the issue of the summons. He failed to give a reasonable explanation for such failure. Indeed Mr *Mapondera* for the appellant could not point to any misdirection by the learned trial judge. His submissions only amounted to saying that the learned trial judge ought not to have made the order. That is not sufficient for this Court to move to interfere with the decision of the court *a quo*.

The appellant is, however, on firm ground in connection with the second ground of appeal. I agree that an order for an automatic increase of maintenance is unusual in matters of this nature. Although the learned trial judge gave sound reasons for the order I am still of the view that it is inappropriate in the circumstances and could work a hardship on the appellant. Further it could still lead to a lot more litigation by the parties. The order automatically cuts down or ignores the consideration of any changes in the circumstances of either party at the time the increase is applicable. I consider that this is an essential consideration in matters of this nature. It could be that at the time the appellant's salary is increased that of the respondent is also increased. The appellant's obligations may have increased at the time. The proper and usual approach to issues of this nature is to simply make an order for maintenance and leave either party to approach the court for variation on change of circumstances. This is what is envisaged in section 8 of the Maintenance Act [Chapter 5:09] and section 9 of the Matrimonial Causes Act [Chapter 5:13]. Ms

Munangati properly did not seek to defend the learned trial judge's order in this respect.

In connection with the order of costs in the court *a quo* I am again of the view that the learned trial judge properly exercised his discretion on the matter after a full consideration of the facts involved. This is borne out in the reasons he gave in his judgment for the decision. This Court cannot also interfere with that order.

Although the appeal was noted on the grounds stated above, in the appellant's heads of argument the appellant sought to have the court revisit the issue of the share in the matrimonial home and that of custody of the children. The respondent also addressed the issues in her heads of argument. As these issues were not raised in the Notice of Appeal the Court declined to deal with them. Suffice to say that if the Court had been obliged to deal with them I would have found for the respondent and dismissed the appeal on both issues.

From the above it is clear that the appellant has won on one issue and lost on the other issues. In the circumstances I will order that each party pays its own costs to reflect what occurred.

In the result the appeal in connection with the arrears of maintenance and the court *a quo's* order of costs is dismissed but that in connection with the automatic increase in maintenance is allowed. The order of the court *a quo* is

therefore amended by the deletion of all provisions which provide for automatic increase of maintenance. Each party is to pay its own costs.

EBRAHIM JA: I agree

MALABA JA: I agree

Muchandibaya & Associates, appellant's legal practitioners

Munangati & Associates, respondent's legal practitioners