

RICHARD CHIWANDIRE  
versus  
CYNTHIA CHIWANDIRE

HIGH COURT OF ZIMBABWE  
CHITAKUNYE & TSANGA JJ  
HARARE, 14 October 2014

### **Civil Appeal**

*L Uriri*, for appellant  
Respondent in person

TSANGA J: This is an appeal against an order for maintenance granted by the Magistrate Court in the sum of US \$ 2000.00 for the respondent, who is his wife and their minor son. Upon hearing the appeal we granted the following order.

It is ordered that

1. The judgment of the court *a quo* is hereby set aside.
2. The matter is remitted back to the Magistrate for a proper enquiry to be conducted before a different magistrate.
3. Pending the enquiry, applicant will continue to pay maintenance in the sum of \$150.00. In addition respondent will also continue to receive the sum of \$200.00 being monthly rentals from a cottage.

Notably as regards the respondent, the award was made pending a divorce in the High Court. The filing of the divorce matter preceded the claim for maintenance in the maintenance court. The appeal before the High Court was briefly on the following grounds:

1. That respondent should have filed for maintenance pendent lite in the High Court
2. That appellant's expenditures were not taken into account in arriving at the sum awarded to the Respondent.
3. That no known formula was applied in arriving at figure.

4. That the figure awarded does not state how much is for Respondent
5. That no finding was made on whether Respondent is able to maintain herself.
6. That no date is stated as to when the maintenance order will lapse.
7. That the magistrate erred in ordering maintenance for the minor child when there was no evidence placed before the court that he was failing to support the minor child.
8. That the figure of \$2000.00 unreasonable considering child is at boarding school and Respondent will only stay with child for two weeks.

It was our view that there is nothing to bar an applicant from seeking maintenance from a maintenance court pending the finalisation of a divorce hearing as such a claim is materially different from maintenance pendelite as stipulated in the Matrimonial Causes Act [Cap 5:13]. As was made clear in the case of *Pahla v Pahla* 1987 (2) ZLR 70 (HC) where a magistrate court has made an order for maintenance, the High court is certainly not precluded from making a further order in finalising divorce. This is because the Matrimonial Causes Act permits the court to make orders for maintenance upon divorce. As elucidated in that case where it does so, its order supplants the order made by the magistrate court, which would from that time be discharged. The matter was therefore properly heard by the maintenance court.

However, it is on the remaining grounds of the appeal that we found that there are clear grounds for remitting this matter back to the magistrate's court for a full hearing. It was evident from the record that there were shortcomings in how the magistrate dealt with the issues that were raised on appeal. The factual findings of the magistrate were not supported by clear and convincing evidence in how the magistrate arrived at its conclusions. In an award for maintenance where there is no firm evidence that lends support to how a magistrate court arrived at its decision, then a court on appeal will naturally find that a proper enquiry has not been made in terms of sections 5 and 13 of the Maintenance Act [Cap 5:09].

Having ordered a remittal of the matter back to the magistrate's court, we hereby seek to clarify on the nature of the proper enquiry to be conducted by the Magistrate.

In holding a proper enquiry as hereby directed, it is our view the magistrate hearing this matter afresh should have regard to the following:

1. The magistrate must be satisfied that factually and procedurally the matter is one which falls within the ambit of the Maintenance Act Chapter in terms of there being neglect by a responsible person to carry out of his duty to support. This is particularly

so with regards to appellant's son who is said to be at boarding school and who spends two weeks of the holiday only with the respondent. The school fees are fully paid for by the appellant. Where there is no evidence of neglect of the duty to support with regards to any applicant, then the application with regard to such party would not properly be before the maintenance court. Where the court is satisfied that there is indeed neglect of the duty to support then it must be clear how much maintenance is awarded the applicant and the basis for arriving at the sum awarded. Where there are two applicants as in the present case then the amount awarded to each must be dealt with according to the facts.

2. The magistrate hearing the matter should further ensure that all evidence in support of factual averments is laid before him or her. Where an applicant in particular claims specific sums to support alleged expenditures and a certain lifestyle, these should be supported by clear evidence. Expenditures cannot be based on mere assertions from which the magistrate then draws his or her own conclusions. The investigative role of the magistrate is emphasized. See *Hora v Tafamba* 1992 (2) ZLR 348.

The formula applied in arriving at the final figure for maintenance must be apparent from the judgment. Where appropriate the magistrate must use the guidelines set out in cases such as *Hora v Tafamba* above and *Gwachiwa v Gwachiwa* S 134-86.

3. Where a party to a maintenance claim owns a business as in this case and reaps dividends from such business, but clearly also has expenses, a proper enquiry into the company's income and expenditures must be made in order for the court to arrive at an informed assessment of the actual disposable income at hand. Financial evidence is crucial and its accuracy is key. It is the duty of the party concerned to place all relevant information before the court. However, where such information has not been placed before the magistrate can request for such information particularly in terms of s 13 (b) and (c) of the Maintenance Act. Only where such information has been sought and is still not forthcoming can the court be justified in making its objective assessment on income from the totality of the facts. (*Lindsay v Lindsay* 1993 (1) ZLR 195).
4. Spousal support pending divorce is often a matter of urgent need and it should be apparent from the application as well as from a thorough enquiry whether the applicant has generally not been employed in the marriage and has not means to

support herself. Ultimately in such cases, spousal need, and the other spouse's ability to pay, are the core factors in an enquiry for maintenance by a spouse.

An appropriate sum for spousal support pending divorce is largely influenced by the standard of life the parties established during the marriage and the spouse's ability to pay.

Where divorce is pending, and a spouse seeks support because she is unable to support herself, the magistrate must approach the matter in recognition that the application is being made in the context of immediate need. However, it would also seem logical particularly where the reality of a pending divorce has been brought to the attention of the magistrate, that the maintenance court should then bear in mind that temporary support is different from the final post judgment support in the divorce matter. This is because the divorce court will take into account factors such a final apportionment of the assets of the parties, the duration of the marriage, the age and physical condition of the parties, the time necessary to enable the party seeking maintenance to find their feet and so on. . It will inevitably be in the final divorce matter that the issue of what is equitable will be fully canvassed as espoused in the *Pahla* case *supra*.

It is therefore the above issues which should guide the magistrate in hearing this matter afresh.

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

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