REPORTABLE ZLR (16)

Judgment No. S.C.30/2002

Civil Appeal No. 196/00

DONALD JUAN CHAKRAS v SOORAYA CHAKRAS

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & MALABA JA
HARARE, MARCH 4 & MAY 14, 2002

A Ebrahim, for the appellant

L Uriri, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dissolved the parties' marriage and ordered the appellant to pay maintenance to the respondent in the sum of $4 000 per month until her death or remarriage. The appeal is in respect of the maintenance order only.

The background facts are as follows. The parties started living together in 1984 when both of them were divorcees. They subsequently got married in 1988 by civil rites and separated in December 1997. No children were born of the marriage.

In February 1998 the appellant issued a summons against the respondent claiming a decree of divorce on the ground that the marriage had irretrievably broken down. In her counter-claim the respondent claimed, *inter alia*, maintenance at the rate of $4 000 per month until her death or remarriage.

When the matter came up for trial, the learned judge in the court *a quo* dissolved the marriage and ordered the appellant to pay to the respondent, who was aged forty-nine at the time, maintenance in the sum of $4 000 per month until her death or remarriage. She made it clear in her judgment that should the respondent's circumstances change and she became self-sustaining the maintenance order could, on application, be varied or discharged. Aggrieved by the order to pay maintenance to the respondent, the appellant appealed to this Court.

At the commencement of the hearing of this appeal, counsel for the respondent raised a point *in limine* and submitted that as the appellant had not complied with the order to pay maintenance, he was in contempt of court and should not be heard. After hearing both counsel on the point *in limine*, we reserved our decision and proceeded to hear the appeal.

I shall first of all deal with the point *in limine*. In making the submission that the appellant was in contempt of court, counsel for the respondent relied upon the provisions of s 27(3) of the Maintenance Act [*Chapter 5:09*] ("the Act").

However, I shall set out the provisions of both subs (1) and subs (3) of s 27. They read as follows:

> "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 …".

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. I disagree with that submission.

I say so 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."

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.

There is, therefore, no merit in the point *in limine* raised by counsel for the respondent.

I now wish to deal with the merits of the appeal. The respondent claimed the sum of $4 000 per month as maintenance for herself. She did not break down that amount, nor did she give any indication of how she had arrived at that figure. However, in my view, that is not relevant in determining this appeal. I say

so because the appellant did not dispute the *quantum* of the maintenance required, nor did he contend that he could not afford to pay the sum claimed. Instead, he contended that the respondent was employable and, therefore, capable of supporting herself.

In her evidence, the respondent stated that she had held several jobs before and after the parties separated, but that at the time of the trial she had been unemployed for several years. Because of that, she had relied on the charity of some members of her family, particularly her daughter, her son-in-law, her sister and her brother. She added that she lived with her daughter and son-in-law, for whom she did "odd jobs" for no pay. She said she had little education, having completed only two years of secondary school education.

In addition, she said that she was certain that the appellant had the ability to pay her $4 000 per month because when he left employment with Trinidad Industries (Private) Limited, that company paid him a lot of money and gave him a motor vehicle. She added that he was also in receipt of a monthly pension of $3 000 from Old Mutual, after that company paid him a lump sum.

That evidence was not challenged by the appellant. Commenting on it, the learned judge in the court *a quo* said:

> "The plaintiff challenges the defendant's claim for maintenance on the ground that she is employable and capable of supporting herself. He has not challenged the *quantum* of maintenance claimed, nor contended that he cannot afford it. The plaintiff did not challenge the defendant's assertion that he received the lump sum payments alluded to above, nor that he was in receipt of a monthly pension of $3 000 from Old Mutual … . The plaintiff has also not challenged the defendant's evidence that she is currently unemployed."

After considering all the evidence before her, the learned judge concluded that the respondent had made out a case for the maintenance claimed. She indicated, however, that if the respondent's circumstances changed and she could support herself, the maintenance order could, on application, be varied or discharged.

I am in complete agreement with the learned judge. The respondent was married to the appellant for about ten years. Before the marriage, the parties had lived together as husband and wife for about four years. During the subsistence of the marriage the respondent was periodically employed. She and the appellant attained a standard of living which, on the evidence before the learned judge, was fairly comfortable. The respondent played a significant rôle in the attainment of that standard of living.

In any event, it is important to recall that in granting the maintenance order the learned judge was exercising a judicial discretion in terms of s 7(1)(b) of the Matrimonial Causes Act [*Chapter 5:13*]. This Court has, in a number of cases, stated that the exercise of a judicial discretion can only be interfered with on very limited grounds.

In *Lindsay v Lindsay* 1993 (1) ZLR 195 (S) at 201 C-E KORSAH JA said:

> "In making an award of $2 000 per month in favour of the respondent, the learned judge was exercising a judicial discretion. As stated by ASQUITH LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite (2)* [1948] 1 All ER 343 at 345:
>
> > 'We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'"

Subsequently, in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 at 62F-63A, GUBBAY CJ said:

> "The … determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first - one which clearly involved the exercise of a judicial discretion - may only be interfered with on limited grounds. See *Farmers' Co-operative Society (Reg.) v Berry* 1912

> AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court."

Applying those principles, I am satisfied that there is no basis whatsoever upon which this Court can interfere with the decision of the learned judge in the court *a quo*.

In the circumstances, the appeal is devoid of merit and is dismissed with costs.

CHEDA JA: I agree.

MALABA JA: I agree.

Ali Ebrahim, appellant's legal practitioner

Honey & Blanckenberg, respondent's legal practitioners