SAMUEL UNDENGE
versus
BONGANI UNDENGE

HIGH COURT OF ZIMBABWE
MAKONI & MWAYERAJJ
HARARE, 22 October 2015, 19 November 2015

Civil Appeal

F Nyamayaro, for the appellant
R Venge, for the respondent

MWAYERAJ: The appeal is against the entire judgment of the court *a quo* wherein, the court ordered that, the appellant pays maintenance in the sum of $350-00 per month until the respondent becomes self-supportive. The appellant raised grounds of appeal as follows:

"1. The learned magistrate erred and misdirected herself in awarding the applicant an order for maintenance when the Maintenance Act does for provide for applications for maintenance by children who are above 18 years of age.
2. The learned magistrate erred and misdirected herself in giving an order that does not have a time frame. To say until the beneficiary becomes self- supportive does not mean anything as the beneficiary can become self-supportive after 40 years or not at all. The order is clearly devoid for vagueness and is difficult to comply with.
3. The learned magistrate erred and misdirected herself in holding that the respondent fell within the defination of a dependant in terms of the maintenance Act. This interpretation was clearly incorrect.
4. The learned magistrate erred and misdirected herself in failing to realise that where there is need to have a maintenance order extended such an application is made in terms of s 11 (2) of the Maintenance Act which is clear to the effect that it has to be made before the child turns 18 years.

   4 (1) if it was possible after 18 years a child could still make a fresh application for maintenance then in all legal reasoning s 11 (2) of the maintenance Act would not be necessary.

5. The learned magistrate also erred and misdirected herself in awarding respondent a huge figure of $350-00 without taking into consideration the fact that the appellant has other maintenance orders in respect of 3 other children that he is paying $800-00 for, in addition he pays school fees and attends to those children's other educational needs.
6. The learned magistrate erred and misdirected herself in falling to take into consideration the fact that, the appellant is married and has a legal obligation to also look after his family.
7. The learned magistrate erred and misdirected herself in failing to take into consideration the fact that 'A' level falls out of the scope of mandatory level of education which is ordinary level. The respondent therefore does not qualify for any further maintenance beyond the age of 18 years.
8. The learned magistrate also erred and misdirected herself in awarding the respondent a maintenance order simply because she is still in school. A person can choose to remain in school until the age of 40 years. She ought to have simply considered if the respondent qualified to be a dependant in terms of the Maintenance Act.

   8 (i) in any case, extension of maintenance orders even when done properly in terms of the Act are not ordinarily granted. There has to be exceptional circumstances and none were pleaded by the respondent. Being in school is not an exceptional circumstance as any interested person may choose to remain in school until they get old.
9. In the circumstances the appellant prays that the maintenance order by the learned magistrate be set aside and in its place an order dismissing the application with costs. Should the honourable court uphold the decision of the learned magistrate the appellant will pray for an order reducing the maintenance order to US$100-00 per month with effect from 30 June 2014."

The facts forming the background to this appeal, as discerned from papers filed of record, may briefly be summarised as follows: The appellant is the father of the respondent. Pursuant to granting of a decree of divorce to the appellant and the mother of the respondent one Angeline Munyeza Undenge, a maintenance award was granted for the upkeep of the respondent and her other sibling. Upon the respondent attaining the age of 18 the order automatically terminated by operation of the law. The respondent, who at the relevant time was in upper sixth form at Lord Malvern High School in Harare, made an application for continuance of maintenance as she was still not self-sustaining and aspired to pursue tertiary

training. The magistrate's court granted the order and the appellant was ordered to pay $350-00 per month as maintenance for the respondent until the she becomes self-supporting. Irked by this decision of the court *a quo* appellant lodged the present appeal with this court.

Maintenance issues are a governed by the Maintenance Act [*5:09*], (herein referred to as the Act) to an extent the Matrimonial Causes Act [*Chapter 5:13*] and the Constitution of Zimbabwe Amendment (No 20) Act 2013.

Section 19 of the Constitution on children reads

(1) The state must adopt policies and measures to ensure that in matters relating to children the best interest of children concerned are paramount (my emphasis)
(2) The state must adopt reasonable policies and measures within the limits of the resources available to it, to ensure that children
(a)
(b)…….
(c) are protected from maltreatment, neglect or any form of abuse
(d) have access to appropriate education and training." (my emphasis)

Section 20 on youth reads:

"(1) the State and all institutions and agencies of government at every level must take reasonable measures, including affirmative action programmes, to ensure that youths, that is to say people between the ages of fifteen and thirty five years.

(a) have access to appropriate education, and training."

Section 25 on the Protection of the Family reads:

"The state and all institutions and agencies of government at every level must protect and foster the institution of family and in particular must endeavour, within the limits of the sources available to them, to adopt measures for-
(a) the provision of care and assistance to mothers, fathers and other family members who have charge of children and
(b) the prevention of domestic violence."

Domestic violence in my view would be all inclusive ranging from economic violence that is neglect, emotional violence to physical violence.

Section 27 on Education reads: 27

(1) the state must take all practical measures to promote-

(a) free and compulsory basic education for children and

(b) higher and tertiary education." (underlining my emphasis)

A reading of these sections of the Constitution shows the emphasis placed on education and training. There appears to be no mention, as suggested by the appellant, that 'A' level falls out of the scope of the mandatory level of education.

The Maintenance Act is a piece of legislation which has, among others, the fundamental purpose of upholding the rights of dependents. The Act makes provision to

ensure that dependents and children are catered for and looked after by the responsible persons. A maintenance court beset with a maintenance application initial, or subsequent for downward or upward variation of necessity has to look at the following aspects:

1. Is the party from whom maintenance is being claimed responsible in other words duty bound to maintain the claimant.
2. Is the applicant or claimant entitled to maintenance as a dependent.
3. Does the responsible person have the means to maintain
4. Has the responsible person neglected the obligation of maintaining as expected by the law.

The Act, in the interpretation section, clearly defines a dependant and responsible person respectively. A "dependent" in relation to a responsible person means any person whom the responsible person is legally liable to maintain and a "responsible person" means a person who is legally liable to maintain another.

In this case the appellant is the father of the respondent who at the time of award of the order by the court *a quo*, was not self-sustaining by virtue of being an upper 6th student. The respondent was therefore a dependent as defined in the Act. Section 4 (2) makes it clear that a dependent or any other person having the care of the dependent may apply to the maintenance court claiming maintenance from a responsible person who fails or neglects to provide reasonable maintenance for the dependent.

Section 4(2) is instructive and it reads:

> "A complaint in terms of subsection (1) may be laid by the dependent or by some other person having care or custody of the dependent or by a probation officer" (underlining my emphasis)

In *casu* the respondent having turned 18 had the existing maintenance order automatically discharged in terms of s 11(1) (2). The respondent was however, still not self-sustaining since she was still in upper 6th. She was still a dependent in terms of the law and rightfully as provided by the law, she mounted an application for maintenance from the responsible person her father. The respondent was clothed by the law with *locus standi in judicio.* For starters she was still in need of maintenance as a dependent from the responsible person her father. Secondly she had capacity to bring the claim to sue for maintenance in person since she had attained the legal age of majority. Lastly she was empowered to claim by virtue of the Constitution and the Maintenance Act as she still required to pursue her education and training to enable her to be self-sustaining. Section 11(2) of the Maintenance Act [*Chapter 5:09*] reads:

> "A maintenance court where an order is for the time being registered may, upon an application being made to it by or on behalf of a child who attains the age of eighteen years in whose favour an order has been made and upon due inquiry to which section eight shall apply, *Mutatis Mutandis*, extend the order for such period and on such terms as the maintenance court thinks fit"

The wording of s 11 (2) does not, by any chance, bar a child who has attained 18 from making an application for maintenance given the automatic discharge upon turning 18. The argument by the appellant that the application has to be made before the child attains 18 is mere semising with no legal foundation. It would be illogical for the legislature to seek to allow the child to lodge an application on his own behalf on attaining 18 and then also seek to bar self representation by insistence on application for extension being made before the child turns 18. In fact the whole Maintenance Act does not preclude an 18 year old from claiming maintenance. The Act lucidly and clearly allows a dependant to claim maintenance from a responsible person. Section 2, s 6 (2) as read with s 4 of the Maintenance Act outline the prerequisites for maintenance consideration. A dependent child is not excluded and has a right to education and training as provided for in the Zimbabwean Constitution.

Clearly the Maintenance Act was enacted to protect the rights of dependants in situations where the responsible persons are held to be neglecting the obligation of maintaining and sustaining dependents squarely placed on them by the law.

If I may digress a little at this stage and point out that from the appellant's submission he is one such "responsible" person defined in the Maintenance Act who has had to be ordered to maintain his dependents by a court which will have after enquiry deduced that he is the responsible person with means but neglecting his obligations. I say so because gleaning from the heads of argument filed on behalf of the appellant para 4 there are other current maintenance orders issued by the Maintenance Court.

> "….if the learned magistrate had correctly considered the appellant's earnings of less than $2 000 per month and the fact that he has 3 other maintenance orders to comply with that he has since remarried and also that he has other family responsibilities, then she would have awarded an order not exceeding $100. ……" (underlining my emphasis)

The "responsible" person is duty bound per the Maintenance Act but needs to be cajoled by court orders to take up his responsibility to take care of his dependents. The court *a quo*, surely beset, by the man who is duty bound to see to his 18 year old child in upper 6th complete education and training resisting the legal obligation bordering on neglect surely had to make provision for the dependant's needs. A close look at the record of proceedings in particular the reasons for the decision of the court *a quo* reveals the court considered all necessary factors before coming up with a decision.

The court *a quo* dismissed the point *in limine* that the respondent could not bring a maintenance application on her own as clearly s 11 (2) empowers her to bring up an application. Even s 4 as read with s 6 does not preclude the respondent from claiming maintenance. The trial court further made a finding that the respondent was still not self -supportive and that remained a dependent in need of assistance. The appellant being the father, was held to be the responsible person to maintain the respondent. The court made an assessment of the respondents needs and balanced it with the appellants' income and expenses p 7 of record last paragraph

> "The court is of the humble view that $150 for food for one child is more than enough and also considering that the respondent has other children and he is realising $1 000".

The trial court in coming up with an appropriate maintenance order took into account the requirements to be satisfied before granting on order.

It is settled an appeal court should not be quick to upset the trial court's decision for the obvious reason that the trial court has the opportunity to assess evidence. Only in exceptional circumstances where the trial court will have improperly exercised its discretion and misdirected itself should the appeal court interfere with the court *a quo*'s findings. In the case of *Barrows and Another* v *Chimpondah* 1999 (1) ZLR 58 Gubbay CJ (as he then was) made pertinent remarks on the general test for interference with lower court decision when he remarked:

> "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 act upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes 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 materials for doing so. In short, this court is not imbued with the same broad discretion as was enjoined by the trial court."

See also *BHP Minerals Zimbabwe (Pvt) Ltd* v *Cranny Takawira* SC 81/99. It is apparent that where there is no misdirection. The appellate court should not be quick to interfere with the decision of the court *a quo*.

In *casu* having considered the requirement on whether or not to grant maintenance the court *a quo* correctly, procedurally and in terms of the law came up with a maintenance award. The fact that the respondent had turned 18 at the time of application is no bar for grant of maintenance. The respondent was not self- supportive and the appellant was held the "responsible" person for the maintenance.

The maintenance award was after due consideration of all relevant factors and cannot

be viewed as outrageous given the need for tertiary training.

The argument that the order is vague and difficult to comply with cannot be sustained either. We are not persuaded by the appellant's argument that the order is vague because it is specific that maintenance is to be paid till the respondent becomes self-supportive. The appellant unsurprisingly, in a dramatic fashion, given the history of maintenance orders suggests the appellant might get to 40 still not being self-sustaining. Maintenance is a creature of statue and clearly regulated by the Maintenance Act. In the event of a party being aggrieved because of change of circumstances there is provision for downward and upward variation or better still discharge. The order issued by the trial court is specific that the appellant is to pay $350 maintenance per month till the respondent becomes self-supportive. It follows once she becomes self-supportive the order terminates. There is no ambiguity in the order which cannot be regulated by the relevant statute warranting interference with the court *a quo's* decision.

The appeal lacks merit and must fail.

Accordingly, IT IS ORDERED THAT:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the respondent's costs on an ordinary scale

MAKONI J agrees: _____

Farai Nyamayaro Law Chambers, appellant's legal practitioners
Mambosasa, respondent's legal practitioners