TAPIWA MAGURE
versus
FENNY CHAPMAN

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 24 September 2015 and 26 October 2016

CIVIL APPEAL

E. Hamunakwadi, for the appellant
F. G. Gijima, for the respondent

CHITAKUNYE J: The appellant and respondent bore three children together. It would appear appellant was already married to another woman and so theirs was not a marriage. The children nevertheless needed to be provided for. In a bid to secure provisions for the children, respondent applied to the maintenance court for an order of maintenance against the appellant in respect of the three children.

In August 2014 a maintenance order was granted by consent in the sum of $2000-00 per month for the three children. After a few months appellant approached the maintenance court seeking a downward variation of the maintenance order. That application was dismissed. After about a month from the date of that dismissal appellant launched another application for downward variation on the 2nd March 2015. The applications were essentially based on the same alleged change in circumstances.

That second application was dismissed on the 21st April 2015. In dismissing the application the magistrate alluded to the fact that appellant had failed to discharge the onus on him to prove change in the means or circumstances of the parties.

Dissatisfied with the decision, appellant appealed to this court. Initially seven grounds of appeal were proffered. On the date of hearing appellant's counsel abandoned grounds 3 to 6. Thus only three grounds remained to be considered.

The grounds that remained to be considered were that:-

"1. The court *a quo* erred in dismissing the application when it fully satisfied the requirements of section 8 of the Maintenance Act [*Chapter 5:09*] in that the appellant had proved that there were changed circumstances which warranted downward variation as his income had changed and had closed his surgery due to rental hikes and non-payment by medical aid societies.

2. The court *a quo* failed to take into consideration that the Appellant no longer earns extra income as he was not able to do part time work at West End Hospital and Baines 24hour emergency as these part time jobs used to increase his salary but now he shares his salary between the two families which renders an amount of US$2000-00 as maintenance per month too exorbitant.
7. The court *a quo* also failed to make an inquiry into the appellant's current means which was proof of the changed circumstances."

The major issue before the maintenance court was whether there had been a change in the means or circumstances of appellant such as to warrant a downward variation. It is that issue that runs through the three grounds of appeal noted above and for which this court is being asked to find that the appellant had discharged the onus on him and so the magistrate erred in not granting his application.

It is indeed true that as an appellate court, this court is empowered to set aside a lower court's decision and substitute it with an order that the lower court should have granted. This power is however not exercised just at the asking. There are limited grounds upon which this court can interfere with a lower court's exercise of judicial discretion. In regard to interfering with the lower court's finding of fact the general rule was aptly stated by KORSAH JA in *Nyahondo* v *Hokonya* 1997(2) ZLR 457 at 460G- 461A that:-

> "…. an appellate court will not interfere with the decision of a trial court based purely on findings of fact unless it is satisfied that having regard to the evidence placed before the trial court the findings complained of are so outrageous in their defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at that decision."

The rationale is that the trial court is better placed as trier of fact to assess the credibility of the witnesses and primary evidence brought before it. It is thus imbued with wide discretion to arrive at a just decision taking into account what has been presented.

The lower court's discretion is thus not to be lightly interfered with. In *Barros and Another* v *Chimponda* 1999(1) ZLR 58(S) at 62G-63A at 62G – 63A GUBBAY CJ laid the test as follows:

> "….. 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 relevant some considerations, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always 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."

In *casu,* it is important to ascertain the extent to which appellant discharged the onus upon him and to decide whether the trial magistrate can be faulted in coming to the decision as he did.

The question of variation of maintenance is provided for in terms of section 8 of the Maintenance Act, [*Chapter 5:09*]

That section provides, *inter alia*, that:-

"1. ……
2) an application referred to in subsection[1] shall:-
a) be on affidavit; and
b) state the grounds upon which the variation or discharge is sought."

Where an application is deemed not to be frivolous and vexatious, the matter shall be set down for an inquiry.

Section 8(6) then provides that:-

"On the day specified in the notice referred to in subsection (3) the maintenance court shall inquire into the application."

The purpose and intent of such inquiry is to ascertain if there have been any change in the means or circumstances of the parties justifying interference with the existing maintenance order. It is in this light that subsection (7) of s 8 provides that:-

"If the maintenance court holding an inquiry in terms of subsection (6) is satisfied that:-
(a) …
(b) The means or circumstances of any of the parties have altered since the making of the direction or order or any variation thereof, it may vary the direction or order subject to subsections(3),(4),(5),(6) and (7) of section six which shall apply mutatis mutandis, in relation to any such variation."

In conducting the inquiry court is guided by the affidavits filed of record and other evidence that may be led in support thereof. The onus in such applications is on the applicant to satisfy court of the change in circumstances. The onus is on the party who applies for variation of a maintenance order to put before the court cogent evidence to show that as a result of the changed circumstances he is unable to pay the amount ordered.

In *casu*, the appellant's affidavit contained two grounds for seeking variation. These were stated as follows:-

"6. This is an application for variation downwards made specifically because:
(a) There are changed circumstances on my income in that I used to have a surgery but it has since closed doors due to hikes in rentals and non payment of medical aid societies.

(b) Due to the increased workload at my workplace, the National Aids Council, I am no longer able to do part time work at West End Hospital and Baines 24 Hour emergency."

It was thus incumbent upon the appellant to put before the lower court such evidence as would confirm the above grounds. This is especially so as respondent had opposed the application and contended that the grounds being advanced were not true.

It is thus pertinent to examine the evidence tendered in respect of the grounds advanced by appellant.

Issue of surgery

In his founding affidavit appellant stated that his surgery had closed due to hikes in rentals and non payment of medical aid societies. He tendered no documentary proof of the existence of the surgery and its subsequent closure or even rental hikes and non payment by medical aid society. He called no witness in support of his assertion. It was thus his mere say so.

The respondent countered these assertions by stating that the assessment of the maintenance order was based on appellant's salary and not other income. The issue of surgery was not mentioned. She went on to say that in any case appellant has not produced any proof of the closure of the surgery.

In his answering affidavit appellant responded to this contention by respondent, not by producing proof of the closure of the surgery, but by stating that the order was granted by consent as he did not want to waste court's time since he earned extra income. But surely as appellant was legally represented he ought to have realised the need to counter the assertion that the issue of the surgery was not considered as it was not mentioned when the order by consent was granted. What was considered by the parties in agreeing on $2000-00 was the appellant's salary only and not income from undisclosed sources.

This is the situation the magistrate conducting the inquiry faced whereby appellant had no proof of what he was alleging and could not rebut contentions by respondent.

The second ground for seeking variation faced similar challenges. In his founding affidavit appellant stated that:-

"Due to increased workload at my workplace, the National Aids Council, I am no longer able to do part time work at the West End Hospital and Baines 24 Hour emergency."

The respondent's response to this ground was to the effect that the applicant still does locums at West End Hospital and at Baines 24Hour emergency from where he gets extra

income. She challenged him to produce proof that he is no longer doing the locums. In support of her contention she tendered two letters from the two institutions confirming that appellant does locums at those institutions. The letters were dated 26 January 2015 and 18 March 2015. She however still maintained that the sum of $2000-00 per month was based on appellant's salary and not the extra income earned by appellant.

In his answering affidavit appellant insisted that he was no longer doing locums but as with the first ground, tendered nothing to show that he was no longer doing locums at those institutions.

After having consistently stated that he was no longer doing locums at the two mentioned institutions, the appellant's counsel, in oral submissions, submitted that appellant was still doing locums at those institutions. Counsel argued that the number of locums had reduced to about 5 per month instead of between 15 and 20 per month. But, surely, appellant had said he was no longer doing locums, it was not a case of a reduction in the locums.

During his submissions appellant's counsel tendered a bank statement showing that in January 2015 and March 2015 appellant had in fact received payments from the two institutions in respect of locums he had done with them. This tended to support respondent's contention, as depicted in the two letters that during the time appellant was busy pursuing applications for downward variation on the basis that he was no longer doing locums; he was in fact doing locums

This ground is thus without merit. The magistrate cannot be faulted for finding that appellant was not being truthful and was not worth believing.

I am of the view that the appellant failed to prove that there had been any change of circumstances to warrant a downward variation. He was simply not being truthful with court. The first two grounds of appeal would thus not succeed.

In his last ground of appeal appellant alleged that the *court a quo* failed to make inquiry into the appellant's current means which was proof of the changed circumstances.

This ground is contrary to appellant's first ground where he was alleging he had proved the change of circumstances. One wonders what he expected of the magistrate. The appellant was ably represented by a legal practitioner who should have known that the onus was on appellant to prove change of means or circumstances. The respondent's contention that appellant had not tendered any proof of the changes he was alluding to must have alerted both appellant and his legal practitioner of the need to tender evidence on the change of circumstances. The fact that they did not tender any could only mean that they had none. The

magistrate's role where both parties are legally represented would not be one of directing parties what to tender. His intervention is limited by the fact that parties are legally represented, more so in this case by experienced legal practitioners. The magistrate could not have been expected to order or direct appellant to produce what he did not have.

It may also be noted that appellant had persisted with grounds 3 to 6 of his notice of appeal till the date of trial. As ably noted by respondent's counsel issues in those grounds were never presented before the court a quo. The appellant's intention in springing up these issues on appeal was never explained. Though these grounds were abandoned on the date of the hearing, they nevertheless serve to confirm that appellant was simply desperate to find a way of avoiding paying the maintenance sum that he had consented to in the maintenance court. The desperation was such that he now alleged he had been unduly influenced or coerced to consent to the sum of $2000-00; yet before the magistrate he had openly admitted he had consented to the order. That admission was without any reservation.

It is clear to me, just as it was to the court *a quo*, that appellant is simply not being candid with court.

In the circumstances appellant has lamentably failed to discharge the onus on him in such appeals. The court a quo cannot be faulted for dismissing the application for variation. That was the most appropriate decision to make given the evidence adduced by the parties.

Accordingly the appeal cannot succeed.

Costs

The respondent asked for costs on the legal practitioner and client scale. Respondent's counsel argued that the appeal was a waste of time and only served to put respondent out of pocket.

Costs on the legal practitioner client scale may indeed be awarded in a deserving case. As aptly stated by TINDALL JA in *Nel* v *Waterberg Landbouwers Ko-operative Vereeniging* 1946 AD 597 at 607:-

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

In *Midlands State University* v *Zimbabwe Insurance Brokers Limited* HH 367-16, I considered a number of cases on this aspect and concluded by stating that:

> "A perusal of various case authorities shows that the circumstances in which attorney and client costs may be awarded include where a litigant is found guilty of: persisting with frivolous and vexatious proceedings; dishonesty or fraud of litigant; reckless or malicious proceedings; deplorable attitude towards the court; and other circumstances the court may deem appropriate. The court must however exercise its discretion with circumspection and reluctance so as not to act as a hindrance to parties in the pursuit of justice." (p7, cyclostyled judgment)

From the circumstances of this appeal I am in agreement with respondent's counsel that this appeal was doomed to fail and appellant ought to have realised this. The aspect of alluding to new issues that were never before the magistrate such as grounds of appeal 3 to 6 served to show the appellant realised its case was not strong hence the need to buttress it with aspects that had never been placed before the court *a quo*. As has been shown above appellant was simply not candid with the court a quo and so this appeal was bound to fail. An element of dishonesty crept in under the guise of seeking justice.

I am thus of the view that where a party persists with a hopeless appeal even to the extent of buttressing it with new unfounded allegations it is only proper for that party to be ordered to pay costs on a higher scale.

Accordingly the appeal be and is hereby dismissed with costs on the legal practitioner and client scale.

NDEWERE J agrees ……

Madotsa & Partners, appellant's legal practitioners.
F. G. Gijima, respondent's legal practitioners.