Judgment No. S.C. 202/98
Civil Appeal No. 203/98

KOGA CHIMIKA v PATRICIA MTOKO

SUPREME COURT OF ZIMBABWE
McNALLY JA, MUCHECHETERE JA & SANDURA JA
HARARE, OCTOBER 1, 1998

The appellant in person

The respondent in person

SANDURA JA: This is an appeal against the judgment of the High Court which dismissed the appellant's application with costs. After hearing both parties, we dismissed the appeal with costs and indicated that our reasons would be given in due course. I now set out those reasons:

The facts of the case are as follows: The appellant and the respondent are husband and wife living separately, but divorce proceedings have been instituted. The respondent has the custody of the two minor children of the marriage.

In November 1997 the respondent filed an application against the appellant in the maintenance court, claiming maintenance *pendente lite*. She claimed maintenance for herself in the sum of $3 000,00 per month and maintenance for each child in the sum of $1 200,00 per month, making a total of $5 400 per month. When

that application was heard, the appellant was in default, but his legal practitioner was present. A default judgment was granted in terms of the respondent's claim. The appellant was, therefore, under an obligation to pay maintenance *pendente lite* at the rate of $5 400,00 per month.

When he did not pay that maintenance, the respondent issued a warrant of execution, and certain property belonging to the appellant was attached.

Subsequently, the appellant filed an application in the High Court which he termed an "appeal" and in which he claimed: (a) the rescission of the default judgment granted against him; (b) the setting aside of the attachment of his property; and (c) the reduction of the maintenance *pendente lite* from $5 400,00 to $900,00 per month.

When the matter came up for hearing, the learned presiding judge, in his reasons for dismissing the application with costs, said:-

> "The applicant has confused two remedies in this application:
>
> (a) An appeal against the merits of the order made; and
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> (b) Rescission of the order made against him by default.
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> If the applicant is appealing against the merits of the award then the noting of the appeal does not suspend the operation of the order - see s 27(3) of the Maintenance Act. What the applicant must do is apply to the maintenance court for such suspension. If the applicant is applying for rescission of judgment, then that application must also be made to the maintenance court, i.e. the court that made the default order."

I agree with those comments.

It seems to me that the main reason for filing the application in the High Court was to have the default judgment rescinded so that the attachment of the appellant's property would be set aside. As the learned judge in the court *a quo* stated, that application should have been made in the maintenance court, the court which granted the default judgment.

On the other hand, if the appellant had appealed to the High Court against the merits of the award of maintenance *pendente lite*, that fact would not have automatically suspended the order to pay maintenance *pendente lite* in the sum of $5 400,00 per month. In order to achieve that result, the appellant would have had to make an application in the maintenance court for the suspension of the order to pay maintenance. In this regard s 27(3) of the Maintenance Act [*Chapter 5:09*] states as follows:-

> "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 …".

Thus, even if the appellant had appealed to the High Court against the merits of the award of maintenance, that fact would not have affected the appellant's obligation to pay maintenance at the rate of $5 400,00 per month until such time that the maintenance court, on application made to it, directed that the order to pay maintenance be suspended. As long as the obligation to pay the maintenance existed, and as long as that maintenance was not paid, the attachment of the appellant's property was valid and could not be set aside.

In the circumstances, the learned judge was right in dismissing the confused application with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.