Judgment No. S.C. 97/2000
Civil Appeal No. 365/99

JENNIFER CLARE HINGESTON v CHRISTOPHER JOHN LIGHTFOOT

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
HARARE, SEPTEMBER 11 & 28, 2000

W T Miles, for the appellant

J B Wood, for the respondent

GUBBAY CJ: The parties to this appeal were married to one another. Three children were born to them. They are: Kirsten on 10 October 1973, Shaun on 4 April 1976 and Kathleen on 15 September 1980. The marriage was dissolved on 13 May 1992. The consent paper that was made part of the divorce order provided that the appellant was to have custody of the two minor children, Shaun and Kathleen and, to the extent that it was necessary or appropriate, that of Kirsten, who was then a major. Clause 2:5 stipulated that the respondent:

> "shall be solely responsible for all costs incurred in the ongoing education of all the children, together with the costs of their uniform, private clothing, shoes, sports equipment, stationery and such other items as any of them may in the (appellant's) opinion reasonably require in accordance with the standard of living that each of them has enjoyed to the date of these presents."

Save for such expressed liability there was no requirement that the respondent make any payment for the monthly maintenance of the children.

A first draft of the consent paper, prepared by the respondent's legal practitioners, was rejected by the appellant. It provided, *inter alia*, that the respondent was to maintain the three minor children and bear all the costs of their education, clothing and housing. The appertaining clause was altered to meet the agreement of the parties that the term "ongoing education" of the children be the basic criterion for determining the extent of the respondent's financial responsibility to the children.

At the date of signing of the consent paper Kirsten had commenced her university degree course. Shaun and Kathleen, on the other hand, were still school-going – the boy attending secondary school, the girl primary school.

The respondent paid the university fees for Kirsten without quibble from 1992 to 1995. He also paid the tuition and residence fees for Shaun at Rhodes University, South Africa, in 1995, 1996 and 1997; but only the tuition fees for 1998. He refused to pay for Shaun's second degree course, that of Bachelor of Laws, at the University of Cape Town, in 1999. Kathleen commenced her tertiary education at Rhodes University in 1999. The respondent declined to meet any such expenditure. He paid for her secondary school fees and pocket money of $400 a month in 1998.

On 29 April 1999 the appellant brought an application before the High Court seeking reimbursement from the respondent of the following expenditure: (a) $140 770.05 paid towards Shaun's tertiary education at Rhodes University during 1996, 1997 and 1998; and, then in 1999, a further $143 224.92 to the University of

Cape Town; (b) $57 645.43 paid towards Kathleen's secondary education at Girls College during 1996, 1997 and 1998; and $190 084.84 towards her tertiary education at Rhodes University in 1999. Annexed to the appellant's founding affidavit were a set of schedules detailing the payments made in respect of Shaun and Kathleen over the four year period in question.

The respondent opposed the appellant's claims. He contended that he was not obligated under clause 2:5 of the consent paper, or by s 8(3) of the Matrimonial Causes Act [*Chapter 5:13*] ("the Act"), to pay for the tertiary education of Shaun or Kathleen. He had, however, paid for Shaun's tertiary education from 1995 to 1998 from a moral commitment to do so; he drew the line at Shaun's second university degree course. With regard to Kathleen, he had paid all her legitimate secondary school tuition and boarding fees, but was not prepared to meet the costs of her tertiary education at Rhodes University, and was not legally obliged to do so. Furthermore, the respondent did not admit the payments made and claimed by the appellant. They had been incurred without his knowledge and consent and, in any event, some were prescribed.

The presiding judge (SMITH J) held that in compliance with s 8(3) of the Act, clause 2:5 contained a sufficiently clear direction that the respondent would pay the education costs of the three children even after they had attained the age of eighteen years. Nonetheless, a reasonable interpretation of such provision did not extend the liability of the respondent to the costs of Shaun's degree course at the University of Cape Town. With respect to the specific expenses which the appellant sought reimbursement of, the learned judge found that those incurred more than three

years before the proceedings were instituted on 29 April 1999 were prescribed; and some of the later expenses did not qualify as costs incurred in the ongoing education of the children. He concluded, in a judgment now reported in 1999 (2) ZLR 281 (H) at 287 E-F that:

> "It is not possible for the court to go through each of the expenses claimed by the applicant and decide which should, and which should not, be allowed. It is hoped that the parties will be able to reach agreement thereon in the light of the indications given above. As neither party has been completely successful in this case, I consider that each should bear his or her costs. Therefore there will be no order in relation to costs.
>
> The application is dismissed."

The order dismissing the application was perhaps somewhat misleading to the parties. The appellant had succeeded to the extent that she was entitled to reimbursement of the expenses (particularised in the schedules) which it was the respondent's responsibility to pay, as being the costs of the ongoing education of Shaun and Kathleen, and which had been incurred subsequent to 29 April 1996.

Neither party was satisfied with the outcome of the High Court proceedings. The appellant raised the grounds that the learned judge had erred in finding that:

(1) it was an unreasonable interpretation of the consent paper that the respondent be obliged to pay the cost of Shaun's course at the University of Cape Town, when such course was concomitant to his first university course and to his becoming a lawyer;

(2) the expenses paid by the appellant more than three years before the institution of the application did not constitute "judgment debts" for the purposes of s 15(a)(ii) of the Prescription Act [*Chapter 8:11*] and had thus prescribed;

(3) some of the costs claimed by the appellant did not constitute "costs incurred in the ongoing education of the children".

The cross-appeal noted by the respondent, on the other hand, alleged that the learned judge had erred:

(1) in construing the words "ongoing education" as implying a direction that the respondent's liability for the costs of the education of the two minor children would continue beyond the age of eighteen years;

(2) alternatively, in failing to find that the parties had abandoned the consent paper/court order.

I did not understand either party to take issue with the view of the learned judge that it would be a sufficient compliance with the requirements of s 8(3)(a) of the Act if the direction of the appropriate court arises implicitly from the wording of the order or from the relevant provision in the consent paper that was incorporated in the grant of the order. I too agree with the reasoning set out at 285 C-F of the judgment:

> "I do not think that the legislature could have intended that the court would have to state, specifically, that the maintenance would be payable even after the child concerned attains the age of eighteen years. In the majority of divorce cases which come before the High Court, the court does not make an

> order in which the details of the maintenance payable (are) actually spelt out. In most cases the court order merely provides, *inter alia*, that the questions of custody and maintenance for the children of the marriage shall be in terms of the consent paper filed of record. That was what the divorce order granted by SANDURA JP on 13 May 1992 stated. I consider that if the consent paper or the court order clearly implies that education costs will continue to be payable after the child attains the age of eighteen years, then the requirements of subs (3) of s 8 of Chapter 5:13 would be satisfied. Therefore, if, for example, the consent paper or court order specifies that one of the parties will pay for the tertiary or university education of a child, that would be a sufficiently clear indication that the court has indicated that the maintenance order shall be extended beyond the date the child attains the age of eighteen years."

The initial question to consider, therefore, is whether clause 2:5 of the consent paper directs, with sufficient clarity, that the respondent is liable to pay the education costs of the children after they attained the age of eighteen years.

The meaning to be assigned to the phrase "ongoing education of all the children" is not open to conjecture. It connotes the continuance of their education. See *The Oxford English Dictionary* Vol VII. What was in dispute was whether "ongoing education" was to bear the same meaning with respect to all three children; for, so far as Kirsten was concerned, the education that was "ongoing" at the material time was university education; whereas in the case of Shaun, who was fifteen years of age, and Kathleen, who was twelve, the education that was ongoing for them was schooling. Based on such factual situation, it was the submission of the respondent's counsel, both in this Court and below, that "ongoing education" as applied to the two youngest children meant the education in progress at the date of the finalisation of the consent paper, which was schooling. Accordingly, there was no unequivocal direction in the consent paper that the maintenance order extended beyond the date each of them attained the age of majority (see s 8(c) of the Act).

In disposing of this argument SMITH J said at 286 D-G:

> "I do not think it could be said that, because they were not attending university at the time, the parties intended that it was only the costs of attending school that would be covered by the consent paper. If it was contemplated and agreed that the respondent would be liable to pay the costs of a university education for Kirsten as part of her ongoing education, why should the same not apply in relation to Shaun and Kathleen? Where a child, after finishing school, goes on to attend a university, technikon, college or other tertiary education institution, surely that is part of its ongoing education? If the respondent could not afford to pay the costs of university education or the circumstances of the parties changed, he could have applied, in terms of clause 7.1 of the consent paper, for a variation of the terms thereof."

Again I regard this reasoning as unassailable. It was borne out by information of the background circumstances under which clause 2:5 of the consent paper was formulated, furnished so as to enable the court "to understand the broad context in which the words to be interpreted were used" per DIEMONT JA in *List v Jungers* 1979 (3) SA 106 (A) at 120C: see also, *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 624H; *Coopers & Lybrand & Ors v Bryant* 1995 (3) SA 765 (A) at 768 B-C; *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) at 1187 B-C.

The pertinent background was that the original provision, which read: "(the respondent) shall maintain the three minor children and bear all costs of their education, clothing and housing" (i.e. during minority), was substituted by the present clauses 2:1 and 2:5 of the consent paper. If the term "ongoing education" was intended by the parties to mean that already embarked upon by each child, in the case of Shaun and Kathleen school education as opposed to post secondary education, there would have been no necessity to alter the original provision; and the respondent would not have agreed to the change. Kirsten had already turned eighteen

on 18 October 1991 when the first consent paper was drawn up. When the final consent paper was signed she had commenced her university course. The respondent had agreed to bear the costs of her tertiary education, and did so.

A further important background factor was that the respondent was a person in affluent circumstances. He was an executive director of a large public company and enjoyed, among other perquisites, educational benefits for his children. It seems to me that, taking account of the standard of living, social status and income of the parties, tertiary education for the children would be considered as part of their necessary maintenance. See *Scott v Scott* 1946 WLD 399 at 401.

Contrary to the contention of the appellant's counsel, I share the view of the learned judge that the respondent's liability to meet Shaun's ongoing education did not extend to the degree course he embarked upon at the University of Cape Town. It seems that while at school Shaun had aspirations of becoming a pilot and, later, a professional hunter. The degree he obtained at Rhodes University was Bachelor of Human Movement Studies. This, I understand, is the qualification necessary to pursue a career in physical education. Not a word is said by the appellant that it was Shaun's intention to qualify as a lawyer when he commenced at Rhodes University; and that the first degree was simply a preliminary to the Bachelor of Laws degree. The absence of such an assertion, and the *onus* of proof was on the appellant, points to the probability of a change of career intention on Shaun's part. The costs of Shaun's ongoing education was the degree course he chose to undertake at Rhodes University. Had Shaun embarked upon a legal Bachelor of Arts degree with a view to proceeding to the Bachelor of Laws degree, different considerations

might well have applied to the respondent's financial responsibility. But this was not the case. I think that the learned judge put the position correctly at 286 F-H of the judgment:

> "The provision in the consent paper must be given a reasonable interpretation. It should not be construed as meaning that, as long as the child wants to stay at university, the respondent has to foot the bill. That would be unreasonable. If, for example, one of the children had wanted to become a doctor and spent seven years at university and then decided that he or she would rather be a lawyer and embarked on a six year BA, BComm, LLB course, the respondent would not be expected to continue paying for the additional university costs. It seems to me that the costs of the degree course at the University of Cape Town fall into the unreasonable category."

I now turn to the alternative substantive argument advanced on behalf of the respondent. It was that the parties had by their conduct abandoned the consent paper/court order and that the appellant could no longer hold the respondent to its terms.

It was common cause that the appellant paid some of the educational expenses for Shaun and Kathleen. Yet the fact that she did so does not, to my mind, warrant the inference that she waived her right to receive reimbursement of whatever costs incurred in their ongoing education it was the respondent's responsibility to meet. Nowhere in the respondent's opposing affidavit was it suggested that the appellant had acquiesced in a situation in which he paid less than he should have. Indeed, his assertion was that he paid for the two children all that he was obliged to under the consent paper; and that, in any event, some of the expenses to which the appellant laid claim had become prescribed.

Furthermore, it is clear that the relationship between the parties was not one which was conducive to an agreement being reached on the respondent being released from any part of his financial responsibility. A letter written by the appellant on 3 September 1996 voiced dissatisfaction over the respondent's contribution towards the costs of Kathleen's ongoing education.

The learned judge held that some of the appellant's claims in respect of the years when Kathleen was attending school were prescribed by virtue of s 15(d) of the Prescription Act. They had been incurred more than three years before the institution of the proceedings. The appellant has argued that such ruling was wrong. The claims were made pursuant to an order of court and, therefore, constituted judgment debts for the purposes of s 15(a)(ii) of the Prescription Act; hence, the prescriptive period is thirty years.

This submission is untenable. Again I have very little to add to the learned judge's reasons for rejecting it. He said at 287 B-D:

> "The actual school fees and associated expenses paid by the applicant are clearly required, in terms of the consent paper, to be paid by the respondent. However, that does not mean that the obligation of the respondent to pay any particular expense arose out of the divorce order and became a debt when the divorce order was granted. Each particular expense became a debt due by the respondent when it was actually incurred. Therefore, the respondent's obligation to reimburse the applicant for the education costs that she paid arose when she actually paid the costs concerned. If she paid them more than 3 years before this action was instituted, then they have become prescribed in terms of s 15(d) of the Prescription Act [*Chapter 8:11*]."

I think it clear beyond doubt that the appellant's right to claim reimbursement arose not from the order of court incorporating the consent paper, but from the decision to pay, and the actual payment of, the expenses herself.

Finally, as already pointed out, the learned judge left it to the parties to identify the expenses claimed by the appellant which constituted costs incurred in ongoing education in accordance with the findings he had made. He was not prepared to undertake the exercise himself. I have not disturbed any of the findings made, so the task remains to be carried out by the parties. In the event of them not being able to reach agreement thereon, leave is given to raise the dispute before the same learned judge by way of the filing of further affidavits in case no. HC 1034/99.

For the reasons aforegoing both the appeal and cross-appeal must be dismissed. As neither party has achieved success it is equitable that no order for the costs incurred in this Court be made.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners