

THELMA HOMWE
versus
CLIVE MAJONI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 29 NOVEMBER 2018

Opposed application

H Muromba, for applicant
Mrs S Mangwengwende, for Respondent

TSANGA J: This is an application for maintenance *pendente lite* and for contribution towards costs in litigation. The parties were married in 2013 and have three minor children. They no longer stay as husband and wife. The wife had moved out with all the children and is renting accommodation elsewhere. The parties have a pending divorce action. The applicant is not formally employed but is the custodian and primary caretaker of the children on a day to day basis. The respondent, her husband, is a managing director of a company. What applicant seeks are the following sums of money:

- \$ 5 000.00 as contribution towards litigation costs
- \$ 1 200.00 for herself as maintenance *pendente lite*
- \$500.00 for eldest minor child Manatsa Jayden Majoni
- \$300.00 for second minor child Matipaishe Jayda Majoni
- \$300.00 for third minor child Maitashe Jamal Majoni

The children range in age from 5 years to 18 months.

In essence she therefore seeks a sum of \$2 300.00 as monthly payment for herself and children to continue with the lifestyle they were accustomed pending the finalisation of the divorce. At the hearing, her lawyer explained that the sum of \$1 200.00 for herself was inclusive of rentals as well as payment for domestic help. She has had to move out of the house because of domestic violence.

Applicant argues that the requirements for the granting of maintenance *pendente lite* are met namely:

- a) There must be a subsisting marriage

- b) The suit in action must be a matrimonial one
- c) The application must have reasonable prospects of success
- d) The application is not in a reasonable position to bring or defend the action without the contribution from the other spouse
- e) The spouse is able to provide the applicant with this contribution

See *Chinyamakobvu v Chinyamakobvu* 2014 (1) ZLR 509 (H); *Chiyangwa v Chiyangwa* HH 173 /16.

The respondent is opposed to paying any maintenance at all for applicant. As regards the children, he argues that the form of application that the applicant has brought does not relate to children and that an application for their maintenance should have been brought in the proper for a namely a maintenance court. He further avers that he maintains his children in the sum total of \$300.00 per month. As for supporting the applicant, his argument is that she should simply mitigate her circumstances and fend for herself. He also says that he cannot afford the sums claimed.

The respondent produced a payslip showing that he earn \$ 7938.72. He also averred through that payslip that his take home pay is only \$833.00 as he is still settling certain loans. At the hearing, applicant, through her lawyer disputed the deduction on loan payments as not genuine and that the pay slip had been doctored. For instance, a deduction of \$ 2800.00 was said to be in reality only \$519.00 as was indicated more accurately at the bottom of that payslip showed the actual deductions. A prepayment of \$1500.00 on the payslip was also said not to be for every month. The court, on being taken through the basis for reaching the conclusion that there was indeed a doctoring of figures, was satisfied that there had been an effort to mislead the court. His real take home pay was in the region of \$5 500.00 per month. The sum claimed for contribution towards costs was said to be justified on account of the respondent having dragged applicant to various courts for where she has had to defend herself. However the court was not shown any basis as to how the \$5000.00 was arrived at. The respondent said he is willing to contribute \$1000.00 estimated on the basis of what is within his means to pay. As regards repayment of loans the respondent's counsel emphasized that the matrimonial home was under mortgage as the matrimonial property had been purchased on loan.

Whilst the court was satisfied that respondent in particular had not been candid with the court regarding his actual expenses, the court was equally not satisfied with how the respondent had arrived at her figures especially in relation to the contribution towards costs.

Applicant for example mentioned three court cases, the divorce case, another for custody, and a third being a protection order against her parents, all three cases issued by the respondent. The respondent argues that he is not under any obligation to pay for her parents' litigation costs. The divorce itself is contested on issues relating to distributing of property and maintenance for the minor children. There was also no detailed breakdown of the monthly costs sought as maintenance.

However, where maintenance *pendente lite* is concerned as stated in *Galante v Galante* 2000 (2) ZLR 453 (S) at p 454 which is a Supreme Court decision, the general consideration in dealing with maintenance *pendente lite* are as follows:

1. *Maintenance pendente lite is intended to afford temporary relief; thus the courts do not insist on the claim being presented with the same degree of precision and exactitude as is afforded by detailed evidence (such as in D a claim for maintenance after divorce): Acutt v Acutt 1990 (2) ZLR 220 (S) at 225C; Hodgson v Hodgson S-190-92.*
2. *The court must endeavour to arrive at a figure within the payer's means which will allow the continuation of a comparable standard of living to that formerly enjoyed: Acutt supra and Barrass v Barrass 1978 RLR 384 at E 386B.*
3. *The court will make an assessment based on its own experience as well as on such information as is furnished by the parties. This exercise of discretion will not be interfered with on appeal unless the court has misdirected itself, or the assessment is grossly excessive or substantially inadequate: Lindsay v Lindsay 1993 (1) ZLR 195 (S) at 199B. F*
4. *When the court is dealing with the wife of a very rich man it will take the view "that she is entitled to be maintained pendente lite upon the basis of being the wife of a very rich man, not as a person who had no means or possibly very limited means, before she married him": Glazer v Glazer 1959 (3) SA 928 (W) at 930F.*
5. *An increase in the cost of living may in itself be "good cause" for an increase in maintenance. We live in unusual times of very high inflation: Crone v Crone 2000 (1) ZLR 367 (S) at 369G; Tyzer v Tyzer HH-123-99 at p 6.*
6. *When considering the payer's means, as in point 2 above, the court will bear in mind, where the payer has an income in foreign currency, a variation in the rate of exchange between that currency and the Zimbabwe dollar: Crone supra at 370F-H. A*
7. *Two things follow from the above considerations. First, that the court will be prepared to adopt a more robust approach to assessment of an appropriate level of maintenance pendente lite than it will in the case of maintenance after divorce. Second, that a wife prior to divorce is entitled, other things being equal, to continue to live in the style to which she has become accustomed;*

whereas maintenance for a former wife may be subject to other consideration, namely, those set out in s 7(4) of the Matrimonial Causes Act [Chapter 5:13].:

Maintenance *pendente lite* is a stop gap measure. It seeks to address the inconvenience caused by pending divorce which should not affect the life style of a relevant party in need. Applicant's disrupted lifestyle is inclusive of the children as she has custody of all three children. Her claim is therefore rightfully inclusive of the children at this point. It is the type of claim awarded by the court *pendente lite* as she is incurring an expense for their upkeep pending the finalisation of the divorce on all matters inclusive of those relating to the maintenance of the children. What she is getting from him is not enough. To deprive her of costs towards the children would be to defeat the principle behind the award of maintenance *pendente lite* as a stop gap measure.

Respondent says the sums claimed are exorbitant. Notably applicant's claim as regards herself is inclusive of rentals. This court notes that the movement away from the matrimonial home has been occasioned by domestic violence. Applicant also averred that the assault which was done in front of her five year old child has resulted in him having post-traumatic stress disorder. Whilst the respondent denied assaulting the applicant she did provide a doctor's note in which it was clearly indicated that the child had witnessed an assault.

The significance of all this is that if she has had to move out because of assault then she is justified in protecting and shielding her children from violence by seeking alternative accommodation. If she has had to incur rental costs as she says she has, the court must come to her aid by granting her maintenance pending divorce. It is not healthy and certainly not desirable for children to witness violence. It has detrimental effects on children. In allowing for a claim for maintenance which includes accommodation the court is exercising its powers to protect both the spouse and the children from an abusive situation.

The applicant has estimated her monthly costs for four of them at \$2300.00. As stated, respondent says these are high. The case of *Galante* above is very clear that the aim of such maintenance at this point is temporary relief and that precision and exactitude is not a must at this point. It would appear that the respondent has a very unrealistic picture of what it costs to look after children. Costs of day to day living have gone up astronomically. I will only reduce the amount claimed for the first child slightly in view of the fact that he is paying his fees.

As regards contribution towards litigation costs, I would agree with the respondent that he has absolutely no obligation to assist applicant's parents to litigate. The custody

matter is said to have been completed. His counter offer of \$1000.00 for the divorce however is not a realistic estimate as to what she is likely to incur. A figure of \$2500.00 would be more within the realistic range for litigation costs.

Applicant has had to drag the respondent to court to get him to pay a realistic sum of maintenance pending divorce. She is justified in her claim for costs of this suit. Accordingly:

It is therefore ordered that:

1. The respondent pay the sum of \$2500.00 to the applicant's legal practitioners as contribution towards litigation costs in the pending divorce matter and ancillary issues proceedings.
2. That the respondent pay maintenance pendent lite in the sum of :
 - a. \$1 200.00 per month in respect of the applicant.
 - b. \$300 per month in respect of the minor child Manatsa Jayden Majoni born 14 April 2013;
 - c. \$300 per month in respect of the minor child Matipaishe Jayda Majoni born 26 January 2016;
 - d. \$300 per month in respect of the minor child Maitashe Jamal Majoni born 27 July 2017.
 - e. Costs of suit.

Kantor and Immerman, Applicant's legal practitioners
Phillips law, respondent's legal practitioners