TEMBA PETER MLISWA
versus
CYNTHIA MUGWIRA

HIGH COURT OF ZIMBABWE
WAMAMBO J & MUCHAWA J
HARARE, 27 January 2022 & 3 May 2022

CIVIL APPEAL

L Uriri, for the appellant
C Dube, for the respondent

WAMAMBO J: The appellant and respondent are parents to two minor children. The respondent was the applicant while appellant was the respondent in the court *a quo* under M523/21. Respondent issued summons seeking maintenance for the two minor children born of her and appellant. The minor children are Watinoda Sithembile Margaret Mliswa (born 3 March 2014) and Waishe Cheduchemoyo Joseph Naill Mliswa (born 12 September 2011).

In the main respondent sought USD500 or equivalent per month as maintenance for the two minor children and an order for appellant to pay school fees for the two minor children directly to Hellenic Primary School.

At the end of the hearing the learned trial magistrate granted an order as follows:

> "Respondent deposit R8000 rtgs maintenance for the two minor children with effect from 30 June 2021 money to be deposited into applicant's bank account. In respondent to pay school fees directly at Hellenic Primary School until order is varied in terms of the Act".

The order as given above is as it appears at page 8 of the record. It obviously is rather awkwardly couched and also contains some typographical errors which were not attended to. Unhappy about the order granted by the court *a quo* appellant launched an appeal before this court. This is the appeal we are dealing with here. Two grounds of appeal are raised in the notice of appeal. They are couched as follows:

> "1. The court *a quo* grossly erred and misdirected itself at law in its assessment of evidence placed before it in making a finding of fact that appellant has the financial capacity to pay school fees at Hellenics Primary School which is a private school disregarding clear evidence that proved appellant's income and expenditure could not sustain to pay school fees at Hellenics Primary School but could sustain school fees at a government school.
> 2. The court *a quo* erred and misdirected itself in law and in fact by ordering appellant to solely pay the minor children school fees at Hellenics Primary School disregarding evidence that respondent had the means to contribute to the payment of fees which she even offered to partly contribute to as a responsible person and co-parent of the minor children".

It is clear from the above and from the oral submissions made that appellant is content with the portion of the order granted ordering him to pay $8 000 rtgs as maintenance for the two minor children.

The appellant is clearly unhappy about the portion of the order ordering him to pay school fees to Hellenics Primary School. Appellant contends that the minor children should attend school at a government school instead.

Before dealing with the two grounds of appeal it is necessary to deal with a point *in limine* raised by respondent in the heads of argument and at the hearing of the appeal.

The point *in limine* raised is that appellant at the time of the writing of respondent's heads of argument had not paid school fees at Hellenics Primary as per order of court and thus approached this court on appeal with dirty hands.

The point *in limine* was expanded in the heads of argument and in oral argument. Case law dealing with the dirty hands principle were also furnished.

Appellant on the other hand resisted the point *in limine*. Appellant's main argument is that respondent should have issued a warrant against appellant who would have been brought before the maintenance court to show cause why an order for committal should not be issued against him.

Appellant also contends that the dirty hands point *in limine* is made in the heads of argument which is not a pleading.

The case of *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity in the President's Office & Ors* SC 20/2003 enunciates the principles applicable wherein a party approaches the court with dirty hands.

The matter concerns minor children's rights. While appellant has not adhered to the order made by the Magistrate there are processes provided for in the Maintenance Act [*Chapter 5:09*] to enforce adherence. See ss 22 and 23 of the Maintenance Act [*Chapter 5:09*].

We have however taken a robust and practical approach in this case in the light of the fact that minor children's rights and their rights to education are affected. To that end we shall deal with the merits of the appeal.

The findings of fact made by the court *a quo* may only be interfered with on limited grounds.

In *Barros and Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at p 62 G – H to p 63A the principle is enunciated thus:-

> "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 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 consideration, 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".

Findings of fact are generally the province of the primary court.

The first ground of appeal attacks the trial court firstly for finding that appellant can afford school fees at Hellenics Primary School. We have closely examined the evidence presented in the court *a quo* in this regard. The tenor of evidence is clear that appellant was not being called upon to enroll his minor children at Hellenics Primary School for the first time. The minor children were already attending school at Hellenics Primary School and appellant was solely responsible for the payment of their school fees.

No cogent reason was given why appellant now says he can no longer afford the said school fees. At the most appellant alleged a change in his financial situation. The nature of the change is not stated. The trial court thus had facts of a history of payment of school fees by appellant beforehand. On the other hand was a bald assertion that the financial situation of appellant had changed.

In his evidence appellant could go no further than, "I can not afford to pay more school fees at a private school". See p 10f of the record.

The appellant's salary as a parliamentarian was said to be insufficient to cater for fees at a private school. This is against the fact that appellant had been paying fees for the same children when he was in the same position of a parliamentarian.

His sources of funds appear on the record to be varied. The appellant insisted that some of his immovable properties were not generating money and that some of the companies associated with him were being sued. The court *a quo* could read between the lines that appellant's sources were not clear to the court. It was however clear to the court *a quo* that at the end of the day appellant can afford the fees at Hellenics Primary School.

Between the unclear sources of income sight should not be lost that appellant appears to be an affluent person who has all along been able to pay the school fees at Hellenics Primary School. Among other sources or potential sources of income for appellant are two houses in South Africa, the Shumba Murena Family Trust, Saltlakes Holdings Private Limited and others.

Although the learned Magistrate seems not to have dealt with the evidence in detail there appears at least on respondent's side that there is an allegation that appellant bought an expensive land cruiser motor vehicle. Appellant avers that the said car belongs to a friend. Appellant does not satisfactorily explain why he declared a friend's car to the parliamentary asset declaration list. That fact points to appellant not being candid on his resources and sources of income.

The second ground of appeal mainly attacks the fact that the respondent offered to pay half of the fees but the court *a quo* ordered appellant to pay the school fees on his own.

On record respondent does not make this offer to pay half the school fees. In fact documents filed on her behalf reflects that she proposes appellant to pay the school fees for the minor children on his own. Even her proposed draft order in the court *a quo* addresses this proposition.

The allegation that respondent has offered to pay half of the school fees only came from the appellant when he testified. He gave this evidence in answer to a leading question. Granted respondent did not ask questions in cross examination to rebut this averment.

A reading of the record reflects however that respondent was insistent that she is the one responsible for among other financial duties the day to day needs of the children, accommodation, food, entertainment and clothing. Further that she is the primary care giver to the children. Although there appears to be a feeble resistance by appellant to the averments by respondent that

she takes care of the given contributions as alluded at the p 16 on para 8, there seems no proper basis for such resistance.

Taking into account the current economic situation and value of the Zimbabwean dollar the total amount of Z$8 000 can hardly take care of two children. This effectively means that the other needs of the children have to be taken care of by the respondent.

The trial court in its assessment ordered a minimal maintenance order of $8 000 rtgs against appellant. The court however in its total assessment of the evidence found it proper that appellant should pay the school fees on his own. This among other things takes into consideration the fact that appellant had for a number of years been solely paying school fees at Hellenics Primary School.

As adverted to earlier appellant does not demonstrate what if any changes have impacted on his financial situation I have already dealt with this issue when dealing with appellant's oral evidence. In a letter by appellant's legal practitioners the reason for failure to pay fees at Hellenics School is given as "his financial position is already precarious". See p 31 para 4.

In the opposing affidavit appellant at p 61 in para 5.2 puts it thus:-

> "it is becoming difficult for me to continue contributing the same way I have been contributing due to my financial standing at the moment".

The trial court was faced with on the appellant's side a bare averment of an inability to pay the fees at Hellenics Primary School. The appellant was not candid to the court. He did not give details of what has changed as regards his financial position. He was content to make a bald averment.

The learned trial court had to contend with his bald averment as against the fact, that he had for years been solely paying full fees for the two minor children at the same school.

There was also an averment which appellant did not dispute that one of the minor children has special needs which are being met at Hellenics Primary School.

The learned Trial Magistrate was cognisant that essentially he was guided by the best interests of the children. See *Lindsay* v *Lindsay* 1983 (1) ZLR 195 (S) and *Hwata* v *Zvingwe* HH 592-14.

We find in the circumstances of the case that the two grounds of appeal are without merit. We find that the appeal thus stands to be dismissed.

We therefore order as follows:-

The appeal is dismissed with costs.

MUCHAWA J AGREES:……

Masiya-Sheshe & Associates, appellant's legal practitioner
Scanlen & Holderness, respondent's legal practitioners