GRACE MUVINDI

Versus

ADSON CHAERUKA

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE AND NDOU JJ
BULAWAYO 7 JULY 2003 AND 9 DECEMBER 2004

Appellant in person
Respondent no appearance

Judgment

      NDOU J: This is an appeal against the determination by the Maintenance Court, Bulawayo. What can be gleaned from the record of the proceedings is that the parties were customarily married. Their union was blessed with two children. In 1998 the Maintenance Court ordered the respondent to pay $250,00 per month per child. The appellant did not apply for upward variation since 1998. The respondent was a member of the Zimbabwe Republic Police. He retired from the police on 31 October 2000. This retirement precipitated the application in the Maintenance Court which resulted in this appeal. Realising that, on account of his retirement, the respondent was due to receive a lump sum of his terminal benefits the appellant launched this application. In the application she sought payment of substantial fraction of the lump sum due to the respondent. The respondent eventually got a lump sum on his retirement i.e. $101 458,75 for cash in lieu of leave and bonus of $116 120,60. In her application for a share of the lump sum the appellant stated the respondent was irresponsible and had to be forced by the court to pay the $500,00 per month for the children. She also said she feared that the respondent would use the lump sum to the detriment of the children. She said after using up the lump sum the

respondent will not be able to pay for the children's maintenance. The respondent stated that he left his job in the police to take up employment as a security officer at Edgars Company. During the hearing he produced a payslip to confirm the latter employment. He was then earning $15 299,29 per month. He testified that he was in a position to continue paying maintenance because he was employed. He stated that even after retiring from the Police Force he continued paying maintenance in terms of the court order. He never defaulted on such payments. He stated that he intended to continue paying this maintenance in instalments as he had done all along. The court a quo held that the respondent was still gainfully employed and that his access to the lump sum terminal benefits was not detrimental to future maintenance of the children. It held that from the facts of the case, the lump sum was not the only source of the respondent's income as he was gainfully employed elsewhere.

The court also made a finding that there is no evidence that the respondent was irresponsible in financial matters. The respondent even offered to have the maintenance order varied upwards.

The court *a quo* has given a decision on a matter within its discretion and this appellate court will only interfere if it comes to the conclusion that the former court has not exercised a judicial discretion, i.e. it has exercised its discretion capriciously or upon a wrong principle, has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons – *Merber* v *Merber* 1948(1) SA 446(A); *Cronje* v *Pelser* 1967(2) SA 569(A) and *The Civil Practice of the Supreme Court of South Africa* (Herbstein and Van Winsen) 4th Ed at 918.

The court *a quo* exercised its discretion judiciously. Further the trial magistrate made a finding of fact which cannot be reversed on appeal.

There is no case made out for reversal – *R* v *Dhlumayo & Anor* 1948(2) SA 677(A);

Ndlovu v *A A Mutual Insurance Association Ltd* 1991(3) SA 655(E); *S* v *Mlambo*

1994(2) ZLR 410 (S) at 413; *Soko* v *S* SC 118-92 and *Mbanda* v *S* SC-184-90.

The lower court cannot be faulted. On the question of costs I take into account

that the appellant was in pursuit of the interest of the minor children of the parties. It

is therefore undesirable to burden her the costs in such a case where there is no abuse

of court process. She is a victim of poor judgment of the facts.

Accordingly, the appeal is dismissed with no order as to costs.

Chiweshe J ………………………….. I agree