

JUNE LYNDA ANN BION

Versus

RICHARD NIGEL BION

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 11 MARCH 2005 AND 12 MAY 2005

Advocate P. Dube for the Applicant
M Ndlovu for the Respondent

Opposed Application

NDOU J: This is an application for the upward variation of an order of this court regarding maintenance of four minor children of the applicant and the respondent. It is common course that when issuing a decree of divorce in 2002, this Court ordered the respondent to pay \$10 000-00 per child per month. It is also common course that the respondent has been paying that sum until January 2004, when he increased the figure without an order of court. It is further common course that at the time of the Founding and Opposing affidavits were authored the respondent was paying maintenance in the sum of \$800 000-00 for all four children, translating to \$200 000-00 per month per child. The respondent is now resident and employed in the United Kingdom. The applicant now claims Z\$625 000-00 or 80 British Pounds per child per month. The issues are very few and narrow. These are the following :

First, whether the applicant has set out clearly, and with justification, the monthly cost, on average, of the upkeep of the children, This issue, of necessity, includes issues of whether the needs of the children have been exaggerated, or the

HB 40/05

costs thereof inflated, and duplicated in any manner. Second, whether respondent can, or should be able to, afford the amount claimed as maintenance from him.

In my view, the respondent's liability to contribute to the children's upkeep and the children's entitlement to maintenance from the respondent are not issues, they are givens, as it were. Therefore, the main issues are those of the quantum of maintenance, and the respondent's ability to meet the claim. The applicant has set out in some detail the monthly needs of the children, and the cost thereof. The applicant's list of items seem credible. It shows simply what the children eat and use in the course of a month. There are no superfluous or luxury items on the list. It is notable that the respondent himself has not raised the point that there are items on the list that should not be there at all. In other words, the respondent has not said that certain items are superfluous or unnecessary. The respondent has however, taken issue with the quantities, and brands of some items that the applicant has placed on the list. He has, for instance, disputed that the applicant uses seventy (70) litres of fuel per month. The respondent has also queried the quantities of items such as his daughter's cotton wool and has queried the brand of rice, pasta, and cheese purchased by the applicant.

He has disputed the clothing cost, the sizes that his children wear, and the cost of such clothing, and has taken issue with the shops from which the applicant buys groceries and clothing. I hold the view that these respondent's issues do not, in fact raise any real challenges to the applicant's shopping list for the children. The respondent has raised issues in areas, on which the applicant's knowledge is superior to his own. The applicant lives with the children, and is able to monitor and assess their needs on a day-to-day basis. By contrast, the respondent sees the children only occasionally, and forms his impressions of what the children need from such

HB 40/05

occasional, and fleeting contact with them, It is clear from the papers that the applicant's assessment of the children's needs has a firmer basis than that of the respondent. The applicant's evidence on these issues is the best that can be found in the circumstances. This is so, especially in view of the fact that no other serious challenges such as duplication, superfluity or extravagance have been raised. Other issues raised by the respondent are issues over which the applicant, in my humble view, has discretion as the custodian parent. These are issues such as the shops from which the applicant should buy groceries. In short, the respondent states that the shop from which the applicant buys groceries is more expensive than another chain of supermarkets. With respect, unless the prices differ by a very wide margin this aspect has to left within the discretion of the custodian parent. It has to borne in mind that there is also the question of fuel and convenience to the custodian parent and the children that has to be taken into account. The custodian parent exercises a wide discretion in issues concerning the day to day upkeep of the children. It is trite that such parent has the right to decide where the children go to school, where they live, where they attend for religious instruction etc. It, therefore, follows, that the applicant as the custodian parent has the discretion of where to shop for the children and what to buy. The applicant, has, therefore, the right to regulate the life of the child – *Ryan v Ryan* 1963 R & N 356 (SR) at 368A *Handmann v Mienie* 1944 OPD 59; *Kustener v Hughes* 1970 (3) SA 622 (W); *Simleit v Cunliffe* 1940 TPD 6 and *M v A* and *Anar* 1981 ZLR 306.

The crisp legal and factual problem raised by this claim is whether a case has been made out for the upward variation of the maintenance order of this court granted at the time the parties divorced. The general principles are that a child of a

HB 40/05

divorced parents is entitled to be maintained by them, and they are correspondingly obliged to provide it with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life –*Herfst v Herfst* 1964 (4) SA 127 (W) at 130; *Farrel v Hankey*, 1921 TPD 590 and *Woodhead v Woodhead* 1955 (3) SA 138 (SR). This principle has a foundation in international law. The provisions of the relevant international and regional instruments that Zimbabwe has ratified are the following:

“The Convention on the Rights of the Child” (adopted by the General Assembly of the United Nations on 20 November 1989- Resolution 44 – 25) in Article 27 (2) provides.

“The parents or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.”

Further, in Article 3 (1) it is provided that in all actions concerning the child undertaken by any person or authority “ the best interests of the child shall be the primary consideration”

Regionally “The African Charter on the Rights and Welfare of the Child” has in Article 4 provisions that are similar Article 3 (1) *supra*. Further in Article 20 (1) it provides-

“Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty:

- a) To ensure that the best interests of the child are their basic concern at all times,
- b) To secure, within their abilities and financial capacities, conditions of living necessary to the child’s development.”

HB 40/05

From the foregoing it is apparent that the said obligation attaches to both parents jointly, but, their respective shares of that obligation are apportioned according to the financial sources and circumstances of each of them.

From the papers I hold the view that the respondent's current contribution towards the maintenance of the four children has been shown to be inadequate. The Respondent concedes that devaluation of the Zimbabwean Dollar adversely affects the financial circumstances of each person and will constitute a change in financial circumstance and may be a source of variation of maintenance order – *Marufu v Moyo* 1983 (2) ZLR 386. He even showed his appreciation of this economic factor by increasing his total contribution from \$10 000-00 per month per child to \$800 000-00 for all the children. At the time of the application, the applicant was in receipt of a gross salary of \$2 474 040-00 and a net salary of \$1 275 735-00. She is leasing a property in Hillside, a three bedroom home. Except for the oldest child, the children share bedrooms. There seems to be nothing ostentatious or extravagant in her way of life. It is the standard necessary to the children's development. She pays rentals and rates. She is at work during the day, and employs a full time domestic worker to assist her. She pays for the water and electricity. Children and telephones are friends so she has one for emergencies and the children's own communication with their friends. The telephone is available to the respondent as well to communicate with the children. She is strict with the children with regard to the use of the telephone and the account is approximately \$15 000 per month, which is fair and reasonable.

She has her own vehicle, which she uses to and from work, for doing the household shopping, taking the children to school and to attend extramural

HB 40/05

activities. The vehicle is used mostly in the interests of the children than her own. She pays for non-prescriptive medicines and requirements.

The children enjoy a social life and that comes at a cost. After carefully scrutinising the amended schedule of expenses. I am overall satisfied that they are reasonable and necessary for the upkeep of the children.

But can the respondent afford the amount claimed? This is the next enquiry that I have to undertake. As indicated above, both in domestic and international law, it is important for the court to determine whether the non-custodian parent can, or should be able to afford the amount claimed. Can the respondent afford Z\$625 000-00 or 80 British pounds per child per month? The respondent is employed and resident in the United Kingdom. He submitted a rather old salary advice slip which shows that as at end of February 2004 he was in receipt of a gross salary of 1333-33 British Pounds.

He gives, *inter alia*, the following expenses:

- 40 Pounds per month for furniture when he is in fact stays in furnished abode,
- 50 Pounds per month, which according to his own papers must have long been paid up at the time of the hearing of this application.
- 20 Pounds per month for motor vehicle maintenance (exclusive of fuel) without explaining what exactly this is for.
- 120 Pounds per month for "According Qualification" what explaining the debits thereof.

Generally, although he takes issue on what the applicant is spending on the upkeep of the children he does not seem to apply the same standard to his own

HB 40/05

expenditure. If his children have to tighten their belts he too must do likewise. Looking at his income and necessary expenses I hold the view that the respondent is able to afford about 225 Pounds for his four children. From a net salary of 1118,64 Pounds a father cannot seriously complain when around 250 Pounds goes towards meeting his legal obligation towards his four children. He is not staying with the children and the applicant, besides the quantified expenses has to make do with hidden costs and social and parental pressures occasioned by being the custodian parent. The applicant has approached the court as an “agent” of the children.

Accordingly, I am satisfied that a case has been made out for the relief sought.

I, therefore, order:

1. That the order of this court dated 3 October 20002 under Case Number HC 929/02, insofar as it relates to paragraph 3 (a) of the Consent Paper, Annexure “B” hereto, be and is hereby varied by the deletion of the figures and words “\$10 000-00 (Ten Thousand Dollars only)” and the substitution therefore of the figures and words, “ZW\$625 000-00 (Six Hundred and Twenty – Five Thousand Dollars) or the alternative of 80 (Eighty) British Pounds”
2. That the respondent pays the costs of this action.

Ben Baron and Partners, applicant’s legal practitioners
Kantor & Immerman, C/o Coghlan & Welsh, Respondent’s legal practitioners