

**PROSPER CHIGU**

**Versus**

**LAWRENCE GAVA**

IN THE HIGH COURT OF ZIMBABWE  
NDOU & MATHONSI JJ  
BULAWAYO 5 SEPTEMBER & 6 OCTOBER 2011

Appellant in person  
Respondent in person

Civil Appeal

**NDOU J:** This is a civil appeal against the decision of a Gokwe Senior Magistrate. The parties were customarily married in 2000. The union was blessed with two children Samuel and Anotidaishe. The parties' union was terminated pursuant to action instituted by the respondent on 8 April 2008 under case number Gokwe CL 11/2008. At the time of the dissolution of the union the appellant was granted custody of the children coupled with an order for her personal maintenance and that of the two children. The appellant however, surrendered the children to the respondent but continued to receive maintenance notwithstanding the fact that the children were staying with respondent. The appellant claimed custody of the children and immediately thereafter made an application for upward variation of the maintenance amount.

Thereafter, she once more surrendered children to the respondent. The appellant said she did this because of her poor health at the time. Once more she received maintenance money after surrendering the children. When the respondent took back the children after their three month's stay with appellant, the elder one was no longer attending school. The respondent stayed with the children from the time when the youngest child was 3 years 10 months until the child attained age of 7 years. After three (3) years the respondent naturally did not see the necessity of paying maintenance for the children to appellant when the children are actually residing with him. He protested the payment of this maintenance by way of an application "for stoppage of maintenance" on 25 November 2010. At the end of the hearing the senior magistrate made the following order:-

"After assessing all the evidence, it is ordered that:

- (a) The maintenance order against the applicant which relates to the two children (\$40) is hereby discharged.
- (b) Maintenance order against applicant which relate to the respondent (\$30) is temporarily suspended up to March 2011 whereupon the respondent will retribute it.
- (c) Custody of the 2 minor children will remain with the applicant.
- (d) Each party shall pay its own costs.”

This decision did not amuse the appellant and as a result she noted the current appeal. In his/her judgment the learned magistrate reasoned that it is not in the interest of the children to uproot them (so to speak) and surrender them to the applicant after about three (3) years. The magistrate also noted that on three occasions between 2008 and 2009 the appellant surrendered the children to the respondent after being granted custody and maintenance by the magistrates' court. The learned magistrate felt that the welfare of the minor children would be served by the respondent being granted custody. Looking at the facts of this case, this finding of the magistrate cannot be faulted. As alluded to above, when the appellant had custody of the children, one of them ended up not attending school. At one point she left the children in the custody of a friend. Her own father opined that the best interest of the children would be served by the respondent having custodial rights. The evidence points to the respondent being a responsible parent who has established a stable home environment for the upbringing of the children. The fact that he intends to get married does not change anything. In any event there is nothing that would stop the appellant from getting married.

In the result, therefore, I cannot fault the decision of the senior magistrate. The magistrate did not act irrationally. There is no basis on which this court can interfere with the decision of magistrates' court. In the circumstances, the appeal is dismissed with costs.

Mathonsi J ..... I agree