

LYNETTE RUDO MALANGO (NEE MANZINDE)

Versus

YAHAYA BVUMIRAI CHIMESYA MALANGO

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 12 & 15 OCTOBER 2015

Opposed Application

L. Sibanda, for the applicant
T. Matshakaile, for the respondent

BERE J: This is an application for maintenance *pendente lite* and contribution to costs brought in terms of Order 35 Rule 274 (1) and (2) of High Court Rules, 1971.

The applicant seeks to obtain the following order:

“It is ordered that:

- (1) ... the respondent be ordered to pay maintenance *pendente lite* in the monthly sum of US\$5 055,08 (five thousand and fifty-five United States dollars and eighty cents)
- (2) ... the respondent pays the sum of US\$930,00 (nine hundred and thirty dollars United States dollars) as his contribution to the applicant’s legal costs in the main divorce matter pending in this court.
- (3) Respondent pays the costs of suit.”

The background of this matter can be summarised as follows:

The two parties to this matter are married to each other in terms of the Marriage Act Chapter 5:11 and have been blessed with two minor children. The applicant is currently not in employment whilst the respondent is a Specialist Orthopaedic Surgeon running his own surgery

here in Bulawayo and doubling up as a lecturer at the National University of Science and Technology (NUST) and working at Mpilo Hospital.

The applicant and the respondent's marriage is on the rocks and this culminated in the respondent issuing out divorce process in this court hence the instant application by the applicant. The divorce process is live and pending in this court. There has been no sound explanation by the parties' counsel why the process has not been expeditiously pushed to finality to allow the parties to start their lives afresh. Both counsel have however assured me that there is a likelihood the divorce might proceed by way of consent.

I turn now to deal with the issues in this matter. Both counsel have articulately stated the legal position with regards to the application before me and I have no wish to repeat same. Suffice it to say that as has been repeated in numerous similar cases,

“In considering an application by the wife for maintenance *pendent lite* the court has to make a value judgment based on the income and assets of the respective parties in an endeavour to arrive at a figure which will enable the wife to maintain a standard of living reasonably comparable to the standard that she maintained when she lived with her husband and which figure is within the husband's means.”

The same principles applicable to granting a wife maintenance *pendente lite* apply to a contribution towards her costs. It is proper to take into account the relative assets possessed by both parties in arriving at a conclusion where it is apparent that both parties individually have the necessary funds to pay the costs. The court must look at the means of both parties and try to determine what is reasonable and just (*Treger v Treger*, G. S. 1/77, followed)¹

The need for both parties to lay bare before the court their assets and income is of paramount importance for it is the honesty disclosure of such information which will enable the court to make a value judgment from an informed position. In this regard KORSAH JA cautioned as follows:

1. Barras v Barras 1978 RLR 384 per BEADLE AJ

“... the quantum of maintenance *pendente lite*, or otherwise which a court may order a husband to pay to a wife ... is at the discretion of the court. In order to ensure the proper exercise of that discretion, the court requires that every part to an application for maintenance shall deal with the court with condour and utmost good faith. Each party must disclose to the court every material fact, whether for and against him or her, which will enable the court to make a fair and just assessment.” (my emphasis)²

I must now move to consider what the parties have stated in their papers as supplemented by their counsel.

When this matter was argued, counsel for the applicant disclosed that the respondent has been paying \$500,00 per month to the applicant as part of the \$1 000 per month due to applicant in terms of an agreement arrived at by the parties. It was also acknowledged that the respondent has been paying school fees for the children and that these children were residing with the respondent from Monday to Friday with the applicant picking them on Friday and returning then on Monday morning. The court was further advised that this arrangement had started in January 2015.

However, this arrangement was said not to be comfortable with the applicant because the respondent did not have a maid and the children end up having to do daily chores like cleaning their rooms and washing their clothes. The respondent saw nothing wrong with the current arrangement and believes it is the best way to bring up the children as according to him they have always been doing some of these daily chores even before the parties separated as a result of the parties’ matrimonial discord.

The applicant in her papers alleged that the respondent has abandoned and neglected his duties of taking care of her and the minor children. She sought to project the respondent as an uncaring and irresponsible husband.

1. Lindsay v Lindsay 1993 (1) ZLR 195 (S) at 197 (E – F)

The applicant was able to narrate in detail the respondent's income some of which tallied with the respondent's position except the income from the surgery. The applicant attempted to deal with the respondent's income with precision and sought to project him to court in bad light.

The respondent alleged that what he gets from the surgery was extravagantly or exaggeratedly stated and favoured the court with his August 2014 bank statement. The respondent was also able to demonstrate by way of documentary evidence that despite having moved away from the parties matrimonial home he has not abdicated his family duties. In his opposing papers he was able to demonstrate that he still carried the family obligations including the basic needs of the applicant including but not limited to medical care, all in an effort to ensure that his family does not suffer from the separation. For almost everything that he has alleged in his papers the respondent has been able to back it up with documentary evidence.

The respondent makes the point in his opposing papers that the applicant has been very conservative to the court in disclosing her own income and assets despite being too keen to disclose the respondent's income and assets. The respondent also makes the point that the applicant is employable and that apart from a letter of regret from AMH (Pvt) Ltd, the respondent does not seem to have done much to secure employment.

Of particular concern to the court is the uncontroverted averment by the respondent that he had endeavoured to set the applicant up by injecting in funds to enable her to start her own poultry project and a nursery school whose combined income she has deliberately withheld from the court. All the applicant could say in her answering affidavit is:

“10. Ad Para 1.2 – 1.4

The averments herein are wholly denied and are irrelevant with regard to the application for maintenance.”

There can be no doubt that the applicant was mistaken. The need for each part to deal with condour and utmost good faith in disclosing their income and assets is one of the pillars upon which the court can properly exercise its discretion.

It is difficult for this court to believe that for all the years the applicant has worked she has neither income in bank nor any other assets that she has accumulated which might be at her disposal to assist in taking care of her to compliment the respondent’s sole efforts in taking virtually everything to do with the welfare of the family pending divorce.

What one sees through the applicant’s founding affidavit is her bitterness about the divorce and the blame game placed squarely on the door steps of the respondent as the proximate cause for the parties impending divorce. One sees very little in terms of the disclosure of the applicant’s own financial situation except a determined effort to want to manage the respondent’s deliberately exaggerated finances.

In my view, this is not what a modern woman should stand for. A well groomed modern woman must aim to asset her independence and equality with her male counterpart. She must demonstrate pro-activeness and innovation in the face of adversity and try to wean herself from the syndrome of dependence. This is particularly so where one has been able to acquire education and some professional qualification and is on the face of it able to stand on her own. Gone are the days when such a woman would seek to survive exclusively on the assistance of her husband. Such attitude as shown by the applicant in this case retards the rise of the revolution by women to free themselves from perpetual male control.

I accept in this case that overally the respondent has a slight financial advantage over the applicant and that my assessment of the evidence of the papers filed of record does not show that the respondent has abdicated his responsibilities.

Whereas the applicant has sought to demonstrate that the respondent has a steady income, it is quite significant that in her desire to maximize some financial benefit and control of that income she deliberately makes no mention of the respondent's creditors. The respondent says he has such obligations and it is difficult to imagine a surgery that can just operate without creditors. I accept the respondent's position and that the wild figure slotted in by the applicant as representing the income from the surgery may not be realistic in the absence of any documentary confirmation.

I do not believe that at this stage of the parties' relationship it is advisable to change the manner in which the parties have sought to deal with the welfare of their minor children and themselves. The applicant's discomfort with the current arrangement is with no justification at all. The respondent must continue to look after the family in the way that he has been doing until the divorce matter is settled. Equally true, the applicant must endeavour to do more in dealing with the welfare of the family.

I have already alluded to the fact that comparatively the respondent is better resourced than the applicant. It is precisely for this reason that I would probably lean backward and say that he should avail additional income to the applicant to assist in the gardening of their matrimonial home and other basic requirements. To this I allocate \$500,00 per month commencing end of October 2015.

I have already registered my displeasure at the failure by the applicant to disclose her own income and assets. Under normal circumstances that failure must dissuade the court from showing sympathy with such an errant litigant.

But again given the respondent's financial position I think it is only fair that he be ordered to contribute towards the applicant's costs for divorce. I propose to allocate a 1/3 of those costs to be borne by the respondent. This will be his contribution at the conclusion of the divorce matter.

Consequently I order as follows:

- 1) The respondent be and is hereby ordered to pay maintenance *pendente lite* in a monthly sum of \$500,00 with effect from end of October 2015.
- 2) That the respondent be and is hereby ordered to pay 1/3 of the applicant's costs of suit at the conclusion of the divorce matter.
- 3) That the respondent continues to discharge his family duties as he has been doing from the time of the parties' separation.
- 4) That costs be costs in the cause.

Webb, Low & Barry Inc Ben Baron & Partners, applicant's legal practitioners
Messrs Lazarus & Sarif, respondent's legal practitioners