DISTRIBUTABLE (6)

Judgment No. 6/11
Civil Appeal No. 302/09

DARREN STEWART THORNTON v KATHLEEN ENID THORNTON

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & CHEDA AJA
HARARE, OCTOBER 18, 2010 & MAY 16, 2011

H Mutasa, for the appellant

R M Fitches, for the respondent

ZIYAMBI JA: The parties herein were divorced by an order of the High Court dated 18 March 2004 ("the order"). In terms of that Order the respondent was granted custody of the minor child Graydon William Thornton born 30 January 1996, and the appellant was ordered to pay maintenance for the minor child. Clauses 6 and 8 of the Order provide as follows:

> "6. That as and by way of child maintenance:-
>
> a) Defendant shall pay to the plaintiff, in respect of the minor child Graydon, in cash and, without deduction, with effect from the 5th day of February 2004 and thereafter on or before the 1st day of each successive month, until his completion of secondary school, the sum of $400 000,00 (four hundred thousand dollars); and
>
> b) Defendant shall pay, on or before due date, directly to the school or institution concerned, upon presentation to him of the invoice in respect of the attendance of Graydon at private primary or secondary schools including the full cost of any necessary extra tuition, reasonable extra-mural activities, school uniforms, school outings, textbooks and school sportswear and sports equipment; and

8. That the provisions hereof relating to the custody, access and maintenance of Graydon and of the minor step-children shall be variable on application by either Plaintiff or Defendant to the High Court of Zimbabwe or other court of competent jurisdiction on good cause shown and, without derogation from the generality of this clause, it is recorded that the child maintenance payable by Defendant in terms of this Order, and the issue of a maintenance contribution by Defendant in future in respect of defendant's said minor step-children, shall be reviewed by plaintiff and defendant regularly, as to the sufficiency thereof, having regard to increases in inflation and the general cost of living, (And the cash maintenance payable by defendant in terms of clause 6(a) shall in any event increase automatically by no less than 30% thereof compounded every four months with effect from 1 June 2004)."

On 23 February 2009, the respondent brought a court application in the High Court seeking a variation of the above order. She sought the following:

"**IT IS ORDERED:**

1. That the Order of the High Court of Zimbabwe of 18th March 2004 in matter HC No. 7136/2003 be and is hereby amended –

   (a) by the deletion of clause 6(a) thereof' of the words '5th' and 'February 2004' and '400 000 (four hundred thousand dollars)' and the substitution in place thereof of the words '1st' and 'March 2009' and 'US$1 000 (alternatively petrol in such amount as can be purchased on the market at a cost of lUS$1 000 on the date on which payment is due each month)', respectively; and

   (b) by the deletion in clause 8 of the words following the word "living" in line 12 thereof.

2. That the respondent, shall pay to the applicant, in respect of arrears maintenance, within ten (10) days of delivery to him of a copy of the Order, the sum of US$318.50.

3. That the respondent shall pay the applicant's costs of suit herein (if this matter is opposed)."

The High Court granted the application to the extent that the appellant was ordered to pay US$500 per month for the maintenance of Graydon and arrear

maintenance in the sum of USD$318. The appellant now appeals against the order for maintenance.

It was submitted by the appellant that the learned Judge erred in making the Order that she did, in the face of evidence that he was not employed and could not afford the amount of maintenance awarded.

The respondent, however, averred that her net income from her employment is US$1 000.00. The appellant has made no payment in respect of the maintenance of the step-children and that during the month of October 2008 to February 2009 the appellant made the following contributions by way of maintenance for Graydon:

a) 80 litres of fuel for October

b) 80 litres of fuel for November.

Nothing was paid whether in cash or kind during the month of December to February 2009. The respondent works fulltime and has exhausted her savings on the maintenance of herself and the children.

On 9 January 2009 the respondent's legal practitioners addressed a letter to the appellant reminding him of his obligations in terms of the consent paper and broaching the subject of a variation of the court order in order to claim a reasonable maintenance for Graydon. Although the appellant has made no contribution whatever to the maintenance of his step-children notwithstanding his statutory liability in terms of the

Children's Act and his binding undertaking in terms of clause 8 of the consent paper, the appellant's failure to make any contribution to the maintenance of his step-children was not pursued. The request was only in respect of Graydon.

No response having been received, a Court application was filed by the respondent seeking a variation of the Order as set out above.

The appellant's income is not known to the respondent but it was alleged that judging from the lifestyle that he enjoys he must be in receipt of a healthy foreign currency income because of the following:

a) In December 2008 he spent 2 weeks on holiday in South Africa (including a Rod Stewart concert);
b) also in December 2008, he spent 2 weeks in Kariba;
c) over December 2008/January 2009 he spent 2 weeks in Mozambique;
d) he drives an Isuzu truck;
e) he owns a fishing boat with motor and accessories;
f) he plays golf frequently;
g) he spends a lot of time fishing with Bassmasters, an exclusive fishing club, (and has a lot of expensive fishing tackle) and takes part in all Bassmaster Classics – at least 10 a year – which covers full weekends away and considerable monies are spent on transport/fuel and accommodation;
h) he rents a large house in Avondale (near the Ridge);
i) he is always dressed in new clothes;
j) he frequently throws parties and dinners;
k) he receives rent from properties in Harare belonging to his mother;
l) he owns a Camry motor vehicle;
m) he has external holidays every year (and internal holidays including houseboat trips to Kariba);
n) in August 2008 he spent 3 weeks in the United Kingdom."

The respondent further averred that although the appellant is relieved from paying school fees for Graydon by reason of the fact that he has obtained a scholarship from St Georges College in respect of the school fees, he has not met Graydon's needs

either for maintenance or the expenses attendant upon his schooling for which the appellant is expressly liable in terms of Clause 6(b) of the order. The appellant, she averred, is well able to pay the amount claimed because most of the activities in which he habitually engages sound in foreign currency and the appellant is a commodity trader buying and selling such items as fuel, tyres and cell phones in foreign currency.

The appellant in his opposing affidavit pleaded inability to pay the amount claimed by the respondent and accused the latter of inflating her claims. Regarding his income, the tenor of his evidence was to the following effect. He is currently unemployed and does not have a definite monthly income. He is occasionally hired as a bodyguard by Zimbabwe Cricket and on occasion he works at his girlfriend's shop. Indeed, he has disposed of most of the assets awarded to him in the divorce settlement to fund his living costs. He did not disclose his income to the Court.

He traveled to South Africa but that was at the expense of his girlfriend who was on a business trip. Certainly it was not a holiday trip. He spent 5 days in Kariba but all expenses were paid by his unnamed friend and host. He went to Mozambique on a business trip but all the expenses were paid again by his unnamed friend at whose lodge they were accommodated. As to the Isuzu truck that he drives, that is borrowed from an unnamed friend. He has not played golf for 8 months now. He has taken part in Bassmasters fishing expeditions only four times and not ten as alleged by the respondent. The boat that he uses belongs to his "partner" and the vehicle they used is the one borrowed from his friend. The expenses of the Bassmasters expeditions are shared with

his "partner". The very house he lives in at the Ridge, Avondale, is owned by a friend and the rent is paid by his "partner". The rent is minimal because his girlfriend, presumably the same person described above as the "partner", contributes to the maintenance of the house. He denied that he receives rent for the properties belonging to his mother, averring that such rent is, since 2009, applied to the maintenance of the properties.

The Camry motor vehicle belongs to his mother (who apparently lives in London). He does not have external holidays or houseboat trips to Kariba. Only in 2008 did he make a visit to London. It was his first visit in 8 years and he had gone to visit his mother and his brother. The expenses incurred on that trip were not more than 80 dollars as he stayed with his mother and brother.

The appellant claimed that he has duly met all his obligations in terms of the Order, that the respondent's needs were exaggerated, and that 150 dollars per month as well as 50 litres of fuel would be just, fair and reasonable for the maintenance of Graydon.

The learned Judge after full consideration of the matter reasoned as follows:

> "The *onus* is also on the applicant to justify the granting of the claim that she seeks. In *casu* the *onus* is particularly pertinent as regards the quantum of such maintenance. No direct or concrete evidence has been adduced to justify the contribution sought from the respondent. The respondent accepts the need for the variation of the maintenance order and has in fact proposed the amount that he should be ordered to pay. But he has not taken the court into his confidence and divulged/stated how much income he gets albeit from the occasional jobs that he

> says he does from time to time. It cannot also be ignored that his responses to the factors cited by the applicant as indicators of the lifestyle that he is leading are far from convincing. The respondent is eager to portray himself as someone without adequate means even for his own upkeep. It is not possible to miss the undertones of his responses which in a number of instances reveal some level of resentment towards the applicant."

In arriving at the determination which she made, the learned Judge exercised a judicial discretion. See *Hinwood v Hinwood* SC-61-99.

There is nothing on the papers to show that her discretion was wrongly exercised. Indeed, the conclusion arrived at by the learned Judge is inescapable on the papers. It would be naïve to accept the picture painted by the appellant of a businessman content to sponge off relatives and friends for a living. The appellant has not disclosed his income or given in his affidavit any information which would assist a court in ascertaining a fair maintenance for Graydon judging by the earnings of both parents. He pleaded poverty and inability to pay 500 dollars per month for the maintenance of his child yet the evidence shows that he has managed to enjoy a fairly luxurious life, albeit at the expense of others, as he would have the Court believe.

Quite clearly, the appellant has not been candid with the Court and has not taken the court into his confidence. Other than his say so, there is nothing on the record to suggest that, indeed, his friends and girlfriend have assisted him in the way he has described. The lifestyle that the appellant has been living is not that of an ordinary unemployed and possibly destitute man. It suggests a person with some means and influential connections. This is a case where the court must take a pragmatic view of the

means of the appellant and not be misled by appearances. Such an approach is called for in a case, such as the present, where the appellant is being exceptionally frugal with the truth. The remarks of KORSAH JA in *Lindsay v Lindsay* 1993(1) ZLR 195(S), 202 D are pertinent. In that case the learned Judge remarked:-

> "… one can only infer that he is still a wealthy man capable, from his elusive resources, of furnishing his wife with maintenance …".

Those remarks apply with equal force to the present case. On the evidence placed before it, the court *a quo* made a value judgment which cannot be impugned in any way.

It is therefore our finding that the appellant has not established that he is unable to pay the amount ordered and that no good cause has been shown which would justify interference by this Court with the judgment of the court *a quo*.

The appeal is accordingly dismissed with costs.

GARWE JA: I agree

CHEDA AJA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners
Coghlan, Welsh & Guest, respondent's legal practitioners