REPORTABLE (10)

DAVID RICHARD KEMPEN
v
CARROL KEMPEN

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GUVAVA JA & BHUNU JA
HARARE, OCTOBER 23, 2015 & MARCH 22, 2016

T Zhuwarara with him *G Sithole*, for the appellant

R M Fitches, for the respondent

BHUNU JA: This is an appeal against a portion of the judgment of the High Court dated 30 April 2015. The order is couched in the following terms:

"In the result it is ordered as follows:-

1. **That respondent shall forthwith pay to the applicant the sum of US$3 026 by way of reimbursement of medical aid subscriptions.**
2. **That respondent shall forthwith pay to the applicant the sum of US$5 599.80 in respect of the child's arrear maintenance.**
3. That clause 3.2 of the consent paper be deleted.
4. That clause 2.1 and 2.3 of the consent paper are by consent of the parties amended by the substitution of the "Plaintiff" for "Defendant and of the "Defendant" for "Plaintiff" in view of the minor child having relocated to Zambia with the respondent.

5. That respondent shall pay applicant's costs of suit."

The appellant now appeals against clauses 1 and 2 of the order granting the respondent payment of US$3 026.00 as reimbursement of medical aid subscriptions, US$ 5 599.80 in respect of arrear maintenance and an award of costs.

The historical background to this case is that the parties were married in 1996 divorcing on 25 September 2002. The marriage was blessed with the birth of a minor child Courtney. Upon divorce the parties concluded a consent paper regulating the maintenance of their minor child. In terms of the consent paper it was the appellant's obligation to provide medical aid cover from a recognised medical aid scheme and to pay all medical, dental or prescription shortfalls for the minor child.

The consent paper was couched in Zimbabwean Dollars before dollarization in 2009. Upon dollarization the parties agreed without reference to court to provide for the child's maintenance in United States dollars apparently because the local currency had become valueless. In terms of that agreement arising from the original maintenance court order, the appellant was obliged to pay US$500.00 per month for the child's upkeep and rentals.

When circumstances changed and the child began to spend more days in the appellant's custody, the parties agreed to vary the amount downwards to US$400.00 per month.

The appellant apparently having fallen on hard times requested the respondent and she agreed to provide medical aid cover for the minor child. He however continued to pay the agreed amount until February 2013 when he stopped all payments prompting the

respondent to approach the High Court seeking the variation of the original court order couched in Zimbabwean Dollars to sound in United States dollars. Payment of arrear maintenance and a refund of the medical aid expenses incurred in respect of the child at his specific instance and request.

The net effect of the relief sought by the appellant was a retrospective order for arrear maintenance sounding in United States dollars and a reimbursement of the medical aid expenses in respect of the minor child.

The Zimbabwean Dollar became worthless sometime in 2009 but the respondent only approached the court for relief in July 2014. This prompted the appellant to raise the issue of prescription arguing that the cause of action arose in 2009 when the Zimbabwean dollar became defunct and the obligation to pay in United States dollars arose. There is absolutely no merit in the argument founded on prescription because at no time did the appellant dispute his obligation to pay in United States Dollars once the local currency became valueless. In the opposing affidavit at p 22 of the record of proceedings the appellant says:

> "9.1. I aver that I have always had the best interests of the minor child in my contemplation and resultantly, despite not being compelled to do so by any order of court (the provisions of the court sounding in Zimbabwean Dollars) having been rendered worthless and resultantly, unenforceable, I duly gave applicant US$500.00 per month from 2009 up until 2011 in respect of both my minor child and the applicant. This payment was over and above the payments I was making for my daughter's school fees and medical expenses."

In terms of s 15 as read with s 16 of the Prescription Act [*Chapter 8:11*] the prescription period of the debt arising from the plaintiff's claim is 3 years. The prescription period began to run as soon as the debt was due. In terms of s 18 the running of prescription

is however interrupted by acknowledgement of debt. Once so interrupted it begins to run afresh.

It is self-evident that in his opposing affidavit the appellant makes it clear that prior to 2011 there was no dispute concerning his liability to discharge his maintenance obligations in that currency. It follows therefore, that no cause of action could have arisen during that period in the absence of any dispute concerning payment in United States Dollars and in light of his agreement to pay as agreed. It therefore stands to reason, that prescription only begun to run sometime in 2013 when the appellant stopped discharging his maintenance obligations altogether thereby giving the respondent a cause of action.

There is equally no substance in the appellant's defence of impossibility of performance when the Zimbabwean Dollar became valueless. This is for the simple reason that he professes to have continued to discharge his maintenance obligations in United States dollars with the respondent's consent in the best interest of both beneficiaries.

The appeal is however grounded on the well-known principle against interpreting statutes in retrospect. This is however only a general principle of law not cast in stone. Thus in appropriate circumstances the law may be applied in retrospect as happened in this case.

When GUBBAY CJ in *Nkomo & anor v Attorney General & Ors* 1993 (2) ZLR 422 (S) remarked that there is a strong presumption against a retrospective construction of a legal instrument he was not setting out an immutable rule of law but merely restating a well-known variable legal principle.

This being a case involving the welfare of a minor child the overriding consideration in interpreting and applying the law is the best interest of the child duly protected by the courts in terms of s 81 (2) and (3) of the Constitution which provides that:

"(2) A child's best interests are paramount in every matter concerning the child.

(3) Children are entitled to adequate protection by the courts in particular the High Court as their upper guardian."

Section 11 of the Matrimonial Causes Act [*Chapter 5:09*] provides for the payment of arrear maintenance signifying a clear departure from the common law principle against retrospectivity. Where a valid law provides for retrospective effect courts have no option but to give effect to the intention of Parliament.

In awarding the respondent arrear maintenance the court *a quo* relied on s 11 of the Act which provides that;

"**11 Claim for arrear maintenance for children**

1. *Where a spouse has provided for the maintenance of any children of the marriage or* <u>*of a former marriage of one or other of the spouses*</u>*, that spouse shall be entitled to recover in arrear from the other spouse such maintenance or such portion of such maintenance as an appropriate court may consider just or equitable in the circumstances.*

2. An appropriated court may make an order for the payment by a spouse of his or her share of such arrear maintenance in an application by the other spouse for maintenance *pendent lite,* pending an action for divorce, judicial separation or nullity of marriage, or may include such an order in the final order of divorce, judicial separation or nullity of marriage, as the case may be."

Subsection (1) makes it clear that a spouse who has, provided for any child of a former marriage of the spouses is entitled to recover arrear maintenance determined as just or equitable by the appropriate court.

The respondent is a former spouse of the appellant who has since established in court his obligation to pay maintenance for their child. The appellant has however sought to bar the respondent from recovering arrear maintenance for the child by employing the *expressio unius est alterius* maxim. That maxim loosely translated means that the express mention of one thing excludes that which is not mentioned. By extension counsel for the appellant argued that the express mention of spouse in subs (1) of s 11 of the Matrimonial causes Act excludes former spouses who are not mentioned therein.

As I have already indicated, whenever a court interprets legislation to do with the welfare of children it is enjoined to employ the purposive interpretation in the best interest of the child. Thus where the court is confronted with more than one interpretation of a given statute or common law principle, it will invariably give effect to the construction best suited to give effect to the best interest of the child.

A child is an offspring of both parents who have joint legal obligation to contribute towards its maintenance according to their means. It is therefore clear that the purpose of s 11 is to enable a spouse or former spouse who has, in good faith, discharged the other party's maintenance obligation in the best interest of the child to recover arrear maintenance pertaining to their child from the former spouse. Excluding reference to subsisting marriages the section reads:

> "(3) *Where a spouse has provided for the maintenance of children …… of a former marriage of one other of the spouses, that spouse shall be entitled to recover in arrear from the other spouse such maintenance or such portion of such maintenance as an appropriate court may consider just or equitable in the circumstances.*"

Thus on proper reading of s 11 of the Act given its natural and grammatical meaning, it expressly confers the right to recover arrear maintenance on a former spouse.

The appellant's reliance on the *expressio unius* maxim was therefore misplaced and ill-advised as there was no omission to talk about.

In the context of s 11 it is wholly undesirable and not in the best interest of the child to discriminate against a former spouse in favour of a current spouse as suggested by the appellant.

In any case, the appellant agreed to pay maintenance for his child on agreed terms and conditions from which he now wants to resile. Generally speaking, lawful agreements freely concluded by persons of competent capacity are sacrosanct and therefore enforceable at law without let or hindrance by courts of law and tribunals.

In furtherance of his bid to avoid paying arrear maintenance for his child, the appellant argued with some force that the agreement without reference to court amounted to an unlawful variation of a court order rendering it unlawful and unenforceable.

A maintenance court order is designed to provide the minor child with the basic necessities of life according to its parents' means and status in life. It is by no means a bar to parties agreeing to vary the award in the best interest of the child as happened in this case.

While in *Godza v Sibanda* H-H – 254-13 the High Court expressed the need for parties to apply to court before departing from a lawful binding court order it was not laying down a hard and fast rule but a general rule subject to alteration or modification depending on the exigencies of each case.

A survey of the authorities shows that it is permissible for parties to agree to vary such court orders without reference to court. This prompted BEADLE AJ, as he then was, to remark in *Exparte Boshi & Anor* 1978 RLR 382 (H) at 383 F that :

> "In matters such as this where the amendment can be of interest only to the parties themselves, I do not think the court would require formal amendment of the original order or consider it discourteous to the court if no formal amendment was applied for."

In this case, it is clear that the parties tacitly agreed to amend the original consent court order in the best interest of their minor child and the subsequent claim for arrears arising from that agreement could only affect none other than the parties themselves. That being the case, the parties were within their rights to amend the consent order regulating their divorce without reference to court. The agreement was therefore, lawful and enforceable at law like any other contractual agreement. In the words of BEADLE AJ, as he then was, in *Exparte Boshi & Anor (supra):*

> *"The parties having entered into an agreement, it may be enforced as an ordinary contract and to apply to court for the amendment seemed a waste of costs."*

Our legal system pays great honour to the doctrine of sanctity of contract to the effect that lawful agreements are binding and enforceable by the courts. In *Book v Davidson* 1988 (1) ZLR at 369F, the court held that, it is in the public interest that agreements freely entered into must be honoured.

The appellant having agreed to pay the medical aid subscriptions and maintenance in all the amounts claimed and in the absence of any error in calculation or fraud he is firmly bound in contract and in terms of s 11 of the Matrimonial Causes Act. Thus the court *a quo* did not err at all when it ordered the appellant to discharge his maintenance

obligations arising from a lawful court order subsequently modified by mutual agreement in the best interest of the minor child of the parties according to law.

The respondent has asked for costs on the punitive scale. Such costs are however not lightly granted. They are normally reserved for unbecoming deplorable conduct which puts the other party to unnecessary expense. Although the appellant was unsuccessful, he had an arguable case based on sound legal principles. Punishing him with costs at the higher scale in the circumstances of this case would have the undesirable adverse effect of discouraging litigants with arguable cases from approaching the courts.

It does not follow that every loser in a legal contest must face costs at the punitive scale. Such costs are normally meant to punish some form of misbehaviour or unbecoming conduct, which attributes are absent in this case.

It is accordingly ordered that the appeal be and is hereby dismissed with costs.

MALABA DCJ: I agree

GUVAVA JA: I agree

Mawere & Sibanda, appellant’s legal practitioners

Coghlan, Welsh & Guest, respondent’s legal practitioners