

DISTRIBUTABLE (11)

ALBAN GERARD BOWERS
v
SHARIFFA PRECIOUS BOWERS

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & HLATSHWAYO JA
HARARE, 11 JULY 2017

Advocate *L. Uriri*, for the appellant

Advocate *E. Matinenga*, for the respondent

Judgment No. 11/18
Civil Appeal No. SC 550/16

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GWAUNZA JA: This is an appeal against the entire judgment of the High Court of Harare handed down on 25 August 2016. At the end of hearing in this matter we dismissed the appeal with costs and indicated that the reasons would follow. These are they.

FACTUAL BACKGROUND

The parties are a married couple in the middle of divorce proceedings on the basis of irretrievable breakdown of their marriage. The union was blessed with four children.

In February 2013 the appellant instituted divorce proceedings against the respondent, Mrs Bowers. He was amenable to distribution of their assets, to granting Mrs Bowers custody of their minor children, to her retaining the matrimonial home and to payment, by him to her, of

spousal maintenance. The respondent accepted the US\$2 000.00 per month that Mr Bowers offered as maintenance as well as custody of the children which he did not seek to contest. She however rejected the distribution of assets suggested by him, on the basis that he had not disclosed all the assets in his possession.

In August of 2013 the appellant sought to amend his declaration but only pursued the matter in December of 2014. He was now seeking custody of the minor children and retracting his offer to pay maintenance to Mrs Bowers. The latter then, in February 2015, filed an application for a contribution towards the costs of her litigation in terms of r 274 of the High Court Rules. It was the court *a quo*'s finding that the amendment sought by Mr Bowers, if successful, would result in a costly and seriously contested trial over issues of custody, maintenance for the children and post-divorce maintenance for Mrs Bowers.

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The court *a quo* accordingly found in the respondent's favour and granted the order that she sought. It is this decision that the appellant has brought to this Court on appeal.

The grounds of appeal relied upon raise the single issue of whether or not the respondent was entitled to a contribution towards her legal costs.

The judge *a quo*, relying on the case of *Chinyamakobvu v Chinyamakobvu*¹ correctly set out the requirements for the granting of an order of contribution towards legal costs in divorce proceedings, as follows;

- a) there must be a subsisting marriage;

¹ 2014(1) ZLR 509 (H)

- b) the suit in action must be matrimonial in nature;
- c) the application must have reasonable prospects of success;
- d) the applicant must show that;
 - i) he or she is not financially able to bring or to defend the action without the contribution from the other spouse; and
 - ii) the other spouse is able to provide the applicant with the contribution sought.

The learned author, Hahlo, in his book “South African Law of Husband and Wife”² states that the last two requirements cited, in particular, are conjunctive, and that ultimately for the application to succeed all the requirements must be met.

The judge *a quo* correctly found that requirements (a) and (b) had been met. As for requirement (c), that is, the prospects of success in relation to the division of the parties’ matrimonial assets as well as custody of the minor child, the judge opined as follows in his judgment;

“The aspect that seemed contentious is whether there are prospects of success. This should however not overly detain me. In terms of the Matrimonial Causes Act [Chapter 5:13], a court in determining the matrimonial issues between spouses is enjoined to consider all the circumstances of the case. The spouses must be able to place before the court all relevant factors to be considered. Where, as in this case, parties are not in agreement on the extent of their matrimonial estate it is only prudent that each party be able to satisfy the court of their contention regarding such assets. The success or otherwise will be in the sharing ratios to be determined by court.

It is my view that the facts clearly show that applicant may succeed in getting a favourable share of the matrimonial estate as compared with what she is being offered. In fact, in terms of the intended amendment the offer of number 129 Patrick Close had been withdrawn and replaced by a usufruct right for 2 years and half of the sale proceeds thereafter. I am of the view that there are prospects of success in applicant arguing for a better division of the immovable property taking into account other properties she alleges respondent acquired.

² 5th Edition at page 424

On the issue of custody, clearly this is contentious and the need for parties to adequately argue their respective cases cannot be overemphasized. The paramount consideration is the best interests of the children and in my view this can only be achieved where both spouses are afforded the opportunity to adequately argue their case.”

Concerning the respondent’s prospects of success in respect of spousal maintenance and her financial capacity the judge *a quo* had this to say:

“The last issue of spousal post-divorce maintenance is an issue that is also contentious especially that respondent on his own volition had deemed it proper to offer applicant maintenance as he realized she needed financial support. Now that he wishes to withdraw such offer applicant is justified in seeking to be awarded maintenance as her need for maintenance had initially been appreciated by respondent. Whilst post-divorce maintenance is not granted just on the asking, it is only proper that applicant be given opportunity to argue her case. It may also be noted that the duration of the marriage and the standard of living they had been used to may enhance the prospects of success for applicant. I am thus of the view that there are prospects of success.”

The judge *a quo* also considered the question of the parties’ financial situations *visa- vis* the respondent’s ability or otherwise to pay her legal costs and whether the appellant was able or obliged to contribute to such costs. The appellant it seems did not dispute that the respondent had a monthly income of \$6384,00 made up of \$1084,00 salary, \$2000,00 maintenance for herself, \$2000.00 maintenance for the children, \$1000,00 received as rent and \$300.00 received from her daughter. The respondent showed how that income was spent, leaving her with slightly over \$300.00. The appellant was of the view that if respondent did not live a ‘lavish’ lifestyle, as evidenced by the breakdown of her expenses, she could easily afford the cost of the litigation in question.

The judge *a quo* was not persuaded by the appellant’s submissions in this respect. He noted that they ignored firstly the fact that the respondent was expected to continue living the lifestyle to which she and he (a specialist orthopedic surgeon) were accustomed, and secondly,

that \$4000,00 of the amount was specifically for her and the children's maintenance. The judge stated as follows in his judgment;

“It would be an act of irresponsibility for applicant to utilise money for the children's maintenance for her legal fees. The children should not be denied their requirements just because father and mother have some court battle. Out of the remaining \$4384-00, \$2000-00 was for applicant's personal maintenance. Upon separation respondent on realizing the standard of living expected of his wife had offered her that sum. It was thus not a sum for savings but for the applicant's monthly requirements as appreciated by respondent.”

The appellant, it would appear, did not assert that the expenses listed by the respondent went beyond what the parties used to enjoy whilst staying together. He made the suggestion but tendered no evidence to substantiate it, that the respondent had other, undisclosed sources of income. The latter disputed this assertion and placed before the court records showing the extent to which she had been compelled to raise loans in order to meet some of the family's expenses. These were not seriously challenged by the appellant.

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The last requirement relates to the appellant's ability or otherwise to pay the costs sought by the respondent. The judge *a quo* noted that the appellant did not dispute that he had a bank balance of some \$185 000,00 as shown by the respondent. Nor did he indicate what expenses he had, out of an admitted monthly income of \$7 500.00, that made it not possible for him to contribute towards the respondent's legal costs. The judge *a quo* in my view correctly observed that the appellant's opposition to the claim was not because he could not afford to contribute to the respondent's costs, but his belief that she was extravagant in her expenses and ought to be able to fund her defence from her own resources.

It is also clear from his heads of argument that the appellant believes that he already does much for the family and ought therefore not to be made to take on the respondent's legal costs as well. The point will be made here that while this may very well be true, it is not part of the requirements put to the test in such an application. What suffices is that the appellant does not dispute his ability to contribute towards the respondent's legal costs as claimed.

With all of the foregoing in mind, it is in my view correctly argued for the respondent that the standard applicable in considering prospects of success is itself low. In the case of *S v McGown*³ Garwe JA, after considering a number of authorities on the matter, stated as follows;

“The applicant should, therefore, be required to make out a reasonably arguable case, in the sense of there being substance in the argument: *Beatley's Trustee v Pandor & Co* 1935 TPD 365 at 366, cited in *S v Mutasa* 1988 (2) ZLR 4 (S)”.

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When this test is applied to the circumstances of this case, I do not find that there is anything to fault in the reasoning of the court *a quo* as cited above, nor in the conclusions reached on the question of the respondent's prospects of success in the main action. Issues of division of matrimonial assets, custody of minor children and maintenance tend to be contentious issues in divorce matters. Generally, they are better determined by a divorce court after the consideration of detailed evidence be it *viva voce* or otherwise. Thus a court hearing an application for contribution towards the legal costs of a party in ongoing, contested divorce proceedings may not always be best placed to make a definitive finding on that party's prospects of success or lack thereof, in the main action.

³ 1995 (2) ZLR (S) 81 at page 83

I accordingly, hold the view that the respondent cannot be said to have failed to make out a reasonably arguable case nor for that matter, that such case as she made out, lacked substance. In the result I do not find any merit in the appellant's assertion that the court *a quo* fell into error in reaching the decision that the respondent had proved a case for contribution from him, towards her legal costs.

The last issue to consider is the *quantum* of the contribution awarded. The respondent claimed \$28 750.00 contribution in legal costs and the court granted \$25 000.00 in her favour.

The judge reasoned as follows;

“Upon a careful consideration of the sum being claimed I have come to the conclusion that it may be on the high side. It must be borne in mind that that this is a contribution and so it need not pay for everything. The applicant should be able to save a bit on her own. To expect (the) respondent to foot the entire bill may not be appropriate. I believe a contribution in the sum of \$25 000.00 should be adequate”

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There is no gain saying the fact that in reasoning and concluding thus, the judge *a quo* exercised a discretion. The respondent in this respect contends correctly that nowhere in his arguments did the appellant challenge the exercise of this discretion. It is an established principle of the law that a higher court will not lightly interfere with the exercise of discretion by a lower court. It can only do so if it is established that the discretion was exercised capriciously or erroneously, that the lower court acted on a wrong principle, allowed extraneous or irrelevant matters to guide it, mistook the facts or disregarded some relevant considerations⁴.

⁴ See *Barros & Anor v Chimponda* 1999 (1) ZLR 58(SC) at 63-64

All this not having been alleged, much less established, I am unable to find that the judge *a quo* misdirected himself in ordering that the appellant contributes \$25000.00 towards the legal costs of the respondent.

In all respects therefore we were satisfied that the appeal lacked merit. Hence the order dismissing it with costs.

GOWORA JA I agree

HLATSHWAYO JA I agree

Atherstone and Cook, appellant's legal practitioners

Gill, Godlonton and Gerrans, respondent's legal practitioners