DISTRIBUTABLE (48)

ALASTAIR WALTER POLLOCK SMITH
v
ABIGAIL ROSALYN SMITH

SUPREME COURT OF ZIMBABWE
GARWE JA, BHUNU JA & MAKONI JA
HARARE: NOVEMBER 16, 2018 & MARCH 16, 2020

T. Mpofu, for the appellant

T.W. Nyamakura, for the respondent

MAKONI JA: This is an appeal against part of the judgment of the High Court. The appellant specifically appeals against paras 2 and 3 of the operative part of the judgment which awarded the respondent maintenance at the rate of US$3 000.00 per month until she dies, remarries or cohabits with another man plus costs of suit.

Although the notice of appeal indicates that the appellant appeals against para 3 of the judgement, it is worth noting that no ground of appeal relates to that paragraph, neither do the appellant's heads of argument address that issue. I will take it that it was abandoned.

BACKGROUND FACTS

The appellant sued his wife, the respondent, seeking a decree of divorce and other ancillary relief. The respondent did not contest the appellant's claim for a decree of divorce. She however sought the distribution of the assets of the spouses and post-divorce maintenance.

The parties found each other regarding the distribution of their assets including the matrimonial home. They agreed to sell the matrimonial home and most of the proceeds were used to purchase an immovable property which was registered in the name of the respondent and the major and only son of the marriage. The appellant received the remainder of the proceeds.

PROCEEDINGS IN THE COURT *A QUO*

The court *a quo* captured the only outstanding issue before it as whether or not the defendant is entitled to post divorce maintenance and the quantum of such maintenance. I will revert to the question of how the sole issue was captured later on in the judgment.

At the end of the trial, the court *a quo* found that the appellant was currently maintaining the respondent in the sum of US$3000,00 per month and that from his income he could continue to maintain the respondent in that amount. It then concluded that on the basis of the proven facts, the appellant was well able to maintain the respondent in the sum of US$3 000-00 per month. It also found that the defendant's health condition entitled her to maintenance until she dies, remarries or cohabits with another man.

The appellant, aggrieved by the decision, filed the present appeal on the following grounds.

GROUNDS OF APPEAL

"1. The court *a quo* erred in awarding respondent post-divorce maintenance in the sum of USD3 000-00 per month on the basis that appellant had in the past afforded it and so erred in making that award against the background of appellant's dwindling income and increase in his financial obligation.

2. The court *a quo* misdirected itself in failing to take into account the fact that respondent had taken all the proceeds from the sale of the sole immovable property of the parties and that she has effectively been paid a lump sum payment by the appellant.

3. The court *a quo* misdirected itself in finding without credible evidence that respondent suffers from a medical condition rendering her permanently incapable of engaging in any income generating project.

4. The court *a quo* erred in failing to take into account the rental income derived by respondent from her Zvishavane properties and misdirected itself in putting any premium on the fact that respondent's late father's estate had not been wound up.

5. The court *a quo* erred in failing to grant an award which releases appellant from the control and influence of respondent and so erred in failing to take into account the fact that he is entitled to move on with his life."

APPELLANT'S SUBMISSIONS BEFORE THIS COURT

Mr *Mpofu*, for the appellant, made the following submissions.

The court *a quo*'s findings were contrary to the evidence adduced and principles of law applicable in such matters. The exercise of the discretion by the court *a quo* was therefore improper and must therefore be vitiated**.**

Contrary to evidence presented before it, the court *a quo* imposed an obligation upon the appellant to work for the respondent for life. Respondent has some free income in the sum of US$3 800 whilst the appellant's free income is under
US$1 000-00. It is settled law that marriage is not a bread ticket for life.

The court *a quo* further made a finding that the respondent was entitled to US$3 000-00 per month when no evidence had been placed before it showing the respondent's expenses to be in that amount. The court had no basis to come to the conclusion that her expenses were US$3 000-00 per month. The award did not take into account that she was earning $3 800-00 from her father's deceased estate through the properties she was leasing out in Zvishavane.

The court further fell into error in finding that the respondent was unable to work, based on a report produced by a Dr Gunning. The appellant complained that he paid for the production of the report and yet it was only produced after he had testified and during the respondent's case. The finding that she cannot work does not mean she cannot generate income. She could employ people to do the running around for her.

The respondent got a lump sum in sum of US$200, 000-00 from the proceeds of the sale of the parties' matrimonial home which enabled her to buy another property. Appellant had to obtain a mortgage bond to acquire his own property. The US$200, 000-00 should have set up the respondent and she should have used it in a profitable endeavour.

The question of the respondent's adultery should have been taken into account in coming up with the quantum.

Mr *Mpofu* further submitted that the court *a quo* had erred in not considering the income due to the respondent from the Zvishavane properties on the basis that the estate has not been wound up. If ever it changes then she would approach the court for variation. Instead the court turned principles of law on the head by asking the appellant to approach the court for variation if the respondent is awarded the properties. He prayed that the court interferes with the *quantum* and the period.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

Per contra, Mr *Nyamakura* made the following submissions. The court *a quo* did not act in a vacuum but in terms of facts it found to have been proven. He referred to the judgement where the court *a quo* deals with the facts that the court found to have been proven.

The appellant, in his pleadings, did not put in issue the fact of entitlement to maintenance and the period. He offered to pay maintenance until such time as the respondent remarried or cohabited with another man. In the notice of appeal, he now prays that he pays the defendant the sum of US$1 500-00 per month for a period of five years reckoned from the date of this order until the respondent either remarries or commences to cohabit with another man. He now seeks to re-argue his case on appeal.

The finding that the respondent had many ailments was based, *inter alia*, on the appellant's own admission. These are findings of fact. When the report by Dr Gunning was introduced there was no objection from the appellant. There was no insistence that Dr Gunning be called to testify. It would therefore be unfair to attack the court's reliance on the report**.**

The issue of adultery was never raised as an issue to be considered regarding the respondent's entitlement to maintenance and the *quantum*. Again the issue of the lump sum, realised from the disposal of the matrimonial home, was never raised as a factor in determining the amount of maintenance to be awarded to the respondent. The appellant should have given the respondent due notice that the lump sum would be taken into account in considering the issue of maintenance.

ISSUES

From the above submissions and the pleadings by the parties, the issue for determination is the quantum of post-divorce maintenance and the period. In my view this should have been the sole issue before the court *a quo*. It however proceeded to consider the question of entitlement to such maintenance. This was improper as the appellant in para 9 of his declaration pleaded as follows:

> "9 It is just and equitable that plaintiff (appellant) pay maintenance to defendant in the sum of US$750-00 per month for a period of one year commencing with effect from December 2009 or until such time as the defendant should remarry or live with another man as man and wife whichever should occur first".(my emphasis)

Clearly the appellant did not take issue with the respondent's entitlement to post divorce maintenance at that stage and throughout the trial, but rather put in issue the *quantum* and the period.

The trial was long-drawn and judgment was only rendered on 22 September 2016. The appellant did not seek to amend the period indicated in para 9 of his Declaration. The offer to pay maintenance for one year from December 2009 was consequently overtaken by events.

THE LAW

The law is settled that an appellate court can interfere with factual findings of a lower court in very limited circumstances.

In *Hama vs National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at p 670, KORSAH JA remarked:

> "The general rule of the law as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is

> satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion. …"

In *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/01, at pp 5 to 6 of the cyclostyled judgment, the court held that if an appeal is to be related to the facts:

> "there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. And a misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented."

As regards the *quantum* in maintenance matters the approach to be adopted on appeal was laid out in *Mentz* v *Simpson* 1990 (4) SA 455 where HEFER JA held that the approach should be along the lines adopted in compensation cases as indicated in *Sandler* V *Wholesale Coal Suppliers Ltd* 1941 AD 194 where WATERMEYER JA stated at 200 that:

> "....a Court of Appeal should not interfere unless there is some striking disparity between its estimate of the damages and that of the trial court, and further unless there is some unusual degree of certainty in its mind that the estimate of the trial court is wrong."

The position of the law regarding post-divorce maintenance and the duration is now well established in our law. In *Chiomba vs Chiomba* 1992 2 ZLR 197 the following is captured in the head note.

> "- marriage can no longer be seen as providing a woman a bread ticket for life. A marriage certificate is not a guarantee of maintenance after the marriage has been dissolved.
> Elderly women who have been married for a long time and are too old to now go out and earn a living and are unlikely to re-marry will require permanent maintenance."

APPLYING THE LAW TO THE FACTS

The starting point in such matters where the lower court would have given a decision within its discretion is to look at the power of this court on appeal. As clearly comes out from the above authorities, this Court cannot interfere with factual findings made by the trial Court except

(a) on the basis of irrationality

(b) where the trial court reaches a decision which is not supported by the evidence

(c) where the finding is patently wrong.

The question therefore is whether the findings of fact made by the court *a quo* can be interfered with on any of the bases set out above.

The court *a quo* made the following factual findings;

"The facts found proved are;

1. The plaintiff is currently maintaining the defendant at US$3 000-00 per month.

2. He earned an average of US$ 12 923-81 per month in 2015 and an average of US$10 868-00 per month, between January and March this year.

3. That salary is well able to maintain him and the defendant at US$3 000-00 each per month.

4. It leaves him a balance of between US$2 868-00 to US$4 913-00 per month from which he can save for the future.

5. His current means therefore enables him to continue maintaining the defendant at US$3 000-00 as he is currently doing. He has been able to do so and more since their separation.

6. The defendant is not the type of spouse who should be weaned off from her former husband on divorce. Her medical condition qualifies her for maintenance till death or when she remarries or cohabits with another man.

7. That the defendant's father's estate is still to be wound up. If the defendant's means improves from what she will get from it the plaintiff can seek variation.

8. The plaintiff's fear that his means may come down and make him unable to maintain the defendant at US$3 000-00 per month is not a bar to his maintaining her at that rate till the arrival of that eventuality, which would entitled him to seek variation of the maintenance order.

9. Their son has acquired his first degree and is currently staying with the defendant. This increases the defendant's expenses. The possibility of his going for further education does not presently disentitle the defendant from the maintenance she seeks. If those changes come they can only be relevant in an application. This also applies to the possibility of the plaintiff having to pay fees for their son's further studies."

It then concluded as follows:-

"I am therefore satisfied that on the present facts the plaintiff is well able to maintain the defendant at US$3000.00 per month. He has been doing so and his means enables him to do so"

I turn to deal with the two issues that arise before this Court's.

QUANTUM

Mr *Mpofu*'s argument was that the court *a quo* found without a basis that an award of US$3 000-00 was a reasonable monthly award. In doing that it committed many cardinal sins which he listed as set out below;

(a) It made an award in the absence of evidence showing her monthly requirements and how they answer to the
US$ 3 000-00 awarded.
(b) It failed to factor in respondent's income from Zvishavane.
(c) It did not consider the net effect of the award in that it left the respondent with an income of $3 800-00 as against that of the Appellant in the sum of $700-00.

The court *a quo* reasoned that the appellant, in his evidence-in-chief, stated that he could probably afford US$3 000-00 per month although he could not say for how long he will be able to sustain that amount. He did not put in issue the aspect of the respondent's schedule

of expenses despite the question being put to him by his counsel. It is the figure of US$3 000-00 that he kept toying around with throughout the proceedings. He also told the court that his own expenses were about US$3 000-00 per month. It must be noted that due to the long drawn nature of the proceedings, the appellant successfully applied to re-open his case. This was to enable him to lead further evidence regarding his dwindling income. Despite leading that evidence, he still confirmed, under cross-examination, that at that moment, he could afford to pay the respondent the sum of US$3 000-00 per month and make provision for his own expenses in the same amount and still have an amount left over for savings.

In arriving at its decision, the court *a quo* looked at all the above and the appellant's average income of US$12 923-81 per month in 2012 and US$10 686 per month between January and March 2016. It went further to analyse the figures and concluded that after paying US$3 000-00 to the respondent and to himself, he would remain with a balance of between US$2 686.00 and US$4 913-00 per month which he could save for the future.

I find no misdirection in the court's reasoning. The appellant himself did not place emphasis on the absence of the schedule of expenses. His main concern was whether he could be able to pay the figure of US$3 000-00 per month in future in view of his dwindling income and whether he would remain with some savings for the future. These factors were taken into account by the court *a quo* in arriving at the *quantum* it awarded.

THE ZVISHAVANE PROPERTIES

The court *a quo* had this say on the above issue;

> "That the defendant's father's estate is still to be wound up. If the defendant's means improves from what she will get from it the plaintiff can seek variation."

Mr *Mpofu* submitted that the court asked itself the wrong question. It ought to have asked itself whether, as at the date of the trial and subsequent thereto, the respondent was receiving income from the Zvishavane properties. He opined that what can happen in the future is immaterial. In ignoring the reality of that income from the estate, the court *a quo* hopelessly misdirected itself.

I am persuaded by the submission by Mr *Nyamakura* that there was no misdirection by the court in finding that the estate of the respondent's father had not been wound up. It would have been speculative on the part of the court to rely on the existence or otherwise of income from that estate at that stage. In any event, the court made a finding that the evidence led from an investigator hired by the appellant was not conclusive. This was not challenged on appeal. The court could not have been expected to take into account evidence from a report it had adjudged inconclusive.

ADULTERY

The court *a quo* was attacked on the basis that it failed to consider that the respondent had committed adultery which had not been condoned. Mr *Mpofu* relied on s 10 of the Maintenance Act [*Chapter 5:9*] which provides as follows:-

> "Where a spouse is proved to have committed adultery before or after the making of an order and such adultery has not been condoned, the maintenance court may refuse to make an order for maintenance in favour of such spouse or may discharge an order for maintenance made in favour of such spouse."

I find merit in the submission, by Mr *Nyamakura*, that whilst the appellant expected the court *a quo* to deal with the issue and consequently this court, he never pleaded that such alleged marital misconduct be used against her, in his pleadings. Doing so would

have been inconsistent with his prayer which offered post-divorce maintenance until the respondent remarried or cohabitated with another man.

LUMP SUM PAYMENT OF $200-000-00

Mr *Mpofu* submitted that the judgment of the court *a quo* was irregular in that it ignored the lump sum payment made to the respondent in fixing the *quantum* of maintenance and its duration. Again as submitted by Mr *Nyamakura* this does not arise from the proceedings. When the parties agreed on the distribution of the proceeds of the matrimonial home, they did not agree that that aspect was to be taken into account in the maintenance dispute.

DURATION

Mr *Mpofu* attacked the court's findings that the respondent was incapacitated from working on the basis of her medical condition. He submitted that the court relied on a medical report prepared by a Dr Gunning which report was signed on 25 October 2015 after the appellant had testified. It did not at any rate claim that the respondent could not work.

Per contra, Mr *Nyamakura* submitted that the appellant's case on appeal is certainly different from his case in the court *a quo*. In his declaration, he tendered maintenance until such time as the respondent cohabited with another man or remarried, whichever occurred sooner.

The appellant in his prayer before this court now seeks an order for payment for a period of 5 years reckoned from the date of the order of this Court. No amendment to the declaration was sought and granted.

The law is clear that parties are bound by their pleadings and they are not allowed to depart from them without leave. The remarks by the authors Jacob and Goldrein in Pleadings: Principles and Practice, (Sweet & Maxwell London, 1990) at page 8-9 which are cited with approval in the judgment in *Jowel* v *Bramwell-Jones & Ors* 1998 (1) SA 836,898 are apposite and to the following effect:

> "As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings …… for the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon an enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings….. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda of the trial by their pleadings and neither party can complain if the agenda is strictly adhered to……"

See also *Dube* v *Bushman* Safaris & another HB 112 – 13; *Matambanadzo Bus Service (Pvt) Ltd* v *Magner* 1971 (1) RLR 543 at 55H-I

The appellant is therefore bound by his pleadings wherein he offered to pay maintenance until such time as the respondent remarries or cohabites with another man. This is the order that the court *a quo* granted.

In any event, even going by the appellant's own version, he still would not have succeeded on appeal. The court did not solely rely on the report by Dr Gunning. It also took into account that the appellant, on his evidence, accepted that the respondent was of ill health and that condition caused her to stop working during their marriage. It then concluded:-

> "A spouse who may if in good health be expected to work and earn his or her own money and support himself/herself is entitled to maintenance if the evidence placed before the court establishes that his or her condition does not permit him/her to do so. His or her

condition entitles him or her to permanent maintenance which according to MANYARARA JA in the case of *Chimora* v *Chiomba* 1992 (2) ZLR 198 is reserved for an elderly spouse who is too old to work. A spouse who is too ill to work is like the spouse who is too old to work entitled to permanent maintenance."

From the above, it is clear that the court was alive to the legal principles to be taken into account in post-divorce maintenance claims despite the unjustified attack by the appellant that the judgment was contrary to the law. The reasoning of the court is supported by evidence presented before it. Its findings of fact cannot be described as irrational.

In view of the above the appeal has no merit and must be dismissed.

The respondent prayed for costs on a higher scale on the basis that the appellant sought to re-argue his case on appeal. This prayer was not persisted with in submissions before this court. Costs will be awarded on the ordinary scale.

In the result I make the following order-

The appeal is dismissed with costs.

GARWE JA I agree

BHUNU JA I agree

Mtetwa & Nyambira, respondent's legal practitioners

Atherstone & Cook, appellant's legal practitioners