

DISTRIBUTABLE (66)

Judgment No. SC 76/02

Civil Appeal No. 306/02

JOHN COSMAS MOYO v REGINA ZIHANZU

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, JUNE 13 & OCTOBER 7, 2002

The appellant in person

The respondent in person

MALABA JA: The appellant and the respondent lived together as husband and wife under a customary law union. They separated in July 1993. The respondent retained the custody of four children of the union. In August 1995 she obtained an order from a maintenance court compelling the appellant to pay an amount of \$850 per month towards the maintenance of the four children. The order did not apportion the amount due to each child but stated that it would terminate in respect of each child when he or she reached the age of eighteen.

The appellant paid the maintenance in terms of the order for four months but remained in default of payment thereafter until he was arrested and prosecuted for non-compliance in 1999. He was convicted of the charge of unlawfully failing to obey the maintenance order and sentenced to a term of imprisonment. The sentence was suspended on condition that he paid \$16 000 in

arrear maintenance.

Meanwhile one of the children had, to the knowledge of the appellant, died on 18 December 1995.

The respondent successfully applied for the variation of the maintenance order on 23 March 2000 so that the appellant now had to pay \$1 200 per month for the maintenance of the three surviving children. At the time the variation order was made the appellant had not had the previous maintenance order varied for the reason that one of the children had died.

In what appears to have been a reaction to the variation order granted to the respondent on 23 March 2000 the appellant made an application to the magistrate's court on 27 April 2000 claiming an order compelling the respondent to refund to him \$11 687.50, which he said was the total amount he had paid to her as maintenance for the deceased child during the period extending from December 1995 to March 2000. The magistrate who heard the application dismissed it on the ground that the appellant had knowledge of the fact that the child had died but nonetheless had paid the money to the respondent, who used it to maintain the three surviving children. He held that it would not be in the interest of justice to order the respondent, who had not put the money to personal use, to refund it to the appellant.

An appeal to the High Court from the magistrate's decision failed on the same ground.

This appeal is against the judgment of the High Court. I do not think the court *a quo* needed to base its decision on the alleged waiver by the appellant of a right to discontinue the payment of the maintenance after the death of the child.

The issue should have been disposed of by the application of the provisions of s 11(1)(a), as read with s 11(1)(4) of the Maintenance Act [Chapter 5:09] (“the Act”), which state that:

“11 (1) Subject to subsection (4), an order made in favour of a child shall, with respect to that child, cease if and when –

(a) the child dies; ...

(2) ...

(3) ...

(4) Where an order has been made in favour of more than one person and the amount due to each person under the order has not been apportioned, the order shall not cease with respect to any of those persons in circumstances specified in subsection (1) ... but shall remain in force until varied or discharged in accordance with section 8.”

The order made against the appellant was that he should pay \$850 per month for the maintenance of the four children without apportioning amounts due to each child. It is common cause that at the time the respondent obtained the variation

order on 23 March 2000 for the maintenance of the three surviving children the appellant had not had the original order varied by the maintenance court on the ground that one of the children had died. Without a variation order having been made in terms of s 11(1)(4) of the Act, the appellant was under a duty to pay the amount of \$850 per month towards the maintenance of the three surviving children. There was no question of him acting through volition. He was bound by law to pay the money.

The appeal is dismissed with costs.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.