HB 376-17
HC 1117-17
XREF HC 1190-17
XREF HC 2016-17

SYDWELL NSINGO
versus
VIOLA CHAGWEKA
and
TINASHE TASHAYA N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 5 DECEMBER 2017 AND 7 DECEMBER 2017

Urgent Chamber Application

B Sengweni for the applicant
Ms M Sibanda for the 1st respondent

MATHONSI J: The rules of this court allow a party, in appropriate circumstances, to make an approach to the court on a certificate of urgency seeking urgent relief. When such an approach is made the court is required to drop everything and promptly attend to the matter. The court does so and abandons all the other matters it is dealing with because the exigencies of such a matter are such that it cannot wait and should be dealt with as a matter of priority in order to address the mischief which, if allowed to perpetuate, would result in harm or irreparable damage or loss to the applicant. It is for such reasons that the court sees it fit to drop everything and entertain the applicant in the exercise of its discretion.

Those rules of the court providing for an approach on an urgent basis are not to be abused. They are certainly not for a parent who refuses to pay reasonable maintenance for his children, who has been ordered by the maintenance court to provide such reasonable maintenance *pendent lite*, but would rather not pay or pay as little as possible, to come to court on an urgent basis seeking a stay of the order for provisional maintenance for no other reason than that he would like to challenge the provisional maintenance order by way of a review application to this court under circumstances suggesting that the resort to review proceedings was meant to circumvent the protection provided to beneficiaries of the maintenance directive by

s27 (3) of the Maintenance Act [Chapter 5:09]. This is because upon a closer look at the purported review application it becomes very apparent that there are no review grounds.

This urgent application was initially placed before me on 10 November 2017. Upon going through the application I formed the preliminary impression that it was not urgent. I stated;

> "There is absolutely no legal foundation for the hearing of such a matter as urgent. The refusal to pay maintenance in terms of an order of the maintenance court is not the kind of urgency contemplated by the rules of this court. I therefore refuse to deal with the matter as urgent."

The applicant would have none of it but took time to respond. It was only on 28 November 2017 that the legal practitioners representing the applicant wrote a letter to the registrar insisting on being heard. They stated;

> "RE: SYDWELL NSINGO V VIOLA CHAGWEKA AND ANOTHER 2970/17
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> We refer to the above and the query raised by Hon Justice MATHONSI in this matter. Our client is convinced that this matter is urgent and instructed us to request audience with the judge at his convenience. Kindly advise when."

It was in consideration of the applicant's insistence that he be heard on an urgent basis albeit almost three months after the impugned maintenance order was issued by the maintenance court on 14 September 2017, that I set the matter down for hearing. The task to prepare a certificate of urgency fell to one Taboka Nyathi, a legal practitioner practicing law at the law firm of Makiya and Partners whose reasons for certifying the matter as urgent are that:

> "2. ----. There currently is an order of the court in operation against the applicant which order was obtained in violation of the applicant's constitutional rights to be heard and to a fair trial.
> 3. If the order sought by the applicant is not granted it means the applicant will for possibly many months continue to be bound by an order obtained in clear violation of procedure and fundamental rights.
> 4. The applicant has offered reasonable interim maintenance pending finalization of the review application and as such the issue of prejudice against the minor children or the 1st respondent is non-existent.
> 5. The balance of convenience clearly favours the granting of the order sought."

It is difficult to say that the legal practitioner who issued that certificate of urgency ever bothered to apply her mind to the matter. I say so because I have searched high and low for urgency in all the four relevant paragraphs and have been thoroughly disappointed not to find any. In my view urgency certainly cannot spring merely from a violation of a constitutional right to be heard. Surely there must be more to that violation requiring the court to abandon everything and deal with the matter.

Urgency cannot stem merely from binding the applicant to pay maintenance for his three very young children pending divorce, children whose paternity is not even in issue. He has an obligation to provide for his children even if he is providing more than they require. At least it is his children who are benefiting and they are entitled to be spoiled by their father. I do not want to believe that Taboka Nyathi considers an offer to pay $300-00 towards the maintenance of three children, instead of the $500-00 ordered by the maintenance court as constituting urgency requiring this court to deal with the matter as urgent and during the vacation.

Counsel for the applicant deserves to be commended for his determination, bravery and indeed his belief in the applicant's case to demand audience in those circumstances. It was in light of that that I allowed *Mr Sengweni* for the applicant to prosecute his client's case in the hope of being persuaded. If I expected *Mr Sengweni* to show me the urgency of the matter beyond what Taboka Nyathi had failed to do in her certificate of urgency, loads of disappointment awaited me.

Mr Sengweni submitted that the matter is urgent because there is a maintenance order which was issued against the applicant unprocedurally and yet he cannot afford to pay the sum of $500-00 for his three children which he was ordered to pay. He added that the irregularity is found in the fact that the applicant was not accorded a chance to show the maintenance court why he could not afford to pay the maintenance. He went on to submit that if the application is not heard as urgent the applicant would accumulate arrears and might end up being imprisoned for failure to comply with a maintenance order. On why the application was only made two months after the impugned judgment, *Mr Sengweni* submitted that he takes responsibility for that

because he had advised his client that the review application had the effect of liberating him from complying with the order.

Ms Sibanda for the first respondent submitted that the matter cannot possibly be urgent because the applicant has already resorted to self-help by refusing to comply with the order for maintenance. He is paying only in terms of his offer of $300-00 per month. As it is now the applicant is approaching the court with dirty hands as he is deliberately flouting the court order. For that reason he should be denied audience it being trite that those who approach the court with dirty hands should not expect the court to accord them audience until such time that they purge their contempt of the court.

Having listened to counsel, I remain unmoved from my preliminary view of the matter. Let me set out the historical narrative. Alleging cruelty as is incompatible with the continuance of a normal customary marriage and physical and emotional abuse the first respondent instituted summons action against the applicant on 24 April 2017 in HC 1117/17. She sought a dissolution of the marriage, maintenance for three minor children namely Byron Sydwell Nsingo, born on 11 September 2006, Darrel Sydwell Nsingo born on 14 April 2010, Mia Nsingo, born on 8 October 2014 and a division of immovable and movable assets acquired by the two of them during eleven years of marriage. The action was contested by the applicant and is still pending before this court.

On 31 July 2017, the first respondent issued maintenance summons against the applicant in the maintenance court at Bulawayo. She sought an order directing the applicant to contribute towards the maintenance of the three minor children at the rate of $1 955-00 per month as he was failing to provide reasonable maintenance for those children aged between 11 and 2 years. The matter was set down for hearing on 21 August 2017. The record of the maintenance court shows that on that date *Mr B Sengweni* appeared on behalf of the applicant and a lengthy hearing was conducted. The applicant in that case, who is the first respondent herein, stated her case and sought to justify why she was claiming the sum of $1 955-00 when the responsible person was earning only $1305-00 per month.

She stated that they had been operating a transport business with a fleet of five buses plying the Bulawayo –Masvingo route and two minibuses. In addition they rented out a flat in town. The tenants pay a sum of $350-00 per month all of which she had to forego after vicious attacks by the applicant forced her to run away from the matrimonial home fearing for her life. The applicant responded through his legal practitioner who addressed the court at length disputing the allegations made by the first respondent. He offered $200-00 as maintenance for the three minor children even though his net salary as an employee of Zimra was shown to be $990-26 and not $1 305,00.

At the end of that hearing the matter was postponed to 23 August 2017. On that date the applicant was again represented by a legal practitioner of his choice who made further submissions to the court and produced exhibits on behalf of the applicant in the form of bank statements, proof of ownership of certain buses, operator's licences and Zimra clearance documents. All this was being done in order to contest the first respondent's claim of $1955-00 maintenance for the three minor children. Counsel for the applicant also submitted that although he had requested Prosper Nsingo, the applicant's brother, to come and testify on his behalf as a witness, he was "surprised he is not in court." This is the man who was said to own some of the buses operated by the parties.

The record shows that after submissions made by counsel for the applicant the present first respondent was allowed to respond. The matter was then postponed to 28 August 2017 and further slated for 6 September 2017. On that date the applicant defaulted despite knowledge of the set down. In his affidavit in support of the review application to which I have been referred he explains why he defaulted at paragraph 6 which reads in part;

> "I am further advised that the 1st respondent interfered with the 2nd respondent by making baseless allegations to the 2nd respondent's superiors and the Chronicle Newspaper which interference resulted in the 1st respondent appearing on the 4th of September 2017 and again on the 9th of September 2017 in my absence. Her interference is also evident from the fact that the clerk of court called my legal practitioner of record and asked him to appear before the court on the 4th of September 2017 which my legal practitioner rightly refused."

Of course the applicant confuses the dates because the record shows that the matter had been slated for 6 September 2017 on which date it was postponed to 11 September for judgment.

It is common cause that a maintenance application is set down by the maintenance officer. It has become apparent that the maintenance officer did communicate the new date to the legal practitioner concerned, it being also common cause that from the time the matter commenced it is that legal practitioner who had been attending and making submissions on behalf of the applicant.

What we therefore have here is a situation where, well aware of the set down, the applicant took the conscious decision not to avail himself. As a necessary sequel to such non-attendance a ruling was made. Now the applicant rushes to this court alleging a violation of his constitutional right of audience. A party that deliberately refrains from exercising such constitutional right is not denied the right when an opportunity is presented for them to enjoy that right but the party chooses not to.

Whatever the case, on 14 September 2017 the maintenance court issued a maintenance order, to wit;

> "Pending the divorce order to be made by the High Court, the following interim maintenance order is granted in favour of the applicant:
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> 1. Respondent is hereby ordered to pay US$500 as monthly maintenance for 3 children namely Byran Sydwell Nsingo, Darrell Sydwell Nsingo and Mia Sydwell Nsingo with effect (from) September 2017 until the children (reach) the age of 18 years or become self-supporting whichever comes first.
> 2. In addition, respondent shall pay school fees for 2 minor children who are attending school at their respective schools with effect (from) 3rd term 2017. The fees shall be paid on or before opening of schools.
> 3. Respondent shall clear or pay all school fees arrears, owing at the two children schools on or before end of December 2017.
> 4. Applicant shall collect rentals of $350-00 from the flat in town the parties own or else to move together with the children and stay in that flat with effect (from) September 2017."

Exactly two months after that maintenance order was granted, the applicant filed this application seeking the suspension of the order to enable him to prosecute a review application in which he craves the setting aside of the order and its substitution with one directing him to pay $300-00 instead. Although he gives an explanation for the two months delay in approaching this court, namely that he had been ill-advised by his legal practitioner that the review application he

filed on 5 October 2017, also a month after the order was granted, had suspended the maintenance order, that explanation is tenuous indeed. In fact it is steeped in the ridiculous regard being had that in terms of s 27 (3) of the Act even an appeal does not suspend a maintenance order.

It is however the concept of approaching this court on an urgent basis in order to avoid paying reasonable maintenance for children which is extremely unacceptable. This is particularly so when the applicant earns almost $1000-00 even without regard to what he makes from the transport business which was the subject of contestation. Even from his basic salary as an employee of Zimra he is left with almost $500-00 to spend on his own while his three children have to share the remainder between themselves.

This court is the upper guardian of all minor children and ensures, first and foremost, that their best interests are catered for before anything else including the overgrown ego of a father who wants to dictate what has to be given to the children no matter how unreasonable that is. It simply cannot be allowed. In my view the rules of this court allowing litigants to come to court on an urgent basis were never crafted for such matters. There is nothing urgent about trying to avoid maintenance. As long as the hearing of a matter as urgent remains the discretion of this court, there is no way the court will exercise such discretion in favour of a recalcitrant parent at the expense of his minor children. Therefore even after hearing counsel I remain firmly rooted in my initial position that this matter is not urgent and constitutes an unpalatable abuse of the process of the court.

In the result, it is ordered that;

1. The hearing of the application as urgent is hereby refused.
2. The applicant shall bear the costs of this application.

Sengweni Legal Practice, applicant's legal practitioners
Vundla-Phulu & Partners, 1st respondent's legal practitioners