BERTHA KAKONO

versus

HERBERT KAKONO

HIGH COURT OF ZIMBABWE

CHITAKUNYE & MAWADZE JJ

HARARE, 22 June 2011 & 29 March 2011

**Civil Appeal**

Appellant in Person

No appearance for respondent

MAWADZE J: This is appeal against the judgment of the Harare Magistrates Court delivered on 1 July 2010. The appellant appeals against the order granted by the magistrate declining to grant the upward variation of a maintenance order.

After hearing the appellant on 22 June 2011 we granted the following order and indicated that the reasons thereof will be availed in due course:-

“1. The appeal is allowed.

2. The decision by the lower court dismissing the appellant’s

application for variation is hereby set aside.

3. The matter is referred back to the lower court for a proper inquiry to be held.

4. The original maintenance order remains in force.

5. No order as to costs”.

I now proceed to deal with the reasons for the order granted. A brief background of the case is in order:-

On 26 February 2010 the appellant applied for contributory maintenance inn terms of s 4 of the Maintenance Act [*Cap 5:09*] (hereinafter the Act) in respect of two minor children Kudzaishe Kakono and Simbarashe Kakono before the learned magistrate Tahwa. On 18 March 2010 after holding the requisite inquiry in terms of s 5 of the Act the learned magistrate granted the following order in terms of s 6 of the Act;

“Order granted in that both parties contribute to maintenance of minors. Respondent to meet half costs of school fees termly, buy casual wear twice a year, to pay monthly maintenance of US$150-00 with effect from 31 March 2010 and contributing to cover minors on medical aid” (*sic*)

On 14 June 2010 the appellant approached the court seeking an upward variation of the maintenance order granted on 18 March 2010 and the discharge of the provision that the appellant contributes half of the school fees. This application was made in terms of s 8 of the Act. The appellant wanted the maintenance order to be varied from US$150-00 per month to US$300-00 per month. The basis for the application for variation of the maintenance order is captured in the appellant’s affidavit which states as follows:-

“I now have in my possession proof that other than the means of income the respondent showed the court at earlier hearing he earns more than that.

* That the amount of US$150-00 granted by the court is inadequate to maintain the standard of living the children were living prior to separation.
* I have not been able to pay the other half of the school fees of the minor children as the court ordered as I am not employed. The respondent has always paid the full school fees and should be ordered to do so.
* Whereof I pray for an order varying the maintenance to US$300-00 per month and an order that the respondent pays the full school fees for the minors”.

During the brief hearing held on 1 July 2010 before the learned

magistrate Rwodzi the appellant gave the same reasons as outlined in her affidavit for seeking the variation of the maintenance order. The respondent opposed the application and indicated that the appellant should not be heard as she had dirty hands arising from her failure to comply with the initial maintenance order compelling her to pay half of the children’s school fees. As regards the merits of the application the respondent stated that the appellant had now put tenants in the matrimonial house and was realising a monthly income of US$300-00 to $400 per month.

The respondent indicated that his circumstances had not changed since the granting of the initial order except that the divorce proceedings have commenced. The respondent dismissed the document produced by the appellant as of no value as it is not signed by the parties mentioned therein and could not be taken as proof that the respondent had extra income. The respondent therefore sought the dismissal of the application.

The appellant in response stated that she is unable to contribute towards the children’s school fees due to lack of means as she is unemployed. The appellant refuted the allegations that she was renting out some of the rooms of the matrimonial house to tenants for a fee. The appellant stated that she stays with her niece and that there is a maid and a gardener who occupy staff quarters and that one of the rooms is full of property belonging to the respondent’s brother. Appellant insisted that the document she produced was of some probative value as it showed that the respondent owned a company. The appellant indicated that she could not wait to have the issue of maintenance resolved by the divorce court as this process takes long despite that the divorce proceedings have commenced.

After this brief hearing the learned magistrate granted the following order on 1 July 2010:

“Application for upward variation be and is hereby dismissed – no changed circumstances”.

There were no reasons given for the order granted and on 2 July 2010 the appellant wrote to the clerk of court requesting to be furnished with the reasons for the ruling by the learned magistrate dismissing her application for variation as she wanted to appeal against the order. The record does not show that the appellant’s request was acceded to and to date there are no such reasons given by the learned magistrate in the record of proceedings. On 9 July 2010 the appellant noted an appeal with this court against the order granted by the learned magistrate Rwodzi. The grounds of appeal are as follows:-

“1. The court *a quo* erred in finding that there were no changed circumstances when the appellant clearly proved that;

1. The respondent had additional income which had not been proved at the initial hearing of the matter. The court *a quo* disregarded the evidence produced by the appellant and failed to give reasons as to why it did so.

2. The court *a quo* erred in taking an arm chair approach to the appellant’s case when the appellant had proved that the respondent had more means than initially proved in court *a quo”.*

There are a number of irregularities in this matter. The failure by the trial magistrate to give reasons for the order granted is a serious misdirection. The court *a quo* is a court of record and should always give reasons for the decisions made. The rationale for this is self evident as MUCHECHETERE J (as he then was in *S* v *Ndebele* 1988 (2) ZLR 249 at 254 had this to say:-

“All courts are courts of record and are required to keep full comprehensive records of proceedings …. the need to do so is obvious. In the absence of such record how is the review or the Appreciate Tribunal to assess the correctness and validity of any proceedings placed before it for adjudication?”

In *casu* no reasons are given as to the reason or reasons why the learned magistrate was of the view that there are no changed circumstances. The appellant’s request for the reasons for the order given was simply ignored.

The court *a quo* made a finding in terms of s 8(7)(b) the Act that the means or circumstances of the respondent have not changed since the making of the order on 18 March 2010. In the absence of reasons for this finding this court is constrained in deciding whether the decision arrived at by the court *a quo* is indeed correct and supported by the facts or evidence on record. This problem is further compounded by the fact that no evidence was led in much detail during the inquiry. The averments by the parties during the inquiry clearly indicated material dispute of facts which should have been properly dealt with by allowing the parties to lead evidence in chief and in cross-examination.

Despite the fact that the respondent was properly served for this appeal hearing and is in default this court is still unable to find in favour of the appellant by granting the upward variation sought in the court *a quo*. This is so because there is insufficient evidence on record to make an informed finding in that regard. The proper course to take in such circumstances is to set aside the order granted declining the upward variation of the maintenance order and to refer or remit the matter to the court *a quo* for a proper inquiry to be carried out by any magistrate of competent jurisdiction. In the interim the original order granted on 18 March 2010 remains valid.

CHITAKUNYE J: agrees …………………………