LARA JANE DUNCAN
versus
HENRI DU CLADIER DE CURAC

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 7 February 2017, 14 February 2017 & 28 March 2018

Opposed Matter

S. Mpofu, for the applicant
S. Njerere, for the respondent

NDEWERE J: On 18 December, 2015, the applicant applied for a declaratur to the effect that the respondent was in contempt of the court in relation to the court order in case HC 1243/98. The court order in case HC 1243/98 was granted on 20 January, 1999. It provided the following:

> "It is ordered that:
> 1. That a decree of divorce be and is hereby granted.
> 2. Custody of the minor child, Tyler-Jane du Cladier De Curac, be awarded to the plaintiff.
> 3. The defendant shall exercise reasonable access rights to Tyler-Jane, such rights to include access on every alternate weekend between the hours of 5pm Friday to 5p.m. Sunday, alternate Public Holiday, Christmas day and Tyler –Janes's birthday, except when her birthday falls on a school day, and for one half of every school holiday.
> 4. The defendant shall pay to the plaintiff and by way of maintenance for Tyler-Jane, the sum of $4 000.00 per month until Tyler-Jane attains the age of 18 years or becomes self-supporting, which ever event is the sooner.
> 5. Maintenance shall be payable on or before the first day of every month.
> 6. For so long as maintenance is payable in terms of this order, the defendant shall meet the costs of prescriptive medicines and all medical aid shortfalls reasonably incurred.
> 7. The defendant shall pay to plaintiff at the beginning of each short term, one half of Tyler-Jane's crèche fees, and thereafter, all school fees incurred in respect of her primary, secondary and if necessary, tertiary education. It is recorded that the Tyler-Janes's current crèche fees $1 000.00 per term.
> 8. The defendant shall pay to the plaintiff the sum of $10 000.00 as her contribution to the parties joint Beverly Building Society Bank Account.
> 9. The plaintiff shall retain as her sole property the Mazda pick-up truck.
> 10. Each party shall retain as his or her own such movable property as is currently in their respective possession.

11. Each party is to pay their own costs, save that defendant shall contribute the sum of $4 000.00 towards plaintiffs legal costs."

In her founding affidavit, the applicant said her understating of the 20 January, 1999 court order was that the respondent was obliged to pay Tyler's tertiary fees. She said Tyler was admitted at the University of Stellenbosch on 30 November, 2015. She said she called upon respondent to pay Tyler's tertiary fees and he refused to pay all the fees. She also said Tyler herself sent the respondent an e-mail attaching the fee structure and this e-mail was attached to the application as Annexure C1. She also referred to conversations on whatsapp texts between Tyler and respondent and between her and the respondent. Lastly, she referred to a letter written by her lawyers to the respondent dated 26 May, 2015, which was telling respondent to comply with the court order and pay the tertiary fees on his own since the obligation was not placed on both parties but just on the respondent. The letter stated that refusal to comply with the court order amounted to contempt of court. Applicant said the letter invited respondent to seek clarifications on the matter from the applicant's lawyers and the failure of the respondent to pay the fees or seek clarifications meant that he was in contempt of court.

The relief which the applicant sought from the court was indicated in the draft order as follows:

"It is ordered that:
1. Respondent is in contempt of court.
2. Respondent shall comply with the order of this court relating to payment of tertiary education fees for Tyler du Cladier de Curac.
3. Respondent shall pay costs at an attorney and client scale."

The respondent filed opposing papers on 14 January, 2016. In his opposing affidavit, the respondent said the applicant had no *locus standi* to raise the issue of Tyler's maintenance since Tyler who was born on 6 September, 1996, was over eighteen years old. He also said that since the Maintenance Order was registered in the Maintenance Court in 2009 under Case No. M907/09, any issue to do with that maintenance order should be raised in the Maintenance Court. His conclusion was that the High Court would not have jurisdiction to deal with Tyler's maintenance. The respondent also alleged improper service of the application by a policeman who threatened to arrest him when service should have been by the applicant, her legal practitioners or other agent or the Sheriff.

The respondent denied that he was in contempt of court. He said the Maintenance Order terminated by operation of law when Tyler-Jane turned 18. He said Tyler-Jane herself upon

turning 18, could have applied for the extension of the order but she chose not to do so. The respondent said para 4 of the Court Order clearly stated that maintenance would be paid "until Tyler-Jane attains the age of 18 years or becomes self-supporting, whichever event is the sooner."

The respondent also said he was not aware that Tyler-Jane had been admitted to University. All he knew was that she had applied to the Universities of Cape Town, Pretoria and Stellenbosch. He said he never received an invoice from either the applicant or Tyler-Jane. He attached documents from the University of Cape Town, University of Pretoria and University of Stellenbosch which showed that the fee structures were inconclusive as the amounts given were said to be estimates, and since they depended on the course chosen and whether one was in a catering or self-catering residence. He queried why, if Tyler-Jane had been admitted to any of the Universities, there was no letter from the concerned university and an invoice. He said he had no legal obligation to pay for Tyler-Jane's university because the maintenance order terminated. He also said even if he were to pay the university fees, he could not afford a foreign university because the company he used to work for closed in 2014 and he no longer had guaranteed employment. He said he also had three other children who are still at school.

He urged the court to dismiss the application with costs on the legal practitioner and client scale.

Both parties filed Heads of Argument in support of their arguments.

After going through all the papers filed and hearing oral arguments, my view is that the issues for determination are firstly, the two points *in limine* raised by the respondent about lack of *locus standi* for the applicant and lack of jurisdiction for the High Court. The third issue is whether the respondent is in contempt of the Court Order of 20 January, 1999.

On *locus standi*, clearly, the applicant has *locus standi* to file this application. The order of 20 January, 1999, was granted in a divorce matter between her and the respondent. The Court Order was binding on both parties in the divorce. The order included ancillary issues of maintenance of the parties' child. The applicant's view was that the respondent had failed or neglected to comply with the order made in their divorce case. Surely she has the *locus standi* to raise that issue? She is definitely an interested party. It should be noted that the application is not for a maintenance claim, but for a contempt of Court Order for failure to comply with a Maintenance Order granted in 1999. The preliminary point about the applicant having no *locus standi* is therefore dismissed.

The next point *in limine* raised was whether the High Court has jurisdiction to enforce an order that has been registered in the Maintenance Court. In response to this point *in limine,* the applicant referred to s 171 of the Constitution of Zimbabwe, Amendment No. 20 of 2013. It provides as follows:

> "(1) The High Court –
> (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe".

The above section provides the legal position about jurisdiction. In any case, this is not an application for maintenance or its variation, it is an application for a contempt of Court Order. So why should the jurisdiction of the High Court be ousted? Furthermore, the contempt of court application is premised upon a prior order of the High Court for divorce and the ancillary issue of a child's maintenance. What is in issue is the interpretation of the High Court order of 20 January, 1999 regarding tertiary education for the child of the terminated marriage. So how can the High Court which granted the order which is the basis of the disputed interpretation, be said to have no jurisdiction in the matter? Such a conclusion would not make sense. The point *in limine* on lack of jurisdiction is dismissed.

The only remaining issue is whether the respondent is in contempt of court as alleged. Clause 4 of the Court Order of 20 January, 1999, provided for maintenance of $4 000 per month "until Tyler – Jane attains the age of 18 years or becomes self-supporting, whichever event is the sooner."

Clause 7 of the Order provided as follows,

> "7. The defendant shall pay to plaintiff at the beginning of each school term, one half of Tyler – Jane's crèche fees and thereafter all school fees incurred in respect of her primary, secondary and if necessary, tertiary education…."

Clause 7 is the reason why the parties have come to court. Applicant has submitted that Clause 7 went beyond the age of 18 years; its provisions did not terminate at age 18. I am persuaded to agree with that argument. We have clause 4, which gave a specific amount of money payable as maintenance and provided that this shall terminate at age 18. Clause 5 and 6 which follow are all about maintenance which terminates at age 18. However Clause 7 brings in the issue of tertiary education. The court shall take judicial notice of the fact that in Zimbabwe, children who do seven years of primary school and six years of secondary school will begin their tertiary education when they are eighteen years. This is because ordinarily, the primary school children are required to start school when they are five or six years. After seven years of primary school, they will be either 12 or 13 years and if you add six years of high

school they will be eighteen or 19 years old. Indeed, when Tyler – Jane's parents started discussing her tertiary education, it is confirmed by the respondent that she was over 18 years. So in my view the obligations which were given in Clause 7 of the Court Order were not meant to terminate when Tyler reached 18 years. If that was the intention, tertiary education would never have been mentioned in Clause 7.

However, the phrase, "and if necessary," was put in the order, before tertiary education. In my view, this phrase is the decisive phrase. The necessity was not defined. Several questions can be posed. For example;

Is it necessary for Tyler – Jane to attend tertiary education? Is it necessary that she attends a foreign university? Is it necessary that respondent pays the tertiary fees? Is it necessary that respondent pays all of the tertiary fees on his own?

In my view, until the "if necessary" phrase has been addressed, the respondent cannot be found to be in contempt of the Court Order. In *Minister of Lands and Others* v *Commercial Farmers Union* 2001 (2) ZLR 457 SC the requirements of contempt were set out as given in CJ MILLER's book on *Contempt of Court* as follows:

> "Before a finding of contempt of court can be made it is necessary to determine whether there has been a factual breach of an order or undertaking on the part of the person brought before the court. This necessarily demands that the terms of the order be expressed in clear unambiguous language and in so far as possible, the person should know with complete precision what it is required to do or abstain from doing."

It is clear from the above case that before a charge of contempt can succeed, the court order should be definite, clear and precise in its terms so that it is not misunderstood. It should not give rise to various inferences and conclusions. In the present case, the use of the phrase, "if necessary" created various inferences as exemplified above. The order was no longer precise and unambiguous.

That is probably the reason why, unlike in the fees up to secondary school, the respondent was asking to pay half. He was taking advantage of the imprecise nature of the order in relation to tertiary education. Because of that phrase, the meaning of the court order in relation to tertiary education became blurred, it was no longer precise.

The case of *Mangwiro and Others* v *City of Harare* HH 307/2014 also held that an applicant seeking an order for contempt of court is required to establish

(a) That an order was granted against the respondent.

(b) That the respondent is aware of the order.

(c) That the respondent willfully disobeyed or neglected to comply with it.

In the present case, the applicant was not able to establish that respondent willfully disobeyed the order because of the phrase "…if necessary…"

Furthermore, no actual refusal to pay was established by the applicant. In his opposing affidavit, respondent said he never received any letter from a university confirming Tyler – Jane's admission, neither did he receive an invoice of the actual fees. All he received were documents from three universities with estimates of fees. These factual assertions by the respondent were never disputed by the applicant. So they must be accepted as the correct factual position.

Before the contempt of court allegations were raised, there was need to tender to the respondent the confirmation of admission and the fees invoice. Respondent said this was never done and no answering affidavit was filed by the applicant to dispute this. It is trite that what is not disputed by the applicant is taken to be the correct position. So if the respondent was never requested to pay the fees through tendering to him the relevant admission letter and a fees invoice, why rush to court and allege contempt?

In my view, there is no basis to hold respondent to be in contempt of court. The application for contempt of court must therefore fail. However, the applicant is not to blame for the imprecise nature of the order on tertiary education. There is therefore no need to punish her with an order for punitive costs. It is therefore ordered as follows:

1. The application is dismissed.
2. The applicant shall pay the costs of the application on the ordinary scale.

Munangati & Associates, applicant's legal practitioners
Honey & Blackenberg, respondent's legal practitioners