OLGA MUKWINDIDZA
versus
MUHAMMAD AKRAM
and
MAGISTRATE B. PABWE N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 May 2019 & 1 November, 2019

Opposed Application

J. Mafumhe, for the applicant
Advocate D. Ochieng, for the respondents

MANGOTA J: I heard this application on 15 May, 2019. I delivered an *ex-tempore* judgment in which l granted the same.

On 26 June, 2019 the registrar of this court addressed a minute to me. He stated, in the minute, that my decision had been appealed and reasons for the same were required. These are they:

The applicant applied for review of the proceedings of the second respondent. Her grounds of review, quoted verbatim, read:

> "(i) it was incompetent for the second respondent to grant the relief that had not been prayed for. Second respondent could not have stayed the maintenance order when the first respondent had sought the discharge of the same.
>
> (ii) in any event, second respondent proceeded to stay the maintenance order based on a criminal appeal. The approach adopted by the second respondent is contrary to section 27 of the Maintenance Act, [*Chapter 5:09*].
>
> (iii) The second respondent ignored the best interests of the minor child, Mohsin Akram. Whilst applicant is in custody, no provision was made by the second respondent to secure the best interests of the minor child.

(iv) the decision to stay the maintenance order is grossly irregular both in fact and in law."

The above mentioned grounds were predicated upon the following common cause matters. These were that:

a) On 18 August, 2015 the maintenance court ordered the first respondent to pay $2 050 per month as maintenance for the child, one Mohsin Akram, whom he allegedly sired with the applicant.
b) The applicant, the first respondent states, was arraigned before the criminal court on charges of forgery, extortion and fraud.
c) She was fined $300 for allegedly falsifying Mohsin's birth certificates and was ordered to restitute $6 000 she had been paid through the maintenance order which the first respondent sought to be discharged.
d) She appealed her conviction and sentence and the appeal was, at the time of hearing, pending at this court.
e) on 28 September 2015 the first respondent applied for discharge of the maintenance order.
f) He premised his application upon the applicant's conviction and sentence.
g) On 16 October, 2015 the applicant applied for variation of the maintenance order.
h) Both applications - for discharge and variation – were set to be heard on the same date by the second respondent.
i) The application for discharge was heard first.
j) It was heard on 29 February 2016.
k) During the hearing, the applicant asserts, the first respondent tendered in evidence a court extract which showed the applicant's conviction.
l) The second respondent suspended the order of maintenance pending the hearing and determination of the applicant's criminal appeal.

The suspension of the maintenance order constitutes the applicant's complaint. She insists that the same was grossly irregular and was not in tandem with the relevant law. She moved me to set the magistrate's order aside.

The first respondent sings in the applicant's corner on the assertion which is to the effect that the second respondent's order was/is irregular. Reference is made in this regard to paras 7,

9.1, 9.5 and 10 of his notice of opposition. These appear at pp 132 and 133 of the record. He states, in para 7, as follows:

> "7. It is correct that the second respondent ought to have discharged the maintenance order especially if regard is had to the finding of the court in the reasons for judgment that as it stands the facts of the matter point to the applicant's husband to whom she is still married to (sic) as the father of the child. While the decision could have been irregular at law the court's discretion was reasonable."

He asserts in para 9.1 that:

> "9.1 I aver that the reasons proffered by the second respondent in his judgment favoured the discharge of the maintenance order in question."

Paragraph 9.5 reads:

> "9.5 While the court *a quo* should have ordered discharge, it is denied that second respondent aided in any away my alleged abdication of my responsibility to maintain the minor child."

He deals with the applicant's prayer in para 10 of his opposing papers wherein he states that:

> "10 The court *a quo* must be directed to make a decision on whether or not the maintenance order of 18 August 2015 should be discharged in light of the contents of the application for discharge and the submissions made at the hearing of the matter. Thus I pray that, the decision be made operative retrospectively from 4 March 2016…"

It is evident, from the foregoing, that both the applicant and the first respondent are *ad idem* on the point that the second respondent's decision was/is incompetent. The variations which the first respondent makes in his notice of opposition do not, in substance, shift his position from what, in his view, should have been the outcome of the court *a quo's* proceedings.

Applications for review fall under Part V of the High Court Act [*Chapter 7:06*]. Section 27 of the same stipulates three grounds in terms of which any proceedings or decision may be brought on review. These comprise:

(i) absence of jurisdiction on the part of the court, tribunal or authority concerned;

(ii) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned, or on the part of the authority concerned, as the case may be;

(iii) gross irregularity in the proceedings or the decision.

The applicant does not criticise only the decision of the second respondent. She criticises both the decision and the process of reasoning which the second respondent employed to arrive at

that decision. Her second ground of review is conspicuous in the mentioned regard. She states, in the same, that the approach which the second respondent adopted is contrary to s 27 of the Maintenance Act, [*Chapter 5:09*].

Whether or not the applicant's criticism holds does depend on the second respondent's application of section 27 of the Maintenance Act to what was then before him. What the parties placed before him was an application for discharge of the maintenance order. It was not an application for the suspension of maintenance order.

To appreciate the applicant's complaint, it is pertinent to quote *verbatim* the portion of the judgment of the second respondent to which he applied s 27 of the Maintenance Act. The portion appears at p 155 of the record. It reads:

> "An appeal has been noted against the criminal conviction which has the effect of suspending the effect of the condition. However, a fact remained that a court of similar jurisdiction determined that the birth certificate in applicant's name is fake.
>
> In light of this and also the fact that the respondent (i.e. applicant) is still legally married to the husband hereby bringing into operation the often quoted rule '*gomba harina mwana'*, the court is called upon to make a value judgment.
>
> In terms of section 27 (c) of the Maintenance Act, the court can on application suspend part or the whole of the order appealed against pending the determination of the appeal. This section is not applicable in this case. However, by parity of reasoning Im(*sic*) will look at this application in those circumstances……
>
> Therefore, I am not disregarding the criminal conviction entirely and at the same time not burden further the applicant (ie respondent) with paying maintenance whose paternity is with the husband regard being had to common law rules and legal documents.
>
> In the result, discharging the order at this stage before the appeal in the criminal court is heard will not be well informed. Accordingly, I order for the suspension of the current maintenance until the determination of the criminal appeal …" (emphasis added).

A number of issues arise from the second respondent's above-quoted process of reasoning. The opening section of the cited portion of the judgment is as unclear as he states it. The second matter which arises is whether or not he had the jurisdiction to make what he termed a value judgment on a matter which was strictly within the four corners of the Maintenance Act. The simple answer is that he did not have such.

Section 27 (3) (c) of the Maintenance Act upon which the second respondent rested his value judgment relates to appeals which are processed through the maintenance court and in terms

of the Maintenance Act. It does not deal with processes which relate to criminal matters or, as *in casu, to* criminal appeals. It is, therefore, mind boggling to observe that the second respondent maintained the view that a law which relates to processes of the maintenance court and the Act under which it falls would, by parity of reasoning, apply to processes which fall in the purview of the criminal law. *A fortiori* when he states, as he did, that he had regard to what he termed common law rules whatever he meant by the assertion.

The second respondent must have known, on a proper reading of the Maintenance Act, that what he was doing was not only irregular but was also grossly irregular. He should have realised that no common law rule was applicable to the case which he was dealing with. He should have remained alive to the fact that, as a creature of statute himself, he could not go outside the four corners of the Maintenance Act and proceed to determine the matter on the basis of what was not provided for in the Act. His process of reasoning caused him to traverse outside the jurisdiction which the Maintenance Act confers upon him.

The second respondent, it is evident, misconstrued the meaning and import of s 27 (3) (c) of the Maintenance Act. He accepted that it was inapplicable to what was then before him. He, in the same breadth, proceeded to state boldly that he would, by parity of reasoning, consider the application of the parties in terms of the section which he accepted was inapplicable to the case.

The second respondent's decision ends with the order which he made. He did not explain what he would do with the parties' case after the criminal appeal has been heard and determined.

The decision which the second respondent made makes him *function officio* to the case. He, on the mentioned basis, cannot revisit his decision after the appeal. He, in the process, left the parties in the dark as to what would happen to their case post the appeal. He did not spell out how the first respondent's application for discharge would be resolved after the determination of the applicant's appeal. The proceedings which he conducted were grossly irregular and so was the decision which he made.

If the second respondent had read the relevant section of the Maintenance Act and had appreciated what he was called upon to do, he would have realized that his answer to the same is crisply provided for in s 8 of the Maintenance Act. The section deals with variation or discharge of direction or order. His application of the evidence which the parties placed before him to paragraph (a) of subsection (5) of s 8 of the Maintenance Act would have persuaded him to dismiss

the application if he was of the view that the same was frivolous and / or vexatious. If the application had merit, he would have been properly guided by para (a) of subsection (7) of s (8) of the Maintenance Act in which case he would have discharged the maintenance order which was the subject of the proceedings which were then before him. He could not adopt what I may refer to as the middle-of-the road approach which he employed to arrive at the decision which he made. What he did was not at all called for on the evidence which had been placed before him.

The second respondent's conduct was not only grossly irregular. It exceeded the jurisdiction which the Maintenance Act conferred upon him. As to the meaning and import of the phrase *gross irregularity* reference is made to the case of *Pondoro (Pvt) Ltd & Anor* v *Nemakonde & Anor*, 2008 (1) ZLR 6 wherein it was stated that:

> "irregularity must have resulted in a miscarriage of justice for it to be sufficient ground for review. It is not merely high-handed or arbitrary conduct which is described as a gross irregularity. Behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it prevented a fair trial of the issues then it will amount to a gross irregularity."

I am satisfied that, regard being had to what the parties placed before the second respondent, the decision which he made is so outrageous in its defiance of logic and reason that no sensible court which applied its mind to the question to be decided could have arrived at the conclusion which he reached.

The applicant, in my view, proved her case on a balance of probabilities. Her application is not without merit. It is, in the result, granted as prayed.

Mafumbe Law Chambers, applicants' legal practitioners
Mahuni, Gidiri Law Chambers, respondents' legal practitioners