

**Vuyo Mjimba
Versus
Zanele Francisca Mjimba**

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 10 and 22 November 2006

BHUNU J: The parties contracted a civil marriage on the 3rd of April 1999 at Bulawayo and the marriage still subsists.

There are two minor children of the marriage namely: -

1. Vuyisile Nkanyezi Mjimba a boy born on the 5th of December 1999 and
2. Nomvula Banele Mjimba a girl born on the 17th of March 2002.

Vuyisile is at primary school whereas Nomvula is still at Creche.

The parties are agreed that their marriage has irretrievably broken down such that it is beyond repair. They have also settled all the ancillary matters in terms of the deed of settlement filed of record with the exception of the issue of maintenance for the two minor children of the marriage.

In terms of the deed of settlement the defendant will have custody of both minor children. She has submitted exhibit 3 being a breakdown of what she considers to be the children's needs in the total amount of \$877 000.00 per month.

She earns \$372 000.00 per month. The plaintiff used to work for Olivine Industries (Pvt) Ltd. He has however since resigned from his employment with effect from the 31st October 2006 ostensibly to pursue further studies in South Africa. His enrolment with the intended educational institution in South Africa has not been confirmed. Apart from his mere say so he has furnished no concrete proof that indeed he is going to pursue further studies in South Africa.

He says he has a passion for the Sciences but his children cannot sustain themselves on his passion for further education alone. He says that during his studies he might earn a stipend as a research assistant. He however has no idea as to how much he will be able to earn in that capacity.

He stated without any contradiction that at the time of his resignation he was earning \$600 000.00 per month. He was unable to say how much he is likely to earn by way of terminal benefits from his previous employment. There is therefore no way of knowing whether that will be enough to sustain his children for the duration of his studies which is likely to take two years.

The plaintiff further stated that he will have no problem going back to his work nor taking up alternative employment if he so wishes.

The defendant testified that the plaintiff's resignation from employment is a ploy to avoid his maintenance responsibilities. She suspects that the plaintiff intends to take up alternative employment in South Africa with the aid of his four siblings who are resident in that country. Her suspicions are fortified by the fact that the plaintiff had to be arrested in the past after he had refused to pay maintenance for the two children and had blatantly defied a maintenance court order in the magistrates' court.

The plaintiff retorted that he has no intention to avoid his maintenance responsibilities, infact it is him who approached the maintenance court for an order directing him to pay maintenance for the children. The defendant countered that the plaintiff only approached the court to pre-empt her application for maintenance.

Given that, it is not in dispute that the plaintiff had to be arm twisted by arrest to force him to maintain his children and the fact that he resigned from his job before he had secured a place at the intended university, the probabilities favour the defendant's version.

I therefore find as a fact proved on a balance of probabilities that the plaintiff's intended move to South Africa is a ploy to avoid his maintenance responsibilities.

A casual survey of case authorities establish that where a person liable to pay maintenance deliberately decides to earn less than his earning capacity the court may assess the *quantum* of maintenance based on his earning capacity rather than his actual earnings. the case of *Peter Curzon Beswick v Caroline Magdalene Beswick* AD 211/77 is instructive. The facts of that case as summarised by MCDONALD CJ at page 2 of his cyclostyled judgment were as follows:-

"The evidence established that the appellant was capable of earning \$600 per month and that he could obtain employment at such a salary with certain free benefits. These included free accommodation, water, lights and medical aid. The appellant was once in such employment. He left it to take up employment at the rate of \$458 a month without accommodation, light and water. It was in these circumstances that the magistrate ordered the appellant to pay \$375 per month."

On these facts the appellant approached the appellate court complaining that having regard to his actual earnings the amount of maintenance awarded was unreasonably high. In dismissing the appeal the court held that having regard to the appellant's earning capacity the amount awarded by the magistrate for the support of his dependants was reasonable.

That being the case, the plaintiff is obliged to maintain his two children at the level commensurate with his earning capacity had he not voluntarily resigned from his lucrative job.

While the court takes cognisance of the fact that the children might benefit from the plaintiff's enhanced earnings in the event of him acquiring better qualifications, the children's immediate needs are however paramount.

It is therefore in the best interest of the children that they be maintained at a level commensurate with their parents' current earning capacity.

Their parents' total earning capacities are as follows: -

Plaintiff	-	\$600 000.00
Defendant	-	<u>\$372 000.00</u>
Total		<u>\$972 000.00</u>

At a glance it will be obvious that the defendant's claim is extravagant and unsustainable having regard to the parties' means at their disposal.

On the basis of the evidence before me it is not possible to determine the reasonable expenses on the children's needs. For instance no alternative schools have been suggested although it is clear that the schools they are currently attending are not within their parents' means.

The expenses for food, entertainment, clothing and transport all appear to be excessive having regard to the parties' total earnings per month. What I therefore propose to do is to share the total amount at the parties' disposal and let the custodian parent use each child's share according to each child's reasonable needs.

The case of *Gwachiwa vs Gwachiwa SC 134-86* which was quoted with approval in the case of *A Cutt vs A Cutt 1990 (2) ZLR 220* provides a useful rough guideline. In that case the court allocated one share per child and two shares per parent.

I will therefore allocate two shares to the plaintiff and one share to each child from the plaintiff's earnings. $\$600\,000.00 \div 4 = \$150\,000.00$.

Each child is therefore entitled to \$150 000.00 from the plaintiff.

I will do the same with the defendant's earnings: - $\$372\,000.00 \div 4 = \$93\,000.00$.

Each child is therefore entitled to \$62 000.00 from the defendant.

Father's contribution per child	-	\$150 000.00
Mother's contribution per child	-	<u>\$ 93 000.00</u>
Total per child		<u>\$243 000.00</u>

On the basis of the above calculations the plaintiff is liable to maintain each child at the rate of \$150 000.00 per month per child in accordance with his earning capacity at the moment regardless of the fact that he has voluntarily resigned from his job. Despite his resignation it is his primary duty to maintain his children according to his means and his children's current needs are paramount.

It has been argued that the plaintiff's earnings are gross earnings and not net earnings. That submission is clearly an after thought. The plaintiff did not see it fit to give

the court his net earnings at the trial. He gave the impression that the amount given constituted his net earnings.

It however appears to me that whatever prejudice he might have suffered in respect of his failure to disclose his net earnings is adequately compensated by the fact that in computing his maintenance contribution I have not included his benefits which according to his evidence are fairly substantial.

While the defendant desires and strives for a lavish, opulent life for her children, she will have to cut her garment according to her cloth. The children will just have to live within their parents' means.

On the other hand the plaintiff cannot shy away from his basic responsibility of maintaining his family by resigning his lucrative job in pursuit of his educational passion.

In the result it is ordered: -

1. That a decree of divorce be and is hereby granted.
2. That custody of Vuyisile Khanyezi (born 5 December 1999) and Nomvula Banele (born 17 March 2002) is awarded to the defendant.
3. That ancillary matters relating to access and distribution be and are hereby regulated in terms of the agreement of settlement filed of record dated 26th October 2006.
4. That the plaintiff be and is hereby ordered to pay maintenance for the two minor children of the marriage, **Vuyisile Nkanyezi Mjimba** born 5 December 1999 and **Nomuvula Banele** born 17 March 2002, at the rate of \$150 000.00 (One hundred and fifty thousand dollars) per month per child until each child attains the age of 18 years or is self supporting whichever is sooner.
5. That each party bears its own costs.

Scanlen & Holderness, plaintiff's legal practitioners
Honey & Blankenberg, defendant's legal practitioners