[2024] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CIVIL APPEAL NO COA2023PCCV00014

BETWEEN	**NG**	**APPELLANT**
AND	**MS-G**	**RESPONDENT**

Duncan Roye instructed by Williams, McKoy & Palmer for the appellant

The respondent appearing in person and self-represented

19, 21 June and 31 July 2024

Family Court – Jurisdiction under the Maintenance Act - Child maintenance – Whether the judge of the Family Court erred when she made the findings she did without documentary proof – Whether the judge of the Family Court erred in the apportionment of child maintenance in an unequal ratio – Child maintenance order manifestly excessive – Whether the judge of the Family Court erred in law in ordering spousal maintenance – Maintenance Act, sections 5(2), 6, 9(2), 14(1)(a), 14(4)

P WILLIAMS JA

[1] I have read the draft reasons for judgment of G Fraser JA (Ag) and agree with her reasoning and conclusion.

D FRASER JA

[2] I, too, have read the draft reasons for judgment of G Fraser JA (Ag) and agree.

G FRASER JA (AG)

Introduction

[3] On 21 June 2024, after considering this appeal against the decision of Her Honour Mrs Amina Maknoon ('the judge of the Family Court'), this court made the following orders:

> "1. The appeal is allowed in part.
>
> 2. The appeal against the order for child maintenance is dismissed.
>
> 3. The order made on 11 November 2022, by Her Honour Mrs Amina Maknoon for child maintenance in the sum of $71,693.27 is affirmed.
>
> 4. The appeal against the order for spousal maintenance is allowed.
>
> 5. The order made on 11 November 2022, by Her Honour Mrs Amina Maknoon for spousal maintenance in the sum of $35,000.00 is set aside.
>
> 6. Each party is to bear his/her own costs."

We promised at that time that we would provide reasons in writing. We now fulfil that promise.

Background

[4] The events leading to this appeal are that, on or about 18 August 2018, the parties separated after being married on 28 June 2015. During the short marriage, the parties resided at Kingston 8 in an apartment said to be jointly owned by NG ('the appellant') and his mother. Throughout the marriage, the parties shared expenses half and half, with the appellant covering the mortgage and MS-G ('the respondent') covering the remaining household expenses. The union produced one child ('ZAG').

[5] Before their separation, the parties started the process of acquiring a two-bedroom apartment ('new apartment') also located in Kingston 8. The parties separated before

residing together in the new apartment. The respondent, on separation, moved into the new apartment with ZAG. The appellant admitted to only having contributed $80,000.00 to the acquisition of the new apartment, for which he is a joint tenant, and has not contributed to the mortgage payments to date.

[6] On 3 February 2021, the respondent filed an application for child maintenance for ZAG in the Corporate Area Family Court; on 17 May 2021, she filed a second application for spousal maintenance. On approaching the court below, the respondent complained that the appellant was not providing child maintenance. She contended that the appellant had failed to contribute towards the mortgage of the new apartment of which he is a joint tenant. Due to the appellant's failure to contribute to the mortgage payments, the respondent further contended that she was unable to maintain herself and ZAG sufficiently. Additionally, the respondent averred that since she was struggling to meet the mortgage payments for the new apartment, she was willing to dispose of it by sale and restructure her finances to better meet her financial obligations. The appellant, she said, refused to sign the necessary documentation to facilitate the sale. The appellant's uncooperativeness had exacerbated the respondent's financial straits.

[7] In the proceedings in the Family Court, the evidence proffered by the respondent was in the form of oral evidence, and no documentary proof of expenses was presented. The records and the notes of evidence from the court below reflect that the judge of the Family Court received in evidence three payslips tendered by the appellant and a means report requisitioned by the court. These documents were utilized by the judge of the Family Court in making her decision. Although the respondent did not possess or make available physical copies of her payslips, the notes of evidence indicate that she had soft copies on her phone, which she was granted permission to review and confirm her gross and net pay. As far as could be gleaned from the evidence, no objection or challenge to this method of verification of the respondent's salary was taken by or on behalf of the appellant. Both parties were cross-examined on their evidence and were asked questions for clarification by the judge of the Family Court.

[8] The judge of the Family Court granted orders in favour of the respondent, making the following order for child maintenance:

> "The Respondent/[NG] is ordered to pay the sum of Seventy One Thousand, Six Hundred and Ninety Three Dollars Twenty Seven Cents ($71,693.27) per month for the maintenance of child [ZAG] plus half (½) all Medical Expenses and half (½) Educational Expenses until the child attains the age of eighteen (18) years of age."

Spousal maintenance was ordered as follows:

> "The Respondent/Husband, [NG] is ordered to pay the sum of Thirty-Five Thousand Dollars,($35,000.00) per month, whilst the property remains the principal dwelling of the Applicant, [MS-G] or property is sold, whichever is sooner."

The appeal

[9] On 24 November 2022, the appellant filed a notice of appeal against the decision of the judge of the Family Court. The appellant sought orders that: i) the appeal be allowed; ii) the execution of the judgment be stayed until determination of the appeal; iii) the order of the judge for the Kingston and Saint Andrew Family Court made on 11 November 2022 be set aside; iv) the appellant be ordered to pay the sum of $20,000.00 per month for child maintenance until said child attains the age of 18, in addition to half all medical and educational expenses or, in the alternative, for the matter to be remitted to the Kingston and Saint Andrew Family Court for determination; and v) costs of the appeal to the appellant.

[10] The grounds alleged that the judge of the Family Court erred in law and fact when calculating the respondent's monthly expenses, the expenses relative to ZAG alone, and the total expenses of ZAG, where the respondent "…led no shred of objective evidence to substantiate any of these purported expenses". Furthermore, the appellant argued that the judge of the Family Court erred in her apportionment of the responsibility to provide for ZAG in the ratio of 57:43 and in ordering the appellant to assume the greater amount. The appellant also complained that the maintenance award for ZAG was manifestly

excessive, and further, in the exercise of her discretion under the Maintenance Act ('the Act'), the judge of the Family Court erred in ordering spousal maintenance.

[11] On 30 August 2023, the appellant further filed a notice of application in this court seeking a stay of execution of the orders of the judge of the Family Court. On 10 October 2023, a single judge of this court heard the application and made an order granting a stay of execution of the order to pay spousal maintenance until the determination of the appeal. The other orders were not stayed.

The issues

[12] Although the appellant filed seven grounds of appeal challenging several findings of fact and eight additional grounds pertaining to law, the essence of the appellant's complaints related to issues concerning the total expenses of the parties, the appellant's monthly net salary, the respondent's and appellant's capacity to provide maintenance for the child and whether there was a basis for ordering him to pay spousal maintenance. To promote efficiency and minimize overlap and repetition of the arguments and submissions, the appellant's complaints are better addressed by utilizing an issue-based approach. Thus, the issues identified for exploration are: (a) whether the judge of the Family Court erred in law in accepting the respondent's evidence of the monthly expenses for herself and ZAG and further erred in her findings of fact relying on such evidence; (b) whether the judge of the Family Court sufficiently considered the appellant's means and capacity to pay the amount of maintenance ordered and whether the judge of the Family Court erred in law in her assessment of the sum awarded for child maintenance and its apportionment; and (c) whether the discretion to award spousal maintenance was properly exercised.

Submissions

Appellant's submissions

[13] The gravamen of the arguments of counsel Mr Duncan Roye ('Mr Roye'),on behalf of the appellant concerning child maintenance, was that it was the duty of the respondent

as claimant to prove her case with the best possible evidence. In this regard, he contended that the respondent failed to do so since no documentary evidence was provided to the judge of the Family Court regarding the respondent's monthly expenses. Counsel submitted that the means report highlighted that figures of expenses given by the respondent in her evidence were exaggerated. He compared the figures specified in the respondent's evidence with those she related during the interview with the probation officer who prepared the means report. He pointed to inconsistencies such as a $25,333.33 difference for groceries, a $5,900.00 difference for electricity, and a $2,240.00 difference for cable and internet. Counsel further submitted that "the Court was not duty bound to accept the evidence of a witness as truthful notwithstanding that same was not challenged in cross examination" and cited in support of this proposition the authority of **Various Claimants v Giambrone & Law (A Firm) et al** [2015] EWHC 1946 (QB).

[14] Mr Roye argued that the judge of the Family Court, therefore, erred when she accepted the respondent's evidence of her monthly expenses. Counsel further argued that as it related to child maintenance she erred by taking into consideration the amount of $10,000.00 for lunch money when that expense should have been included in half of the educational expenses the appellant was to pay. The appellant also complained about the sums he was ordered to pay for ZAG's grooming and clothing expenses. He alleged that he was providing grooming for her when she visited with him and also made purchases of clothing. Moreover, he argued that the judge of the Family Court erred when she deviated from the statutory 50:50 apportionment of the obligation of the parties to maintain the child. The appellant complained that all those attendant flaws in the reasoning and computation of the judge of the Family Court resulted in the maintenance order for ZAG being "manifestly excessive".

[15] Counsel further submitted that spousal maintenance was not automatic; it was the discretion of the judge to determine such an award, after considering necessity, capacity, practicality, and reasonability (see **Margaret Gardner v Rivington Gardner** [2012]

JMSC Civ 54). He argued that since the parties separated in 2018 and the respondent brought her claim for spousal maintenance in 2021, she had failed to meet the criteria stipulated under section 6(2) of the Act. Thus, the respondent should not have been granted spousal maintenance by the judge of the Family Court. Further, since the respondent was gainfully employed and could provide for herself, an order for spousal maintenance was erroneously made. Counsel argued that the judge of the Family Court erred in failing to consider the appellant's monthly expenses. She also erred in finding that the appellant's monthly net income was $350,000.00.

Respondent's submissions

[16] In both her written and oral submissions, the respondent contended that the judge of the Family Court made no error and correctly made the orders that she did concerning maintenance for both child and spouse. She argued that her testimony concerning her and ZAG's expenses was not refuted or challenged by the appellant. Accordingly, the judge of the Family Court had correctly determined that the amounts specified were reasonable estimates. Furthermore, the respondent highlighted that the judge of the Family Court reduced certain expenses, such as clothing and entertainment for ZAG, and found that the respondent could exercise greater economy in those areas.

[17] The respondent submitted that latitude was permitted under sections 8(1) and 9(1)(a) of the Act for the allocation of maintenance by parents to be disproportionate and was to be based on the capacity of each party. She maintained that the sums presented for ZAG's maintenance were grounded on evidence. Moreover, the respondent submitted that the allocated apportionment, which related to the responsibility to provide for ZAG, was done in accordance with the Act. In support of this submission, the respondent relied on **Alfred Robb v Beverley Robb** (unreported), Supreme Court, Jamaica, Claim No D01148/2005, judgment delivered 11 December 2009, **Stewart v Stewart** [2013] JMSC Civil 121 and **Hugh Sam v Hugh Sam** [2015] JMMD: FD 1.

[18] The respondent, in her written submissions, attempted to explain the circumstances surrounding her application for spousal maintenance and the order of the

judge of the Family Court granting same. The respondent contended that the judge of the Family Court was entitled to consider "any other circumstances" in accordance with section 4(b) of the Act. In doing so, the judge of the Family Court was correct in considering that the property occupied by the respondent was jointly owned by the appellant, for which he had made no contribution to the mortgage payments. Further, she argued that her major expenses were the mortgage payments and maintenance fees for the property jointly owned by her and the appellant. The respondent reiterated in oral submissions, that her difficulty in meeting her financial obligations resulted from the appellant's failure to sign documents to accommodate the sale of the property, which would allow her to restructure her finances.

Issue (a): Whether the judge of the Family Court erred in law in accepting the respondent's evidence of the monthly expenses for herself and ZAG and further erred in her findings of fact relying on such evidence (Grounds i, ii, iii (findings of fact) and i (findings of law)).

Discussion

[19] Consideration must be given to the long well-known principle confirmed in **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21 and adopted by this court in numerous decisions such as **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7, in resolving this matter. Therefore, this court will not lightly interfere with the findings of facts and decision of a judge of first instance unless, after a thorough assessment, it can be shown that the judge was plainly wrong in arriving at the decision through an error in the analysis of the evidence.

[20] For the appellant to have succeeded on this appeal, he had to demonstrate to the satisfaction of this court that the judge of the Family Court fell into error by accepting and relying on the respondent's evidence as to expenses with no documentary evidence presented. Further, she had improperly considered factors and conversely failed to consider relevant factors, which resulted in an inordinately high or excessive maintenance award for the child ZAG.

[21] Indeed, the respondent did not submit any documentary evidence for consideration by the judge of the Family Court. Nonetheless, she gave oral evidence and was cross-examined by counsel on behalf of the appellant. As far as this court is aware, there was and is no requirement by law or practice for the respondent's evidence to be corroborated by documentary evidence. Therefore, the cogency of the evidence regarding the respondent's earnings and expenses was, determined by the court's assessment of the respondent's credibility and the value to be ascribed to such evidence.

[22] We observed that, indeed, there were inconsistencies between the oral evidence and the means report relative to the costs of mortgage payment, food, and utilities, as highlighted in the table prepared by Mr Roye. However, on inquiry by this court, Mr Roye conceded that the cost of utilities could and do fluctuate from month to month. This court further observed that the difference in the mortgage payment was the princely sum of $1,000.00, a difference, we regarded as negligible. There was a significant difference of over $25,000.00 regarding the food bill. However, again, the cost of groceries will be inconstant. Moreover, the judge of the Family Court, in her computation of the figures, utilized a sensible approach by taking an average of the high of $85,333.33 and the low of $60,000.00. The mean figure of $72,000.00 was the figure upon which the maintenance award for ZAG was made. In the premises, there could be no complaint that there was any prejudice to the appellant in that regard.

[23] In the face of the appellant's complaint that the figures proffered by the respondent "were exaggerated", counsel was asked to indicate in what way the line items for supervision for the child and domestic assistance were overpriced, but he was unable to do so. This court was of the view that the cost of living was common to every inhabitant of this country; therefore, the court was at liberty to take judicial notice of the common factor of the high cost of living, which affects every person domiciled within this jurisdiction. On the court's assessment, the figures indicated by the respondent were not extravagant or inflated; on the contrary, they were in keeping with the reasonable expenses commensurate with the high cost of living in the jurisdiction.

[24] Although the appellant criticized the judge of the Family Court for having accepted evidence from the respondent that was not "objective", we noted that the appellant did not place himself in any better position. Whilst he provided three "payslips" as documentary evidence of his monthly net pay, he had not provided one iota of documentary proof as to his monthly expenses. He too relied on his oral testimony. During the course of cross-examination, there was no challenge to the respondent's stated figures of her net monthly income and expenses. The cross-examination centred on criticizing her for purchasing a new car and moving ZAG to another school that was said to be more expensive. It, therefore, was unreasonable that the appellant expected a more stringent approach to be applied to the respondent's evidence as opposed to the approach that was applied to his evidence. Having fully considered the matter, we did not believe that the evidence before the judge of the Family Court was insufficient or that it should have been rejected. In that regard, we found that the judge of the Family Court was well within her purview to rely on the parties' oral evidence of expenses and the means report in making her decision, notwithstanding the lack of documentary proof.

[25] There was also no reason to depart from the judge of the Family Court's finding of the appellant's net salary being $350,000.00. On our review of the appellant's payslips presented, his net salary varied from month to month for July, August, and September 2021. Indicated for July was a net pay of $298,748.42, for August $231,934.31, and for September $160,882.32. Mr Roye, in his written submissions, sought to explain the differences for each month by asserting that the payslip with the highest net pay figure reflected salary arrears for acting. We observed that for July 2021, the appellant's gross salary had included arrears totalling $67,719.71. If this sum is deducted, the resulting figure would be the same as that reflected on the August 2021 payslip. The low figure on the September payslip remained unexplained. This court also noted that a deduction of $105,000.00, in favour of Victoria Mutual Building Society (VMBS), related to the appellant's mortgage and motor vehicle loan payments. As far as we are concerned, the net salary was derived after statutory deductions of income tax, NIS, NHT, education tax, and pension deductions were made to the gross salary, without accounting for any

personally authorised deductions. Moreover, the issue of the appellant's net salary was now moot. We noted at page 108 of the notes of evidence, that the appellant had testified that his "[n]et salary is approx. 350k per month". Further, counsel on his behalf conceded that the correct net salary was, indeed, $350,000.00 per month. In the circumstances, the complaint that the judge of the Family Court erroneously calculated the appellant's net salary to be $350,000.00 cannot be sustained.

Issue (b): Whether the judge of the Family Court sufficiently considered the appellant's means and capacity to pay the amount of maintenance ordered and whether the judge of the Family Court erred in law in her assessment of the sum awarded for child maintenance and its apportionment (Grounds iv, vi, vii, viii (findings of fact) and ii, iii, iv, v, vii (findings of law)).

Discussion

[26] The Act imposes an obligation on parents, as distinct from fathers alone, to support their children. It states explicitly that "…every parent has an obligation, to the extent that the parent is capable of doing so, to maintain [his/her] unmarried child who – (a) is a minor...".

[27] This court appreciated that the appellant was not taking issue with the fact that he was obliged by law to pay maintenance for his child; indeed, he indicated a willingness to do so and had offered to pay the monthly amount of $20,000.00 to $25,000.00 in addition to paying half the medical and educational expenses. What he had disputed, however, was the quantum sought by the respondent and that which he was ordered by the judge of the Family Court to pay, being the sum of $71,693.27, which he indicated he could not afford.

[28] Where a parent asserts that he or she is unable to pay the quantum of maintenance requested by the other parent, the court is, nonetheless, enjoined by law to make a maintenance order for the support of the child, and such order "…shall apportion the obligation according to the capacities of the parents to provide support".

[29] In the face of the appellant's averments that he could not afford to pay, the onus was on him to make full and frank disclosure of his means. The rationale is that the court must be satisfied that any maintenance order it makes is reasonable. The "welfare of the child" does require that the respondent who currently has the day-to-day responsibility for ZAG, receives adequate provision by way of maintenance from the appellant, failing which, ZAG's well-being would be impaired.

[30] In **McEwan v McEwan** [1972] 2 All ER 708, the court underscored the consideration to be given when assessing a party's capabilities. In dismissing the husband's appeal, it was stated that:

> "When assessing whether or not the weekly sum to be paid by the husband to the wife was 'reasonable in all the circumstances of the case' within s 2(1)(b)[a] of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 the justices were entitled to take into account not only the husband's actual earnings, but also his potential earning capacity; accordingly the justices, being satisfied that the husband, although unemployed, had ample earning capacity, were justified in dismissing the application…."

[31] By virtue of section 14(4)(a) and (b), the factors which a court must take into account in determining the amount and duration of support of a child are the present and future assets of the parents, the parents' expenses, and their means. Further factors stipulated in section 9(2) are that:

> "2) In considering the circumstances of a dependant who is a child, the Court shall have regard to the following matters in addition to the circumstances specified in section 14(4)-
>
> > (a) that each parent has an obligation to provide support for the child.
> > (b) the child's aptitude for, and reasonable prospects of, obtaining an education; and
> > (c) the child's need for a stable environment."

[32] As far as the evidence unfolded before the judge of the Family Court, both the appellant and the respondent were gainfully employed in the public service. At the time

of the trial, the appellant was 34 years old, with no evidence of ill health or any chronic illnesses. The appellant had satisfactorily checked all relevant boxes pursuant to section 14(4) of the Act. He was in a good job with the prospect of advancement. According to his evidence, he was acting in a higher position, to be appointed, and there were no mental or physical impairments to affect his advancement. From the evidence, it was discerned that his earning capacity was greater than the respondent's. In fact, under cross-examination, he agreed that he was earning over $90,000.00 more than the respondent per month. Notwithstanding this fact, he insisted that the maintenance for ZAG be split equally as he was a "fifty fifty man". The appellant testified that he had investments in stocks and shares under $200,000.00, whereas the respondent indicated that her salary was her sole means of income. The judge of the Family Court, therefore, had ample evidence that the appellant had the ability and capacity to provide adequate financial assistance to ZAG.

[33] During the trial, the appellant maintained that the sum of $60,000.00 that the respondent requested was unreasonable and proposed instead the sum of $18,000.00 as his contribution towards ZAG's maintenance. However, he agreed that such a sum would be insufficient to provide shelter or electricity for his child. He insisted that the respondent was to match that figure, making a total of $36,000.00 for child maintenance. When taxed by the appellant's counsel in cross-examination as to the adequacy of even this amount to provide shelter for ZAG, he evasively responded, "I can't answer".

[34] The appellant conceded that the sum he offered for ZAG was less than what he paid for tithes and offerings ($40,000.00) and less than what he contributed to his parent's monthly maintenance ($25,000.00). This court observed that his parents lived in their own home, and his mother was a joint owner with him of the property he resided in. He testified he was the sole contributor to the mortgage of $36,000.00 per month for that property. He also gave evidence that he borrowed funds from his father's retirement savings. This begs the question of whether his parents required maintenance; from his own lips, they seemed to be providing greater financial assistance to him. It would

therefore have been open to the judge of the Family Court to doubt his veracity and reject his evidence that he provided maintenance for his parents.

[35] The appellant gave his address in the Kingston 8 area. He complained that when he and the respondent separated, she moved to the new apartment that they jointly acquired, hence depriving him of the opportunity to earn additional income from the property owned by him and his mother. In the circumstances, he refused to pay any of the mortgage loan for the new apartment. The financial strain of the mortgage was being borne solely by the respondent in the amount of $92,000.00 or $93,000.00 per month, plus an additional $12,000.00 for property upkeep. This stance adopted by the appellant was unreasonable since, in his evidence, he stated that it was by agreement that the respondent went to live at the new apartment. He had not given any testimony that there had been further discussions, and a consequent new agreement brokered between himself and the respondent that she was to undertake full responsibility for the mortgage payments at the new apartment. The appellant clearly had not relinquished his interest in the joint premises as in his evidence-in-chief, he acknowledged that existing interest. He had, however, demonstrated a marked unwillingness to assume any of the attendant costs and expenses, including the mortgage payments; a classic case of wanting to have his cake and eat it too. Having heard that evidence, it was the responsibility of the judge of the Family Court to determine a result that was fair, just, and reasonable, based on the realities, practicalities, and circumstances of the parties.

[36] Having looked at the line items of the respondent's expenditure, it seemed to this court that the respondent was entirely reasonable in securing living accommodations for ZAG, in an area where she would be relatively safe. Moreover, the respondent merely took advantage of accommodations in which she already had a proprietary interest.

[37] Mr Roye helpfully provided a table of expenses for the appellant, which included a line item listed as "unsecured loan facilities" of $50,000.00. This expense was touted as a factor that should have been taken into account as to the appellant's capacity to pay. It is noted from the evidence that these loans were obtained after the interim order for

child maintenance was made by the judge of the Family Court. The appellant testified that he had obtained a loan of $420,000.00 after the court order was made for him to pay "half school fees". Half the school fees were in reference to the tuition payable to ZAG's school, totalling $91,000.00 per term. We saw no correlation between a loan of $420,000.00 and the payment of half the school fees which was $45,500.00. Even though the appellant said he paid the full amount of the tuition, he expected to be reimbursed by the respondent for her half share.

[38] The appellant's assertions regarding loans and loan repayments were further confused when he was asked about the total amount of loans he had obtained. His response was "[t]he funds are not clear cut…". He went on to explain that he had another loan from his father's retirement savings, "in excess of $200,000.00". He also mentioned another loan in the form of a "line of credit" with the Bank of Nova Scotia (BNS); he did not, however, disclose the amount of this loan nor the terms of its repayment.

[39] The appellant initially testified that he had obtained two loans, one from BJ Staff Credit Union for $420,000.00 and the second loan from National Commercial Bank in the amount of $300,000.00. These two loans totalled approximately $720,000.00 for purposes, he said, of "[v]arious.[sic] Legal fees, back to school, or tuition …mounting credit card debt…to pay down". That figure did not represent his total outstanding loan obligations as indicated by the appellant and discussed in paras. [37] and [38] above. He seemed unsure of the reasons for obtaining those loans. He initially claimed that loans were taken out to pay legal fees and tuition. It is startling that the appellant admitted that the "majority" of those loans materialized after the respondent filed for child maintenance and after the interim maintenance order was made by the judge of the Family Court. Moreover, he provided not one scintilla of documentary evidence that he had all those loan obligations. The appellant's evidence as to the $50,000.00 for "unsecured loan facilities", in all the circumstances, was lacking in cogency, and the judge of the Family Court would not have erred if she had not countenanced this amount as a monthly expense.

[40] Further, in the submission made on the appellant's behalf before this court, Mr Roye submitted that the loans were obtained to satisfy the outstanding balance on the interim maintenance order, which was indicated to be $40,000.00 per month. That was the amount included in the table of the appellant's monthly expenses. This court noted that the figure of $40,000.00 was, in fact, erroneous as disputed by the respondent. Discerned from the information and complaint of the respondent number CA2021FF00202-1 dated 3 February 2021 (information before the Parish Court) was an endorsement as follows:

> "By court an interim order is made for the respondent to pay the sum of $4,000.00 per week for maintenance of child [ZAG], born 7.4.18 plus ½ all [educational expenses] & ½ all [medical expenses] until 20.10.21 payment to [the applicant's] bank a/c effective 23.07.21.
>
> [signed and dated]
>
> Judge of the Parish Court"

[41] There was no reason that endorsement should not have been accepted as the correct order made by the judge of the Family Court since it was signed as such. This court also noted that the interim maintenance order amounted to $16,000.00 per month, a far cry from the $40,000.00 alleged by the appellant. On a calculation, the difference of $24,000.00 would have resulted in a surplus for the appellant. In any event, the interim order was no longer a relevant consideration as it would have been subsumed into the final order made by the judge of the Family Court on 11 November 2022.

[42] By his evidence, the appellant averred that before the respondent commenced court proceedings, he would regularly deposit to her account, sums ranging from $21,000.00 to $62,000.00. Therefore, it was curious that at the time of trial, the appellant was averring that he could afford no more than $18,000.00 per month, in addition to half the costs of health care and education. The appellant was offering a lesser amount for ZAG's maintenance at a time when her needs had increased significantly. The increased expenses were precipitated by ZAG's enrolment and attendance at school, which

generated significantly more expenses, including school fees, lunch, and transportation to and from school. When the appellant was taxed by counsel for the respondent in cross-examination, he asserted that the $62,000.00 per month he provided between August 2018 and January 2021 included school expenses. That could not have been true because, on his own evidence, ZAG did not commence school until January 2021. When pressed for an explanation for this inconsistency, he evasively responded, "I can't answer that".

[43] Based on the respondent's evidence, her net pay was $262,000.00 per month. The total expense for ZAG alone was $159,083.00, half of which the respondent would have been responsible for. In addition, she was expected to contribute equally to the child's educational and medical expenses. While the court is acutely aware that child maintenance is a joint and shared obligation of both parents, we had taken note that, the respondent was not making ends meet and was overwhelmed by a mortgage payment she was solely responsible for; a mortgage payment to which the appellant, as a joint tenant of that property, should have been making an equal contribution but refused to do so.

[44] Further, taking into consideration sections 14(4)(a) and (b), as to apportionment, the appellant earned more than the respondent, and his living expenses and accommodation were significantly less than hers. Moreover, the respondent had the day-to-day physical custody and care of the child, which necessitated the engagement of domestic assistance (helper) and, occasionally, paid supervision for the child. Taking into account the appellant's greater means and capabilities, the judge of the Family Court was not acting perversely when she accorded the greater responsibility for ZAG's maintenance to the appellant, as in the circumstances, it was fair and reasonable so to do.

[45] Both parties provided a litany of their monthly expenses and in our assessment of the respondent's expenses, were reasonable. On the other hand, the appellant's expenses seemed grossly inflated. A means report was ordered by the judge of the Family Court to assist her in deciding the appellant's ability to pay, but this had proven unhelpful. The

report was unhelpful because it was discernible that the appellant had been less than frank and forthright in giving an account of his monthly expenses. He sought to inflate line items and introduce various insurance payments, credit card debts, and expenses. The assertion of having to pay additional monthly expenses was not the evidence that was put before the judge of the Family Court for consideration, and any such change in circumstances, to be admissible evidence, would have had to be contained in an affidavit. Those belated claims of having to pay those additional amounts appeared to have been insincere since such assertions were not raised in his evidence before the judge of the Family Court. Accordingly, they ought to be disregarded

[46] Moreover, the judge of the Family Court was not bound to accept the recommendation of the probation officer to award the sum of $16,000.00 for ZAG's monthly maintenance. Ultimately, based on the factual circumstances, as she found them to be, she was obliged to determine for herself what was a reasonable sum to be awarded, bearing in mind the best interest of the child, ZAG.

[47] While we cannot attest to the methodology employed by the judge of the Family Court, the final figure she arrived at was reasonable. We find that the judge of the Family Court when she considered the parties' responsibilities to maintain ZAG, did not err when she deviated from the 50:50 ratio when apportioning the monthly sum for child maintenance to be provided by the appellant.

[48] In his grounds of appeal, the appellant specifically complained that the award for child maintenance was "manifestly excessive" and, accordingly, Mr Roye, in his oral submissions, asked this court to recalculate the quantum of the maintenance order for ZAG. We did so with regard to the evidence from both parties. From the evidence, we discerned the following:

i. The average monthly net income of the appellant was more than $350,000.00 and that of the respondent was approximately $262,000.00.

ii. The appellant's evidence of investments could be regarded as income or potential income and ought properly to be contemplated by the court as a part of the means and circumstances of the appellant.

iii. The parties' earnings were significantly disproportionate; therefore, an apportionment that leans more on the appellant's income was fair and reasonable in all the circumstances, bearing in mind the essential consideration being the welfare of the child.

iv. The accommodation provided by the respondent was not extravagant, given all the circumstances.

v. In these prevailing economic times, the sum of $25,000.00 per month for the maintenance of ZAG is grossly inadequate.

[49] In calculating the expenses referable to ZAG only, we utilized the same figures that the judge of the Family Court computed as follows:

1.	Clothing	$10,000.00
2.	Entertainment	$ 6,000.00
3.	Grooming	$ 8,000.00
4.	Babysitter	$ 6,000.00
5.	School lunch	$10,000.00
	Total	**$40,000.00**

[50] The following are the expenses shared by the respondent and ZAG and, in fairness, ought to be apportioned 50:50, having regard to the benefit that the child would derive from these heads. They are as follows:

1.	Housing	$ 105,000.00

2. Utilities (water/light/cable)	$	27,000.00
3. Groceries	$	72,000.00
4. Domestic assistance	$	22,000.00
Total		**$226,000.00**

[51] On our calculations, the total expense for ZAG was $153,000.00. Using the ratio of 57:43, the recalculated expenses for ZAG increased to $87,210.00. This court was not minded to substitute that higher award for child maintenance. Our review fortified our position that the award made by the judge of the Family Court was reasonable.

[52] Despite the various complaints of the appellant, he had not established any basis for this court to interfere with the findings of facts of the judge of the Family Court. Nor did we find that she erred in law concerning the computation of the award for child maintenance. Therefore, grounds iv, vi, vii, viii (findings of fact) and ii, iii, iv, v, vii (findings of law) pertaining to that issue failed.

Issue (c): Whether the discretion to award spousal maintenance was properly exercised (Ground v (findings of fact) and vi (findings of law)).

Discussion

[53] The guiding principles pronounced in the case of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, which followed the principles outlined in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, must be applied in reviewing the decision of the judge of the Family Court. In **The Attorney General of Jamaica v John Mackay**, Morrison JA (as he then was) at para. [20] of the judgment articulated as follows:

> "[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be

> shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[54] In the case of **Dalton Wilson v Raymond Reid** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 14/2005, judgment delivered 20 December 2007, at page 4, Harrison P stated that:

> "Although an appellate court may not be readily inclined to entertain an issue raised for the first time on appeal, there is no absolute prohibition against doing so. In ***Connecticut Fire Insurance Co v Kavanagh*** [1892] AC 473, Lord Watson, on behalf of their Lordships Board of the Judicial Committee of the Privy Council, at page 480 said:
>
> > 'When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below.
>
> Their Lordships, continuing, expressed a caution:
>
> > 'But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea.'
>
> Fairness to all parties, the interest of justice, and the governing rules of practice are the influencing factors in the determination of the issue in an appellate court."

He further stated the following:

> "[a]s a general rule, an appellate court will not entertain a point which was not raised and considered in the court below. The present case is not one which this court does not have all the facts relevant to the issues raised and considered in the trial."

[55] The respondent testified that the parties separated in 2018, and in 2021, she filed for spousal maintenance. The appellant also testified that the period of separation began in August 2018, with the respondent taking him to court for maintenance "in early 2022". The period between separation and the filing of maintenance was, therefore, not in dispute, but was a fact in issue and was relevant to the determination of the question regarding spousal maintenance.

[56] Without dissecting all the factual basis of any error made by the judge of the Family Court, this court can, nonetheless consider as submitted by the appellant that there was no jurisdiction conferred on the judge of the Family Court to order spousal maintenance in light of section 6(2) of the Act.

[57] Section 6(2) provides the timeline within which to apply for spousal maintenance, it states that:

> "An application for maintenance upon the termination of cohabitation **may be made within twelve months** after such termination, and the Court may make a maintenance order in accordance with Part VI in respect of the application." (Emphasis added)

[58] The parties had been separated for more than 12 months, and the respondent had made no application to enlarge the time within which to make her application. The judge of the Family Court did not demonstrate an awareness of the limitations of her discretion as created by section 6(2) of the Act. In fact, she made no reference to the provision at all in determining her award for spousal maintenance. It is arguable, therefore, that the judge of the Family Court had not addressed her mind to that provision when she granted an order for spousal maintenance. In the circumstances, this court found much merit in

the appellant's complaint that the judge of the Family Court erred in fact and law when she made an order for spousal maintenance.

Conclusion

[59] The complaints concerning the decision of the judge of the Family Court relative to the child's maintenance award turned on her findings of fact, which heavily depended on her assessment of the credibility of the witnesses. There was ample evidence to support her findings of fact. The sum of $25,000.00 per month offered by the appellant for child maintenance was grossly inadequate to ensure that ZAG was maintained at a reasonable standard of living. We were further of the view, that contrary to the appellant's assertions, he could comfortably afford the amount requested and had a greater disposal income than he had admitted. He had not been candid with the court. The award made for child maintenance was reasonable and should, therefore, stand.

[60] However, by operation of law, the judge of the Family Court had no jurisdiction to entertain the application for spousal maintenance and, ultimately, we agreed with the appellant's submission in that regard and this order was therefore quashed.

[61] It was for those reasons that we made the orders outlined at para. [3] above.