

LINDA MAGWARO

Versus

MTHOKOZISI NDIWENI

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 11 NOVEMBER 2021 AND 21 APRIL 2022

Opposed Application

S.P. Sauramba, for the applicant
J. Tsvangirayi, for the respondent

TAKUVA J: This is an application for variation of the consent paper and divorce order granted by this court under cover case number HC 125/14. The basis of the application is section 9 of the Matrimonial Causes Act (Chapter 5:13) (The Act), and section 81 (2) (3) of the Constitution of Zimbabwe Amendment No. 20 2013. (the Constitution)

Facts

The parties married under the Marriage Act (Chapter 5:11) on the 5th of July 2005. The marriage was blessed with two children. The parties' marriage irretrievably broke down and the respondent instituted action against the applicant for a decree of divorce and other ancillary relief. After agreeing on all issues, they signed a consent paper on the 21st day of March 2014.

Paragraph 2 (e) of the Consent Paper states;

“(e) Maintenance of the minor children

- (i) The parties have agreed that by way of maintenance the plaintiff shall pay US\$500-00 for each of the minor children per month as monthly maintenance until they attain 18 years or they become self-supporting which ever occurs first.
- (ii) Plaintiff shall pay all school fees inclusive of levies and other related ancillary education costs, purchase school uniforms, stationery and all other school requirements until they finish tertiary education

3.”

This mutual agreement was incorporated into the court order granted on 27 March 2014 as paragraphs 4 and 5. Respondent then religiously paid a total of US\$1000-00 from 2014 until 2019 when Statutory Instrument 33 of 2019 was introduced. The effects of the Statutory Instrument are that all liabilities prior to and as at the effective date, sounding in United States Dollars are deemed to be values in RTGS Dollars at a rate of one-to-one to the United States Dollar.

What this effectively mean is that the respondent is liable to pay RTGS \$500-00 for each child per month making a total of RTGS \$1000-00. Respondent decided to pay RTGS \$1500-00 per month for both children which the applicant rejected. Months later, respondent decided on his own to pay maintenance of US\$50-00 per child. Applicant engaged the respondent to increase the payment to at least US\$320-00 for each child but the respondent refused insisting to pay RTGS \$1 500-00 for both children per month. Further, between January and May 2021, respondent has not been paying maintenance. For these reasons, applicant approached this court for a variation of the maintenance clause in the consent paper and court order to maintain the payment of maintenance at US\$500-00 for each child, that the respondent was ordered to pay by the court in 2014.

The application is opposed by the respondent on two grounds. Firstly respondent argues that applicant wishes to live a lavish lifestyle on the children’s

maintenance and has plucked figures from the air in justification of her claim. Secondly respondent claim that his financial circumstances have changed such that he is unable to afford to pay US\$500-00 for each child as ordered in 2014.

It is apparent that the issues for determination *in casu* are the following;

- (a) Whether the applicant has shown good cause for the variation that is sought.
- (b) Whether the respondent has been candid with the court that his financial circumstances have changed such that he cannot afford to pay US\$500-00 for each child as ordered in 2014.
- (c) Whether applicant wants to live a lavish life-style off the maintenance of the two minor children.
- (d) Whether it is in the interests of the minor children that the respondent is allowed to pay RTGS \$7 500-00 per child.

THE LAW

In terms of section 9 of the Act, an appropriate court may, on good cause shown vary an order made in terms of section 7 and subsection (2) (3) and (4) of that section shall apply in respect of any such variation. Section 7 (4) (d) provides that in making the order the court shall have regard to all the circumstances of the case including:-

- (a) The income earning capacity, assets and other financial resources which each spouse has or is likely to have in the foreseeable future.
- (b) The financial needs, obligations and responsibilities which each spouse and child has or likely to have in the near future.

- (c) The standard of living of the family including the manner in which any child was being educated or trained and or expected to be educated or trained.

A child's best interests are paramount in all matters concerning the child. Also children are entitled to adequate protection by the courts in particular the High Court as their upper guardian. See section 81 (2) and (3) of the Constitution.

In his opposition to the application, the respondent raised a couple of points *in limine*. Firstly, it was contented that in her Answering Affidavit, applicant has put in new documents and fresh affidavits which the respondent cannot answer to. Respondent specifically referred to Annexures G, H, L1 – L4 and O attached to the Answering Affidavit. Respondent prayed that these documents be expunged from the record. Secondly, respondent complained about contents of paragraphs 4 subparagraph 9, 8 subparagraph 7 and 11 of the Answering Affidavit by the applicant.

In my view, the points *in limine* have no merit in that all these Annexures have not introduced new issues. They refer to issues raised firstly in the Founding Affidavit and secondly in the Opposing Affidavit. It is trite that an Answering Affidavit must meet the sting of the defence head-on. It is not true that the respondent has been prevented from filing an Answering Affidavit in that Rule 59 (12) of SI 202/21 permits the filing of further affidavits with the leave of the court. Respondent should have applied for leave to file his Answering Affidavit if he felt that there was need.

I find that the points *in limine* lack merit and are hereby dismissed.

On the merits, both parties are agreed that in assessing a fair amount of maintenance to be paid, the court must consider two cardinal points which must

guide it. First is a change in financial circumstances and secondly is the ability of the person being ordered to provide maintenance to pay the increment sought. The primary consideration though being the best interests of the children. See *Crone v Crone* 2000 (1) ZLR 367 H.

WHETHER APPLICANT HAS SHOWN GOOD CAUSE FOR THE VARIATION

The onus is obviously on the applicant. See *Fleming v Fleming* HH 27-2003 where it was held that

“On the applicant therefore rests the onus to establish good cause to justify a variation of the maintenance granted by the court at divorce In order for a court to grant a variation, there must have been a change in the conditions that existed when the order was made, that it would be unfair that the order should stand in its original form.” (my emphasis).

In casu, the parties are agreed that Statutory Instrument 33/2019 has had financial implications on paragraph 2 (e) (i) of the consent paper incorporated in paragraph 4 of the court order. What the parties disagree on is the quantum of maintenance to be paid. That paragraph 4 of the court order granted in 2014 required that the respondent shall pay maintenance of US\$500-00 for each child per month is not in dispute.

Section 4 of SI 33 of 2019 states, the Reserve Bank has with effect from the effective date issued an electronic currency called the RTGS Dollar. Further, section 4 (c) provides that such currency shall be legal tender within Zimbabwe from the effective date. Section 4 (i) (d) provides that for accounting purposes all assets and liabilities that were immediately before the effective date be deemed to be values in RTGS Dollars at a rate of one-to-one to the United States Dollar. The clear effect of this legislation is that the maintenance payable then became

RTGS \$500-00 for each child. That this amount is ridiculously low and must be varied upwards as to keep it in its original form is beyond question.

The respondent did not dispute that he did not pay maintenance for the months of January, February and March 2021. His reason according to the opposing affidavit is that he was recovering from the financial burden of paying school fees and that in any event by paying US\$100-00 for both children he has overpaid maintenance, that applicant infact owes him. This reasoning is flawed for two reasons; firstly the respondent is obliged in terms of the court order to pay both the school fees and maintenance. Secondly where the respondent elects as *in casu*, to pay a certain amount he is bound to such an election. Certainly he cannot excuse himself on the basis of having overpaid. See *Carol Kempen v David Kempton* HH 417-15, the court held per UCHENA J (as he then was) that;

“the spouse who was obliged to maintain the child cannot hide behind the fact that the order had not been varied especially when he himself in obedience of his duty to maintain the child voluntarily started paying in United States Dollars immediately after dollarization. The probabilities favour the applicant because how could the respondent pay consistently for four years and seek to say he had no such obligation.”

The relevant facts in the Kempen case are that the provisions for maintenance were in Zimbabwean dollars and the respondent complied until dollarization of the economy in February 2009. He paid maintenance in United States Dollars and then stopped arguing that he had no obligation to make such payments in United States Dollars. The court held that he had such an obligation.

Similarly, *in casu*, the respondent has consistently paid US\$100-00 from November 2019 to December 2020. Surely he cannot say he has no obligation to pay in US dollars or that he has overpaid the applicant. In my view, from the above factors, the applicant has established a good cause for variation of the amount.

WHETHER APPLICANT WANTS TO LIVE A LAVISH LIFESTYLE ON THE CHILDREN'S MAINTENANCE AND AS SUCH HAS PLUCKED FIGURES IN THE AIR

Respondent makes this accusation because in his own assessment of the children's needs RTGS\$7 500-00 per month per child is sufficient to cater for their requirements. This despite the fact that the applicant has presented a monthly expenses schedule *vis-à-vis* the total payment of US\$100-00 that the respondent stopped making and the proposal that he has made to pay a total of RTG S\$15 000-00 for both children at RTGS \$7 500-00 each. Further applicant has provided receipts for groceries, fuel and internet service to show that US\$50-00 per child that respondent has been paying or RTGS \$7 500-00 that he wants the court to order him to pay is totally inadequate.

The receipts for groceries for the period from 21 March to 25 April 2021 on page 84 show that applicant spent a minimum of RTGS \$31 870,96 and US\$50-00 in groceries, a total of RTGS \$36 020-96. It is not in doubt that these groceries are basic necessities which can in no way be described as extravagant or lavish. Surprisingly in 2016 under cover case No. M1256/16 respondent offered to buy groceries to the tune of US\$370-00 per month for the same children but now wants to pay RTGS \$15 000-00 equivalent to US\$180-00 to cater for food and other expenses. Surely the growing children cannot now eat less than they did five (5) years ago.

As regards WIFI I find nothing extravagant with spending US\$180-00 per month. It is a necessity in this era of Covid 19 pandemic where private schools attended by children of a medical doctor have been conducting lessons on line for a considerable period of time. For entertainment the children utilize Netflix an online streaming service since there is no DSTV. In terms of section 7 (4) (d) (c)

of the Act, the court is enjoined to regard the standard of living of the family. We are dealing here with children of a medical doctor in private practice.

Respondent submitted that he should be ordered to pay half of the expenses listed on the monthly expenses schedule. While it is trite that both parents are liable to maintain their minor children, the liability is not in equal shares as the court is required to consider the income earning capacity of the parties and a party in a better financial position is liable to pay more. *In casu*, respondent is a medical doctor in private practice while applicant is a lecturer who earns significantly less than the respondent. She has provided her payslip showing that she is still paying mortgage for the accommodation she provides as shelter for the children and herself. That is her contribution coupled with the emotional, mental and physical attributes that come with being a mother and custodian parent.

In any event in the present matter the order did not state that applicant was liable for half the maintenance or that the US\$500-00 was respondent's half portion of suitable maintenance. In *Mackintosh (nee) Parkinson v Mackintosh* SC 37-18 it was held that;

“It is a truism that as children grow so do their needs some of the needs of the children cannot be treated separately from those of the appellant. Shared expenses such as food, toiletries, consumables, electricity, water and the like, cannot be divided into categories of what is consumed by the appellant and what is consumed by the two minor children.”

Further, the fact that the applicant has shown a willingness to accept a reduced amount in the sum of US\$320-00 per child instead of US\$500-00 dispels any notion that applicant intends to live a lavish life from the maintenance.

WHETHER THE RESPONDENT HAS BEEN CANDID WITH THE COURT THAT HIS FINANCIAL CIRCUMSTANCES HAVE CHANGED SUCH THAT HE IS UNABLE TO PAY US\$500-00 FOR EACH CHILD

Respondent opposed the application on the ground that his financial circumstances have changed and that he has since lost three other sources of income being employment with the Government of Zimbabwe, closure of a second surgery and closure of a shop in Cowdray Park. He also contended that he is now married to Soneni Ndiweni and this is a “major change” which the court should consider. Reliance was placed on *Chizengeni v Chizengeni* 1988 (1) ZLR 286 HC, *Dane v Dane* 1979 RLR 395 and *Kok v Maxwell* 1717-236-14 where TSANGA J held that;

“where a divorced man with maintenance obligations towards his first family remarries, it is superficially and unrealistic to suggest that the first family must continue to be maintained at the same standard regardless of her former husband’s subsequent commitment... the court cannot ignore the fact that applicant’s circumstances have changed as he has since remarried. His exercise of his right and freedom to find a new family must be respected and recognized. He has equal obligations to the offspring prior to divorce and after. His own needs must be taken into account, to permit an upward variation as requested by respondent oblivious of these changed circumstances and increased obligations incurably brought by a new family ward, in my view, does not serve the best interests of any of the children.”

I concur with these sentiments as they represent the correct legal position in our jurisdiction. The broader question is whether respondent can afford the variation. Respondent submitted that he lost three sources of income during the relevant period. The question becomes whether there is evidence on record that the financial circumstances of the respondent who could afford to pay maintenance equivalent to US\$1000-00 per month has so altered that he is

incapable of paying. The applicant submitted that respondent was not candid with the court as regards the change in his financial circumstances. I agree respondent makes bald statements and further does not mention in his papers the dates or any evidence as to when he lost the three sources of income.

On the other hand, applicant has shown that these sources of income were lost before the divorce. Respondent lost his employment with the Government of Zimbabwe in 2013. Documents further show that he lost the shop in Cowdray Park and the other surgery in 2014. A letter from Ingutsheni Hospital shows that respondent was dismissed from employment in April 2013. There is also an affidavit of a former employee confirming that the surgery was closed in 2014.

For these reasons I agree with applicant's submission that the reality of the matter is that the respondent has had one source of income from 2014 when the order whose variation is being sought was granted. He managed with that one source of income to pay a total of US\$1000-00 in maintenance from 2014 to 2019. The *status quo* has been affected by two things; one is the introduction of SI 33/2019, the other is respondent's marital status.

During the 2016 application for variation respondent did not seek a downward variation. Instead he offered to pay US\$630-00 cash and then purchase groceries worth US\$370-00 to make a total of US\$1000-00. If his financial circumstances had really changed respondent ought to have mentioned it then.

As regards respondent's financial sources, respondent did not deny that as a medical doctor in private practice he charges his clients in United States Dollars. The bank statements he attached are not sufficient to show the true picture of his finances in that it is not shown how much he makes from the surgery. Further despite arguing that he pays school fees from savings, he has kept the source of

these savings a secret. I agree with *Miss Sauramba* that the mere attachment of a bank statement showing just one page is insufficient as proof of income. What is required are statements spanning longer periods.

A litigant who approaches the court for a variation of a maintenance order must provide the court with full details relating to his financial position and where the applicant fails in this respect, particularly where there is a suspicion that he has endeavoured to mislead the court it seems to me that the court can have regard to such circumstances in considering whether a good cause has been made out misleading the court is a factor that weighs heavily against a litigant. See *Foote v Foote* 1994 (2) ZLR 28 (HC), *Maphisa v Moyo* HB 85-15.

In casu, respondent attempted to mislead the court on the following issues;

- (a) the reason why he had custody of the children from November 2019 to November 2020. His explanation was that applicant had resolved to move to the United Kingdom. The real reason was that applicant could no longer provide for the children on the maintenance that respondent was paying. Applicant only took the children in December 2020 when her salary increased.
- (b) The period that the children were with him between November 2019 and December 2020. Respondent claimed he was with the children for the entire period when in actual fact the children would be with applicant during the school holidays and on weekends

Misrepresenting facts in order to mislead the court ought to weigh heavily against a litigant in such applications. I find that *in casu*, the respondent has not been candid with the court as to his financial circumstances

WHETHER IT IS IN THE BEST INTERESTS OF THE MINOR CHILDREN THAT RESPONDENT IS ORDERED TO PAY MAINTENANCE OF RTGS\$7 500-00 FOR EACH CHILD?

The answer is in the negative for a number of reasons. Firstly, in such an application the court is enjoined to consider the best interests of the children. See section 81 (2) and (3) of the Constitution. The interests of the minor children are always paramount and the children are entitled to protection by this court as their upper guardian. *In casu*, it goes without saying that RTGS \$15 000-00 for both children will not suffice because grocery alone cost at least RTGS36 000-00 while fuel costs RTGS 9 545-00. This excludes clothes, furniture like beds which the children do not have.

In Mackintosh's case *supra* it was held that;

“the suggestion that as at 2016 that the sum of US\$200-00 was sufficient to meet the growing needs of two teenage girls, one born in 2000 and another in 2001 flies in the face of logic it is a truism that as children grow so do their needs.”

One of the children *in casu* was born in 2005 while the other in 2013. The respondent's submission that in 2021 a lesser amount of RTGS\$1 500-00 (equivalent to US\$180-00) is sufficient to cater for food, fuel, clothing and other expenses when the children now eat more is unreasonable. *A fortiori* in 2016 the respondent approached the Maintenance Court to be permitted to buy the same children groceries worth US\$370-00. Why does it make sense to the respondent to pay less for the children who in fact now eat more?

In my view, it will not be in the best interests of the minor children for this court to order the respondent to pay RTGS \$15 000-00 as maintenance for both of them.

CONCLUSION

1. The applicant has shown good cause for a variation of the maintenance order in that the best interests of the two minor children dictate that a payment of maintenance of RTGS\$7 500-00 for each child will not suffice *vis-à-vis* the schedule of monthly expenses.
2. The amount to be granted must be reduced to take into account the fact that the respondent is now married.
3. The introduction of SI 33/2019 had the effect of altering US\$500-00 to RTGS \$500-00 which is totally inadequate to cater for needs of the minor children.
4. The applicant has justified the amount of the claim in that she attached evidence showing that the amount claimed has not been plucked from the air and that she does not want to live a lavish life off the maintenance money.
5. Apart from respondent's marital status, he has not been candid with the court as regards the change in the sources of his income. These sources have not changed from the time the order was granted.

DISPOSITION

IT IS ORDERED THAT:

1. Clause 2 (d) (e) (i) and paragraph 4 of the Consent Order be and are hereby amended by;
 - (a) The plaintiff shall pay the sum of US\$400-00 for each of the two (2) minor children per month payable in cash or into the applicant's

Nostro Account or the RGS \$ equivalent thereof at the bank rate prevailing on the date that payment is made until the children attain the age of 18 years or become self supporting which ever comes first.

2. This order shall be effective from March 2021.

Sauramba S.P. Attorneys, applicant's legal practitioners
Dube-Tachiona & Tsvangirai, respondent's legal practitioners