TAPIWA SHIRI
versus
VALERIE SHIRI
and
N MARUFU NO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 8 April & 12 May 2021

Unopposed application

Applicant in person
Respondent barred

TSANGA J: This application for review of a magistrate's maintenance variation decision on the grounds of bias, was placed before me on the unopposed roll for family matters. Suffice it to state that the failure to respond to the application for review by the judicial officer, who was cited as the second respondent herein, was of no consequence. In the case of *Chiremba v Chiroodza and Another* 2018(1) ZLR 315 (H), it was stated that a judicial officer cannot be compelled to defend his decision in an application for review. If, as held therein, he or she has not filed any affidavit which may be of assistance to the court, he or she is simply taken to have chosen to abide by the court's decision in the matter.

However, regarding the first respondent, Valarie Shiri, in whose favour the order for variation of maintenance for the parties' children had been granted, her lawyers *Mucharaga Law Chambers,* had been served with the application for view on the 5th of March 2021. They had purported to file a notice of opposition on her behalf on the 25th of March 2021. The notice was therefore 4 days out of time. This formed the basis for the placement of the matter on the unopposed roll by the applicant.

Whilst appreciating that matters become unopposed because certain rules of the court that ought to have been observed have not been followed, nothing precludes the appropriate court from determining an application for review on its merits in order to determine whether the order sought should be granted. A maintenance review matter fundamentally impacts on children whose best interests are central. All factors considered must therefore speak to the interests of the child. Therefore even if a review particularly one involving children is unopposed, the matter must still be reviewed on its merits against the backdrop of the

interests of the children as well as in relation to the grievances that will have informed the subject matter of the application. It is for the court to conclude whether from the record of proceedings and against the back drop of procedural justice and the interest of the children, the proceedings should be set aside on the basis of bias of a judicial officer.

The applicant is a self-actor and was thus advised when he appeared in court seeking a default order that his application for review would be examined on its merits and a judgment rendered.

THE FACTS

In 2017, the maintenance court awarded the first respondent the then sum in United States dollars of $90.00 a month for the maintenance of three minor children of the applicant and the first respondent. It is trite that in 2018 Zimbabwe underwent currency shifts that resulted in sums which were expressed in United States dollars now having a value in Zimbabwean dollars. Inflation decimated the Zimbabwean dollar following the conversion. On the 3rd of September 2020, the first respondent herein, as applicant in the court below, filed an application seeking to review upward the maintenance amount of what was now effectively ZW$ 90.00 or more or less just one dollar in United States dollar terms, to Z$30 000.00 (approximately US353.00 at the official rate) for the three children per month. I state the United States values so as to give a clear perspective of the impact of the monetary shifts in terms of the amounts the lower court was being asked to review.

Following the requisite inquiry, the court ordered that the amount be varied to Z$9000.00 with effect from the 31st of December 2020 as payment per month for all three minor children. Dissatisfied with this rendition, applicant the father of the three children, filed an application for review on the following grounds:

1. The 2nd respondent exhibited gross bias in favour of the 1st respondent by granting an upward review of maintenance without a proper assessment as required by the law, of the financial abilities of the parties, bearing in mind that both parties had the capacity to support the minors as they are of means to do so.
2. The 2nd respondent irregularly conducted herself in proceedings in the court *a quo*.
3. The 2nd respondent failed to apply herself to common sense. (sic)
4. The decision of the 2nd respondent was not based on the evidence before her.

Besides the first ground that suggests that applicant's gripe with the magistrate is that procedures were not followed in assessing the financial abilities of the parties, the other grounds are simply vague in their statement. How the judicial officer irregularly conducted herself, or how she failed to apply common sense, or how she did not consider the evidence, are statements made in blanket terms without reference to the substance of those assertions. In terms of r 257 of the High Court Rules, 1971, the grounds for review must be clearly and succinctly stated on the face of the application for review. As explained in *Mambo* v *National Railways of Zimbabwe* 2003 (1) ZLR 347 (H) it is in the statement of the grounds for review rather than in the founding affidavit that the reasons should emerge.

MAINTENANCE VARIATION

Procedural and substantive expectations

This being an application for review on the grounds of bias and procedural irregularities, an appreciation of the procedures for maintenance variation is necessary to grasp. The procedure to be followed is the subject matter of s 8 of the Maintenance Act [Chapter 5:09]. The application is required to be in affidavit form and to spell out the grounds upon which the variation is sought. In this instance, the first respondent, as applicant in the court below, averred that the amount of ZW$ 90.00 was trifling. All three children were staying at home with her and their living expenses which include food had risen. She therefore sought the sum of ZW$10 000.00 for each child giving a total of an upward variation to ZWL 30 000.00 for all.

If a maintenance officer determines that an application is not frivolous, then notices are sent out to affected parties to attend court on a given date. If a maintenance officer is of the view that the application is frivolous or vexatious s/he can decline to send out notices for attendance or s/he can place the matter before the court for determination on that score.

In this instance, the matter was set down for hearing from the onset. Procedurally thereafter, in terms of s 8 (6), on the specified day of the hearing, the court then enquires into the matter. In terms of s 8 (7) (b) if the court is satisfied that the **means** or **circumstances of any of the parties** **have altered** since the making of the maintenance order, it may vary the order.

The onus is on the applicant who seeks variation to show that circumstances have indeed altered. It is also trite that the effect of inflation on the costs of living is a ground for seeking variation and granting of such variation. The income of the party paying maintenance

must allow room for some increase in spite of the effect of inflation. See *Marufu* v *Marufu* 1983 (2) ZLR 386 (SC).

Clearly, the means of the first respondent to look after the children from the existing maintenance order, given her circumstances as the primary caretaker had altered due to inflation. With a current order which now amounted to no more than one United States dollar, she satisfied the requirement to show altered means in supporting the three children on the basis of the existing order. Suffice it to observe that the most she could buy with that amount is a loaf of bread.

The court being content that there was a case for variation went on to the next procedural requirement of satisfying itself that the applicant could afford the varied amount sought. In this instance, on the day of the hearing the court postponed the matter to allow the applicant to provide proof of his earnings as indicated in his bank statements. This followed submissions by the first respondent that the applicant herein earned at the very minimum least US$500 from leasing out premises as commercial premises and that he has at least five bank accounts.

In other words, the court held the requisite inquiry and asked applicant for proof of his earnings in order for the court to arrive at an informed conclusion as to whether he could afford the variation sought. Granted both parties have a legal duty to maintain their children. However, it is not mandatory that the magistrate should request for proof of earnings from both parties all the time. Drawing on the case of *Sibanda* v *Chikumba & Anor* HH 809/ 15, it is important to bear the following in mind:

> "The enforcement of the rules of procedure of the court, is subject to strict guidelines which nevertheless are applied to a certain extent at the discretion of the presiding officer. Judicial discretion is the power of a court to take some step, grant a remedy, or admit evidence or not as it thinks fit. Many rules of procedure and evidence are in discretionary form or provide for some element of discretion."

Looking at the case before me as a whole, there is nothing here that suggests that the failure by the magistrate to call in the proof of earnings of the first respondent was motivated by bias. The test for basis is an objective one from the perspective of the impression created in the minds of right thinking people. *Sibanda* v *Chikumba* above. Furthermore, as stated in the Supreme Court case of *Macintosh* v *Macintosh* 2018(1) ZLR 636, in addition to any evidence given by the parties, a court must be guided by its own experiences and sense of what is fair.

What is particularly noteworthy here is that the final order granted as variation by the court was ZW$ 9000.00 as a total for all three children bringing the maintenance order in value to more or less where it was in 2017 when the order was granted. In *Crone v Crone* 2000 (1) ZLR 367 (SC) the court also stated that an increase in the cost of living is in itself "good cause" for an increase in maintenance and also regarded changes in exchange rate as negativing any argument by the husband that he could not afford the "increase' in maintenance. The same can be said herein.

Procedurally, having heard the matter, the magistrate in the lower court gave her reasons for the sum she granted as the varied amount. She noted that the applicant herein had converted one of his two houses into commercial premises which meant he was getting more money for rentals. She noted that the bank statements which the applicant herein produced in court when ordered to do so, were not a conclusive summary of his financial circumstances. (He produced the bank statements and a lease agreement showing that he was letting his premises for US$150.00 a month). As regards his income, she stated that he also runs a printing business which trades in United States dollars on a cash basis. The court therefore found that he was a man of means, contrary to his assertions. The magistrate also considered the factual circumstances of the parties namely that he has no rentals to pay whereas the first respondent pays rent. She noted that the first respondent is a marketer earning between ZW$20 000-ZW$30 000.00 a month and that she contributes 50% of the children's school fees. She found that the applicant's income, on the other hand, was over US$500.00. The magistrate also considered that the first respondent is the one who looks after the children. The court's finding was therefore that applicant is in a position to support the variation of maintenance and hence the award of ZW$ 9000.00 for the three children in total.

As emerges from the record, the lower court reached the conclusion after an examination of the statements that he was earning more than he had let out. Suffice it to state that where a court finds that a party's income in a maintenance matter is not a true reflection of their actual income, it is free to impute additional income as being available to that party. This is in order to fulfil its duty of ensuring that the welfare of the child is taken care of through adequate child support.

Also all contributions must be taken into consideration. The lower court took into account first respondent's means and circumstances from the point of view that she is the custodial and care giving parent. The court was alive to the fact that her contribution to the children's welfare is already at a far higher level than that of the applicant even if no

monetary value is assigned to such work. Unfortunately, child caring is often taken for granted as a given role for women. The applicant's own attitude here is that such a role does not count and that what only counts are financial contributions. Were the courts to disregard the circumstances of child caring as insignificant, then the courts would simply be perpetuating unjust stereotypes in the worthlessness of child caring roles.

Putting all procedural requirements under scrutiny, the conclusion is that objectively there was zero bias by the judicial officer as claimed by the applicant. The application for review on the basis of bias is absolutely lacking in merit.

Accordingly:

1. The application is dismissed with no order as to costs.

Applicant: Self Actor