

GETRUDE TENDESAYI TAWENGWA
versus
CHARLES ZVIDZAI TAWENGWA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 19 July & 27 October 2021

Opposed application

Ms B Mahere, for applicant
S Kuchena, for respondent

1. TSANGA J: The applicant filed an application which she termed variation of a divorce consent paper. It was two pronged. Firstly, it sought variation of the maintenance clause to reflect the same amount stated therein to be reflected as United States dollars. This was necessitated by the currency shifts from the US dollar to the Zimbabwean dollar which impacted on the amount that was now being paid by the respondent as maintenance. Secondly, two years having lapsed without transfer of the property specified in the consent paper which was incorporated in the divorce order, her application sought to amend the clause relating to transfer by inserting a new time frame and consequences in the event of non-action on the part of the respondent.

2. The parties, who were married for over thirty seven years divorced in November 2018. As part of their divorce, a consent paper had been signed in terms of which the respondent was to pay the sum of \$700.00 a month as post-divorce maintenance. The operative part of their consent paper on maintenance read as follows in paragraph 2 of the consent paper:

“That the defendant shall contribute the sum \$700 per month with effect from 31st of March 2018 as maintenance for the plaintiff post-divorce until death or remarriage or until the order is varied or discharged by the Maintenance Court on good shown.”

3. At the time the order was made, the operative currency was the United States dollar and the RTG dollar which had been introduced at the time was officially said to be one on one with the United States dollar which was the operative currency. Currency changes in 2019 then converted all United States dollar obligations to RTGS obligations on a one to one basis. Whilst

the same amount is still being paid in Zimbabwean dollars, due to the massive devaluation of the Zimbabwean dollar, the amount being paid as maintenance was in reality now less than the equivalent of US\$10.00 compared to the equivalent of US\$700.00 when the order was granted. The application was therefore made on account of the amount in ZW\$700.00 which the respondent is now paying, being woefully inadequate to meet the intended and agreed amount of \$700.00 based on the US dollar currency at the time of the consent paper. Applicant attached a breakdown of her monthly costs. What the applicant sought in her draft order was for the consent paper to specifically state the amount payable in United States dollars so that it reads as follows:

“The respondent is ordered to pay the sum of US\$ 700 per month until the applicant’s death or remarriage or until the order is varied or discharged on good cause shown with effect from the date of the granting of this order.”

4. Two years having passed without transfer, applicant also sought that the consent paper be varied regarding the transfer of property known number 57 Kennedy Drive Greendale, namely, Unit Number 11 Kennedy flats to be transferred to her within 2 months of the order. Failing which she sought that the Sheriff be authorised to sign all necessary papers on the respondent’s behalf.

5. The respondent was opposed and raised two points *in limine*. The first was to the effect that there cannot be a variation of a consent paper or any pleading where there is an extant court order. The essence of the opposition was that what the applicant applied for was a variation of consent paper as opposed to making an application for variation of the maintenance order under the Matrimonial Causes Act [*Chapter 5:13*]. The specific provision under which the application was made was said to be lacking which the respondent construed to mean that there was effectively no cause of action. He also argued that the consent paper was in Zimbabwean dollars and that what the applicant wants is for her claim to be made in United States dollars when that is not the official currency and he has no means of getting United States dollars.

6. Secondly, that transfer of property was said not to be variation of a maintenance order, this being what is permissible under the Matrimonial Causes Act. The respondent also argued that the delay in effecting transfer was beyond his control as the process was being handled by FBC Bank and its conveyancers. In any event, the property was said to have been since transferred into his name and was now simply awaiting transfer into the applicant’s name as

ordered by the court. The respondent therefore sought dismissal of the application with costs on a higher scale.

7. On the argument that the consent paper cannot be varied the Applicant drew attention to the case law which indeed shows that it is not a hard and fast rule in any event that a consent paper cannot be amended especially where the parties themselves are in agreement regarding that amendment. . An amendment can be done by the parties if it is of interest to themselves even without the need to apply for a formal amendment. *David Richard Kempen* SC 14/2016; *Ex parte Boshi & Anor* 1978 (H) 382 at 383 F; *Tracy Lee Fleiner v Albury Deanis Fleiner & Anor* HH261/18.

Analysis of the point in limine

8. The consent paper was entered into by the parties pursuant to s 7 (5) of the Matrimonial Causes Act which provides as follows:

“(5) In granting a decree of divorce, judicial separation or nullity of marriage an appropriate court may, in accordance with a written agreement between the parties, make an order with regard to the matters referred to in paragraphs (a) and (b) of subsection (1).”

The section therefore allows parties to enter into their own agreement regarding;

“(a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;
(b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.”

Such an order made in terms of s 7 (5) of the Matrimonial Causes Act may be varied on good cause shown as provided for in s 9 of that Act.

Variation, etc., of orders

Without prejudice to the Maintenance Act [*Chapter 5:09*], an appropriate court may, on good cause shown, vary, suspend or rescind an order made in terms of section *seven*, and subsections (2), (3) and (4) of that section shall apply, *mutatis mutandis*, in respect of any such variation, suspension or rescission.

9. To the extent that respondent argues herein that the application should have made specific reference to s9 that is not necessary. Section 9 of the Matrimonial Causes Act is clear that a maintenance order arising from a consent paper made in terms of s7 (5) can be varied by the parties. The fact that the applicant, in seeking an upward variation of maintenance does not mention section 9 specifically is therefore immaterial since variation of maintenance, is permissible on good case shown. The critical issue is whether before this court is in fact an

application for variation of maintenance in which good cause has been shown. Granted her application says it is for variation of a consent paper. However, a reading of her founding affidavit, in particular paragraphs 6 to 18 leave absolutely no doubt that what she motivates in those paragraphs is upward variation of the amount of maintenance being paid due to changed circumstances. Those paragraphs are even clearly preceded by a distinct heading titled: **“Upward Variation of Maintenance.”** As stated in *Tracey Leigh Mackintosh v Antony William Mackintosh SC 37/18* for a party seeking variation of a maintenance order, there is no need to interfere with a consent paper since the Matrimonial Causes Act does permit the variation of maintenance arising from a consent paper. It cannot be said that this court failed to understand what her founding affidavit averred. As stated in *Shorai Mavis Nzara & Ors v Cecilia Kashumba N.O. & Ors SC 18/18*

“The function of a court is to determine the dispute placed before it by the parties through their **pleadings, evidence and submissions**. The pleadings include the prayers of the parties through which they seek specified orders from the court.”

10. An order of variation of the maintenance order itself would most certainly be supported by the submissions and evidence of the application itself. In other words, the court would not be making such an order on variation of the maintenance order based on its own discretion which is not supported by the issues and facts of the case. It would in fact be applying the law as it stands on variation of a maintenance order to the facts and issues placed before it by the parties. Applicant was therefore adamant that what she ultimately seeks is a variation of maintenance order even if she may have worded the prayer as variation of the consent paper. The point *in limine* regarding the application not being for upward variation in terms of the Matrimonial Causes Act lacks merit and is dismissed when one looks at the submissions and evidence that was attached. The key issue for decision is whether she has shown good cause for the upward variation of the maintenance order to be granted. I will return to this issue shortly on its merits.

11. On the second point *in limine* which relates to the changed circumstances in the transfer of the property, the respondent is correct that this has nothing to do with upward variation of maintenance. The explanation given to the court that the delays in transfer as per the original time frames were beyond the respondent’s control is accepted. Moreover, the respondent has indicated his willingness, as expected by the court order, to abide by its intent which was that he effects transfer of the said property to the applicant. Now that that hurdles are over by

respondent's own admission, anything less than transfer to the applicant would indeed be contemptuous. This court therefore sees no justification for the variation sought under the circumstances and upholds the point *in limine* that this issue does not fall within the realm of variation of maintenance to justify the court's interference. The point *in limine* regarding the variation sought regarding the transfer of property is therefore upheld.

The merits of the upward variation sought

12. The principles to be considered in an application for upward variation are twofold:

- 1) Change of circumstances
- 2) The ability of the person being ordered to provide the maintenance sought being be to pay

Applicant made her case for upward variation and in fact attached her breakdown of expenses in support of that application amount to at least US\$715.00. These expenses included levies rates, food, electricity, medical aid and car maintenance expenses. As regards the respondent's means she did provide evidence that he is involved in a successful farming venture but more importantly and directly, having been married to him and aware of his properties, she also outlined his ownership of immovable properties from which he draws his income.

13. The respondent, on the other hand, pleaded penury and age pointing out that he relies on a meagre government pension whose sums cannot sustain the maintenance sought. He said he receives ZW\$2100.00 from NSSA and ZW\$41 741.00 from the Government Pension Fund. Both parties are in their sixties. The thrust of respondent's objection was that she is able bodied and should work. She was said to be still a director of an enterprise known as Strawberry Enterprises. The change in the nation's economic circumstances was also said not to have spared anyone. He also averred that her expenses could be reduced. As for his business enterprises, he denied having any successful ones and said most of the companies were dormant for decades. The farm was said to have multiple owners.

14. If indeed the companies mentioned by the respondent were dormant for decades as he claimed, the point is that in 2018, the court awarding the divorce had found that he was capable then of paying post-divorce maintenance pegged at \$700.00 a month when the currency was

still pegged against the United States dollar. There is no reason to believe that the respondent's only source of income are his pension payments as he alleges.

15. However, this court was satisfied that circumstances have indeed changed for both parties especially following the currency shifts when the country effectively de-dollarised and incomes shrunk. Nonetheless there is absolutely no doubt that the amount being paid by the respondent of ZW\$700.00 makes a mockery of what the parties agreed. Indeed at the time the consent paper was entered into the United States dollar was the official currency and to the extent that the RTGS dollar had been introduced it was at par with the official currency being the US dollar at the time. At the official US\$ dollar rate what the respondent is in actuality paying is the sum of US\$7.77 cents compared to the US\$700.00 at the time of the court order.

16. Appreciating that the currency changes have affected both parties, this court did try to get the parties to address the real issue and to negotiate an affordable sum. The parties are said to have failed to reach settlement as applicant negotiated for US\$450.00 (or its equivalent at the interbank rate) as being the minimum amount she could settle for whilst the respondent was said to have insisted that he cannot afford more than the equivalent of US\$ 100.00 at the interbank rate. The matter was therefore referred back to me for a final decision on the point *in limine* that had been argued and the merits.

17. The real issue is about the variation of the quantum of maintenance since after a marriage of 37 years, the consent paper was that she would be maintained for the rest of her life. Respondent's arguments at this point that she is able bodied and is not entitled to post divorce maintenance are neither here nor there. This court is not hearing fresh submissions on whether or not he should pay spousal maintenance but is faced with the issue of upward variation. Having examined the figures that were placed before the court by both parties and those which formed the parameters of their efforts to accommodate each other's realities, this court is of the view that a sum of US\$350.00 or its equivalent at the interbank rate would in fact meet the essential costs that the applicant highlighted in her application to cover essential payments such a rates, water, levies and electricity, food and medical related expenses. Such an amount takes into account that the respondent too has been affected by the currency shifts but it also acknowledges that his total income from his assets was not totally and transparently placed before this court. The amount also takes into account that the order that was granted at the time indeed showed that he was then able to pay the equivalent of US\$700.00. Moreover,

it takes into account that the amount will be paid at the interbank rate thereby meeting his in ability to source the United States dollars as he said.

Accordingly the order granted is as follows:

1. The maintenance order arising from the consent paper is varied in that respondent shall pay the applicant the sum of the equivalent of US \$350.00 a month at the interbank rate until her death or remarriage or until the order is varied or discharged on good cause shown.
2. There shall be no order as to costs

Phillips Law: applicant's legal practitioners

Chinyama Attorneys: respondent's legal practitioners