

KATHLEEN ENID THORNTON
and
DARREN STEWART THORNTON

IN THE HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 11 June and 26 November 2009

Opposed application

F.A. Edkins, for the applicant
H. Mutasa, for the respondent

MAVANGIRA J: The parties herein were divorced by this court on 18 March 2004 under HC 7136/2003. The divorce order incorporated an order for the maintenance of the minor child of the marriage and two natural children of the applicant who are step-children of the respondent. The terms of the maintenance order provide *inter alia* as summarized below that:

- (i) the respondent is required to pay ZW\$400 000 per month in respect of child maintenance in respect of Graydon, the minor child of their marriage;
- (ii) the respondent is required to pay for Graydon's school fees together with all other expenses related thereto and all shortfalls on medical aid upon presentation to him by applicant of proof of those shortfalls;
- (iii) the respondent is required to reimburse the applicant the full costs of all counseling undergone by Graydon and the parties' step-children up to 31 December 2003, within ninety days of the date of each counseling invoice;
- (iv) the respondent is required to pay for Graydon's tertiary education, including boarding fees, cost of textbooks and reasonable amount of clothing; and
- (v) the parties would regularly review the amount awarded in (i) above having regard to increases in inflation and the general cost of living and the cash maintenance payable by respondent and shall in any event increase automatically by no less than 30% thereof compounded every four (4) months with effect from 1 June 2004.

The applicant now seeks an order for the variation of the order in HC 7136/2003. She now seeks that the respondent be ordered to pay US\$1000 per month in place of ZW\$400 000 per month with effect from 1 March 2009 alternatively, petrol in such amount as can be purchased on the market at a cost of US\$1000 on the date on which payment is due each month. She also seeks an order that the respondent pays her arrear maintenance in the sum of US\$318, 50.

The applicant states that the ZW\$400 000 per month payable in respect of Graydon has become meaningless as at the time that she deposed to her affidavit on 23 February 2009 the said amount had become a minuscule fraction of a cent. The respondent's recent contributions in respect of Graydon were 80 litres of fuel for each of the months of October and November 2008. As from December 2008 to February 2009 when the applicant deposed to her affidavit, the respondent had made no contribution at all. In respect of the respondent's two step-children, despite the provisions of the maintenance order, the respondent had declined to review with her the issue of their maintenance or to make any payment in respect of either of them.

The applicant's total income is US\$1000 per month. She states that she has since depleted her savings and has no other source of income. Her salary is inadequate for her upkeep and that of the three children. She has attached the list of expenses which shows a shortfall of well over US\$1000. Graydon is in receipt of a scholarship in respect of school fees from St. George's College where he commenced his secondary education in 2009. This relieves the respondent of a major part of his obligations in terms of the maintenance order as summarised in (ii) above. The respondent has not been meeting the other expenses related to Graydon's educational and medical or health needs. He has also not made any contribution whatsoever in respect of his obligations to his step-children in terms of the said order. On the other hand, although she does not know the respondent's income, the respondent has been living a lifestyle from which the applicant concludes that he must in receipt of a healthy foreign currency income. In August 2008 he spent three weeks in the United Kingdom. In December 2008 he spent two weeks on holiday in South Africa and another two weeks in Kariba. He also spent two weeks in Mozambique during the period December 2008/ January 2009. He drives an Isuzu truck, owns a fishing boat with motor and accessories and plays golf frequently. He owns a Camry motor vehicle, rents a large house in Avondale, frequently throws parties and hosts dinners and is always dressed in new clothes. He receives rentals for properties in Harare that belong to his mother. He spends a lot of time fishing with Bassmasters, an exclusive fishing club and takes part in all (at least ten a year) Bassmaster Classics which entail full weekends away and considerable monies are spent on transport, fuel and accommodation.

The applicant contends that taking into account her income against the expenses that she incurs even in respect of herself and Graydon alone as well as the fact that the respondent

no longer has to pay school fees for Graydon, a contribution of US\$1000 by the respondent would be fair and within his means. The amount of US\$318,50 that she claims as arrear maintenance arises out of expenses that she incurred in making purchases of various items of school uniform and sporting requirements for Graydon from South Africa and from the St. George's School thrift shop. In terms of the maintenance order it was the respondent's obligation to make the said purchases. She prays that the court grants an order in terms of the draft filed with her application.

The respondent concedes the need for a variation of the order for maintenance. He contends that it is common cause or ought to be accepted that in view of the changes that have taken place in the economy of this country since the original order was granted, the application for the variation of the original maintenance order cannot be said to be either frivolous or vexatious. He however claims that his circumstances as at the date of the maintenance order now sought to be varied cannot be said to have changed for the better. If anything he is in a worse off financial position than he was then. He also claims that he cannot afford what the applicant is claiming and that the amounts claimed by the applicant are not fair and equitable. He further alleges that he has met all the requirements of Graydon's schooling, clothing and medical needs but that the applicant expressly relieved him of his obligation to pay maintenance in respect of his step-children in exchange for his abandonment of the right to have access to the said children. He made payments in the form of 80 litres of fuel not only for each of the months of October and November 2008 but also for the month of December 2008. Thereafter the applicant refused to accept similar payments that he tendered for the months of January and February 2009 demanding that the payments be reviewed. He also offered to buy groceries for the applicant on a monthly basis but she refused the offer stating that she could get the groceries cheaper elsewhere. The applicant who earns US\$1000 per month is in a far better financial position than he is in. As he is not employed and does not have a definite monthly income, contributions in the amount of US\$1000 per month and 80 litres of fuel are not only excessive but clearly unaffordable. He only earns money occasionally if he undertakes some work at his girlfriend's shop or as a bodyguard for Cricket Zimbabwe. He has had to dispose of a number of the assets that he got as a result of the divorce settlement in order to sustain himself. He alleges that he finds himself in this pathetic situation because the applicant ruined all his businesses during the period when the parties were going through the divorce.

He indicated that he had cancelled appointments that had been made for him to discuss an equitable maintenance contribution with the applicant's legal practitioners as these had been arranged without any reference to him. He contends that the applicant's budget consists of exaggerated and unnecessary costs one example being a budget requirement of US\$220 per month in respect of telephone and internet charges.

Regarding the factors cited by the applicant as pointers that the respondent is living a lifestyle that suggests that he is in receipt of a healthy income, the respondent alleges in respect of almost all of the stated travels and trips on holiday or otherwise, that the expenses attendant thereto were all borne by third parties. He alleges that the house in Avondale is owned by a friend and his girlfriend only pays nominal rentals for it as she must contribute towards the maintenance of the house. The motor vehicles referred to are owned by third parties and/or are borrowed. The fishing boat was awarded to him as part of the divorce settlement and is broken down and is in need of repairs which he cannot afford to pay for as they require an amount of US\$2500. He denies throwing parties and hosting dinners and denies receiving any rentals in respect of his mother's properties. Although he occasionally buys new clothes, that should not be the basis for determining the amount of maintenance that he can afford. He denies being a commodities trader in fuel, tyres, cell phones and other commodities. He used to own a business of selling tyres but most of his customers stopped dealing with him after the applicant made telephone calls to them discrediting the respondent's personality during the period that the parties were going through the divorce. He later tried acting as an agent for a fuel supplier, selling fuel to customers on behalf of the supplier but this did not work. He is now seeking new employment.

The respondent claims that he is struggling to earn a living and largely depends on his girlfriend's assistance and earnings from casual jobs that he gets from time to time. The amount of US\$1000 is far out of his reach. A contribution of US\$150 per month together with 50 litres of fuel would be just, fair and reasonable having regard to his financial circumstances. He has no objection to and agrees to pay the costs incurred in purchasing uniform items for Graydon in South Africa in the amount of US\$68,50. He however disputes the veracity of the amount being claimed for the items bought for him at the school thrift shop in the amount of US\$250. He believes that the items cost far less than the amount claimed and put the applicant to the strict proof thereof. He prays that the court settles the matter on the basis that he pays maintenance in the sum of US\$150 per month together with 50 litres of fuel.

In *Chodokufa v Chodokufa* 1988 (1) ZLR 14 at 16E-F ADAM J said:

“It is clear that there are on the papers factual disputes on a number of important issues. The Court has been urged by both parties that, despite this, it should do what it can and take a robust approach so as to determine the matter – *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 at 235.

The onus is on the applicant to show good cause for a variation order. This means that he has to establish to the satisfaction of this Court that there is some alteration in the circumstances and means of the applicant and the respondent, his former wife: *Marufu v Moyo* 1983 (2) ZLR 386 at 387-388.”

In casu, the applicant is by implication asking that the court infers that the respondent’s means have altered or that he has the means to pay the maintenance that she says is now required for the upkeep of the minor child G.

In *Marufu v Moyo (supra)* at 387H – 388D GEORGES CJ said:

“In her evidence the wife indicated that she based her application largely on the fact that she was not happy about the original order. She appeared to concede that her husband’s earnings had not increased significantly since that order had been made in 1981, but she did refer to the fact that the cost of living had risen considerably since the original order was made.

There is South African authority supporting the proposition that the effect of inflation can be regarded as good cause for variation in South African law. In *Prophet v Prophet* 1948 (4) SA 325 at 329 (O) HORWITZ J said:

‘...accepting that the onus rests upon the applicant to show good cause for the proposed variation of the order, I am entirely satisfied that she has fully discharged that onus, since it is common cause that the cost of living has risen appreciably since the date of the divorce and that respondent’s position has become more favourable financially... .’

While it is true that inflation affects both the husband and the wife, if it can be shown that the husband’s income allows some room for an increase taking into account his reasonable expenditure then it would be justifiable to hold that there has been an alteration in circumstances justifying a variation.”

In casu, it appears to be common cause that the cost of living has risen considerably since the maintenance order was made in March 2004. It also appears from a perusal of the applicant’s founding affidavit that the applicant had earlier suggested that the respondent contributes US\$500 per month and 80 litres of petrol as maintenance. However, the order she now seeks from this court is for the respondent to pay US\$1000 per month and 80 litres of fuel. From a perusal of the papers it also appears that this application was conceived some time around December 2008 or January 2009. The application itself was then filed on 24 February 2009. It is not clear, as no explanation is given, as to why and how the amount needed as at December 2008 or January 2009 which was indicated to the respondent as being in the amount

of US\$500 suddenly rose to US\$1000 as at 24 February 2009. This may tend to lend credence to the respondent's contention that the applicant's schedule of expenses is most probably deliberately inflated in anticipation of a reduction of the claim by the court. This contention also becomes persuasive when one considers some of the items on the schedule of expenses and the amounts claimed therefore. These include telephone, cellphone and airtime charges, pocket money and entertainment which all add up to a total of US\$924, about one fifth of the total budget. As submitted by respondent's legal practitioner, citing *Lindsay v Lindsay* 1992 (1) ZLR332 at 335C in which *Mutenure v Mutenure* HH 300/90 was cited:

“...court proceedings are not a game where one inflates one's claim in order to allow for an element of reduction. Claims must be genuine, realistic and substantiated in order that the court can make a proper assessment on the claim....”

The onus is also on the applicant to justify the granting of the claim that she seeks. *In casu* the onus is particularly pertinent as regards the quantum of such maintenance. No direct or concrete evidence has been adduced to justify the contribution sought from the respondent. The respondent accepts the need for the variation of the maintenance order and has in fact proposed the amount that he should be ordered to pay. But he has not taken the court into his confidence and divulged/stated how much income he gets albeit from the occasional jobs that he says he does from time to time. It cannot also be ignored that his responses to the factors cited by the applicant as indicators of the lifestyle that he is leading are far from convincing. The respondent is eager to portray himself as someone without adequate means even for his own upkeep. It is not possible to miss the undertones of his responses which in a number of instances reveal some level of resentment towards the applicant.

Regarding arrear maintenance in respect of school and sporting uniforms purchased by the applicant from the thrift shop, the respondent notably does not contend that these were unnecessary purchases. He did not make any checks with the thrift shop for the prices neither does he say why he did not purchase the items himself. It appears to me that he cannot escape liability to pay the amount claimed as arrear maintenance. While the applicant has not, in my view, established justification for maintenance in the amount of US\$1000, the US\$150 offered by the respondent appears to be guided more by his apparent resentment of the applicant than by his inability to pay more than that amount. Taking into account the telephone, cellphone and related charges, pocket money and entertainment amounts reflected in the applicant's schedule of expenses totaling US\$924 and already referred to above, it would appear to me that applicant's reasonable expenses should only be slightly more than US\$1500. A

contribution by the respondent in respect of Graydon's maintenance (the applicant is not making any claim in respect of the maintenance for the respondent's two minor children) in the amount of US\$500 would thus be fair and equitable. In her draft the applicant also seeks amendment of paragraph 8 of the order in HC 7136/2003 by the deletion of the word "living" in line 12 thereof. As no submissions were made in support of this prayer I assumed that the applicant abandoned that part of her prayer. Furthermore, as such an amendment would render the paragraph grammatically meaningless I am not inclined to grant the amendment sought. As the applicant has been substantially successful, costs will follow the cause.

In the result it is ordered as follows:

1. The Order of the High Court of Zimbabwe of 18 March 2004 in HC 7136/2003 be and is hereby amended by the deletion in clause 6(a) thereof of the words "5th" and "February 2004" and "\$400 000 (four hundred thousand dollars)" and the substitution in place thereof of the words "1st" and "March 2009" and "US\$500";
2. The respondent shall pay to the applicant, in respect of arrear maintenance for the minor child G, the sum of US\$318,50.
3. The respondent shall pay the applicant's costs of suit.

Coghlan, Welsh & Guest, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners.