

KURT GARON ANSTEE  
versus  
LINDA ANSTEE

HIGH COURT OF ZIMBABWE  
MWAYERAJ  
HARARE, 13 October 2014, 20 January 2015, 6,13, 20 and 28 February 2015 and 6 August  
2015

**Civil trial**

*R. Harvey*, for the applicant  
*T. Magwaliba*, for the respondent

MWAYERA J: The plaintiff and the respondent were granted a divorce order by consent in HC7249/99. In terms of the amended declaration the plaintiff approached the court seeking the following:

1. Annulment /cancellation of the consent paper with effect from the date of issue of summons (that is 28 June 2012).
2. A declaration that all writs of execution caused to be issued by the defendant in respect of arrears for maintenance (defendant's rentals) and/or the defendant's medical aid be declared null and void, as well as caveats in respect thereof namely 496/13, 23/14, 310/14 and 415/14 registered against plaintiff's Title Deeds 9682/27 being for his home.
3. An order that the defendant should transfer the shares in a company known as CH Heaven (Pvt) Ltd within seven days of the issuance of the order.
4. An order for costs of suit.

Evidence adduced revealed that in principal the relief sought by the plaintiff is a variation of the maintenance order granted in case number HC 7249/99. Annulment of the consent paper to effect variation of a maintenance order would be incompetent in the sense that it is not all the terms of the consent order which the fall under scrutiny. The Decree of Divorce by consent issued by this court under HC 7249/99 is a competent and extant order. Put differently, there is no basis established for annulment of the whole order to vary the maintenance clause. Evidence adduced did not paint a contrary picture but showed that the

plaintiff is seeking a variation/suspension or rescission of the Maintenance Order.

The plaintiff in giving evidence restricted himself to issues relating to maintenance. It is my view that the failure to specify the prayer for variation, rescission or suspension of maintenance order, in the prayer and reference to annulment of the whole consent order is not fatal to the pleadings. It is also not prejudicial to the defendant given the thrust of evidence and argument. The means to variation or rescission by seeking annulment of the whole court order by consent being HC 7249/99 is not competent. This is because it seeks to vitiate without justification the whole consent order.

The plaintiff's evidence which concentrates on maintenance does not support his prayer for annulment of the whole consent order of 1999. It is with this view that assessment of evidence before this court is on variation or rescission of the existing maintenance order.

The Maintenance Order in issue was granted in terms of s 7 (1) (b) of the Matrimonial Causes Act [*Chapter 5:13*] which enjoins a court upon the granting of a decree of divorce, to make an order in favour of one or other of the spouses to the marriage.

The provisions of the Matrimonial Causes Act [*Chapter 5:13*] that are of relevance to this application are s 9 on variation, and s 11 on arrear maintenance ad s 8 subs (2) and (3) on the duration and extension of maintenance orders.

Section 9 on variation states as follows "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 ....." (underlining is my emphasis).

Of significance therefore in any given case for variation, suspension or rescission of a maintenance order is what constitutes "good cause". The case of *Beneke v Beneke* 1965 (1) SA 855 T at 856 H defined "good cause" as ".... Any reason which would render it equitable for the court to exercise its discretion in favour of the applicant...." Equally, in *Crone v Crone* 2000 (1) ZLR 367 at p 371 Ebrahim JA highlighted two cardinal points which must guide the courts in dealing with applications of this nature requiring alteration of maintenance orders. The court has to consider:

- (1) The change in financial circumstances of the person being ordered pay the maintenance
- (2) The ability of the person being ordered provide maintenance.

The plaintiff's request for variation/rescission or suspension of maintenance is brought before the court on the premises that his circumstances have changed materially from the time

of the order. He presented that he is now married to somebody else and thus has further financial obligations. He further pointed out that his jewellery business has since shut down, he has little employment opportunity given his qualifications in geology and the mining sector challenges and that he has incurred some huge debts and at some stage sold some of the properties to sustain himself and wife. The plaintiff alluded to the fact that he has a medical condition whereby he was diagnosed with cancer. The request for variation comes more than 10 years after divorce and the circumstances have changed.

The plaintiff, on the other hand, argued that the maintenance order ought to remain in force since the consent and agreement of the parties leading to the consent paper was premised on a promise that the plaintiff would get the property of more value while the defendant would get property of inferior value. The defendant would also be provided for accommodation wise in the form of Maintenance by the plaintiff until she died or remarried or began to live with another man as husband and wife. The defendant is gainfully employed and has sold part of the property awarded to her during the divorce. She has invested the proceeds therefrom and earns some income from the investment. She also gets rentals from the other property. From the evidence adduced average the plaintiff gets a total income of on ±\$3000 per month. She outlined her expenses inclusive of rentals of about \$800 per month. As a witness the defendant was candid with the court and she did not seek to hide anything as regards her financial standing. She insisted that the plaintiff was capable of maintaining her as per the consent court order but was neglecting and refusing to maintain because he did not want.

I am mindful of the fact that the setting aside of a maintenance order granted by consent is not a remedy easily availed unless there are sound grounds to show that the request is not motivated by malice to change one's mind. The party seeking variation or rescission or cancellation of maintenance must show **good cause and change of circumstances warranting such intervention**. In coming up with a decision the court of necessity must look at both the applicant and the defendant's financial standing and ability since maintenance involves the welfare and well being of the parties. The decision to be reached must seek to strike a balance between need, hardship and ability. In other words, the order reached must be one that does not occasion hardship on either of the parties while at the same time ensuring that welfare is taken care of.

It is necessary that before looking at both parties' circumstances in a juxtaposed

position, the plaintiff's evidence is mirrored. The plaintiff was economical with evidence on his financial standing. He clearly stressed the point that he did not wish to continue with being "financially held" by the defendant as he deemed payment of maintenance to the plaintiff as an unnecessary hardship to him. He could not hide his resentment of the idea of paying maintenance for the defendant and referred to the consent paper which was incorporated as an order of this court as a "curse". The maintenance order was an inconvenience to him which he wished discharged. Proceeding from this premise therefore, the failure to comply with the maintenance order occasioning the writ of execution and arrear maintenance is in- excusable. To the extent that the order is extant and was not complied with, the plaintiff who cannot be described as a man of straw ought to discharge the obligation of the arrear maintenance emanating from the consent order.

However, the fact that the plaintiff is married and that he submits this as a change in circumstance warranting interference with the maintenance order, cannot be ignored. It is an additional responsibility I subscribe to the sentiments of Reynolds J in *Chizengeni v Chizengeni* 1988 (1) ZLR 286 at 288 wherein he remarked as follows:

"Where a divorced man with maintenance obligations toward his first family remarries, it is superficial and unrealistic to suggest that the first family must continue to be maintained at the same standard regardless of her former husband's subsequent commitments" (my emphasis)

The subsequent commitment as a matter of fact will reduce the capacity of the husband to maintain the dependants at the same standard before the change of circumstances.

*In casu*, the plaintiff who is also fairly advanced in age has remarried another wife. He could however have done better on supplying evidence of his financial status. Nonetheless it is a fact that the business has been run down and is no longer lucrative. The court will also take judicial notice of the current economic hardships faced by the business community and society at large. The plaintiff is married to a young wife who is a hairdresser by profession and thus not within a high income bracket. In assessing the needs of all concerned, the financial standing and needs of all would fall for consideration. Despite his failure to articulate fully and clearly his financial standing, it is a fact that the plaintiff has added responsibilities, has little employment opportunities, and business has gone down. The plaintiff has been economical with the court in failing to fully disclose what happened to the proceeds of the sale of the immovable property of value. This is viewed as calculated at frustrating an extant court order by consent, hence the finding that he cannot be exonerated

from paying arrear maintenance. The plaintiff is certainly not a man of straw and as such it would not be in the interest of the administration of justice to allow him to flout a valid court order without due process.

With respect to the request to have the maintenance order discharged/varied or rescinded on the basis of good cause, when circumstances of the plaintiff and his added obligation are placed on one side, and the defendant's needs are placed on the other side, the following observations, are worth noting. The defendant is in her late 50s and is still able bodied and of sound mind. She is employed and earning. She has out of her own innovativeness invested proceeds of sale of one of her immovable properties. She is not a woman who is barely surviving. She is also entitled to substantial arrear maintenance as per the consent divorce order prior to variation or discharge. The plaintiff on the other is approaching his mid60. He has cancer, is married to a young hairdresser in her 20s, has properties and is given to informal dealings in his business style and has been portrayed as less responsible as evidenced by (running the business down his and drinking habits. The circumstances of the plaintiff and defendant when taken into a consideration, show that the plaintiff's conditions have not improved but rather diminished while the defendant is managing.

The change of circumstances in my view, do warrant the discharge of the maintenance order. It is imperative in the circumstances of this case to outline the common cause aspects. It is common cause that upon getting a decree of divorce by consent the consent order governing the ancillary issues maintenance, custody, maintenance and proprietary rights was incorporated as an order of this court.

The plaintiff was duty bound to pay post-divorce spousal maintenance to the defendant as per the consent order. The plaintiff did not pay maintenance religiously and accrued arrears at the time of trial to the tune of \$35 000. This is in clear defiance of an extant court order. To seek to have the writs of execution issued for recovery of maintenance arrears accrued and the consent court order declared null and void, and to remove caveats on the plaintiff's property, is tantamount to request this court to be a party to frustrating execution of this court's order. Failure to pay maintenance as ordered by the court is a criminal offence. This court is duty bound to control court process. In circumstances were a plaintiff defaults compliance, to assist him frustrate execution of a court order in the absence of special circumstances would not only frustrate the ends of justice but facilitate indefinite none

compliance with court orders. It is generally accepted that a party who has obtained an order against another is entitled to execute upon it. In this case the consent order terms included payment of maintenance to the defendant. That order has not been fully complied with, hence the accumulation of arrear maintenance occasioning the writs of execution and registration of caveats.

There is no evidence placed before the court warranting the court to condone the contempt of court and declaring the writs null and void simply because the plaintiff has not paid (albeit able). There is no justification in exonerating the plaintiff from paying the arrear maintenance as such the prayer for the writs to be declared null and void and for removal of caveats in respect of the said writs registered against deed of transfer number 9682/97 must fail.

As observed above, the plaintiff has however, shown change of circumstances amounting to **good cause** warranting the variation/ recession or discharge of maintenance as contemplated in s 9 of the Matrimonial Causes Act [*Chapter 5:13*]. The parties agreed on transfer of shares and sale of commercial property with a view to sharing the proceeds.

In the premises it is ordered that

1. The maintenance order granted in terms of the consent order incorporating the consent paper entered into by the parties in HC7249/99 be and is hereby discharged with effect from the date of this order.
2. The application for declaration that all writs of execution caused to be issued by the defendant in respect of arrears for maintenance (defendant's rental) and or the defendant's medical aid to be declared null and void, as well as caveats registered against the plaintiff's Title Deeds 9682/72, be and is hereby dismissed.
3. By consent the defendant should transfer shares in company known as CH Heaven (Pvt) Ltd within 7 days of issuance of this order.
4. Each party to bear its costs.

*Granger & Harvey*, plaintiff's legal practitioners  
*Atherstone & Cook*, respondent's legal practitioners