HC 12111/01

DEREK RUDD HENNING
versus
ALLISON VERONICA HENNING

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 20 May 2002 and 26 February 2003

Opposed Court Application

R.Y. Phillips, for the applicant
f. Girach, for the respondent

GOWORA J: This is an application for a variation of a consent paper which attached to a decree of divorce granted by this court on 1 December 1998. The order which the applicant seeks is as follows:

1. The applicant pays the sum of $15 000,00 per month per child and that the said sum shall include rental contributions and clothing allowances.

2. All provisions in the consent paper relating to cohabilation be declared void as a result of the respondent having cohabited for a period in excess of three months.

3. The applicant continues to pay the children's education within Zimbabwe.

4. The applicant maintains the two minor children as dependant members of applicant's medical aid society within Zimbabwe.

5. The respondent pays the costs of this application.

In relation to paragraph 1 of his draft order the applicant avers that he has been having difficulty in making increased payments based on the cost of living as determined by the Consumer Price Index and requests that the provision that an annual increase in maintenance should be based on such index, be removed due to his inability to pay. The reason that he is unable to pay according to the index is that the farm which he

was renting in Goromonzi was acquired by the Government for resettlement. He is therefore operating a company named Grill Rock Farming (Private) Limited which offers services as an agricultural consultant. Due to the resettlement process, it is now difficult to obtain work. He is consulting for one farm in Lalapanzi at a monthly fee of $80 000,00 but the contract will expire at the end of the reaping season. That amount is not enough to enable him to pay maintenance as stipulated in the consent order. He therefore proposes that he pays the sum of $15 000,00 which should include clothing for the children. He has attached a list of his expenses to his papers. In his view the respondent should play a part in financing the children's well-being. He considers that the respondent is making no effort to contribute towards the upkeep of the children.

The applicant states further that the respondent cohabited with one Rob Smith from December 2000 to March 2001 and that they intended to get married. Despite this, the respondent's legal practitioners advised him that the cohibitation was at an end. This would force him to pay 80% of the rent even though the respondent had cohabited with another man for a period in excess of 3 months in clear violation of the provisions of the consent paper. He considers it just and equitable that he pays 25% of the rent in view of the respondent's actions. He attaches a letter from tracing agents in proof of the respondent's cohibitation with Rob Smith.
The respondent on the other hand contends that the clause relating to the Consumer Price Index should remain in force as it affords a protection of sorts to the children's interest and welfare. She is of the view that with the escalation in cost of living increasing on a monthly basis it is important that the maintenance increase annually. She goes on to add that the increase should be even bi- annual or quarterly to keep pace with inflation in Zimbabwe.
She admits that the applicant is now self-employed but not for the reasons he advanced. He only farmed one crop of tobacco before moving off the farm he was leasing in Goromonzi, the reason being that he was not suited to farming. She denies that he was forced to move off the farm by settlers.
It is the view further, of the respondent, that the applicant has made no effort to seek for employment. Instead he has been training for triathlons which apparently takes up most of his spare time. She considers that he is living very well if regard is had to the house he is staying in which is a large "luxurious" house with a swimming pool and tennis court. She also believes that he planted about 30 hectares of tobacco and 25 hectares of maize and that he harvested a good crop in respect of both. She believes that he must have raised about $7 million from the tobacco alone.

She is aware that he acquired farming equipment from his father and one Ben Smith, which equipment was disposed of at an auction and should have raised a lot of money. He also received a 25% share of Devuli Ranch from his father. The ranch was sold in the year 2000 and should have raised a fair bit of money and the applicant's own share should have been in the region of between 6 to 10 million Zimbabwe dollars.
The applicant took his partner and four children, including the parties' two, to Cape Town for Christmas in the year 2000. The respondent learnt from the children that they stayed at a mansion by the coast and went on many outings, dinners and site-seeing expeditions. In February or March 2001 the applicant returned to Cape Town where he entered the Mr Iron Man Contest. The respondent is made to understand by the children that on two occasions in 2001 the applicant took them to Kariba where they stayed at the Carribea Bay. He is also supposed to have hired a houseboat. On 2 December 2001, the applicant and his partner left for New Zealand. They were supposed to return on 14 January 2001, but she believes the applicant has remained in New Zealand. She states that she is aware that he has hired a luxury camper van complete with two bedrooms, bathroom, living area and kitchen. The van is also equipped with a washing machine, dish washer and computer. The applicant and his partner, according to the e-mails he has sent to his children, which are filed of record, have been touring New Zealand and taking boat trips to various islands.
The return tickets to New Zealand would have cost the applicant in the region of US$1320,00 each. The hire of the camper van would have cost a considerable amount also payable in foreign currency. The children have advised their mother that the applicant has often boasted of being rich. The children have made mention of seeing the applicant with lots of money in cash. She states that the applicant has stipulated that he earns $80 000,00 per month, but has not attached any documentary proof.
She is willing to accept the offer of maintenance of $15 000,00 per month in respect of each child but not inclusive of the rentals. In the event of the applicant paying this amount, she would be willing to contribute towards non-prescriptive drugs for the children and to consider the waiver by her of the clothing allowance.
In answer to the applicant's complaint that she left her employment and does not contribute towards the children's upkeep, the respondent states that she left her employment at Hunyani due to illness. Her employment at the same company is available when she wishes to return. She hoped to be back in employment by February 2002. Her fiancé had also offered to help her financially until she was back on her feet.
With regard to the cohabitation clause, the respondent avers that she only cohabited with Mr Smith from 1 December to the middle of February. She emphatically denies that the cohabitation clause has been violated by her. She states that on 9 November 2000, at a meeting between the parties and their respective legal practitioners, it had been agreed that as the respondent expected to cohabit indefinitely with Mr Smith from December 2000 onwards, the percentage rental due and payable by the applicant in

terms of the consent paper be reduced to 50%. Thereafter, the respondent, in the hope of a marriage relationship with the said Rob Smith, wrote to the applicant suggesting that he reduce his portion of rentals to 40%. Unhappily, Mr Smith and his children then left before the expiration of the three-month period. Smith, however, out of kindness, had suggested that he would continue to finance any shortfall that would fall as a result of the cohabitation clause until she had recovered from her illness and had resumed work. She however considers that she is still entitled to the 80% rental as provided for in the consent paper.
She has challenged the correctness of the report from Kufeya tracing agents. She avers that she was confronted by an agent who was on a bicycle and who was making enquiries on the whereabouts of Rob Smith. She had refused to divulge any information and had referred the person to her legal practitioners. She has also attached a supporting affidavit from her gardener, in which he denies the allegations that he had confirmed that Smith and his children were residing with the respondent. According to the respondent, the agent did not search the premises.
In order to minimise the difficulties she would encounter in obtaining payment from the applicant, she wishes for the Stop Order provision in the consent paper to remain.
She does not believe that the applicant has a genuine grievance. Her view is that when the consent paper was drafted and signed, the applicant's financial position was less healthy than it is at present. She has always contributed to the children's well-being to the best of her ability. All she asks of the applicant is that her children have a comfortable lifestyle and she herself has contributed towards this goal. What she demands from the applicant is what he agreed to provide at the divorce. She has however had to spend a lot of money on legal fees in an endeavour to enforce her rights against the applicant. She states that the applicant has brought the application in bad faith and has not adduced good cause for him to be granted the relief that he is seeking nor has he adduced *prima facie* proof in support of his submission. She prays for the dismissal of the application.

Maintenance

In terms of section 9 of the Matrimonial Causes Act [*Chapter 5:13*], an appropriate court may on good cause shown vary, suspend or rescind an order made in terms of section 7 of that Act. On the applicant therefore rests the onus to establish "good cause" to justify a variation of the maintenance granted by the court at divorce.[1] In order for a court to grant a variation of a maintenance order, there must have been such a change in the conditions that existed when the order was made, that it

[1] *Black v Black* 1987 (1) ZLR 133 (SC)

would not be unfair that the order should stand in its original form.[2] Moral or equitable reasons, apart from the financial needs of the parties which appear to necessitate the alteration of the order, may constitute "good cause".[3] Any change in the means, income, needs or obligations of one of the ex-spouses may be a sufficient reason for ordering rescission, variation or suspension of the earlier order.

In terms of the consent paper, the applicant had agreed and was ordered to pay maintenance as follows:

> "3.1 The Defendant shall pay maintenance for each of the minor children in the sum of $3 000,00 per month per child until each child shall become self supporting or attain the age of eighteen years whichever is the later. The maintenance payable in terms of this paragraph shall escalate annually on the 1st October of each year by an amount equivalent to the increase in the cost of living during the preceding twelve month period as determined by the Consumer Price Index."

The applicant's case is premised on his submission that he cannot afford the increases in maintenance. He stated that his income as a farming consultant was $80 000,00 per month. He has not however adduced any proof in support of this averment. The issue was raised by the respondent in her opposing papers. The applicant has not found it necessary to furnish to the court proof of his income. I agree with the submission made on behalf of the respondent that the applicant has not been candid with the court.

A perusal of the papers as a whole leads one to the conclusion that the applicant is a man possessed of considerable means. He has, despite his alleged straitened financial circumstances, been on various holidays both inside and outside the country. He has taken part in various sporting activities on which the respondent alleged he must have spent considerable sums. He has made no effort to dispute this.
The applicant has not set out what assets he is possessed of. In order for him to afford holidays both inside and outside the country he must have a source of income in excess of the consultancy fee or considerable assets. In the absence of any such statement, a court dealing with an application of this nature is seriously hampered as it cannot reach an informed view of the applicant's ability or disability to pay maintenance. In *Laxman v Laxman* SC 177/90 McNALLY JA stated:

[2] *Roos v Roos* 1945 TPD 84
[3] *Jacobs v Jacobs* 1955 (1) SA 235

> "The second point to be made is that an application, whether for maintenance or for a variation, should set out on oath the income and expenditure, and where relevant also the assets and liabilities, of the applicant."[4]

The applicant has failed to place before the court sufficient evidence that he had good cause for the variation of the maintenance clause.

Cohabitation Clause

The consent paper provides that the applicant pay 80% of the respondent's rent or, if she purchased an immovable property, 80% of the mortgage bond or Deed of Sale repayment. The applicant was also obliged to pay wages for one of the respondent's employees, pay for adequate insurance for household contents and a motor vehicle and for the respondent's medical aid cover. The rent and domestic wage were payable until the youngest child attained the age of eighteen or became self-supporting. The insurance cover would cease on the third anniversary of the date of the order. There is no time limit on the medical aid cover.

The applicant places reliance on a letter from Kufeya (Pvt) Ltd, trading as S.O.C.R.A.T., dated 21 September 2001 in his request to have the cohabitation clauses declared null and void. The letter is addressed to Messrs Scanlen & Holderness and reads as follows:

"re: ROB SMITH

> We refer to your request dated 17th September 2001. Please be advised that our enquiries revealed the following:
>
> - Subject is still residing with Allison Henning at No. 63 Argyle Road, Avondale, Harare.
> - This was confirmed by the gardener who is employed by the couple, despite claims by Mrs Henning that Rob Smith moved out on 14th February 2001.
> - Mrs Henning however, added that she has no obligation to disclose Rob Smith's residential address.
> - Mrs Henning is currently being represented by Fraser Edgars (*sic*) of Coghlan Welsh & Guest.
> - The gardener also states that the two children are at the

[4] Page 2 of the cyclostled judgment.

address.

- Mr Smith spends most of his time in the air with the South African based MK Airlines, and only returns to No. 63, Argyle Road, Avondale when he is off duty."

The applicant has also attached an affidavit from one Claris Madeyi Kamanga. She was employed by the respondent from 1993 to April 2001. She stated that Rob Smith moved in with the respondent in June 2000 and when she left her employment in April 2001, he was still there. Mr Smith's son also stayed there for a few months. In addition there is an affidavit from John Saizie Simba, who is employed by the applicant, confirming that the respondent's gardener had told him that Rob Smith was residing permanently with the respondent. A letter from Mrs E.P. Smith, the former wife of Rob Smith, confirms that he resides at 63 Argyle Road, Avondale.

The respondent herself denies that she cohabited with Rob Smith for three months. In paragraph 7 of her opposing affidavit, she states that Rob Smith moved in with her on 11 December 2000 and moved out in the middle of February 2001. She has attached an affidavit from her gardener Edward Petro in which he disputes that the report made by Kufeya was a true statement of what had transpired. He however seems to confirm that he did not tell the investigator that Rob Smith did not stay at the respondent's place of residence. There is also an affidavit from Robert Craig-Smith in which he states that he moved in with the respondent on 11th December 2000 and moved out in the middle of February 2001.

The respondent has also attached a copy of a report she filed, presumbably with the police, of an incident which took place on 11 March 2001. On page 2 para 3 she stated:

> "Rob came out and tried to ask Derek what was going on because the children were both in a state, and what was he shouting about. Derek then turned on Rob, telling him that his children's concerns had … all to do with him. Rob raised his voice and told Derek that he looked after the children, and took them to school everyday, and if they were upset, it did concern him."

On the 3rd paragraph of page 3, she stated:

> "Rob and I went outside, and Rob asked Derek what he wanted to do. Derek said that, …, referring to me, won't let my children phone me and come and stay with me. Rob told him that was not true, that he also lived in the house, and I have never stopped the children from phoning, or seeing him. Derek started shouting again. Rob eventually asked Derek if he wanted to know the truth. Derek did. So Rob told Derek, that the children have free access to the phone at any time, to phone whoever they wanted. And that every weekend the children go to Derek, I have to force them to go, and often have arguments with them, because they don't want to go."

On 27 April 2001 the respondent sent a note to the applicant giving a breakdown of her financial requirements for April and May 2001. She put in this note the following:

> "NB. My rent went up at the beginning of April to $20 000 a month herewith letter attached. While Rob's son is living with us – until the end of the year – you only need to pay 40% of the rent, which is your portion due."

Despite the respondent's very vigorous and vehement protestation, I am convinced that Mr Smith stayed with the respondent for a longer period than the two months, the two have admitted to. Rob Smith would not have, as at 14 March 2001, been telling the applicant that he took his children to school every day if he was not living with the respondent. Because of this he felt he had the moral ground to advise the applicant that the children's welfare were also his concern. The respondent herself was requesting, at the end of April 2001, only 40% of her rent from the applicant. In my view the respondent cohabited for a period in excess of three months.

In terms of the consent paper, in the event of the respondent cohabiting for three months, the obligation of the applicant to pay 80% of the rent would be reduced by 30%. In addition, the applicant's obligations in relation to the wages of the domestic worker, the insurance cover and the medical aid cover would also cease.

The applicant has applied for a declaration that all provisions in the consent paper relating to cohabitation be declared void due to the respondent having lived with Rob Smith. It is not clear what that is requested. It is not appropriate that the provisions be declared void. What the applicant requires is a declarator that there has been cohabitation for three months and therefore the consequences thereof take effect.

The provisions of the consent paper were negotiated and agreed to between the parties. It was agreed that, in the event of the respondent cohabiting for a continuous period in excess of three months, the applicant's obligations towards rental would be reduced by 30% and the obligations in respect of medical aid cover and insurance would cease. This court can only give effect to what was provided for in the court order and the consent paper. The applicant is himself relying on the provisions of the consent paper to be relieved of his obligations to the respondent. In considering the application this court must have referred to the pertinent provisions of the consent paper and give effect thereto.

It has been submitted, on behalf of the applicant, that the provisions of the consent paper relating to increases in maintenance being in accordance with the Consumer Price Index are not only unrealistic, but unattainable in so far as the applicant is concerned. In the absence of an honest and candid statement of his financial affairs by the applicant, it is somewhat difficult for me to accept this contention. In view of the lavish spending spree which the applicant embarked upon subsequent to the divorce, I can only conclude that he is a man of very substantial means. The applicant must perform his obligations in accordance with the Consent Paper. The provisions of the consent paper in relation to the reduction in the applicant's obligation to pay the rent or the bond repayments in the event of cohabitation are not very happily worded. The meaning is ambiguous. The obligation is that the applicant must pay 80% of the rent or bond repayments but, in the event of cohabitation, his obligation is reduced by 30%. That could mean that the applicant would then be required to pay 50% of the rent or bond repayments, since the reduction amount to 30% of the rent or bond repayments. One the other hand, it could mean that the applicant would then be required to pay 56% of the rent or bond repayments, because the reduction is 30% of the 80% he is initially required to pay and 30% of 80% is 24%.

Having given the matter very careful consideration, I consider that the latter interpretation is the correct one. It does no violence to the language used and does not require additional words to be implied. If the former interpretation were to be given it would mean that the reference to 30% would have to be interpreted as saying "30% of the rent" and "30% of the bond repayment". Accordingly, I consider that, in terms of the consent paper, the obligation of the applicant in relation to payment for rent is reduced to 56% until the youngest child attains the age of 18 years or becomes self-supporting, whichever is the later. If however the respondent buys a house, the applicant would be required to pay 56% of the monthly bond repayments. The obligation of the applicant to pay insurance and medical aid cover for the respondent is extinguished in accordance with the provisions of the consent paper.

The import of paragraphs 3 and 4 of the draft order are not clear to me. They appear to restate the applicant's obligations in respect of the children's school fees and the contribution for medical aid cover for them.

The applicant has prayed for costs against the respondent. Both of the parties have been partially successful and I cannot see the justification in

awarding costs to either of them.

I therefore make the following order:

1. The applicant shall continue to pay maintenance for the minor children in accordance with clause 3.1 of the Consent Paper entered into by the parties.

2.(a) The applicant's obligation to pay 80% of the respondent's rental is hereby reduced to 56% in accordance with clause 4.2.1;

(b) The applicant's obligation to pay 80% of any mortgage bond or Deed of Sale repayment is reduced to 56% in accordance with clause 4.2.2.

3. The applicant's obligation to pay towards the wages of a domestic worker is terminated in accordance with clause 4.3.

4. The applicant shall continue to pay for the children's education in Zimbabwe in accordance with clause 3.2.

5. The applicant shall continue to maintain the two minor children as dependants on his medical aid scheme in Zimbabwe in accordance with clause 3.4.

6. Each party is to bear his/her costs.

Coghlan, Welsh & Guest, applicant's legal practitioners.
Wintertons, respondent's legal practitioner.