

REPORTABLE (109)

MTHOKOZISI NDIWENI
v
LINDA MAGWARO

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHIWESHE JA
BULAWAYO: 20 JULY 2022 & 31 OCTOBER 2023

N. Sibanda, for the appellant

S. P. Sauramba, for the respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Bulawayo, dated 21 April 2022, in terms of which the court *a quo* granted the application by the respondent for the variation of clause 2 (e) (i) of the parties' consent paper and para 4 of the divorce order granted by the court *a quo* on 27 March 2014 under HC 125/14, providing for the post-divorce maintenance of the parties' two minor children.

The order of the court *a quo* reads:

“It is ordered that:

1. Clause 2 (d) (e) (i) and paragraph 4 of the consent order be and are hereby amended by;
 - (a) The plaintiff shall pay the sum of US\$400.00 for each of the two minor children per month, payable in cash or into the applicant's nostro account or the RTGS equivalent thereof at the bank rate prevailing on the date that payment is made until the children attain the age of 18 years or become self-supporting, whichever comes first.

2. This order shall be effective from March 2021.”

Aggrieved by the decision of the court *a quo*, the appellant has noted the present appeal.

At the close of submissions in this matter this Court made the following order:

“The respondent having conceded that there is merit in grounds of appeal number 5 and 6:

It is ordered as follows:

1. The appeal succeeds in part.
2. The judgment of the court *a quo* is amended by the deletion of paragraph 2 thereof.
3. Each party shall bear its own costs.”

We indicated that our reasons for doing so would follow. They are as follows.

THE FACTS

The parties were married on 5 July 2005 in terms of the Marriages Act [*Chapter 5:11*].

The marriage was blessed with two children. Nine years into the marriage the appellant instituted divorce proceedings in the court *a quo* on the grounds that the marriage had irretrievably broken down. He did so under case number HC 125/14. To curtail the divorce proceedings, the parties negotiated and agreed the terms of the consent paper that would govern their affairs after divorce. It was on the basis of that consent paper that divorce was granted by the court *a quo*. Paragraph 2 (e) of the consent paper provided for the maintenance of the parties’ two minor children. It reads as follows:

“(e) Maintenance of the Minor Children

- (i) The parties have agreed that by way of maintenance the plaintiff (the present appellant) shall pay US\$500.00 for each of the minor children per month as monthly maintenance until they attain the age of 18 years or become self-supporting, whichever occurs first. (my own brackets)

- (ii) Plaintiff shall pay all school fees inclusive of levies and other related ancillary education costs, purchase school uniforms, stationery and all other school requirements until they finish tertiary education.”

The above quoted para 2 (e) of the consent paper was incorporated into the divorce order dated 27 March 2014 as paras 4 and 5. The appellant “religiously” paid the sum of US\$500.00 per month per each child, making a total of US\$1 000.00 maintenance per month. He did so from 2014 until 2019 when Statutory Instrument No 33/19 was promulgated. This instrument decreed that all assets and liabilities, including judgment debts, denominated in United States dollars on or before 19 February 2019 (the effective date) shall be deemed to be values in RTGS dollars at the rate of one to one to the United States dollar.

The appellant, whose liability for maintenance was now deemed to be in RTGS dollars at the rate of 1 to 1 to the United States dollar, would now be liable to pay a total of RTGS \$1000.00 per month for both children. However, realizing that this amount would fall short of the children’s needs, the appellant, at his own volition and unilaterally, decided to pay RTGS \$1 500.00 per month for both children. The respondent found that amount awfully inadequate and proposed that the appellant pays the sum of US\$320.00 per month per child. The appellant refused to budge and persisted with his offer of RTGS\$1 500.00 per month for both children. At one stage and, again, unilaterally, the appellant decided to pay the sum of US\$50.00 per month per child. However, the respondent avers that between January 2021 and May 2021 the appellant did not pay any maintenance at all.

Dissatisfied with that state of affairs, the respondent approached the court *a quo* armed with an application for variation of the maintenance clause embodied in the divorce order

granted under HC 125/14. She asked the court *a quo* to set the rate of maintenance at US\$500.00 per month per child in conformity with the order of the court *a quo* of 27 March 2014.

In opposing the application in the court *a quo*, the appellant submitted that the respondent wished to live a lavish life out of moneys paid out as maintenance for the children and that her claim was based on figures plucked from the air. He also submitted that his financial circumstances had changed since 2014 in such a way that he was unable to pay US\$500.00 per month per child. Despite these submissions by the appellant, the court *a quo* granted the application and issued the order captured on the first page of this judgment.

Although this order is inelegantly drafted, its import is clear – that with effect from March 2021 the appellant was obliged to pay maintenance at the rate of US\$400.00 per month per child or its equivalent in local currency determined at the prevailing bank rate.

It is this order that the appellant appeals against on the following grounds:

GROUND OF APPEAL

1. The court *a quo* erred in varying the maintenance payable towards the minor children whilst disregarding the circumstances of the appellant.
2. The court *a quo*, in varying the maintenance order, misdirected itself on the meaning of good cause for variation.
3. *A fortiori*, the court *a quo* erred in rejecting that appellant's finances had been drastically changed negatively, due to lack of employment and the subsequent remarriage.

4. The court *a quo* erred and fell into error in not considering the US\$100.00 appellant had been paying consistently as maintenance towards the minor children.
5. The court *a quo* misdirected itself in granting a retrospective order when none of the parties prayed for such an order.
6. The court *a quo* misdirected itself in granting an order that was retrospective when the circumstances did not warrant such.”

RELIEF SOUGHT

The appellant seeks the following relief:

- “1. That the instant appeal succeeds with costs.
2. That the judgment of the court *a quo* be overturned and substituted with the following:
“The appellant be and is hereby ordered to pay US\$100.00 or Zimbabwe dollar equivalent at the prevailing interbank rate as maintenance for each minor child.”

ISSUES FOR DETERMINATION

The grounds of appeal only raise four issues, namely;

- 1) Whether the court *a quo* erred in varying the maintenance payable towards the minor children.
- 2) Whether the *quantum* of the variation is justifiable.
- 3) Whether the appellant has the financial capacity to fund the variation.
- 4) Whether the court *a quo* erred in granting a retrospective order.

ANALYSIS

It is trite that s 9 of the Matrimonial Causes Act [*Chapter 5:13*] (the Act) empowers an appropriate court, such as the court *a quo*, to vary, on good cause shown, an order made in terms of s 7 of that Act. The onus is on the applicant to establish good cause for the variation. In the case of *Fleming v Fleming* HH 27/2003 it was held that:

“On the applicant therefore rests the onus to establish good cause to justify a variation of the maintenance granted by the court at divorce. In order for a court to grant a variation, there must have been a change in the conditions that existed when the order was made, that it would be unfair that the order should stand in its original form.”

The court *a quo* was alive to these requirements. It noted at p 5 of its cyclostyled judgment that indeed the parties had agreed that SI 33/2019 had financial implications on the question of maintenance. The only outstanding question being one of the *quantum* of the maintenance to be paid. If it was common cause *a quo* that the SI 33/2019 was in its effect good cause for variation of the maintenance order, one wonders why the appellant now asserts in his grounds of appeal that the court *a quo* erred in failing to appreciate “the meaning of good cause for variation.” The ground of appeal concerned has no merit. It must be dismissed out of hand. It was clear that the amount of US\$500.00 per month per child had now been reduced to a paltry RTGS\$500.00 per month per child. As correctly observed by the court *a quo*, this amount is ridiculously low and must be varied upwards. In the circumstances, the court *a quo*’s reasoning that the erosion by operation of law of the original maintenance award constituted good cause for the variation of the order for maintenance cannot be faulted. The other good cause for variation was put forward by the appellant himself, who has since remarried and now has a new family to support. Some of his resources would now need to be channeled in that direction.

Once the court *a quo* satisfied itself that good cause existed for the review of the maintenance order, it sought to determine the *quantum* of the variation. It correctly relied on the provisions of s 7 (4) (d) of the Act for guidance. That section has a broad provision exhorting the court to have regard to all the circumstances of the case, including:

- (a) the income earning capacity, assets and other financial resources which each spouse has or is likely to have in the foreseeable future.
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the near future, and
- (c) the standard of living of the family including the manner in which any child was being educated or trained and or expected to be educated or trained.

The court *a quo* also correctly noted that in cases such as the present, a child's best interests are paramount. It also recognized that children are entitled to adequate protection by the courts and that in that regard the court *a quo* is their upper guardian, a role enshrined in s 81 (3) of the Constitution. See *Crone v Crone* 2000 (1) ZLR 367 (S).

In assessing the *quantum* of the variation, the court *a quo* was further guided by two cardinal considerations, namely, whether there has been a change in the financial circumstances of the appellant and the ability of the appellant to pay the increment sought. It answered the first question in the negative and then proceeded to assess the appellant's capacity to fund the increment.

The appellant's defence in the court *a quo* was that his financial circumstances had been worsened in that he had lost three sources of income. He submitted that he had lost his employment with the Government of Zimbabwe. A letter from that employer confirmed this fact which was never in dispute. His employment terminated in April 2013. Documentary evidence also confirmed that the appellant had lost his surgery and shop in Cowdray Park in 2014. A former employee swore to an affidavit confirming that the Cowdray Park surgery was indeed closed in 2014.

However, the court *a quo* found that the appellant was not being candid. It observed that the three sources of income were lost before the grant of the divorce order whose variation is sought. To all intents and purposes, therefore, the appellant has had one source of income since 2014, namely, a surgery. He managed with that one source of income to pay a total of US\$1 000.00 per month from 2014 to 2019. In a previous application for variation filed in 2016, the appellant offered to pay US\$630.00 and to purchase groceries worth US\$370.00 per month. Cumulatively, that offer amounted to a total of US\$1 000.00. The appellant did not then raise the defences he now raises. For that reason, the court *a quo* rejected the appellant's contention that his financial circumstances had deteriorated.

The appellant did not deny that as a medical doctor in private practice he charges his clients in United States dollars. The appellant had provided a bank statement showing only one page as proof of income. The court *a quo* correctly observed that a single page of a bank statement was insufficient to prove one's income. What was required was a bank statement spanning longer periods. By producing this one page the appellant was not being candid with the

court as to the *quantum* of his income. His actions in this regard were intended to mislead the court. The court *a quo* also noted that the appellant had attempted to mislead the court in two other respects. Firstly, the appellant had custody of the two minor children in November 2019 and December 2020. Firstly, the appellant said that he held custody during that period because the respondent intended to relocate to the United Kingdom. The truth, however, was that the respondent was no longer able to provide for the children on the maintenance that appellant was paying. She resumed custody in December 2020 when her salary improved. Secondly, the appellant says that he had the children for the entire period in November 2019 and December 2019. He omitted to disclose that during that period the children were with the respondent during the school holidays and on weekends.

The court *a quo* found that the appellant had not been candid with the court with regards his financial circumstances. That fact weighed heavily against the appellant. See *Foote v Foote* 1994 (2) ZLR 28 (HC). It concluded, and, justifiably so, that the appellant's income had not been eroded as alleged and that the appellant could afford the variation sought by the respondent. The court *a quo* also found that the appellant had at some stage been paying maintenance at the unilaterally determined rate of US\$100.00 per month per child. He had thus elected to pay maintenance in United States dollar terms. He could not now seek to do so in RTGS. However, the court *a quo* took into account the fact that the appellant had remarried. His remarriage was accepted as a change in his circumstances in terms of his financial obligations towards his new family. It assessed this obligation to be no more than US\$100.00 per month. For that reason, the variation was granted in the sum of US\$400.00 and not the US\$500.00 sought by the respondent.

Finally, the court *a quo* backdated the variation to March 2021. The appellant is up in arms against this. He argues that the court *a quo* misdirected itself in granting a relief which neither of the parties had asked for. At the hearing of this appeal, the respondent conceded that the variation should not have been backdated and that, accordingly, grounds of appeal number 5 and 6 had merit.

DISPOSITION

This Court is of the view that the reasoning and findings of the court *a quo* cannot be impugned. It properly found, on the evidence before it, that the respondent had shown good cause for the variation of the maintenance order. It correctly assessed the *quantum* of the variation following recognized values and laid down procedures. In its assessment of the *quantum* of variation it took into account the fact that the appellant had remarried. It found that the appellant had not been candid with it in many material respects and rejected as false his assertions that his financial circumstances had changed. It correctly noted that in cases of this nature the interests of the minor children were of paramount importance. On the whole the appellant has failed to prove any misdirection on the part of the court *a quo*, save for the order backdating the variation which respondent conceded was not warranted. For that reason, para 2 of the order of the court *a quo*, backdating the variation to March 2021, must be set aside.

Accordingly, the appeal succeeds in part. Each party shall bear its own costs.

It was for these reasons that we ordered that:

- 1) The appeal succeeds in part.

- 2) The judgment of the court *a quo* is amended by the deletion of para 2 thereof.
- 3) Each party shall bear its own costs.

GWAUNZA DCJ : I agree

MATHONSI JA : I agree

Tanaka Law Chambers, appellant's legal practitioners

Sauramba. S. P. Attorneys, respondent's legal practitioners