PELLAGIA NYAUDE
versus
INNOCENT RUNGANO NYAUDE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 6, 7, 13, March and 8May 2014.

Opposed Application

M. C. Mukome, for the applicant
A Chagonda, for the respondent.

UCHENA J. The applicant is the respondent's wife married to him in terms of the Marriages Act (*Cap 5:11*). They fell in love and married while they were working for Standard Bank Zimbabwe. In 2010 the respondent secured a job with Standard Bank Qatar. The applicant left her job with Standard Bank Zimbabwe to follow and live with her husband in Qatar where she secured a job with DHL.The love which saw them marrying and living together in Qatar has faded.

The respondent transferred to Standard Bank Dubai. That act brought misery to the applicant. She lost her right to stay and work in Qatar as this depended on her husband's stay in that country. The respondent persuaded her to relocate to Zimbabwe on the pretext that he was going to arrange for their stay in Dubai. Instead of a welcome to Dubai, she received summons for divorce from the respondent. She stayed with her parents in Chitungwiza were she depended on them financially except for the irregular receipts of amounts of US$500-00, which have now ceased.

The applicant had no option but to file thisapplication for maintenance pending divorce in the sum of US$1500-00 per month and contribution towards costs of the divorce in the sum of US$1500-00. The respondent initially opposed both, but at the hearing Mr *Chagonda* for the respondent, advised the court that the respondent was offering the applicant contribution towards costs in the sum of US$ 1000-00 payable over three months. Mr *Mukome* for the applicant, advised the court that his client accepted the respondent's offer. That resolved the issue of contribution towards costs.

The applicant is now employed earning a total package of US$459-00, per month though she has not yet started earning that salary. It was argued on her behalf that delays of up to 6 months are not unusual. What is important is that she is now employed and will be paid her salary in spite of the delays. The court should determine the maintenance the respondent should pay. He is employed earning a salary of US$6000-00 per month. He claims to have loans which almost wipe out his salary. The applicant who previously worked for Standard Bank said the Bank does not allow one to take loans which exceeds half of his/her salary. The applicant did not state when the loans will be paid up.

The circumstances in which he lured the applicant back to Zimbabwe so that he could institute divorce proceedings against her gives the impression that he is a calculating litigant who can turn events to his own advantage. The loans may therefore be a ploy to deny the applicant adequate maintenance.

The respondent is responsible for the applicant's present circumstances. She was in employment which he caused her to lose. He was previously erratically giving her US$500-00 per month. He on receiving the application offered her US$100-00 per month.On hearing that she was now employed he withdrew the offer of US$100-00 per month. This gives the impression of an insensitive man who despite his ability to maintain the applicant, and what he has done to impoverish her, does not care about her maintenance. He in fact seems bent on insuring that she does not enjoy what she used to enjoy when they were staying together. She is however still his wife and entitled to be maintained by him at the standard of living they were used to, till a decree of divorce is granted. That is when the case law on spousal maintenance relied on by Mr*Chagonda* for the respondent will apply.

The applicant has since her coming back to Zimbabwe been staying with her parents in Chitungwiza. Except for the erratic payments she received from her husband she was totally dependent on her parents. Her founding affidavit indicates that she requires maintenance of US$1500-00 pending divorce. She wants to rent her own accommodation and live a life independent of that of her parents. Her circumstances have however changed for the better. She is now employed and staying at the school where she teaches. Mr *Mukome* for the applicant however submitted that she still needs her own accommodation in town, as she should not be confined to rural life. That may be so but she nolonger needs the amount she originally claimed. She now has an income of her own which despite delays will be paid to her. Her real needs will be determined on the basis of her changed circumstances.

The applicant seems to be aware of the effect of her changed circumstances. She in her answering affidavit on p 26 para8.2 said;

> "I deny that I was sitting on my laurels because I recently secured a teaching job with the Government with effect from the 23rd January 2014 at Chironana Secondary School, Mahusekwa, Marondera. **Respondent can continue giving me the US$500-00 which he said was surplus money". (emphasis added).**

This in my view is applicant's realistic assessment of her present circumstances. If she gets US$500-00 per month, from the respondent, that will give her a total of US$959-00 per month. She had asked for US$1500-00,which seems to have been on the high side.

In the case of *Galante* v *Galante 2000* (2) ZLR 453 @ 454C to 455 B (SC)McNALLY JA gave guide lines on how and what should be considered in determining an application for maintenance *pendete lite.*

The court will thus adopt a robust approach to the assessment of an appropriate level of maintenance *pendent lite*.

Aspouse, whose divorce case is pending, is as of right entitled, other things being equal, to maintenance *pendete lite*, until a decree of divorce is granted.He or she is entitled to continue enjoying the standard of life he or she was used to. On the other hand, maintenance for a former spouse, may be subject to other considerations, namely, those set out in s 7(4) of the Matrimonial Causes Act [*Cap 5:13*]. It is therefore not correct to apply the principles applied in determining maintenance after divorce, to an application for maintenance *pendete lite*.

In this case the applicant is clearly entitled to maintenance at the standard of living she was enjoying in Qatar until the respondent duped her into returning to Zimbabwe.

The issue to be determined is the quantum of maintenance, which need not be determined with the exactitude of post divorce spousal maintenance, or general maintenance. The court is entitled to adopt a robust approach. The applicant is nowemployed. What she now needs is top up maintenance which will enable her to live a standard of life she was used to.

The respondent inspite of his many deductions is able to maintain the applicant in the sum required to give applicant enough to afford the standard of living she was used to. He indicated in his evidence that the deductions leave him with about US$ 500-00. That amount plus the applicant's salary is enough to afford the applicant the standard of living she was

used to. The respondent used to sendher that amount.She in her answering affidavit seems ready to accept that amount.

The respondent on hearing that applicant was now employed withdrew the US$100-00 he was offering as maintenance per month. He now says she needs no maintenance. That view is both mean and indicative of a desire to inflict misery on the applicant through denial of means of survival. It is hard to imagine how the respondent expected his wife to live on US$100-00 per month before she secured employment. This casts a shadow on his many deductions. They appear to me to be a means of justifying his desire not to meaningfully maintain his wife if the court finds that he has to.I must therefore take a pragmatic view of the respondent's means and not be misled by what respondent presented as his means.

In the case of *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (SC)195 KORSAH JA at p 202 B said;

> "The court must take a pragmatic view of the means of the husband, and not be misled by appearances, especially when the husband is being exceptionally frugal with the truth. The court must ascertain not only what monies the husband admits to having, but also what monies could reasonably be made available to him if he so wished: O'Donnell v O'Donnell [1975] 2 All ER 993 (CA) at 996G-H."

I have already found that the respondent's list of deductions is aimed at denying the applicant maintenance just as her being duped to return back home was a preparatory stage of the divorce proceedings.

Self-imposed penury cannot justify denial of a maintenance order to the applicant. If the respondent incurred the loans, he must have done so fully aware of his responsibility to his wife. He should not be allowed to deny her adequate maintenance through his incurring unreasonable obligations. He is a man of means and must be well able to adjust his means to maintain his wife. See the case of *Lindsay* (supra) where GUBBAY CJ at p 204 A-Gdealt with how the courts should deal with self imposed penury.

During the hearing Mr *Mukome* for the applicant applied for the back dating of the maintenance to be granted, to the date of the applicant's application. He relied on the cases of *Taneka* v *Taneka* 1993 (2) ZLR 9, and *Barasi* v *Barasi* 1978 RLR 348.Mr *Chagonda* for the respondent opposed the back dating of the maintenance if any is granted. He in fact initially strongly opposed the granting of any maintenance but seemed to have changed his view as he ended up offering the US$100-00 the respondent had withdrawn on hearing that the applicant was now employed.

In the case of *Taneka* (supra)ROBINSON J relying on the authority in *Lindsay* (supra) back dated the maintenance *pendete lite* he granted to the date of application.In the case of *Lindsay* (supra) KORSAH JA at p 202 E to 203 A dealing with the back dating of maintenance *pendete lite* said;

> "I now turn to the issue of arrear maintenance. It seems to me that there is no reason in principle why an order for maintenance pending the determination of the main divorce suit should not be made effective from the date of presentation of the application for such an order and ending with the date of determination of the suit, as the court thinks reasonable. After all, were the applicant not in need of such maintenance at the time of the application, the application would not have been mounted.
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> The fact is that the legal procedures of swearing affidavits, opposing affidavits and answering affidavits all take up so much time, not to mention the date of set down and the time for the final determination of the application. If it were not possible to back-date an order to the time of presentation of the application, an applicant for maintenance pendente lite would suffer considerable prejudice, not because of any fault on her part, but because of the recalcitrance of an obdurate husband, who ought not to be permitted in law to benefit from protracting the proceedings so as to reduce the burden of maintaining his wife. It is just and equitable, therefore, that such a man should be saddled with the burden of arrear maintenance whenever it is claimed and it is apposite to grant it. I am of the view that it was for these reasons that arrear maintenance prior to the date of judgment was granted in Barass v Barass supra at 388E-G. The learned trial judge was justified, in this instance, in ordering that the payment of maintenance should commence from 1 April 1992."

The applicant applied for maintenance on 8 January 2014. The respondent put up an unnecessary spirited defence in circumstances where a reasonable husband would only have negotiated for a reasonable quantum of maintenance. This led to delays in the finalisation of the applicant's application, forcing her to continue suffering the lack which visited her upon the respondent loosing love and affection for her. If the court does not order the payment of maintenance from the date the application was lodged the respondent will benefit from the delays he deliberately caused. A cunning spouse should not be allowed to get away with such trickery. Justice must be done between the spouses.

In the result I make the following order:

1. The respondent shall with effect from 1 May 2014 pay to the applicant maintenance *pendete lite* in the sum of US$500-00 per month, until the determination of the pending divorce case HC 9686/14.

2. The respondent shall pay arrear maintenance to the applicant at the rate of US$ 500-00 per month for the period 8 January 2014 to 30 April 2014.

3. The respondent shall contribute US$1000-00 to the applicant's costs of suit in HC 9686/13, payable through equal three monthly instalments from 31 March 2014.

4. The respondent shall pay the applicant's costs.

*M.C Mukome,*applicant's Legal Practitioners.
Sawyer and Mukushi, respondent's Legal Practitioners.