TRACEY LEIGH MACKINTOSH (nee PARKINSON)
versus
ANTONY WILLIAM McDONALD MACKINTOSH

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 17 February 2016 and 30 June 2016

Opposed Application

R. M Fitches, for the applicant
L Uriri, for the respondent

MWAYERA J: The applicant approached the court under a broad umbrella for variation of a consent paper incorporated into an order of this court in HC 7216/07. In another breath, the applicant sought to amend the consent paper on the basis that she believed at the time that she entered into the consent paper that she did not get a good bargain. In other words, she feels she was short changed because she did not know all the assets the respondent had. The brief background of the matter is that the applicant and respondent were married in terms of civil rites and the marriage was blessed with two daughters. On 17 December 2009, the parties, after entering into a consent paper, were granted divorce and the terms of the consent paper governing ancillary issues were incorporated into the divorce order by consent. The applicant, was among other things, awarded custody of the minor children while the respondent, among other things, was ordered to pay maintenance for the two minor children.

A reading of the applicant's founding and replying affidavit goes at length to show a desire by the applicant to revisit the consent paper and amend the same on the basis that she feels the respondent has a lot of assets. The parties freely and voluntarily entered into a contract governing the terms of dissolution of their marriage and ancillary issues. To then seek to amend the consent paper which in fact is incorporated as a court order on basis of not having bargained fairly has no sound legal basis, moreso in the nature of proceedings before the court. On the

other hand, the thrust of the applicant's argument of variation of maintenance is provided for in the Matrimonial and Causes Act s 9 which states:

> "Without prejudice to the Maintenance Act [*Chapter 5:09*]; an appropriate court may on good cause (my underlining for emphasis) shown, vary, suspend or rescind an order made in terms of section 7 and subsection 2, 3 and 4 of that section apply *mutas mutandis* in respect of any such variation, suspension or awareness."

Clearly what is central to variation of an order is good cause. In *Henning* v *Henning* HC 12111/01 HH 27-2003 Gowora J ably outlined what amounts to good cause and also laid out factors for consideration for one to determine good cause. The judge further made it clear that the onus is on the applicant to show change of circumstances amounting to good cause. In order for a court to grant variation of a maintenance order, there must have been a change in the conditions that existed when the order was made. Any change in the means/income, needs or obligations of one of the ex-spouses may be sufficient reason for obtaining variation of the earlier order.

In *casu* the applicant is seeking the following:

1. Under variation of maintenance that the maintenance of $100.00 per month per child must be increased to $500.00 per child per month until the child attains the age of 22 or becomes self-supporting.
2. That the clause for maintenance paid to the applicant of $2 000.00 per annum as long as his obligation to pay maintenance in relation to the children pertains, be varied to the effect that the respondent pay $2 000.00 per month until the applicant's death or remarriage but excluding any period of cohabitation with another man.
3. That the current order of maintaining the applicant on medical aid be varied to extend beyond the daughters attaining the age of 18. In other words, the applicant seeks to vary the medical aid clause to the effect that the respondent maintains her on such external medical aid policy irrespective of their daughters attaining the age of 18.

It is apparent from the papers that the applicant based her claim for upward variation on the basis of a document attached to an answering affidavit. She claims the respondent has been dishonest in that he did not disclose his assets and wealth. The applicant infact describes the respondent as a wealthy man. The difficulty presented by the approach adopted in the circumstance of this case is obvious. The applicant alleges dishonesty on the part of the

respondent and alleges without substantiation, that the document attached to the answering affidavit was authored by the respondent with the assistance of his PA. There is untested correspondence from third parties which the applicant seeks to rely on to prove that the applicant is wealthy and as such maintenance ought to be varied upwards. These are contentious issues which require full ventilation.

In order to come up with a determination, it is trite that the court will not resolve disputed issues on affidavit. In this case the applicant imputes dishonesty on the part of the respondent and alleges the respondent lied. This of necessity calls for a finding on who is telling the truth, which aspect cannot be decided on application proceedings. I subscribe in to the sentiments echoed in *Masukusa* v *National Foods Ltd and Another* 1983 (1) ZLR 232 wherein it was stated:

> "This conflict is indeed apparent on the applicant's own papers, since he annexes documents drawn by the first respondent and contends that the allegations therein are untrue ---"

By insisting on proceedings one brings himself within the scope of the dictum of Miller JA in *Tamarillo (Pty) Ltd* v *BN Atiken (Pty) Ltd* 1982 (1) SA 398 (AD) at 430 G-H where the learned judge of appeals says:

> "A litigant is entitled to seek relief by way of Notice of Motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril."

See also *Mata* v *Otho N.O* 1972 (3) SA 858 and *Room Hire Co. (Pty) Ltd* v *Jeppe Street mansions (Pty) Ltd* 1949 (3) SA 1155 (T). The general rule is that where there is a real dispute of fact it is undesirable to seek to settle the issue solely on probabilities disclosed in contradictory affidavits.

It is apparent from the papers that the applicant seeks to recall the position taken when she properly entered a consent paper which was incorporated as an order of this court. Section 7 and 9 of the Matrimonial Causes Act by no means seek to indefinitely prolong litigation. The Act allows revisitation of continuing obligation on good cause shown. Considerations such as change in financial standing could, in befitting circumstances, entail an increase or decrease of maintenance. What is central to good cause is what is just and equitable. That a party regrets having agreed and that they feel they can bargain better is not what falls into consideration of "good cause" especially where at the time of entering into consent or agreement the parties were aware of the full facts. In the present case, the applicant seeks to have her own maintenance

extend beyond the children turning 18, and also extended to include periods when she will be cohabiting but not married to any other party. At the time of entering into the initial consent paper incorporated in this court order HC 7216/07 the applicant was aware of considerations having a bearing on date of termination of maintenances. The parties agreed the maintenance would terminate upon the children attaining the age of majority and that children would have a chance to choose who they want to live with. In any event, the applicant in the papers alluded to the respondent giving more than what was ordered to the children. Although she attributes that to the applicant trying to win favours from the children one cannot help but read a responsible person as envisaged in the Maintenance Act, acknowledging his obligation per the Act and the Constitution. The children, if requiring maintenance in the form of school fees and upkeep, have avenues to get upkeep from both parents. Worth noting at this stage is the fact that the applicant in her presentation of income and expenses did not disclose her own contribution to the children. The claim for increase of maintenance for the children and extension of her own maintenance to beyond the time the children would have turned 18, was not substantiated. In other words, given the introduction of multicurrency there was no evidence to show rise in costs of living warranting the revisiting of the current maintenance. It appears the request is simply centered on the reflection that the applicant feels she agreed to a position she no longer likes and that certainly does not fall under "good cause" contemplated by s 9 of the Matrimonial Causes Act. As regards post-divorce spousal maintenance, the parties agreed on a cutoff point being that when the youngest child turned 18. This is in line with current trends for it is appreciated spouses owe each other obligation to assist each other during marriage at dissolution and upon death. For the obvious reason that parties will move on after divorce, maintenance of an ex-spouse cannot be for an indefinite period. Where a party remarries and has other children for example extra obligations for consideration will arise warranting change of circumstances amounting to good cause.

Also in this day and age where equality is the central aspect in all spheres of life maintenance of an ex-spouse cannot be indefinite. I subscribe to the reasoning in *Chiomba* v *Chiomba* 1992 (2) ZLR 197 (S) wherein it was stated:

> "Marriage can no longer be seen as providing a woman a bread ticket for life. A marriage certificate is not a guarantee of maintenance after the marriage has been dissolved. Young women who worked before marriage and are able to work and support themselves after divorce will not be awarded maintenance if they have no young children."

In *casu* the applicant apart from submitting unsubstantiated and untested evidence in a founding affidavit that the respondent is a very wealthy man (and that she is still in the time of the marriage 6 years after divorce) did not show any change of circumstances amounting to good cause warranting variation of the maintenance in relation to herself. It is clear that in 2009 when the parties entered into the consent paper, which formed the basis of the court order, the applicant was aware of the standard of living she was accustomed to. She agreed to the quantum of maintenance, medical aid care and time frame of operation. No good cause has been shown to warrant interference with the extant court order. Speculative assumptions that the respondent is extremely wealthy given the application proceedings is not good enough for the applicant.

In the result it is ordered that the application be and is hereby dismissed with costs.

Coghlan Welsh & Guest, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners