

CAROL KEMPEN
versus
DAVID RICHARD KEMPEN.

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 20 February and 30 April 2015.

Opposed Application

R. Fitches, for the applicant
T. Zhuwarara, for the respondent

UCHENA J: The applicant and respondent were married in 1996 but divorced on 25 September 2002. Their divorce order incorporated provisions of a consent paper which made provisions for their only child Courtney's maintenance and applicant's rental expenses among other provisions. These provisions were in Zimbabwean dollars. The terms of the court order incorporating the consent paper were complied with till the dollarization of the Zimbabwean economy in February 2009, after which the respondent started paying the child's maintenance and applicant's rentals in the sum of US\$500.00 per month. He later after changes in the minor child's schooling arrangements which necessitated his staying with her for longer periods reduced it to US\$400.00 with the applicant's consent. He from February 2013 stopped paying any maintenance eventually leading to this application.

The applicant has now applied for the variation of the court's order so that provisions stated in Zimbabwean dollars, can be amended to sound in United States Dollars, and the payment of arrear maintenance in-respect of the minor child and herself. She also seeks a refund of the Medical Aid contributions which she paid for the minor child's cover as it in terms of the consent order was the respondent's obligation. She further seeks certain amendments to the consent paper.

The applicant seeks the following court orders;

1. "That Respondent will forthwith pay to Applicant the sum of US\$3026-00 by way of reimbursement of medical aid subscriptions.
2. That Respondent will forthwith pay to Applicant the sum of US\$7 200-00 in respect of arrear maintenance and arrear rental contributions.

3. That clause 4.3 of Annexure "B" hereto be and is hereby amended:
 - (a). By the deletion of the words "the sum of Z\$20 000-00 per month and the substitution of "Applicant with effect from 1st August 2014, the sum of US\$400-00 per month" and
 - (b) by the deletion of the words "or cohabitation with another person" and the substitution of "excluding any period of cohabitation by applicant with another person".
4. That clause 3.2 of the consent paper be deleted.
5. That clause 2.1 be amended by the deletion of all of the words appearing after the word "child" (in line 4 thereof) and the substitution of "including two weeks extended access in Zimbabwe in every school holiday falling prior to the child's attainment of the age of majority, at Plaintiff's sole cost as to the child travelling by air to and from Harare".
6. That respondent shall pay Applicant's costs of suit."

The respondent does not dispute the factual background of the applicant's application. He agrees there is a court order which was granted with their consent based on a consent paper they had signed. He admits that after dollarization he paid maintenance in the sum of US\$500-00 which he subsequently reduced to US\$400-00. He admits he did not pay anything to the applicant from February 2013 till the applicant made this application. He disputes having an obligation to make such payments. In his opposing affidavit on p 22 of the record paras 9.1 and 9.2 the respondent said;

- 9.1 "I aver that I have always had the best interests of the minor child in my contemplation and resultantly, despite not being compelled to do so by any order of court (the provisions of the consent paper sounding in Zimbabwean dollars having been rendered redundant and resultantly, unenforceable, I duly gave applicant payments of US\$500-00 per month from 2009 up until 2011 in respect of both my minor child and the Applicant. This payment was over and above the payments I was making for my daughter's school fees and medical expenses.
- 9.2 It is common cause that our child began spending weekdays with myself and only weekends (two days a week) with the applicant. As a result I accordingly reduced **the maintenance payments from US\$500-00 per month to US\$400-00 per month in light of the fact that the child was spending more time with me.**" (emphasis added)

Maintenance

In paras 9.1 and 9.2 above, the respondent admits an acceptance by him of the obligation to pay the child's and applicant's maintenance though not in terms of the court order which sounded in Zimbabwean dollars. He specifically admitted that he was also paying

for the child's medical aid in US dollars, an obligation he had imposed on him by the consent court order which incorporated the consent paper. The payments were consistently made till January 2013 a period of 4 years.

Mr *Zhuwarara* for the respondent submitted that the applicant's application is based on a prescribed consent order in view of the time during which it has been inoperative. Mr *Fitches* submitted that the application for variation is permissible as even though the provisions of the consent paper sounding in Zimbabwean dollars remained inoperative since 2009, they did not become prescribed as they were incorporated into a court order which remained extant. I agree. The applicant's application for variation of the consent paper, is permissible in terms of s 8 of the Maintenance Act [*Chapter 5:09*] and s 9 of the Matrimonial Causes Act [*Chapter 5:13*]. All she had to do was to show that the respondent is no longer paying maintenance because the consent order which was made part of the court order sounds in Zimbabwean dollars. The need for the child's maintenance and her medical aid cover, was to be extinguished by her attaining the age of majority, which only took place on 15 January 2015. There is therefore no merit in respondent's opposition to the variation sought. Arrear maintenance is claimable in terms of s 11 of the Matrimonial Causes Act, as correctly submitted by Mr *Fitches*. Section 11(1) provides as follows;

“(1) Where a spouse has provided for the maintenance of any children of the marriage or of a former marriage of one or other of the spouses, that spouse shall be entitled to recover in arrear from the other spouse such maintenance or such portion of such maintenance as an appropriate court may consider just or equitable in the circumstances.”

Arrear child maintenance is claimed when one spouse or former spouse incurs maintenance expenses on behalf of the child when it was the responsibility of the other spouse to do so. The spouse who was obliged to maintain the child cannot hide behind the fact that the order had not been varied especially when he himself in obedience of his duty to maintain the child voluntarily started paying in US dollars immediately after dollarization. The applicant said she agreed to the payment of the US\$ 500-00 and subsequently US400-00. The probabilities favour her because how could the applicant pay consistently for four years and seek to say he had no such obligation.

I am satisfied that the respondent and the applicant agreed to the maintenance amounts the respondent paid from 2009 to January 2013. The figure of US \$400-00 which the respondent was paying at the time he stopped paying represents what the parties had agreed was a fair conversion of the Zimbabwean dollars to US dollars.

It has however, not been clearly stated how the US400-00 should be apportioned between the minor child and the applicant. That however should not present an insurmountable problem as the consent order states the amounts the child and the applicant were to receive. The consent paper states that Z\$70 000-00 was to be for the child while Z\$20 000-00 was for the applicant. These figures present a ratio of 2 is to 7 which can establish the entitlements of the child and the applicant out of the agreed US400-00. If the US400-00 is divided by 9 and the resultant figure is multiplied by each recipient's ratio one gets US\$311.10 for the child and US\$88.90 for the applicant per month.

The consent paper is therefore varied by the substitution of "Z\$70 000-00 per month maintenance for the minor child" with "US\$311.10 per month maintenance for the child". The maintenance for the applicant is varied by substituting "Z\$20 000-00 per month" with "US\$88.90 per month".

The variation enables the court to establish the arrears owed by the respondent for the child's and applicant's maintenance.

The applicant's own arrear maintenance is afflicted by her cohabitation prior to and after February 2013. Clause 4.3 of the consent paper provides as follows; --

"The plaintiff shall pay the sum of \$20 000-00 per month by way of rental for the immovable property occupied by the defendant and the child which payment shall cease upon Defendant's remarriage or cohabitation with another person."

In para 21 of her founding affidavit the applicant admitted that she cohabited with another person during the "periods up to and including January 2010 and for five months from December 2012 to April 2014." Mr *Zhuwarara* for the respondent submitted that the cohabitation resulted in her losing the right to maintenance from the respondent. Mr *Fitches* submitted that the cohabitation did not extinguish the applicant's right to be maintained by the respondent. I do not agree.

The provisions of clause 4.3 of the consent paper clearly states that "payment shall cease upon the defendant's remarriage or cohabitation with another person." My understanding of the clear grammatical meaning of the words used is that payment of the amount allocated for the applicant's rentals ceases on the happening of any of the two things linked to its cessation. Cohabitation happened and was admitted, that, marks the end of the inquiry. The applicant has lost the right to be maintained.

The amount claimed for arrear maintenance should now exclude the applicant's own maintenance. The arrears are for the period of 18 months. The amount to be granted should

therefore be reduced from the US\$7 200-00 claimed to US\$5 599.80.

Medical Aid Cover Subscriptions.

It is not in dispute that the respondent was required to keep the minor child on his medical aid cover. Mr *Fitches* for the applicant submitted that the applicant had to put the child on her cover because the respondent was out of employment and had asked her to put the child on her cover.

Mr *Zhuwarara* for the respondent submitted that respondent never asked the applicant to put the child on her medical aid cover. The dispute will be resolved by the documental evidence tendered by both parties. Mr *Zhuwarara*'s submission is supported by Annexure A1 to the respondent's opposing affidavit on pp 30 to 36 which shows that Tamsen Helen Haworth Kempen was to renew her medical aid cover which covered Miss Courtney Leigh Kempen the minor child in question. On p 30 is the letter dated 30 June 2014 addressed to Tamsen Helen Haworth Kempen for the renewal of the medical aid cover due on 20 August 2014 Policy No EHP342752. On p 31 are the details of the persons covered and an indication that the policy was first purchased on 20 August 2008.

Mr *Fitches* relied on a letter dated 15 August 2014 Marked Annexure "I" addressed to the Registrar, which reads "This letter serves to confirm that Ms Carol Kempen has been paying Cimas medical aide contributions via the Vacation Exchanges T/A RCI Zimbabwe account for her minor child, Courtney Leigh Kempen since 1st August 2007. The amount paid was US\$3, 026-00. Enclosed please find one statement from Cimas for each year from 2010-2014." See pp 48 to 53 of the record.

Clause 3.3 of the consent paper from which this dispute arose required the respondent to pay subscriptions necessary for the minor child to remain a dependant member of a recognised Medical aid Scheme and to pay shortfalls. The documents produced show that the applicant took over that responsibility from 1 August 2007, and the respondent's current wife, also started paying for the minor child's medical aid cover on 20 August 2008. The payments, by the two women, in respondent's life, from 2007, lends credence to the applicant's evidence that the respondent asked her to take over the responsibility because he was then not able to meet it. She had not involved herself with that responsibility since their divorce in 2002. She could not have for no apparent reason taken up the respondent's responsibilities. The fact that the respondent's current wife also took over that responsibility confirms the applicant's

evidence that he asked her to take over that responsibility because, he was then not able to then carry that responsibility.

The respondent's bare denial left him in the lurch. Due to it he could not say that he later told the applicant to stop paying for the child. If he had chosen to tell the truth he would have been able to say he subsequently told the applicant that he had made other arrangements for the child's medical aid subscriptions. He obviously led the applicant into paying for the child's medical aid subscriptions, but did not ask her to stop even though his new wife had also started paying for the child's medical aid subscriptions. The respondent is therefore liable to applicant in the amount claimed.

Amendments.

The applicant had applied for the amendment of the cohabitation clause, (clause 4.3 of the consent paper). This has however fallen away due to that right having lapsed due to the applicant's cohabitation.

Clause 3.2 which provided for the minor child's maintenance is deleted by consent of the parties. The child attained the age of majority on 15 January 2015.

Clause 2.1 and 2.3 of the consent paper are by consent of the parties amended by the substitution of the "Plaintiff" for "Defendant" and of the "Defendant" for "Plaintiff" in view of the minor child having relocated to Zambia with the respondent.

Child's Traveling to and from Harare.

In view of the applicant's concession in para 18 of her answering affidavit where she admitted that the minor child refused to visit her during the December 2014 and January 2015 school holiday, during which the child attained the age of majority there is no need to make a finding on this aspect.

Costs

The applicant has substantially succeeded in her application. The respondent shall pay her costs of suit.

In the result I order as follows:-

1. That Respondent shall forthwith pay to the Applicant the sum of US\$3026-00 by way of reimbursement of medical aid subscriptions.
2. That Respondent shall forthwith pay to the Applicant the sum of US\$5 599.80 in

respect of the child's arrear maintenance.

3. That clause 3.2 of the consent paper be deleted.
4. Clause 2.1 and 2.3 of the consent paper are by consent of the parties amended by the substitution of the "Plaintiff for "Defendant and of the "Defendant" for "Plaintiff" in view of the minor child having relocated to Zambia with the respondent.
5. That respondent shall pay Applicant's costs of suit.

Coghlan Welsh and Guest, applicant's legal practitioners
Mawere and Sibanda, respondent's legal practitioners