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REPORTABLE (29)

Judgment No. SC 37/18
Civil Appeal No. SC 433/16

TRACEY LEIGH MACKINTOSH (NEE PARKINSON)
v
ANTONY WILLIAM MACKINTOSH

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & UCHENA JA
HARARE, FEBRUARY 2, 2017 & JUNE 15, 2018

R. M. Fitches, for the appellant

L. Uriri, for the respondent

GARWE JA:

[1] This is an appeal against the decision of the High Court dismissing with costs an application filed by the appellant for the upward review of the amount of maintenance payable by the respondent in respect of the appellant and two minor children of the former matrimonial union.

[2] The court *a quo* concluded that no good cause for such upward review had been shown. Consequently, it dismissed the application with costs.

FACTUAL BACKGROUND

[3] The appellant and the respondent were husband and wife for 12 years. The relationship went through turbulent times. Agreed that the marital relationship had irretrievably broken

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down, and, in anticipation of a divorce order by consent, the parties entered into a consent paper in September 2009 to regulate the issues of custody, maintenance for the appellant and minor children of the marriage, rights of access and distribution of both the movable and immovable property. On 17 December 2009 the High Court made an order granting a decree of divorce and custody of the minor children to the appellant. It further ordered that the issues of access, maintenance and proprietary rights of the parties be regulated in accordance with the consent paper signed by the parties.

[4] Paragraph 4 of the consent paper was the subject of the application filed before the High Court. That paragraph reads, in relevant part, as follows:-

“4. MAINTENANCE

The parties have agreed the following provisions in respect of maintenance;

4.1 (Not relevant).

4.2 (Not relevant).

4.3 The plaintiff will pay US 100.00 per month per child until each child attains the age of 18 years or becomes self-supporting, which ever first occurs, such maintenance to be paid by or before the first day of the month to which it relates, commencing 1 November 2008, and such maintenance figure to be reviewed from time to time as appropriate, regard being had to Plaintiff's financial circumstances in order to maintain the same value and benefit to the children's living costs.

4.4 Plaintiff will pay US2 000.00 per annum to defendant, payable in 4 quarterly instalments on 1 April, 1 July, 1 October and 1 January for as long as his obligation to pay maintenance for the minor children pertains. It is specifically recorded that plaintiff will bear a prorata (*sic*) amount of this liability for the period extending from the date upon which defendant vacated the former marital home, namely 31 October 2008, up to 31 March 2009, and in respect of which it is recorded that such payment has already been effected.

It is recorded that from this said amount of US\$2 000.00 per annum, defendant will procure payment of the DSTV subscription, and plaintiff

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agrees to increase the said amount of US\$2 000.00 per annum by the amount of any annual increase in the DSTV subscription. The current annual subscription being US\$720.00.

- 4.5 Plaintiff will maintain the minor children at his cost for as long as his obligation to pay maintenance for them pertains on a suitable medical and dental aid scheme, both locally and externally (and where the external medical and dental aid policy shall be the Goodhealth policy), and shall in addition, bear any shortfalls in respect of any medical and / or dental attention or treatment or medication administered or applied in respect of the minor children.
- 4.6 Plaintiff will maintain defendant at his cost on an external medical aid policy subscribed with Goodhealth until her death or remarriage or until she may live as man and wife with another man, or until the youngest child attains the age of 18 years, whichever of these contingencies first occurs.”

APPELLANT’S CASE A QUO

[5] In her founding affidavit in the High Court, the appellant was clear that the application was for an upward variation and extension of the period of maintenance. She averred that, before the divorce, the family enjoyed a high standard of living. They enjoyed regular holidays in places such as Maldives, Mauritius, America, Scotland, Germany, South Africa and, locally, at Mazvikadei and on a family houseboat at Kariba. She stated that, as owner and Managing Director of a long established firm, C & J Accounting Secretarial Services (Pvt) Ltd, and having interests in several other companies, the respondent was a wealthy man, capable of meeting the upward variation without any difficulty. She further stated that, at some stage after the grant of divorce, the respondent increased the cash payment in respect of the two children to \$600 per month but stopped providing fuel. In February 2015, however, the respondent wrote to her advising that he was reverting to the US100 per month per child agreed in the consent paper.

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[6] She averred that \$100 per month is obviously insufficient to meet the needs of a teenage girl. Whilst accepting that the respondent had been meeting other additional expenses of the children, she submitted that most of these were not necessary. At the time of divorce she had no idea what it cost to run a family. She discovered, as time went on, that the amount paid by way of maintenance was insufficient. As a result, she sought full time employment although she has no qualifications. Besides a twelve-year-old Nissan Double Cab, she has no other assets of substantial value. She has a usufruct in the house which she currently occupies but which is owned by a trust controlled by the respondent.

[7] It was also her submission that a number of expenses have gone up since dollarization in 2009. She has had to adopt severe cost cutting measures in order to meet some very basic expenses. To the contrary the respondent continues to live a lavish lifestyle. He owns five houses in upmarket areas of Harare, a house in Australia, a weekend cottage at Lake Chivero, a houseboat on Lake Kariba, timeshares in a plot at Lake Mazvikadei and Lokuthula Lodge. He also owns five top of the range motor vehicles and has several bank accounts locally, in South Africa, Australia and other off shore destinations. He has interests in several companies including Kawasaki Motor Cycles which provides motor cycles to the Zimbabwe Republic Police.

[8] She further averred that fairness and logic dictates that the maintenance in respect of the two minor girls should continue beyond the time they attain the age of eighteen as they will need to attend tertiary education. Maintenance for them should continue until they are twenty two years of age. In her case, having contributed directly and indirectly to the acquisition of

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the matrimonial assets and in bringing up the children, respondent should be able to contribute to her ongoing maintenance with little impact on his wealth. She further stated that, although the terms of the consent paper had been agreed upon, the terms were never fair in the circumstances of the marriage. Indeed, if she had known the details then of what she now knows about his assets, she never would have agreed to the terms in the consent paper. Accordingly she sought an order for the upward variation of the maintenance payable in respect of the children to \$500 per month per child and to \$2 000 per month in respect of herself.

RESPONDENT'S CASE A QUO

[9] The respondent's submission was this. The appellant has more by way of financial and proprietary comfort and security than the vast majority of the Zimbabwean urban population. She has a secure job and resides rent free in a well-appointed four bedroomed property in a good area of Harare. She drives a sound and reliable car. The entirety of the children's education as well as medical and dental requirements are fully paid for by himself. The family never enjoyed a high standard of living. Their lifestyle was more consistent with an average middle class urban family. He denied owning C & J Accounting and Secretarial Services but admitted that he is its Managing Director. He gave no further detail. During the subsistence of the marriage, they enjoyed average family holidays, in some cases using RCI timeshares. The former matrimonial home is owned by the A. W Mackintosh Trust, a trust which he formed. His annual income is \$59 660 whilst his annual expenditure is \$61 535, the result being an annual shortfall in the sum of \$1 875.00. He admitted reducing the monthly payment for the children from \$600 to \$200 but explained that this was partly because the appellant was abusing the monies he would have paid and would convert the money to her personal benefit.

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[10] It was his further claim that, in fact, he pays \$561 per month to the appellant. This consists of the cash maintenance of \$200, 60 litres of diesel (\$83.00), internet and security (\$87.00) and the \$2 000 which is paid annually to the appellant which translates to \$191.00 per month. The amount of \$2000 paid annually was not intended as her personal maintenance but was meant to contribute generally to the living costs of the family until the girls attained majority.

[11] He also submitted that the appellant earns a minimum of \$1 500 per month. She stays in a home owned by a trust in her own name and enjoys a life usufruct and is, together with the children, the sole beneficiary of that trust. She also received, as part of the divorce settlement, two motor vehicles and a fair division of the moveable items. He indicated his willingness to pay maintenance to the appellant for the upkeep of the minor children until such time as they finish their secondary education or attain the age of 18 years, whichever occurs last.

[12] He denied spending considerable sums of money on holidays or that the expenditure he incurs on the children is unnecessary. Whilst accepting that his annual earnings are significantly in excess of those of the appellant, he submitted that his expenses are also considerable. He denied owning most of the immovable properties listed by the appellant, save for the timeshares and Trader Horn, the weekend cottage, and the house in Australia, which he says is still heavily mortgaged. He denied owning the vehicles or the bank accounts and other assets listed by the appellant but gave no further detail. He also denied having anything to do with the various businesses itemised by the appellant and, in respect of Kawasaki Motor

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Cycles, stated, also without giving any further detail, that the contract with the Zimbabwe Republic Police is governed by a confidentiality agreement.

[13] On the order sought, he stated as follows. Once the children attain majority, they will be entitled to decide where they live. He will deal directly with each child and make such financial contribution as the child may reasonably need in respect of education, medical, transportation and other related expenses. As regards the appellant, he submitted that she should be able to look after herself and not continue to look to him as her bread ticket for life. He stated that the allegations made by the appellant on his financial and proprietary circumstances are based on supposition, rumour, exaggeration and are in fact “errant nonsense”. He again reiterated his willingness to pay \$300 per month per child but on the condition that the appellant uses at least \$75 of that amount towards the children’s clothing.

APPELLANT’S ANSWERING AFFIDAVIT A QUO

[14] In her answering affidavit, the appellant responded as follows. Her employment in the tobacco industry is not secure. Whilst she does not pay formal rental, she incurs a number of other costs in maintaining the home. The complex in which she stays with the children is not secure. The vehicle she drives is more than twelve years old. All she asks for is fair and reasonable maintenance for herself and the children, having subsisted on inadequate maintenance for several years since the divorce. The annual maintenance of US\$2 000 was intended for her personal maintenance. She insisted that, during the matrimonial union, the family enjoyed a high standard of living and gave a summary of the travel undertaken during the period 1996 to 2007. She further insisted that the respondent is the owner of C & J Accounting & Secretarial Services.

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[15] She denied that the \$600 per month that the appellant paid at some stage was misused, stating that it is not possible for three people to misuse that amount which translates to \$20 per day. On the expenses claimed by the respondent, she averred that the respondent has allocated \$350 for his own food per month but expects the appellant and the two minor children to survive on less than that figure. He does not explain why it is necessary for him to rent premises and produces no proof in respect of the rent he receives for the former matrimonial house. She denied that the payslips produced by the respondent correctly reflect his entire income, or that they are consistent with his lifestyle. As regards the income of \$1 500 per month mentioned in one of her letters, she stated that the figure represented her total income position, inclusive of a thirteenth cheque, \$200 fuel allowance and the annual contribution of \$2 000 paid by the respondent. She reiterated that the divorce settlement was not fair and that she will be bringing a separate action to revisit the settlement.

[16] She attached a copy of a schedule which she says was prepared by the respondent in support of an application for a loan to purchase the Azari property in Mauritius. She came into possession of the document after the respondent had filed his opposing papers. The document reflects the estimates of the values of his assets and a net worth of over \$6 million and annual income totalling about \$985 000. As regards the offer by the respondent to pay \$300 per month per child, she submitted that this is not a compromise at all, as the total figure that will be available to the family is \$557, from which she will be expected to meet all the food and children's requirements. She attached further documents which reflect various bank accounts in the respondent's name with banks in South Africa, Australia and other places.

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DETERMINATION OF THE COURT A QUO

[17] In its judgment, the court *a quo* was of the opinion that the application was an attempt to amend the consent paper on the basis that the settlement had not been fair. The court also found that there were contentious issues that required full ventilation. Despite that finding, the court found that the appellant had no good cause for variation because she was attempting to revisit the agreement which the parties had entered into and that the appellant appeared to have had a rethink on the position she had earlier accepted. The court accordingly found that the appellant had not shown any change of circumstances amounting to good cause as to warrant variation of the maintenance paid to her and the children. Accordingly, the court dismissed the application with costs. Hence the present appeal.

GROUND OF APPEAL

[18] In her amended grounds, the appellant has raised seven grounds of appeal. These are:-

- “1. The court *a quo* made a gross misdirection on the facts, amounting to a misdirection in law, in mistaking the factual Application *a quo* for a variation of a Consent Paper, rather than for an upward variation in maintenance.
2. The court *a quo* made a gross misdirection on the facts, amounting to a misdirection in law, in not exercising its equitable discretion at all, whether by value judgment or assessment, notwithstanding facts proffered which manifested good cause for the relief sought of a variation in maintenance.
3. The court *a quo* made a gross misdirection on the facts, amounting to a misdirection in law, in finding that the appellant had not shown a change in circumstances warranting good cause for the variations sought, as this ignored the facts and figures sworn to in her founding affidavit.
4. The court *a quo* made a gross misdirection on the facts, amounting to a misdirection in law, in allowing extraneous and irrelevant matters to affect its decision, namely considerations pertinent to variation of a Consent Paper, rather than applying its equitable discretion *meru motu* and exercising its value judgment to salient factors pertaining to the costs of living.
5. The court *a quo* made a gross misdirection on the facts, amounting to a misdirection in law, and applied the wrong principle, namely, in not recognising that the appellant’s Answering Affidavit pertained to evidence in rebuttal

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requiring denial from Respondent, failing which the allegations in the Answering Affidavit were deemed to be admitted.

6. The court *a quo* made a gross misdirection on the facts, amounting to a misdirection in law, in overlooking respondent's deemed admissions which precluded a finding that there were disputes of fact militating against the exercise of an equitable discretion in appellant's favour.
7. In the circumstances, the court *a quo* made a gross misdirection on the facts, amounting to a misdirection in law, in not drawing an adverse inference on respondent's failure to deny the evidence in rebuttal."

APPELLANT'S SUBMISSIONS ON APPEAL

[19] The appellant has submitted that the application before the court *a quo* was for the upward variation in, and extension of the period of, maintenance payable by the respondent to the appellant. Notwithstanding that she had shown that she was in need, that the respondent could afford the amount claimed, that there had been a change in her circumstances, the court dismissed the claim in its entirety. Further, although there were disputes of fact, the court had the power to take a robust approach and determine the matter. In her view the court *a quo* should have drawn an adverse inference on the respondent's failure to rebut the contents of the documents which she attached to her answering affidavit which showed that the respondent was a man of means. Lastly she submitted that the amounts of \$2 000 payable to her *per annum* and \$100 per month for the upkeep of the children are obviously inadequate.

RESPONDENT'S SUBMISSIONS ON APPEAL

[20] The respondent has made a number of submissions. First, that the grounds of appeal are vague. Misdirections are alleged but none are illustrated. Secondly, the grounds do not show how the court erred in the exercise of its discretion. Thirdly, the court *a quo* could not have granted the relief sought without at the same time varying the terms of the consent order. In the absence of an application to rescind the consent paper, the court *a quo* could not have revisited the contents of that consent paper. The appellant had, however, made it clear in her

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papers that she had not come to court to vary the consent order. Lastly, the appellant had not proved that there had been a change in her fortunes. What she sought to do was to make her case in her answering affidavit, which is not permissible.

ISSUES FOR DETERMINATION

[21] In my view, the issues that arise for determination before this court are the following. First, whether the grounds of appeal comply with the Rules or are so fatally defective as to render the appeal a nullity. Second, whether it was competent for the appellant to apply for an upward variation of the maintenance before seeking a rescission of the consent order. Third, whether there were material disputes of fact and, if so, whether the court *a quo* was correct in finding, without resolving those disputes, that the appellant had not shown good cause for the upward variation and extension of the order of maintenance. Lastly, the appropriate order to be made in the circumstances. I deal with each of these in turn.

GROUND OF APPEAL – WHETHER VALID

[22] The appellant was granted leave by this court on 18 November 2016 to file amended grounds of appeal. Consequent to that order, the appellant filed, on 2 December 2016, the amended grounds of appeal that I have already referred to. The preliminary point taken by the respondent in heads of argument filed on 17 October 2016 was therefore overtaken by the order of this Court dated 18 November 2016. Nevertheless, the respondent submitted before this court that even the new grounds of appeal are not compliant with the rules of this Court which require that such grounds should be concise. In my view, learned counsel was indeed correct in objecting to the grounds of appeal as formulated. Some of the grounds remained vague

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whilst others, though listed as separate grounds, duplicated issues already raised in other grounds. Mr *Uriri* accepted that although the grounds are not very clear, one can discern from ground 1 and 2 what the appellant seeks to impugn. In response, Mr *Fitches* accepted that some of the grounds merely repeated what had been raised in earlier grounds. He was content to abandon the rest of the grounds and rely on grounds 1 and 2 only. This appeal will therefore be confined to those two grounds.

[23] It is necessary, however, to re-state the need for grounds of appeal to be clear and concise. In the absence of such clarity, grounds of appeal that are vague and lack conciseness stand to be struck out. Grounds 3 to 7 clearly do not comply with the requirement that grounds of appeal must be concise. They are in any event argumentative and repetitive. In the circumstances, those grounds are struck out. The remaining two grounds deal with the issue firstly, whether there was need, before the application for variation was filed, for the rescission of the consent paper and, secondly, whether the court *a quo* was correct in finding that no good cause for a variation had been shown.

WHETHER THERE WAS NEED TO VARY THE CONSENT PAPER

[24] The respondent argued that since the parties had voluntarily agreed to the issues of maintenance by way of a consent paper, the court could not rewrite the agreement for the parties by allowing the appellant an upward variation of the maintenance amount stated therein. It was argued that, in these circumstances, the appellant should have sought rescission or withdrawal of the consent paper and that good cause for such rescission had to be shown. In

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short, it was argued that, in the absence of a rescission, the parties could not revisit what was agreed upon in terms of the consent paper.

[25] The respondent, in my view, is wrong in making the above submission. Firstly, the consent document itself provides in paragraph 4.3 for the occasional review of maintenance. This was an express term of the consent order which the parties agreed upon. An application for a variation of maintenance was therefore contemplated by the parties. Further, s 7 (1) (b) of the Matrimonial Causes Act [*Chapter 5:13*] provides for the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or child of the marriage. Section 7 (5) of the Act allows a court, in granting a decree of divorce in accordance with a written agreement between the parties to, *inter alia*, make an order for the payment of maintenance. This is what happened in this case. The consent paper was, by consent of the parties, incorporated as part of the order of the High Court. Section 9 of the Act, in turn, allows a court, on good cause shown, to vary any order made in terms of s 7.

[26] The consent paper signed by the two parties was incorporated as part of the order of the court *a quo*. In terms of s 9 of the Act the maintenance awarded can be varied without the need to first revoke the consent given in that paper. Whilst it is clear that the consent paper records a compromise reached by and between the parties, the agreement is however regulated by statute once incorporated as an order of court. The submission by the respondent that there was need for a formal withdrawal of the consent therefore has no substance, viewed both from the terms of the consent paper itself and at law.

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WHETHER THERE WERE MATERIAL DISPUTES OF FACT

[27] In the court *a quo* the respondent submitted that there were serious disputes of fact which could not be resolved on the papers without the parties giving *viva voce* evidence and being cross - examined. The disputes related to the following issues: whether the maintenance payment of \$2000 *per annum* was for the appellant personally or the children, the amount actually paid by the respondent to the appellant per month – whether it was \$307 or \$560 -, the identity of the assets owned by the respondent and their value, the respondent’s monthly income, the amount that the appellant herself channels towards the maintenance of the children, whether there has been an increase in the cost of living since 2009 and lastly whether the document produced by the appellant, which purports to have been prepared by the respondent and which reflects a number of assets and considerable annual income, is genuine.

[28] The court *a quo* accepted that “there were contentious issues that require ventilation”. Despite that acceptance, the court went on to find that the appellant appeared to have realised that she had not been able to get a good bargain and for that reason was seeking to revisit the consent paper. It found that this cannot amount to good cause. Further, the court found that the appellant was aware, at the time the parties entered into a consent paper, that maintenance would be payable only until the children attained the age of majority after which they would choose who to stay with. The court further found that even the claim for an increase of maintenance for the children was not substantiated. It also found that no good cause had been shown why, having agreed that maintenance terminates when the children attained the age of majority, the appellant now wanted the respondent to maintain her in perpetuity. In the result, the court found that the appellant had not shown any change of circumstances amounting to

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good cause warranting variation of the maintenance in respect of herself. The court accordingly dismissed the application both in respect of the appellant and the minor children.

[29] At the hearing of the matter before this court, counsel for the appellant accepted that there were disputes of fact but urged this court to take a robust approach and take into account all salient factors and the fact that the general cost of living had gone up. Counsel also accepted that the matter could be remitted for the hearing of *viva voce* evidence.

[30] Counsel for the respondent, on the other hand, submitted that, if this Court comes to the conclusion that the court *a quo* was correct in finding that the application by the appellant was an attempt to revisit the consent paper, then that would be the end of the matter and the question whether disputes of fact exist would not arise. Secondly, he submitted that the appellant had chosen the application procedure well aware that there were disputes of fact which disputes may warrant the dismissal of the application for that reason. Lastly, he submitted that the document which purports to shed new light on his assets and income was attached for the first time in the answering affidavit and the court *a quo* correctly found that the appellant could not make her case in an answering affidavit.

[31] There is no doubt at all that there were disputes of fact which required resolution before the court *a quo* could consider the question of good cause. Without resolving those disputes, and this goes without saying, the court was handicapped in coming to a proper conclusion on whether indeed there was good cause, as such good cause depended on the findings that the court would make on those disputed facts.

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[32] In determining the issue of good cause without resolving the dispute on the facts, the decision of the court resulted in an injustice. The interests of the minor children were not addressed at all and the application for an upward variation of their maintenance was treated in the same cursory manner as the application by the appellant herself, which application was viewed by the court as an attempt to correct what she believed had been a bad bargain. The court should either have heard evidence itself in order to determine the issues before it or alternatively referred the matter to trial. It did neither. In this respect it was therefore wrong.

INTERESTS OF MINOR CHILDREN ALWAYS PARAMOUNT

[33] A court, such as the court *a quo*, must always keep in mind that the interests of the minor children are always paramount. In considering those interests, the court should not allow itself to be misled by the appearances that the parties give. It must, in addition to any evidence given, be guided by its own experiences and sense of what is fair. It must take a pragmatic view of the means of the respondent - *Lindsay v Lindsay* 1993(1) ZLR 195(S), 199 A-B, 202 B.

[34] The need to have due regard to the best interests of the minor children has been part of our law for some time now. Indeed, with the advent of the new Constitution, s 81 (2) thereof has codified this position and provides that in every matter concerning a child, it is the child's best interests that are paramount and that minor children are entitled to protection, particularly by the High Court as the upper guardian of the rights of children.

[35] Cretney S M in *Principle of Family Law*, (Third Edition, Sweet & Maxwell, London, 1979) at page 493 states:-

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“It has traditionally been stressed that the law is not that the welfare of the child is the sole consideration. There may, for instance, be cases where the public interest overrides the welfare of a particular child. But the requirement to treat the child’s welfare as the “first and paramount” consideration means

“more than that [it] is to be treated as the top item in a list of items relevant to the matter in question. [The words] connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.”

[36] In the *UNHCR Guidelines on Determining The Best Interests of the Child*, May 2008, the UN High Commissioner for Refugees states:-

“The term “best interests” broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child’s environment and experiences. ... neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that ... the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).”

[37] In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) S.A. 232 (cc), the South African Constitutional Court quoted with approval the remarks by Julia Sloth –Nielsen in the article “*Chickensoup or Chainsaws: Some implications of the Constitutionalisation of Children’s Rights in South Africa*” 1996 Acta Juridica 6 that :-

“The inclusion of a general standard (‘the best interest of a child’) for the protection of children’s rights in the constitution can become a benchmark review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children’s lives.” (at page 26)

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[38] It follows from the foregoing that the best interests of a child should always be paramount in the making of any determination that affects them in their well-being. A court is therefore under obligation to apply its mind directly to what is in the best interests of a child in any given case.

[39] The suggestion that, as at 2016, the sum of \$200 per month was sufficient to meet the growing needs of two teenage girls, one born in 2000 and the other in 2001, flies in the face of logic. I say this because the respondent, in his opposing papers, appropriated the sum of \$350 from his income just for his food, and a further \$200 towards electricity, \$150 for entertainment, \$340 for the gardener and maid. The complaint by the appellant before the court *a quo* was that the amounts paid by the respondent are not just for food, but also for electricity and the general upkeep of her and two growing girls.

[40] In my view, whilst the question whether the respondent should maintain the appellant beyond the period the children attain the age of eighteen is a moot one, there can be little doubt that, as at the date of the hearing of the application, there was urgent need for the sum of \$100 awarded to the appellant in respect of each child to be varied upwards. The only question before the court, after hearing evidence, should have been the means of the respondent and, as a corollary, the amount of maintenance to be paid by him. It was, therefore, a clear misdirection on the part of the court *a quo* not to hear evidence in this regard or at the very least refer the matter to trial.

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[41] This Court has already found that the dismissal of the application in its entirety, particularly the upward variation of the maintenance for the minor children, was wrong. It is a truism that as children grow, so too do their needs. In this particular case, some of the needs of the children cannot be treated separately from those of the appellant. Shared expenses such as food, toiletries, consumables, electricity, water, and the like, cannot be divided into categories of what is consumed by the appellant and what is consumed by the two minor children.

INTERIM VARIATION OF MAINTENANCE NECESSARY

[42] Having reached the conclusion that there is need for the factual disputes in this matter to be fully ventilated in a trial, I am of the further view that there is an obvious imperative for the interim variation of the amount payable in respect of each of the children until such time as the matter is fully and finally determined. Trials in this jurisdiction can take a long time to complete. In the meantime, the children will need reasonable maintenance.

[43] In the court *a quo*, the respondent consistently offered to pay the sum of \$300 per child, until they complete their secondary education, although he attached conditions to such offer. In coming to a figure that addresses the interests of the children on an interim basis, this court must take into account that offer as well as the other evidence on record which suggests that the respondent is not a poor man. Even taking into account the sum of \$200 which the respondent is under obligation to pay to the appellant in respect of the maintenance of the children, it is clear that the appellant does not have sufficient resources to meet the general expenses both for herself and the children. Whilst the appellant described the respondent as a

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rich man, he downplayed this claim and suggested that the family had always enjoyed a lifestyle of the middle class. The middle class in this country does not spend a paltry \$100 per month to meet the every day basics of two teenage girls, one of whom, as at the date of this judgment, has just attained the age of majority.

[44] From all the facts of this case, I am satisfied that the respondent is not a man of straw. He owns a number of houses in Harare, mostly through trusts established by himself, as well as a house in Australia. He deliberately decided not to take the court into his confidence and avoided disclosing his full interest in C & J Accounting and Secretarial Services as well as Kawasaki Motor cycles. He deliberately said nothing about the considerable assets and income reflected in a schedule, purportedly prepared by him, which was attached to the appellant's answering affidavit in the court *a quo*. He denies owning some of the properties and motor vehicles reflected in the appellant's papers but does not say who does. One can reasonably infer that the respondent is a man of means, capable of providing, on an interim basis, reasonable maintenance for his two children. As already noted, the respondent, in his list of expenses, has appropriated the sum of \$350 just for his own food. No doubt he has other costs in addition to food. These would include cleaning, electricity, maintenance and others. It seems to me, on a consideration of all the facts, that, at the very least, and pending a final determination of this matter, the respondent should be made to pay the sum of \$300, which he offered to pay, for each child.

[45] In the consent order, the parties agreed that maintenance would cease once the two children attained the age of majority. Whilst that is the factual position, there is little doubt

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that that threshold was arbitrary. It cannot be disputed that the children will, in all probability, still be at school when they attain the age of majority. Even if they are not, they may be awaiting enrolment at tertiary institutions. They are unlikely to be self-supporting. The suggestion that once the children attain the age of eighteen, maintenance should cease and that the respondent relates directly to each child is not feasible. As previously noted, there are expenses that are shared and cannot easily be apportioned between the appellant and the children. In any event the respondent did accept in the court *a quo* that maintenance for the children could be extended until they completed their secondary education.

[46] In the result therefore, I consider it in the best interests of the children that the amount of \$100 per month awarded at the time of divorce be increased, on an interim basis, to \$300 per month per child. Since the children will not automatically be self-supporting at the age of eighteen and, in all probability, will be staying with the appellant, there is need that such maintenance continues until after the children complete their education (in the broad sense) or become self-supporting. Naturally, if either of the children, or both, on attaining the age of eighteen, decide not to live with the appellant, then the interim maintenance order can be varied in order to take into account that development.

[47] I am also of the view that the interim maintenance be made payable from the date when the respondent became aware of the application for the upward variation of the maintenance. If it were not possible to do so, an applicant for maintenance would suffer prejudice, not because of any fault on her part, but because of the recalcitrance of an obdurate spouse, who ought not to be permitted in law to benefit from protracting the proceedings so as to reduce the

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burden of maintenance. Such a spouse should be saddled with the burden of arrear maintenance whenever it is apposite to grant it – *Lindsay v Lindsay (supra)* at 202 E-G.

DISPOSITION

[48] The High court Rules permit a court hearing an application to allow any person to give oral evidence if it is in the interest of justice for such evidence to be heard (Rules 229B and 239 (b)). Alternatively the court can direct that the matter be referred to trial. In the circumstances of this case, the court *a quo* should itself have heard evidence in order to properly determine the issues before it.

[49] On the question of costs, I am of the view that the opposition to the upward variation of the children’s maintenance was unnecessary and unreasonable. Further, I find the use of intemperate language such as “arrant nonsense” unacceptable in a court of law. I consider that the respondent should therefore be made to pay the costs on the higher scale.

[50] In the result, it is ordered as follows:-

1. The appeal succeeds with the respondent paying the costs on the scale of legal practitioner and client.
2. The judgment of the court *a quo* is set aside.
3. The matter is remitted to the High Court for the resolution of the following issues, with *viva voce* evidence being led, if necessary:-
 - a) The extent of the upward variation of the maintenance payable in respect of each of the children,

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- b) The duration of the maintenance referred to in paragraph (a) above.
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- c) Whether in terms of the order of the High Court the sum of \$2000 payable *per annum* by the respondent is in respect of the maintenance of the appellant and, if so, whether this should be increased and the extent thereof. In the event that it is found that there is need for the upward variation of the maintenance due to the appellant personally, whether this should be made payable until her death or remarriage but excluding any periods during which she cohabits with another man as if married.
4. The High Court may give such directions on the discovery, inspection and production of documents to be used during the hearing as it considers necessary.
5. Pending the determination of the issues itemised in paragraph 3 above, the respondent is to pay interim maintenance for the children at the rate of \$300 per month per child, such maintenance to be backdated to the time of the application, namely, 1 June 2015.
6. For the avoidance of doubt, the interim maintenance of \$300 ordered in paragraph 5 above is in substitution of the figure of \$100 awarded by the High court in terms of the consent paper.

GUVAVA JA: I agree

UCHENA JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

Atherstone & Cook, respondents' legal practitioners.