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MOSES JUNIOR ROSS MAKIWA

Versus

JOYLEEN TATSIDZA MAKIWA

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 6 JUNE AND 21 NOVEMBER 2024

Opposed Application

T. Murefu, for the applicant
T. Tavengwa, for the respondent

KABASA J: - The applicant and respondent were married until 19 May 2022 when their marriage was dissolved in a divorce order granted by TAKUVA J.

That order provided the following, *inter alia,* in paragraph 3 thereof:

> "House No. 1449 Mahatshula North Bulawayo be and is hereby awarded to the plaintiff and defendant on a ratio of 6:4 with the plaintiff being awarded 60% and the defendant 40% of the property. The plaintiff is awarded the option to buy defendant out of his 40% share in the property within 60 days of the granting of this order. The plaintiff shall pay the defendant for his 40% share on the agreed value of US $70 000 (seventy thousand United States dollars).

The plaintiff did not pay the agreed amount and by letter dated 9 September 2022 informed the defendant (now applicant) that that amount less what the applicant had asked to be deducted, which amounts represented what he had to pay to the plaintiff in terms of the same order, would be paid in the equivalent Zimbabwean dollars. The applicant objected to that and instituted these proceedings seeking the following order:

> "1. Applicant is entitled to receive only United States Dollars for his 40% share value over property known as House No. 1449 Mahatshula North, Bulawayo, as awarded to him in HC 1131/21.
>
> 2. In the event that the respondent fails to pay applicant's 40% share value in United States dollars within 10 days of this order, the Sheriff of Zimbabwe and/or his Deputy be and is hereby authorized to sign all sale agreement documents and transfer of title documents in the sale by private treaty to any 3rd party willing to pay only United States dollars for the property.

3. Costs of suit on attorney-client scale if this application is opposed."

When the parties appeared on the date of hearing, counsel for the respondent took a point *in limine* to the effect that the matter was moot as there no longer was a live issue for the court to decide on. The parties had reached a settlement after a judgment by DUBE-BANDA J, where he dismissed an application for condonation for late filing of an application for variation of the order by TAKUVA J. The variation sought was meant to state that the payment of the 40% share would be at the equivalent local currency. The import of DUBE- BANDA J's decision in holding that there were no prospects of success effectively meant that the payment of the 40% was to be as per the court order. The judgment was handed down in December 2023.

Counsel for the applicant however explained that the Deed of Settlement was yet to be signed and there was also the issue of costs which the parties had not agreed on.

After an adjournment meant to allow the parties to attend to the signing of the Deed of Settlement, *Mr Tavengwa* for the respondent submitted that he had instructions to agree to the payment of the 40% of US$70 000 in United States dollars and that an order could be made by the court to that effect.

The sticking issue remained that of costs. Parties agreed to file supplementary heads of argument addressing the issue of costs only. This judgment therefore relates to that issue.

In arguing for an award of costs at a punitive scale, counsel for the applicant submitted that but for the respondent's refusal to pay the applicant 40% of USD 70 000 in the ordered currency, the applicant would not have approached the court. Pleadings were filed up until the matter was set down for hearing. The applicant was therefore entitled to costs.

Counsel cited *Dhokotera* v *ZIMRA* HH 301-21 for the proposition that costs are awarded against the losing party. The respondent had lost as evidenced by the decision to reach out to the applicant so as to arrive at a settlement of the matter, so counsel argued.

Counsel further submitted that as at 4 January 2024 the respondent engaged the applicant and a settlement was agreed on but the issue of costs was left unresolved as the respondent refused to pay costs.

Applicant is therefore entitled to costs because he had to approach the court before the respondent agreed to settle following DUBE-BANDA J's judgment in HC 2079/22. Such settlement was in essence conceding defeat and with that defeat costs had to be paid.

The refusal to pay costs justify an order for costs at a punitive scale, so counsel argued.

Mr Tavengwa for the respondent countered this argument and in heads of argument submitted that HC 2079/22 had not yet been decided and so yielding to the current proceedings would have put paid to the proceedings in HC 2079/22. After HC 2079/22 was dismissed the respondent realised that she would not get a decision contrary to what had been expressed in HC 2079/22 regarding in what currency the 40% was to be paid. The respondent therefore called for discussions and parties came to a compromise agreement.

Since the parties reached a compromise agreement there is no winner or loser and so an award for costs is not justified. The applicant had also not specifically pleaded on the issue of costs and so cannot seek to do so in heads of argument. (*Crief Investments (Pvt) Ltd* v *Aldawilla Investments (Pvt) Ltd* HH 12-18), so counsel argued.

In the event that the court awards costs, such should be on party-party scale as the respondent is not guilty of conduct warranting censure.

From the foregoing it cannot be any clearer that the applicant approached the court because the respondent was not forthcoming as regards the payment of the 40% share of the value of the house. Her insistence on paying in the equivalent Zimbabwean dollars forced the applicant to seek legal recourse.

In seeking such legal recourse the applicant sought the services of a legal practitioner and all pleadings were duly filed.

Costs are entirely at the discretion of the court (*Kerwin* v *Jones* 1958 (1) 400 (SR).

The respondent's decision to agree to negotiate followed the decision of this court which showed that pursuing with the refusal to pay in United States dollars was ill-advised.

The agreement by the parties had always been that the 40% was to be paid in United States dollars. *Mr Tavengwa's* argument that the parties reached a compromise is not borne out by the facts. The applicant's quest was payment in USD and he did not recede from that position.

In *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Limited* 1998 (2) ZLR 488 (S) at 497 B-C, GUBBAY CJ defined compromise as follows:

> "Compromise or transactio is the settlement by agreement of disputed obligations or of a law suit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something – either diminishing his claim or increasing his liability."

The applicant's claim was for payment of the 40% value of the house as per the court order. He did not recede from that. He did not seek to have the money paid in any other currency or that it be reduced from the 40% value of the house.

Had the respondent agreed to pay as per the court order the applicant would not have approached the court.

On the date of the hearing the settlement had not been signed and it was only after an adjournment that counsel for the respondent advised the court that he had instructions to have the court enter judgment or grant an order for payment of the 40% in United States dollars.

The back and forth was solely due to the respondent's failure to adhere to the terms of the consent order regulating ancillary matters following the granting of a divorce decree.

Costs follow the cause unless there are valid reasons to depart from the norm.

However I am not persuaded to hold that the respondent's conduct is deserving of censure. Her argument was based on the fact that the law provides that debts accrued after June 2019 are payable at the equivalent inter-bank rate.

In *Kadira NO v Nhemwa NO & Ors* HH97-23 the court had this to say regarding punitive costs: " AC Cilliers in the Law of Costs 2nd ed p66 classified the grounds upon which the court would be justified in awarding costs as between attorney and client:

a) vexatious and frivolous proceedings
b) Dishonesty or fraud of litigant
c) Reckless or malicious proceedings
d) Litigant's deplorable attitude towards the court
e) Other circumstances (See also *Mutunhu v Crest Poultry Group (Pvt) Ltd* HH399-17

Punitive costs essentially punish the litigant and not the legal practitioner. The respondent was entirely reliant on her legal practitioner to advise her on what needed to be done. The issues raised in her opposition to the applicant's application were issues she would not be expected to be conversant with as a layperson. I am unable to say the factors listed in the *Kadira* case (supra) exist *in casu*. I therefore find it unjust to punish her with costs.

The applicant is however entitled to costs and such costs were asked for right from the onset. They were not only asked for in heads of argument as submitted by counsel for the respondent.

That said, applicant is entitled to costs.

For the avoidance of doubt this judgment will also grant the order on payment of the 40% of USD 70 000 in US dollars. This is as per counsel for the respondent's concession.

In the result I make the following order:-

1. The respondent shall pay the 40% share of the value of the house in United States dollars. The terms for payment shall be as agreed between the parties.

2. The respondent shall pay costs of suit at the ordinary scale.

V. Chikomo Law Chambers, applicant's legal practitioners
Mutuso, Taruvinga & Mhiribidi Attorneys, respondent's legal practitioners