TUMAI MUNANA

Versus

SAUL MASHORA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 20 February 2024
Written reasons provided on 26 July 2024

R. Zimudzi, for the Applicant
F. Chirairo; for the respondent

OPPOSED APPLICATION

ZISENGWE J: On 20 February 2024, I delivered a brief *ex tempore* judgment dismissing this application for the setting aside of a consent judgment. The application was brought in terms of r21 (2) of the High Court Rules, 2021. A request was then made by the applicant for me to provide the full reasons informing that decision. I oblige.

The consent judgment in question was granted by this court on 19 January 2023 wherein the court granted an order of divorce between the parties together with ancillary relief. The latter consisted of a division of the assets of the parties, both movable and immovable. The applicant claimed that she did not participate in the proceedings that birthed the consent papers nor did she lend her consent thereto. She charged that the consent paper was a product of the unlawful connivance between her erstwhile legal practitioner and that of the respondent to "rubber stamp" his (i.e. respondent's) wishes.

She pointed to the absence of her signature on the consent paper as evidence of her non-participation in all the material events which birthed the consent paper which in turn purportedly gave rise to the judgment by consent.

She branded her erstwhile legal practitioner's conduct "wrongful and unlawful" whose effect according to her was to deprive her *inter alia* of a share in four immovable properties namely:

a) Stand No. 3864 Crowhill Views, Borrowdale, Harare registered in the name of Tatenda Alderman Mashora.
b) Stand No. D855, Chiredzi (Commercial building) registered in the name of Aldwin Mashora.
c) Stand No D5503 Lion Drive, Chiredzi registered in the name of Brickford Trading (Pvt) Ltd.
d) D 986 Westwood, Chiredzi registered in the name of Aldwin Mashora.

She claimed that the respondent fraudulently registered these properties in the names of third parties designedly to ensure that they did not fall for division, as they would ordinarily have, much to her prejudice.

Contending as she did that she had managed to establish "good and sufficient cause" as required by rule 21 (2) of the High Court Rules, 2021, she sought an order in the following terms:

It is hereby ordered and declared that:

a) The application be and is hereby granted;
b) The judgment by consent granted under HC54/20 on the 19th of January 2023 be and is hereby set aside;
c) The applicant be and is hereby granted leave to prosecute or proceed with her matter under HC54/20;
d) The Registration be and is hereby ordered to set down the matter for trial in terms of the rules of this Honourable Court;
e) Costs of suit on an attorney and client scale.

The application was opposed by the respondent who averred that the application was not only *mala fide*, but also that it is the result of applicant having received fresh advice new legal practitioners and amounts to no more than an attempt to have a second bite of the cherry, so to speak. According to him the applicant wilfully entered into and participated in proceedings that birthed consent judgment and cannot purport to renege therefrom.

He, as with the applicant, chronicled his version of events culminating in the granting of the consent judgment. Reference will be made to salient portions thereof shortly.

The Background

The parties were married in terms of the Marriage Act, [*Chapter 5:11*] (now [*Chapter 5:17*]). The marriage which commenced as an unregistered customary law union came in the wake of the death of the respondent's former wife Sekai Sharon Madhumbu ("Sekai"). Sekai was the applicant's paternal aunt and her (i.e. applicant's) marriage to the respondent was as a result of a customary law arrangement called "*Chimutsamapfiwa*". It is common cause that whereas the respondent's marriage to Sekai was blessed with children two of whom are Tatenda Alderman Mashora and Aldwin Mashora, no children were born of the marriage between the parties.

The marriage soon soured and on 26 February 2020 the applicant issued out summons from this court seeking order for divorce and ancillary relief. In the latter regard she sought an order for the distribution of their assets, both movable and immovable. In her declaration she *inter alia* sought to be awarded, the following immovable properties which she described as:

a) A 16-roomed house in Crowhill Borrowdale
b) House Number 1037 Muganda Road, Chiredzi
c) Uncompleted commercial building, D8554, Chiredzi Township, and
d) Commercial garage 5503 Lion Drive Chiredzi.

She also listed four immovable properties which she proposed that they be awarded to the respondent.

The respondent entered appearance to defend and soon filed his plea. In his plea he specifically placed the division of the properties that now constitute the subject matter of much contestation squarely in issue. He specifically averred that those immovable properties were not to be subject to division as they were either acquired before his marriage to the applicant or were

purchased from proceeds generated prior to that marriage coming into existence. Most significantly, however, he pointed out that three of the properties were as a matter of fact registered in the names his children and the fourth in the name of a company called Brickfords Trading Company. According to him it was from proceeds from the latter company, (which were realised prior to his marriage to the applicant) that the Crowhill property was purchased, albeit after his marriage to the applicant. It is common cause that this latter property is registered in the name of the respondent's son Alderman T. Mashora.

The exchange of pleadings progressed in the usual fashion leading to a round table meeting between the parties and their respective legal representatives and thereafter a Pre-Trial Conference before **MAWADZE J** (as he then was). A joint PTC minute encapsulating the agreed facts and defining the issues referred to trial was drawn up. The matter was then referred to trial.

No sooner had the trial commenced before me on 19 January 2023 than the parties intimated that they had "found each other" and had executed a consent paper. It was after which I then granted the now disputed order by consent. It is the events immediately surrounding the granting of that order (which events I will deal with in more detail later on in this judgment) that were contested in the present application. Suffice it, however, to say that that order by consent (whose contents mirrors the terms of the consent paper) reads:

> **"WHEREUPON,** after reading documents filed of record, hearing Counsel who applies for a decree of divorce and other relief on the grounds of irretrievable breakdown under the provisions of Section 5 of the Matrimonial Causes Act, [*Chapter 5:13*].
>
> **IT IS ORDERED BY CONSENT THAT: -**
>
> 1. A decree of divorce be and is hereby granted.
> 2. It is further ordered by consent that immovable property of the marriage be shared as follows:
>
> **IMMOVABLE PROPERTY AWARDED TO THE PLAINTIFF**
>
> (a) **146 A Lion Drive, Chiredzi** which is held by deed of cession in favour of the defendant at Chiredzi Council. The plaintiff to meet all the costs attendant to the change of cession in question.
>
> **IMMOVABLE PROPERTY AWARDED TO THE DEFENDANT**

(b) **1037 Mugandani Road, Chiredzi** which is held by way of deed of transfer in favour of the seller. The defendant to meet all the costs attendant to the transfer.

3. **MOVABLE PROPERTY**

(a) PROPERTIES AWARDED TO PLAINTIFF

1. Toyota Ipsum registration number **ACS 2485**
2. A four-plate stove
3. A king size bed
4. 42-inch Plasma television set
5. TV stand
6. 3 Plastic tables
7. 12 Plastic chairs
8. Kitchen utensils
9. 4 dining curtains
10. 4-bedroom curtains
11. 1 kitchen curtain
12. 1 upright water dispenser refrigerator
13. 13 set of new leather sofas

(b) **PROPERTIES AWARDED TO DEFENDANT**

1. Toyota Hilux ACR 8524
2. 22 head of cattle
3. 1 set of old leather sofas
4. One upright fridge
5. 3 double beds
6. 1 glass table
7. I deep freezer

4. **THE FOLLOWING IMMOVABLE PROPERTIES ARE NOT SUBJECT TO SHARING**

(a) **Stand Number 3864 Crowhill Views Borrowdale, Harare** registered in the name of **TATENDA ALDERMAN MASHORA**.

(b) **STAND NUMBER D 5503 LION DRIVE, CHIREDZI** registered in **BICKFORD TRADING PVT LTD** names.

(c) **STAND NUMBER D 855, CHIREDZI** registered **in ALDWIN MASHORA'S** names**.**

5. There shall be no order as to spousal maintenance.

6. There shall be no order as to costs."

The basis for the present application.

It was the exclusion of the immovable properties listed in paragraph 4 of the order from the distribution matrix that seemed to have particularly irked the applicant. As alluded to earlier she asserted that she could not have conceivably acceded to their exclusion and that their registration in the names of third parties was designed to prejudice her.

At the commencement of the hearing of this matter I enquired from the parties if they had any reservations in me handling this particular application given that I also happened to be the judge who presided over and granted the order by consent, neither had.

The applicant's version, which was rather thin on detail on the events surrounding the drafting and execution of the consent paper which in turn birthed the judgment by consent was that on the day of the PTC she was surprised by the fact that her erstwhile legal practitioners tried to convince her that an out of court settlement was the best route to take in the circumstances. Without disclosing the circumstances leading to the drawing up of the consent paper she averred in her founding affidavit that she merely indicated that surprisingly her erstwhile legal practitioners entered into a consent paper with the respondent's legal practitioners. The two legal practitioners thus purportedly signed on behalf of the parties. She therefore distanced herself from the consent paper not only on the basis that she did not physically sign it but also on the basis that she never agreed to its contents. Her main bone of contention in respect of the latter being that it removed some of the immovable properties from the distribution matrix much to her prejudice.

In her answering affidavit, the applicant went to great lengths in her attempt to sustain her contention that the properties that were excluded from the distribution equation, did in fact from part of the "matrimonial estate".

The respondent's version of events was to the following affect. After the Pre- Trial Conference, and more specifically when the respondent's legal practitioners, Mr Chirairo pointed out to the applicant's legal practitioners Ms Chimwanda that, the four disputed immovable properties were registered in the names of third parties, when juxtaposed against the provisions of the Matrimonial Causes Act [*Chapter 5:13*], the applicant and her legal practitioner saw the light and agreed to the distribution of the assets as depicted in the resultant consent paper.

According to him, the applicant not only agreed to the terms of the consent paper but was "instrumental" thereto. He averred in this regard that the applicant with her legal practitioner Ms Chimwanda are the ones who typed the consent paper at the latter's offices before bringing it to his legal practitioner for signing.

He further averred that when the matter was heard in court, the court proceeded to ask the parties themselves whether the consent paper was a reflection of their will. This was done in open court and both of them responded in the affirmative, hence the judgment by consent.

Further, according to him, the court interpreter explained every word of the consent paper to the parties to which they both affirmed its contents. Therefore, according to him, the applicant could not purport to have been oblivious of its contents.

I will revert to the events that actually unfolded on the basis of the actual recording of proceedings as captured by the recording machine, sufficient to say that Section 21 (2) of the High Court rules requires that before a judgment by consent can be, set aside the applicant must prove good and sufficient cause.

The same considerations in determining whether there is good and sufficient cause to set aside a default judgment under rule 27 (2) of the rules apply to an application for setting aside a judgment by consent, *Roland & Another v McDonnell* 1986 (2) ZLR 216 (SC) and *Georgias & Another v Standard Chartered Finance Zimbabwe Limited* 1998 (2) ZLR 488 (SC).

These considerations are:

a) The reasonableness of the explanation proffered by the applicant of the circumstances in which the consent was entered;
b) The bona fides of the application for rescission.
c) The bona fides of the defence to the merits of the case which prima facie carries some prospect of success; a balance of probabilities need not be established.

These factors must be viewed in conjunction and not one factor is necessarily individually decisive. A weak explanation may be in appropriate circumstances be strengthened by a very strong defence on the merits.

Onus

The onus lies on the party seeking to have the judgment by consent set aside. Makarau J (as she then was) stated in *Masulani* v *Masulani & Others* HH 68-03 that the judgment will not be set aside for the mere asking, the applicant has to discharge the onus for the indulgence to be granted. See also *Yakub Mahomed* v *Adam Ebrahim Mohammed Dudha & Anor* HH-140-18. In fact, this onus was described as "heavy" in *Washaya* v *Washaya* 1989 (2) ZLR 195 (H).

It was against the backdrop of these principles that I proceeded to assess the application.

The reasonableness of the explanation proffered by the applicant of the circumstances in which the consent was entered.

The first question under this head was, of course, whether the applicant participated in the proceedings that gave birth to the order by consent. During the hearing of this present application Mr Zimudzi who now appeared for applicant confirmed the applicant's presence in court on the day the consent judgment was granted. However, he sought to suggest that the applicant did not appreciate what was going on, with Mr Chirairo for the respondent submitting contrariwise.

It is common cause that the applicant's case was based almost entirely on what her erstwhile legal practitioner, Ms Chimwanda did or did not do leading to the granting of the consent order. Tellingly though, the applicant did not deem it fit to obtain an affidavit from Ms Chimwanda to provide an explanation on what truly transpired, *c.f.* Masulani v *Masulani & Others* (*supra*). This was quite despite the fact that in his opposing affidavit the respondent questioned such a glaring omission. The applicant was undeterred and soldiered on regardless and in her answering affidavit, scoffed at the respondent's suggestion of the necessity of Ms Chimwanda's supporting affidavit.

I found that the applicant took a giant leap of faith in assuming that she could discharge the onus reposed on her by her mere *ipse dixit*. The affidavit of Ms Chimwanda was critical, she

would have explained whether she was indeed pressured by the respondent or his legal practitioner to accede to the terms captured in the consent paper.

The mistake that Mr Zimudzi for the applicant made was to proceed with the application without having taken time to peruse the record of proceedings of the 19th of January 2024 to acquaint himself with the contents thereof to enable him to advise the applicant properly. He took the applicant's instructions at face value, which he ought not have.

The digitally recorded record of proceedings was and is still available for transcription and/or inspection. Had he done so he would have appreciated that the following series of events took place. Firstly, the consent judgment came about at the commencement of the trial and after the court had questioned counsel of the propriety of proceeding in respect of property registered in the names of third parties without a joinder of the latter in the proceedings.

The court further gave the parties the option to either proceed with the matter in that state (i.e. without the joinder of the third parties in whose names the properties are registered) or to postpone the matter to allow their joinder or whatever course of action the parties so desired.

The parties opted to have the matter stood down with a view to engage each other on the subject. Upon resumption the same day the parties then advised the court that the parties had 'found each other" and had agreed on a judgment on terms set out in the consent paper.

The contents of the consent paper were read into record and interpreted with the Shona language and indeed the parties confirmed its contents. This was evidently a consent under the common law and not in terms of the rules.

Perhaps it was naïve on the part of applicant's counsel to accept the applicant's version at face value without an attempt to peruse the record of proceedings to verify the instructions he received.

Still on this subject, I stated in my *ex tempore* judgment as I reiterate here that it is highly improbable that two legal practitioners would have connived and conspire to create a fictitious consent paper and proceed to affix their signatures thereto. That would have been suicidal. Not only would they have run the risk of facing severe disciplinary action with their regulating body, the Law Society of Zimbabwe, but they also clearly ran the risk of arrest and prosecution for fraud or some similar criminal transgression.

In the same vein, I found the fact that no complaint was ever made to the police and to the Law society against either legal practitioner purportedly for this alleged transgression quite telling. If indeed Ms Chimwanda did not act as per her mandate and Mr Chirairo pressured the latter to act in such a pertinently dishonest and prejudicial manner, she would have expected the applicant to have swiftly instituted the said disciplinary and/or criminal proceedings against one or both of them.

positions.

Ultimately therefore, I found that the applicant's version in relation to the circumstances surrounding the granting of the consent judgment was not merely unreasonable, it was downright false. She was an active participant in the entire process.

I none the less proceeded to address the remaining requirements for the setting aside of a consent judgment.

The Bona fides of the application.

Evidently the application lacked *bona fides*, it was merely prompted by the applicant having obtained legal advice from some quarter contrary to the position that she had agreed to. This much is borne out from the history of the case. I repeat here solely for purposes of emphasis that surely had the applicant's erstwhile legal practitioner gone off on a frolic of his own to manufacture a non-existent consent paper, the applicant would have swiftly taken appropriate action against her particularly in light of what was at stake.

The applicant averred in her founding affidavit that as early as the P.T.C stage she was surprised by her erstwhile legal practitioner proposing an out of court settlement. I also found it plainly illogical that she would she proceed with a legal representative whose proposed action was at variance with her position.

Two averments made by the respondent in his opposing affidavit with respect to the proceedings on the day the consent judgment was made are critical.

The first was that the presiding judge (myself) specifically asked the parties (not that legal practitioners) whether the terms of the consent paper were a true reflection of their will whereupon both parties confirmed that position in court.

The second, (and related to the first) was that the contents of the consent paper were read to the parties in the Shona language by the court interpreter before the parties were asked to confirm its contents, which they did.

These key averments were not in the least controverted by the applicant in her answering affidavit. It is trite that which is not denied is taken as having been admitted, see *ZUPCO Ltd* v *Packhorse (Pvt) Ltd* SC-13-17.

Not only was the applicant represented, she was also present and confirmed the contents of the consent paper rendering it unnecessary for her to file an affidavit of evidence. This explains why she was asked to confirm contents of the consent paper. It was equally unnecessary to refer the matter to the unopposed roll as the matter had been brought as a contested divorce claim.

The question as to whether a legal practitioner can sign a consent paper on behalf a litigant which appears to have confounded the applicant. needs not detain anyone. There is ample authority to the effect that a legal practitioner when duly authorised to do so can enter such consent on behalf of his or her client.

In *Washaya* v *Washaya* 1989(2) ZLR 195 (H) where Greenland J remarked as follows in this regard:

> "It seems to me that *where the court is satisfied that a legal practitioner has the authority of his client to consent to judgment, the client will be bound by such consent and the court will visit on the client a heavy onus before rescinding the judgment.* See *Moshal* supra, and *Roland & Anor* v *McDonnell* 1986 (2) ZLR 216 (SC)." (italics for emphasis)

Similarly, in *Masulani* v *Masulani* & Ors HH-68-03, MAKARAU J (as she then was) had this to say on the authority of a legal practitioner to consent to judgment on behalf of a client:

> "It is common cause that the consent judgment in the application before me was not granted in terms of the rules. The parties appeared before a judge in chambers and indicated the terms of the consent order to the judge orally. No formal document was signed and filed by the parties, embodying the consent order. Technically, the consent order in the application before me was not granted in terms of the rules. It was granted at common law. (*See Washaya* v *Washaya* 1989 (2) ZLR 195(H) at p 199F*)."*
>
> It would appear to me that the fact that a consent judgment was granted in terms of the rules or at common law is of no importance when considering an application to set it aside. This court and the Supreme Court have applied the same considerations to set aside a

> consent judgment granted in either circumstance. (S*ee Washaya* v *Washaya (supra) and Georgias and Anor* v *Standard chartered Bank* 1998 (2) ZLR 488 (S)).
>
> It does appear to me that to distinguish between a consent order granted in terms of the rules from one granted at common law is indeed to make a distinction without a difference. In both cases, the judge or court will only proceed to grant a consent judgment at the behest of the parties *or their legal practitioners*. The behest may be in writing and signed by the parties or their legal practitioners, or may be made orally during argument or during a trial. In both instances, the judge or court will be relying on the submissions of the parties *or their legal practitioners* that a settlement has been reached in the matter and a consent order may be granted." (my emphasis)

I interpose here to point out there is no longer any distinction in the requirements for setting aside a consent to judgment under the common law and one under the rules. See *Georgias and Another* v *Standard chartered Bank* (*supra*).

The facts of this present matter are not altogether dissimilar to those in *Southend Cargo* v *Zimbabwe Development Bank* HH-123-2004, where a consent was given in court by counsel following a request by the parties for a brief adjournment to reflect on their respective positions. An application for setting aside the consent judgment was dismissed.

Ultimately, therefore I was satisfied that the applicant's legal practitioner Ms Chimwanda had the requisite authority to enter into the consent judgment on behalf of the applicant.

Prospects of success

In Roland & Anor v McDonnell (supra) DUMBUTSENA CJ said the following on the importance of applicant demonstrating prospects of success in the main matter before the consent judgment may be set aside:

> "The court has also to consider the defendants prospects of success at the trial and the question of public policy, that is, the need to reach finality in litigation. See *S v Franco & Anor; S* v *Lasovsky Brothers & Ors* 1974 (4) SA 496 (R, AD) at 501 E-F and *Arab* v *Arab* 1976 (2) RLR 166 (AD) at 172E. In the instant case all that was required of the defendant in his application for rescission was to show that with the averments in his affidavit, if established at the trial, he would succeed. It was, therefore important to establish whether his defence had any prospect of success. If he was not likely to succeed because of the principle of public policy, then the application must fail."

In *casu*, the applicant's main gripe on the merits was the exclusion of some of the immovable properties from the division matrix. Those assets as earlier said are registered in the names of third parties. In this case save for the issue of the four immovable properties, all the other

issues were uncontested. This much is borne out by the joint PTC minute filed by the parties. The applicant's position was basically that the consent judgment should be set aside so that the matter would proceed to trial to enable her to convince the court that she be given a share of those properties.

I pointed out in the *ex tempore* judgment that the parties had not been bothered to join the said third parties in the divorce proceedings and that it was untenable to purport to seek an order for the distribution of those assets without joining the third parties in whose names the properties were registered to the proceedings. Such a course of action would potentially yield untenable results in that a distribution of those properties was virtually impossible in the absence of the joinder of such third parties.

The parties needed to have either proceeded in terms of either rule 32 or 35 of the rules as the case may be, for the joinder of the third parties. The applicant ought to have proceeded along the lines of the procedure adopted in *Katsande* v *Katsande & Ors* HH249-13 where the wife in a divorce action sought to join a third party in whose name an immovable property alleged to be matrimonial property was registered. In that case CHITAKUNYE J (as he then was) explained the desirability of such a joinder as the rights of such third parties would potentially be affected by the decision of the court. See also *Mupombwa* v *Katsvairo & Anor* HH-166-21 and the cases cited therein. The moment the respondent pointed out in his plea that the properties she sought to be distributed as between her and the respondent were registered in the name of third parties, the applicant should have moved for the joinder of those third parties. She however threw caution to the wind and ploughed on regardless.

The need for the joinder of third parties in litigation wherein the rights of the latter are potentially affected is to obviate the multiplicity of litigation over the same subject matter. It would be patently naïve to purport to distribute property belonging to third parties when the risk of the third parties seeking to have that outcome set aside for obvious reasons looms large.

I therefore concluded that the applicant's chances of success in her intended brazen quest to persuade the court to distribute the four immovable properties without the joinder of the parties in whose names they are registered was remote, to say the least.

Disposition

In summation, therefore, I found the applicant's explanation for the circumstances leading to the consent judgment was not only unsatisfactory but was patently false. Her prospects of success in the main matter were poor and the application in my view lacked bona fides. The attempt by the applicant to have the consent judgment set aside was in my view no more than a ploy to wriggle out of the consequences of a judgment she had willingly and knowingly consented to.

There must be finality to litigation. A matter cannot be allowed to go back and forth as per the whims of a litigant. A litigant who voluntarily enters not a judgment by consent cannot whimsically turn around to have it set aside simply because he or she has had a change of heart. I found that she had failed to show good and sufficient cause to have the consent judgment set aside hence I dismissed the application with costs.

ZISENGWE J

Zimudzi &Associates; Applicant's legal Practitioners

Chirairo &Associates; Respondent's legal Practitioners