BRENDA RUFARO MAGORA (NEE CHIUTSI)
versus
PETER MAGORA
and
PRISCA TENDAI MANHIBI N.O
and
MESSENGER OF COURT N.O

HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 15 & 20 January 2025

URGENT CHAMBER APPLICATION FOR STAY OF EXECUTION

Advocate *T. Sibanda with Mr B. Majamanda*, for the applicant
Mr *C. Ndlovu*, for the 1st respondent

SIZIBA J:

INTRODUCTION

1. The applicant and the first respondent are wife and husband respectively who took the solemn vows of marriage on 27 December 2008. Their marriage was blessed with four children who are now aged 22, 16, and the youngest who are twins are aged 14 years. This case *ex facie* renders sufficient testimony that the fountains of love between these two rival parties have long dried up and that the marriage now remains only on paper. When the parties appeared before me, I did not hesitate to ask them together with their counsels why so much exertion, emotion, sweat and expense was being invested in peripheral issues instead of tackling the real issue of giving this dead marital union a decent burial by the usual decree of divorce. Furthermore, I did indicate to them that it is better to go for a once off cure than to survive on a pain ease or such other temporary panacea.

2. The applicant, who is the first respondent's wife, has approached this court by way of an urgent chamber application supported by a certificate of urgency by a legal practitioner seeking a stay of execution of a protection order that was pronounced by

the second respondent who is the learned magistrate who dealt with the case and pronounced the impugned order on 7 January 2025.

3. The relief sought by the applicant has been couched in form of a provisional order whose interim relief is as follows:

"Pending confirmation or the discharge of this order, this order shall operate as a temporary order:

IT IS ORDERED THAT:

1. The enforcement of the ruling by the 2nd Respondent dated 7 January 2025 in CASE NO. MTPO 1176/24 be and is hereby temporarily suspended.

2. The Applicant be and is hereby granted unrestricted possession, occupation and access to the Applicant's matrimonial home known as 2 Plumer Street Murambi, Mutare.

3. The 1st Respondent be and is hereby ordered not to interfere with Applicant's residency at 2 Plumer Street, Murambi, Mutare.

4-. The 3rd Respondent be and is hereby ordered not to evict the Applicant from the matrimonial property known as 2 Plumer Street, Murambi, Mutare."

4. The final relief sought by the applicant was presented as follows:

"PENDING THE DETERMINATION OF THE APPLICATION FOR REVIEW FILED IN THIS COURT UNDER THE ABOVE REFERENCED CASE NUMBER:

1. The warrant of execution and the consequent execution of the decision of the 2nd Respondent dated 7 January 2025 in CASE NO. CASE NO. MTPO 1176/ 24 be and is hereby stayed.

2. Confirmation of the interim order/ relief granted

3. 1st Respondent (if he opposes this order) bears the costs on an attorney client scale."

BACKGROUND FACTS OF THE MATTER

5. It is common cause that the parties have an immovable property in South Africa which has been described as number 1 Milnerstone Street, Kyalami Estates, Midrand, Johannesburg. The house is said to be registered in the names of the first respondent although the applicant claims that the first respondent betrayed her in registering it in his sole names contrary to their agreement since they acquired it together. In the past

couple of years, the parties had relocated to South Africa where they resided together with their children in pursuit of greener pastures. Currently, the parties seem to be facing challenges obtaining work and residents permits but they seem to be optimistic that they will overcome such challenges.

6. It is also common cause that there is now a house at Mutare where the first respondent has been residing of late with some of the children. This property is the one which is the subject matter of this case and it has been described as number 2 Plumer Street, Murambi, Mutare. According to the applicant, this house is their joint asset with the first respondent whom she alleges to have also registered it in his sole names fraudulently contrary to what they had agreed.

7. It appears that in the past five years or so, the relationship between the parties has been a turbulent one. It is common cause that divorce cases were filed in Zimbabwe and South Africa under HC 3495/19 (with the High Court in Harare) and 2019/25483 (with the Gauteng Local Division) respectively. Both cases are still pending. On 2 June 2023, the High Court in South Africa ordered the first respondent to stop interfering with applicant's possession, control and occupation of the house in South Africa. As the marriage relationship continued to turn more sour and the home environment becoming more toxic and hellish, it appears that the first respondent resolved to spend his time in the house at Mutare whilst the applicant remained in South Africa.

8. In face of such a volatile situation between the parties whose love and affection for one another had already given way to suspicion, distrust and active verbal and physical combat, the applicant decided to pay an unwelcome visit to the first respondent at the house in Mutare on 20 December 2024. She arrived with the children to spend the festive season. The papers before this court show that instead of celebrating and feasting on holiday, she spent practically all her time hustling between the charge office and the courtroom and residing at a hotel in terms of an interim protection order that was granted by the court *a quo* prior to the pronouncement of the final protection order which is the subject matter of this case. The first respondent fought tooth and nail to ensure that applicant does not share the same residence with him at the house in

Mutare and he even found it more convenient to pay applicant's hotel bills than to entertain her at the house. His first reaction was to immediately report his unwelcome guest to the police as he must have felt very insecure and vulnerable. He says that the reason why he left the applicant in South Africa to come and reside in Mutare was that he wanted to have his peace. He gave me an impression that the arrival of the applicant at the house was to him a signal or alarm of war and yet he seemed unwilling to fight or break the law. He passionately confessed having been a victim of assaults by the applicant in the past years despite the fact that he had done all his best to love her and do the best for her. He had now resigned to any hope of reconciliation with applicant and he was not keen to attempt or experiment any peaceful co-existence with his wife. The applicant insisted that the parties could co–exist peaceably at the same residence although she conceded that there had been some episodes of violence which she attributed to her immaturity in the past. According to the first respondent, the situation was such that he even feared to use the same utensils with the applicant and he also referred to an incident when he once felt that he was being injected somehow whilst he was asleep.

9. The full record of the evidence that was presented before the court *a quo* was not availed to me by either party. The founding affidavit that was filed by the first respondent before the court *a quo* was also not presented to me. What is apparent from the papers before me is that there is a lot of tension between the parties. There were meetings facilitated by the legal practitioners for both parties to try and settle the matter but all these efforts proved futile. When the matter came up before me, a similar approach was taken to find a common solution to the impasse but it was all in vain.

10. The court *a quo* in its ruling made a finding of fact that the parties have been on separation and living apart since 2019. It found also that the applicant has been resident in the house in South Africa whilst the first respondent has been resident in the house in Mutare. The learned magistrate also made a finding that the extent of the animosity between the parties was that if left alone to share a common residence, they could even murder each other. She then gave the following final order at the end of her ruling:

(a) A reciprocal protection order is hereby granted not to insult, harass, assault and threaten.
(b) Respondent (applicant herein) is to stay away from number 2 Plumer Street, Murambi property pending divorce proceedings.
(c) Order is valid for 5 years.

THE APPLICANT'S CASE BEFORE THIS COURT

11. The applicant seeks an urgent stay of execution of the final protection order which was granted by the learned magistrate. She craves for urgent relief pending the outcome of her application for review which was filed before this court same day with this application under HCMTC 7/25. Her grounds of complaint against the decision of the learned magistrate are numerous. She alleges that the learned magistrate had no jurisdiction to determine rights over matrimonial property which was subject of a pending divorce and therefore *lis pendens*. She further contends that the learned magistrate erred in assuming jurisdiction in a manner that amounted to evicting a spouse from matrimonial property. She alleges also that the learned magistrate's order amounted to deporting her from her home country where she is a citizen. She also made an accusation of bias, malice, interest in the cause and corruption against the learned magistrate whom she accuses of having communicated over the phone with 1st respondent's counsel and also of being conflicted in the case as she allegedly has a child with one of the lawyers at the law firm that represents first respondent. The gravamen of her case was that she has been rendered homeless by operation of the order which she seeks to stay. She indicated, however, that she was currently residing with well wishers and that she had come into this country for the holidays and that she will be returning to South Africa in less than a week's time. She indicated that it is not yet her intention to reside in Zimbabwe as she is doing some works occasionally in South Africa although she is still facing challenges with the issue of permits.

THE FIRST RESPONDENT'S CASE BEFORE THIS COURT

12. The first respondent took four points in *limine*. The first one was that it was improper for the applicant to have filed an answering affidavit in a chamber application as such a

procedure was not provided for in the rules. Counsel for the first respondent prayed that the impugned pleading be either ignored or expunged from the record. The second one was that there had been a fatal misjoinder of the second respondent when no relief was sought against her. The third point in *limine* was that the applicant had dirty hands for having failed to vacate the Mutare house after the interim order was granted by the magistrate. It was common cause that she vacated on 25 December 2024 and she never returned there. The last contention was that the relief sought was inelegant and incompetent as it had the undesirable effect of turning this court into a court of first instance in dealing with the relief which was not sought before the court *a quo*. All these points in *limine* were opposed by the applicant and I allowed the parties to address me on the merits as well so as to make a decision on the merits in the event that I do not find merit in the points in *limine*.

13. On the merits, the first respondent submitted that the factual findings made by the trial court regarding the inability of the parties to share a common residence peacefully were proper and well - grounded at law. It was contended that the applicant had not placed any evidence to prove allegations of bias and improper conduct on the part of the learned magistrate. Furthermore, it was submitted that the order made by the trial court did not diminish applicant's share in the matrimonial property as the divorce case was still pending. The first respondent offered to arrange alternative decent accommodation to the applicant at his own expense as and when she comes into the country prior to the divorce upon arrangement and notice which offer was refused by the applicant who insisted on wanting to move into the Mutare house as a wife and mother.

THE LAW AND ITS APPLICATION TO THE CASE AT HAND

14. All the points in *limine* raised by the first respondent can be quickly disposed of as they lack merit. There is no rule or law which prohibits an applicant from filing an answering affidavit in an urgent chamber application. The submission by first respondent's counsel that the absence of a provision in the rules which provides for an answering affidavit in chamber applications means that such pleading is not to be filed

has no foundation in the law. If such was to be the case, then one would also exclude filing of an opposing affidavit and respondent's heads of argument which are not specifically provided for under rule 60 of the High Court Rules, 2021. The spirit of the law in chamber applications is that such applications are judge–driven or controlled as soon as they are filed. This point in *limine* has no merit and it is accordingly dismissed.

15. The alleged fatal misjoinder of the second respondent is also equally unmeritorious. The law regarding misjoinder and non - joinder is settled in this jurisdiction. No cause or matter can be defeated by a misjoinder or non–joinder in terms of r 31 (11) and (12) of the High Court Rules, 2021. See ***Mwazha and Others* v *Mhambare* SC 116-21** at pp 8 and 9, ***Wakatama and Others* v *Madamombe* 2011 (1) ZLR 18**. A court of law is bound to decide the case for the parties before it although it must not grant an order that will prejudice the rights of a party who is not cited before it. See ***Dynamos Football Club (Pvt) Ltd and Another* v *Zimbabwe Football Association and Others* 2006 (1) ZLR 346 (S).** This point in *limine* is accordingly misplaced and it is hereby dismissed.

16. The third point in *limine* to the effect that the applicant has dirty hands has no merit. She did vacate the said place on 25 December 2024. She is yet to be summoned for such a charge after she was placed off remand by the lower court. Her version is that the interim order was granted *ex parte* and that its exigencies were not explained to her. There would be no legal basis for this court to hold that she has dirty hands. The point in *limine* is dismissed as well for lack of merit.

17. The final point in *limine* was that the final order sought is inelegant. Whilst it is correct to say that the order could have been couched in a better format than what it is, it is still possible for one to relate to the relief sought by the applicant in its current form. In an urgent matter which raises important and critical issues for a court to determine, a court of law will not be easily persuaded to uphold a preliminary point that is centered on the form, syntax and semantics rather than substance. On this aspect, I can do no better than quoting the words of MATHONSI JA in *Delta Beverages (Pvt) Ltd* v *Blakey*

Investments (Pvt) Ltd SC 107-24 at para 25 at p 7 of the cyclostyled judgment as follows:

> *"The practice of law in this country is becoming a practice in preliminary objections at the expense of the resolution of real disputes between the litigants. Courts of law are becoming out posts of technicalities which have no end where counsel seek to outdo each other on the number of and the frequency with which they burden the Courts with objections. In fact, a lot of Court time is now being spent adjudicating over English grammar and syntax which is wholly undesirable, is an abuse of the Courts and impede access to justice. It is a practise which must be discouraged at all costs."*

18. Whilst proper compliance with rules as well as clarity in presentation or drafting is required from legal practitioners and self - actors alike, a litigant who comes hurrying and panting in pursuit of justice from a judge in chambers upon a certificate of urgency signed by a legal practitioner of this court should not be turned back without an answer on the merits of his or her case unless there is a grave infraction that will prejudice his or her opponent in a manner that cannot be remedied. This, to me, is the whole essence and philosophy behind the provision of these urgent applications. It is imperative that by its very nature, an urgent application must involve a certain measure of relaxation of the usual compliance with strict requirements of rules, presentation of papers, siting traditions of the court and time limits so as to effectively and adequately address the unusual and peculiar emergencies that are akin to such applications. To that extent therefore, this point in *limine* has no merit and it is dismissed accordingly.

19. Coming to the merits of the present application, the pertinent issue is whether this court should grant a stay of execution as sought by the applicant. The requirements for a stay of execution are well settled in this jurisdiction. A stay of execution will be granted where real and substantial justice so demands or where injustice would result when a stay is not granted. See *Mupini* v *Makoni* 1993 (1) ZLR 80 (S) and *Kupatsirana Mining Syndicate* v *M & C Mining Syndicate (Pvt) Ltd &* Others SC 112-24 at p 8 of the cyclostyled judgment.

20. For purposes of this case, it is not necessary for me to exhaustively deal with the grounds of review advanced by the applicant which are subject of the pending review application. I will only touch on such grounds to the extent that is necessary in ascertaining the pertinent issue as to whether an injustice would occur if the protection order by the court *a quo* is not stayed.

21. To begin with, I have closely examined the ruling and final order by the learned magistrate. After perusing the papers before her and making the necessary inquiry, she made a finding of fact that given the nature of the hostility between the parties, they could even go to the extent of killing one another if left to reside together at one place. She also made a finding that the parties have been on separation since 2019 and that the applicant has been ordinarily residing in South Africa while the first respondent has been ordinarily resident in Zimbabwe at the house in Mutare all along. In my view, all these findings cannot be said to be irrational. Upon my interaction with the parties when they appeared before me, their hostilities to one another were apparent. Their disputes are deep rooted, passionate and well - grounded in the past and present. Each of them has a painful ordeal to narrate about the alleged abusive conduct of his or her protagonist. The divorce papers were filed in the courts in 2019. The fact that there was a protection order on 2 June 2023 in South Africa over their rights of residence in the South African house does not discount anything from the fact that the parties had by then long ceased to live a normal marriage life. When they appeared before me, the applicant's position was that they last lived together normally as husband and wife in sharing the same bed way back in 2022. We are now in 2025. That on its own shows that these two former lovers now live like completely unrelated strangers even though they are still married in paper. Both of them did not hesitate to confirm that their marriage relationship has deteriorated beyond repair and none of them wishes to revive it.

22. The papers before me show that a lot of effort was expended by legal counsels at the lower court to try and have the parties agree about the issue of whether the applicant should reside with the first respondent at the same residence but there was no break

through. For this reason, I cannot find fault on the learned magistrate having formed a view that the parties cannot live at the same residence.

23. Cases of passion killing resulting from marital disputes are not few in this jurisdiction. The purpose of legal provisions dealing with protection orders is meant to minimize such instances of domestic violence which often result in such irreversible fatalities. It would be accordingly reckless for a court of law to put together in one residence such people whom it sees that they cannot live together without being violent and hostile to each other. The fact that the law would take its course if such misdeeds are perpetrated by any of the parties does not detract from the fact that prevention is better than cure. After all, loss of human life cannot be cured or replaced even if the perpetrator is to be prosecuted.

24. In passing, it is necessary to make a preliminary inquiry whether the learned magistrate in the court *a quo* did anything that can warrant the accusation that she exercised a jurisdiction that she does not have in sharing the matrimonial property that was subject of a pending divorce case. This accusation is simply not true. The learned magistrate did not share or distribute the properties, she simply found it appropriate to say that the applicant should continue residing at the house in South Africa where she is still based and that she must not reside where the first respondent is residing so as to avoid conflicts since the parties are no longer living as husband and wife in a normal love relationship.

25. Furthermore, I agree with Mr *Ndlovu* that in terms of s 3(1)(i) of the Domestic Violence Act [*Chapter 5*:*16*], it constitutes an act of domestic violence to forcibly enter into complainant's residence where the parties do not share the same residence after separation. Again s 11(1)(b) of the same Act provides as follows:

"(1) A protection order may, ***where appropriate****—*
(a) ------
(b) ***direct the respondent to stay away from any premises or place where the complainant resides, or any part of such premises or place****;*"(My emphasis)

26. Whilst it is appreciated that it is very drastic for a court to order a spouse to stay away from a matrimonial property, it does not mean that such cannot be done where the situation demands it. Ordinarily, such an order would not be unjust where there is alternative accommodation for such spouse. Such orders should be granted sparingly where injustice would not occur. Injustice would occur where such spouse is rendered homeless to the extent of having totally no convenient place to stay. On the other hand, injustice would equally result if a court fails to exercise the necessary wisdom and discernment to the extent of putting in the same house those estranged spouses who have a potential of inflicting physical harm to each other when left to reside together. Such lack of foresight would not be an exercise of pity or justice by a court.

27. Coming back to the case at hand, I have agonized whether it would be needful to stay the protection order that was given by the learned magistrate. Both parties have no qualms with the first part which grants a reciprocal peace order as well as the last part which refers to the duration of five years. I have no doubt that the court *a quo* did not err in holding that the parties cannot live peaceably in one house or residence given their hostilities. The first respondent has been residing at the Mutare house for sometime while the applicant simply came over for holidays. She is set to return to South Africa in less than a week from now although she may wish to return on some occasions to check on the children. I do not see any need to ask the first respondent to relocate from the Mutare property to accommodate the applicant on her occasional visits to Zimbabwe. She clearly indicated that for now she is not yet in a position to relocate from South Africa and live in Mutare on a permanent basis. She still wants to earn a living in South Africa. Even though both parties confirmed that there are two separate buildings or houses in the yard, it is till not best to put these antagonistic parties together.

28. Since the parties do not have another property in Zimbabwe, it would have been best to cater for the applicant's temporary stay as and when she comes into the country at the first respondent's expense so as to cater for her concerns that she has been subjected to a quandary by being asked to stay away from the matrimonial property which is in

Zimbabwe. However, she has refused such gracious offer by the first respondent and insisted that she wants to go and stay at the Mutare house as a wife and mother with the children. Having refused such reasonable compromise by the first respondent, this court cannot force it down her throat. It can only be assumed that perhaps she has other better options. Faced with such a scenario, I no longer think that an injustice would result if the protection order is not stayed. It cannot in all justice and fairness be stayed in the manner that the applicant is dictating in allowing her to go and reside at the same house where the first respondent is currently residing. The parties should now put effort in finalizing the divorce so that a final determination of their property rights is made at the earliest possible time so as to avoid numerous peripheral issues that will not resolve heir marital differences or the constant fights about where each of them seeks to reside and how they should access the children.

29. In her passionate plea to reside at the matrimonial home in Mutare so that she can be with her children as their mother and wife, the applicant does not seem to accept that she can still see them at any other place. The first respondent had even offered to cater for their flight expenses when they are to visit her in South Africa. She still saw no light in all this. I must point out that once a normal marriage relationship breaks down irretrievably, none of the parties should expect normalcy, convenience, comfort and gain. There should be a willingness therefore on the part of those affected spouses to compromise, adjust and be accommodative to the needs of the other spouse rather than to selfishly make strict and uncompromising demands to the detriment and discomfort of the other spouse even if the love and affection for such spouse no longer exists as per the usual incantation in the divorce papers. Such accommodative and compromising attitude should just flow from principle and curtesy and there are a few couples or individuals who still manage to exhibit this attitude in matrimonial cases and we must commend such attitude and it is a fact born from life experience that those who choose to take such route of curtesy will always heal faster from the emotional pains associated with a broken home than the hostile and unforgiving ones. Bitterness is like a slow poison which slowly consumes those who choose to imbibe it.

30. The wreckage of a marriage relationship comes with all the attendant economic and emotional losses, discomforts and inconveniences which are abnormal, unnatural, brutal, drastic and difficult for one to acclimatize to and yet all these crucibles must be necessarily adopted and adapted to as the new normal by all who find themselves in such invidious positions whether by their own fault or fate. There is no winner out of a broken marriage, both spouses, the children, relatives and the community at large suffer the shock waves of a broken marriage and even the courts suffer equally in having to resolve and manage all the complicated repercussions and ramifications of a broken family and that is why special Family Divisions and Children's Courts have been set up so as to try and render the best and specialized services to those affected or afflicted by these difficulties.

31. For the reasons given above, I am constrained to conclude that there is no possibility of injustice if the protection order issued by the court *a quo* is not stayed. The order is competent and there was no misdirection or wrong exercise of discretion on the part of the learned magistrate at least to the extent necessary for purposes of this application. It is the established principle of this court that it will not lightly interfere with the decisions of the lower courts in the absence of a misdirection, irrationality or wrong exercise of discretion.

32. Both parties have prayed for orders of costs at attorney and client scale against each other. The first respondent lost on the points in *limine* and succeeded on the merits. The applicant succeeded in defeating the first respondent's points in *limine*. There is no reprehensible conduct on the part of the applicant warranting any order of costs on the punitive scale. Furthermore, this is a family matter emanating from the difficulties faced by spouses when their marriages break down due to their unfortunate circumstances. I do not find it just and proper to saddle the applicant with costs for having approached this court in her right to try and address what she perceived to be an injustice to her. She was not motivated by a mere desire to harass the first respondent and make him incur legal costs. The case involves a complex and delicate marital dispute which both this court and legal counsel had to grapple with to try and unravel hence I must commend and appreciate both counsel in their efforts in assisting these

parties and the court to this extent. I find it proper therefore not to award any costs against the applicant. I therefore order as follows:

(a) The application be and is hereby dismissed.

(b) Each party shall bear his or her own costs.

Khuphe & Chijara Law Chambers, applicant's legal practitioners
Gonese & Ndlovu, 1st respondent's legal practitioners