FATIMA ROSINA MUGWADHI (NEE MUVAZHI)
versus
NIXON MUGWADHI
and
REGISTRAR OF DEEDS NO

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 16 November 2021 and 25 November 2021

Opposed Matter

S Mushonga, for the applicant
N Madzivire, for the 1st respondent

MUCHAWA J: This is an application for amendment of the consent paper which was filed under case HC 3711/17 when a divorce order was granted between the applicant and first respondent and which regulated issues of custody of the minor children, access, maintenance, division of property and costs. The application is allegedly made in terms of section 7 of the Matrimonial Causes Act, [*Chapter 5:13*].

The applicant and first respondent are former husband and wife whose marriage was dissolved on 11th May 2017. It is the applicant's case that the consent paper incorporated into the decree of divorce was not properly worded and drafted as it did not provide for consequences of non-compliance with some of the provisions leading to the first respondent deliberately ignoring compliance. This scenario is alleged to have led the parties to approach the court several times. The sore point relates to division of matrimonial property and the proposed amendments are allegedly meant to enable either party to effect transfer of the properties which were granted to them by the divorce order. The proposed amendments compel the respondent to surrender all title deeds of immovable properties in his name to the applicant and to sign consent to transfer documents within two weeks of the order sought herein. Failing this, the Deputy Sheriff would be ordered to sign all requisite transfer papers and second respondent to then effect transfer.

The application was opposed on the merits and three points in *limine* were also raised at the hearing. I heard the parties on the points in *limine* and reserved my ruling. This is it.

Whether there is a valid application before the court

Ms *Madzivire* submitted that the application purportedly made in terms of s 7 of the Matrimonial Causes Act whilst it is in fact seeking an amendment to the consent paper is bad at law as s 7 does not deal with amendment of orders as sought by the applicant. She pointed to s 9 as the correct section to be used where one seeks to vary an existing order of the court which was made in terms of s 7.

Further, Ms *Madzivire* submitted that what the applicant intends to do is far more than an amendment but is a substitution of the original consent order with the proposed amendment. The court was pointed to the case of *Mushonga & 2 ORS* v *Musandinane* HMA 32/20 wherein the word "amend" was defined to connote, "correcting something". It was argued that what the applicant seeks is a replacement or substitution of the consent order and that is not an amendment.

Mr *Mushonga* replied that they are not seeking to vary the order but to just ensure the order is enforceable by amending it. He stated that the mere reference to section 7 of the Matrimonial Causes Act cannot invalidate the application. He went further to state that the application was in fact brought in terms of Order 8 r 56 of the High Court Rules, 1971.

In my opinion, Mr *Mushonga* indirectly conceded that there was no legal basis for lodging the application in terms of s 7 of the Matrimonial Causes Act as it does not provide for what was sought. He tried to wriggle from the relevance of s 9 instead, by arguing that what was sought is not a variation. This was an exercise in futility and just semantics as when one seeks to amend something, they are in fact seeking a variation from the original.

The reference to r 56 of the High Court Rules, 1971 is also not helpful to the applicant as that was not the basis for bringing this application. In any event, the Rule relates to setting aside of a judgment given by consent on good and sufficient cause. That is not what is sought by the applicant.

It is always important for an applicant approaching the court to lay out the legal basis for doing so. This enables the court to assess whether it has the requisite jurisdiction to act as requested. It is not done as a matter of course.

I find that the applicant failed to show the correct legal basis for invoking the court's power to act on her behalf. The application is bad at law and fails on that account.

Whether the relief sought is incompetent

Ms *Madzivire* submitted that the relief sought by the applicant is incompetent as paragraph 1 of the draft order on record page 18 merely seeks to amend the consent paper under HC 3711/17 without amending the draft order which incorporates the consent paper signed on 28th April 2017. It was argued that the granting of the order sought herein would therefore not change anything to the order granted on 11 May 2017 hence the relief sought is incompetent and ineffective.

Mr *Mushonga* argued that it was not necessary to amend the order in HC 3711/17 as it would be amended by incorporation.

The Court Order on record page 34, in paragraph 3, provides as follows;

> "3. Issues of access, maintenance, division of property and costs shall be governed by the Consent Paper entered into by the parties on the 28th April 2017 annexed hereto"

If this court was to leave the order in HC 3711/17 intact, it would, as orders are expected to do, be complete in itself and would point anyone who got hold of it, to the consent paper signed on 28th April 2017. How then would the amendment be incorporated without being mentioned in the primary order? The scenario proposed by Mr *Mushonga* is untenable and would create confusion regarding the terms of the divorce decree, if I were to grant the order sought.

The relief sought is therefore incompetent.

Whether the applicant has dirty hands and should not be accorded audience

Ms *Madzivire* submitted that the applicant has dirty hands and should not be protected by the court.as she has not passed on transfer of the immovable property 184 Timms Road, Daylesford to the first respondent. Record p 43 was referred to and it contains a letter of the 20th September 2019 in which the first respondent's legal practitioners wrote to the Sheriff requesting him to serve upon the applicant relevant papers for the transfer which, it was alleged, have still not been signed.

Mr *Mushonga,* however misconstrued this argument as relating to physical occupation of the house as provided in the consent paper that applicant shall retain occupation of the house until the youngest child attains the age of 18 years. It was not averred that the applicant had in fact passed on transfer to the first respondent and thus obeyed the court order on her part.

In *Sabawu* v *Harare West Rural District Council* 1989 (1) ZLR 47 (HC) it was stated that it is a plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until the order is discharged. Furthermore, no application to court by such a person will be entertained until he has purged

himself of his contempt. Though the court will not lightly deprive a party of his right to be heard, in a case such as this, where a party seeks the exact same relief, they are withholding from the other, the court is inclined to demand that the applicant should first clean her own hands before seeking the protection of the court.

It is my finding therefore that the applicant has dirty hands and cannot be accorded audience by this court.

Whether costs on a punitive scale are warranted

Ms *Madzivire* submitted that costs on a higher scale are warranted as applicant has dragged the applicant to court several times before as stated in her founding affidavit in paragraph 3.4, including in case HC 8513/19 wherein a wrong application was brought and the court gave clear directions on the form of application to be filed. It was argued that despite such clear directions, the applicant has once again dragged the first respondent to court on a wrong application.

Mr *Mushonga* made no submissions on this.

The legal position is that costs on a higher scale should only be awarded in exceptional circumstances where a party's conduct is mischievous and objectionable and the cause of all costs. See *Davidson* v *Standard Finance Limited* 1985 (1) ZLR 173 (HC). In *Chioza* v *Sawyer* 1997 (2) ZLR 178 (SC), it was held that dishonesty in litigation is certainly a ground for an order of costs on a higher scale. In *Mudzimu* v *Municipality of Chinhoyi and Samuriwo* 1986 (1) ZLR 12 (HC), costs on a higher scale were awarded because it was found that the respondent had behaved unreasonably and objectionably by defying court orders putting the applicant to considerable inconvenience and additional expense in seeking enforcement of those orders.

The applicant cannot be classified as dishonest in her litigation nor has she behaved objectionably or without *bona fides.* Although her application was ill conceived and doomed to fail on the preliminary points raised, costs on a punitive scale are not necessarily warranted in *casu.* See *Faust Products (Pvt) Ltd* v *Continental Fashions (Pvt) Ltd* 1987 (1) ZLR 45 (HC)

I accordingly uphold the points *in limine* and dismiss the application with costs on an ordinary scale.

Mushonga Mutsvairo & Associates, applicant's legal practitioners
Masiya-Sheshe & Associates, first respondent's legal practitioners