MORE-PRECIOUS NCUBE (NEE MAFU)

Versus

STENSLOUS NCUBE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 23 NOVEMBER 2021 & 10 MARCH 2022

Opposed Application – Contribution towards costs

Prof. W. Ncube for the applicant
T. Masiye-Moyo for the respondent

MAKONESE J: This is an application brought in terms of Rule 67 (1) of the High Court Rules, 2021 for an order that respondent contributes towards applicant's legal costs. The applicant contends that she has no financial means to pay for her legal costs in a pending divorce under case number HC 1037/20. The application is opposed. Respondent argues that applicant has adequate income to fund her legal expenses, and in any event the amount being claimed by applicant is exaggerated. Respondent contends that the application is an abuse of court process and borne out of malice and vindictiveness.

FACTUAL BACKGROUND

The parties were married to each other in terms of the civil laws of Zimbabwe on 13th August 2012. Two minor children were born out of the union. The marriage relationship broke down sometime in June 2020. The parties made counter allegations against each other. The parties commenced living apart on 6th June 2020. At the time of the filing of this application, on 20th October 2021, the parties were going through an acrimonious divorce. The main divorce action had been set down for hearing fron the 23rd to 24th November 2021. The parties resolved that the application for contribution towards costs would be argued first. After hearing argument on the matter I reserved judgment. The main divorce action was

commenced and finalized on the 2nd of December 2020. It is pertinent to observe that the contentious issues in the divorce action related to the distribution of matrimonial assets. The divorce action was concluded, including other ancillary issues regarding custody and maintenance of the minor children of the marriage.

POINT *IN LIMINE*

Before dealing with the merits of the application it is necessary to deal with the preliminary point raised on behalf of the respondent. The order sought by the applicant in this application is set out in the draft order as follows.

> "It is ordered that:
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> 1. Respondent be and is hereby ordered to contribute towards the applicant's legal costs in case number HC 1037/20 in the amount of US$16 000 (sixteen thousand United States Dollars) or its RTGS dollar equivalent at the prevailing bank rate on the date of payment.
>
> 2. Costs of suit on a legal practitioner and client scale."

Respondent contends that in terms of our law, the functional currency in Zimbabwe is the Zimbabwean dollar otherwise commonly referred to as the RTGS dollar. To that extent, so respondent argues, a claim sounding in the United States Dollars is illegal. Respondent further argues that in terms of the law as it existed at the filing of this application, it is illegal to benchmark any charges for services rendered using foreign currency against the local currency. Respondent contends that it is not permissible at law to render a statement of services performed, in foreign currency except where services are exported or where local currency is the primary currency to account with foreign currency being an option for the payer to tender at the official auction rate and such foreign currency being held in free funds. Respondent's main bone of contention is that this is an application for an order sounding in

foreign currency, and as such, is unlawful. It is argued by respondent that this court may not possibly grant this order without landing itself in illegality.

In response, the applicant opposed the point *in limine*, pointing out that it lacks merit and ought therefore to be dismissed. Applicant filed extensive heads of arguments in support of her claims, particularly the legality or otherwise of the claims sounding in foreign currency. Applicant avers that the legality of the draft order is premised on the provisions of section 3 of the Exchange Control (Exclusive Use of Zimbabwe Dollar or Domestic Transactions) Regulations, 2019, SI 212/19 as read with section 23 of the Finance Act (No. 2) 2019. Applicant avers that the respondent has misconstrued the law and its consequences, and in particular fails to appreciate the meaning of legal tender as used in section 23 of the Finance Act (No. 2), 2019 as read with section 40 and 43 of the Reserve Bank Act (Chapter 22:15) and the effect of section 7 (1) of the Exchange Control (Exclusive Use of Zimbabwean Dollars for Domestic Transactions (Amendment Regulations, 2020 (No. 3) SI 185/2020, which amended SI 212 of 2019. SI 212/2019 was heavily relied upon by respondent in advancing argument in support of the point *in limine*.

DUAL PRICING LAW

Sections 41 and 44 of the Reserve Bank Act recognizes the distinction between money which is legal tender and money which is not legal tender in Zimbabwe following the well-established principle that all legal tender is money but not all money is legal tender. Respondent correctly cites sections 3 and 6 (2) of the Exchange Control Act SI 212/2019 but somehow deliberately omits to cite section 7 of the same Regulations which was inserted by the Exchange Control (Amendment) Regulations, 2020 (No. 3) SI 185/2020 which provides that:

"7(1) Any person who provides goods or services in Zimbabwe shall display, quote or offer the price of such goods or services in both Zimbabwe dollar and foreign currency at the ruling exchange rate.

(2) Any person who contravenes subsection (1) shall be liable for:
(a) a category of 1 civil penalty if the contravention is completed but irremediable or;
(b) a category 4 penalty of the contravention is a continuing one." (Emphasis added)

The net effect of this provision is that notwithstanding the provisions of section 3 (1) so heavily relied upon by the respondent and whose provisions must be read as having been qualified by the insertion of section 7 quoted above. Section 7 obliges the provider of services (including legal practitioners), to "offer the price of such services in both Zimbabwean dollar and foreign currency at the ruling exchange rate."(emphasis added)

It is my view that it is not only obligated but permitted under section 7 of the Regulations to offer services in the United States dollar at the prevailing exchange rate. The statement of fees prepared for the applicant by the legal practitioners is in compliance with not only section 7 of the Regulations, the Law Society Tariff denominated in United States dollars and published after the insertion of section 7 into the Regulations. It certainly follows as day follows night that there can be nothing improper let alone illegal in preparing a statement of fees in United States dollars as long as the option of the debtor to render payment in Zimbabwean dollars is preserved. As a matter of fact the whole point of the law requiring that the Zimbabwean dollar shall be the sole legal tender in Zimbabwe is so that a debtor presented with a bill in foreign currency may insist on tendering payment in Zimbabwean dollars at the ruling rate of exchange at the date of payment.

The concept of legal tender basically means that a domestic debt in whatever currency it is expressed, will at law, be regarded as having been discharged upon its payment in the currency recognized as legal tender in this country. In this regard, it must always be borne in

mind that the Exclusive Use of Zimbabwe Dollar Regulations (as amended) are made by the President under the provisions of section 2 (1) of the Exchange Control Act, (Chapter 22:05), which provides that:

> "2(1) Notwithstanding anything to the contrary contained in any enactment the President may make such regulations relating directly or indirectly; or
> (a) Gold, currency and securities and transactions, relating thereto; and
> (b) Exchange transaction; and
> (c) The control of –
> (i) …
> (ii) …
> (iii) Payments and
> (iv) Transaction in relation to debts … As he deems fit."

The significance of this is that Regulations made by the President under section 2 (1) of the Exchange Control Act prevail over any contrary provision in any law. The President has decreed that there shall be dual pricing for goods and services under section 7 of the Regulations. This settles the argument.

The respondent placed reliance on the case of *Zizhou* v *Taxing Officer and Anor* 57/20. The case is easily distinguishable in that the order sought in this matter provides for settlement of the costs in United States dollars or Zimbabwean dollar equivalent. This is permissible under the law as expressed above.

I therefore, make a finding that the point *in limine* has no merit and ought to be discussed.

ON THE MERITS

The law on contribution towards cases is well established in this and other jurisdictions. For the applicant to succeed it must be shown that the contribution which is sought relates to a matrimonial case in respect of a subsisting marriage and that the applicant

has reasonable prospects of success in that matrimonial suit and further that applicant is without adequate means to find his/her legal costs while the respondent has the means to make the contribution required.

BASIS OF APPLICANT'S CLAIM FOR CONTRIBUTION TOWARDS COSTS

By way of a brief background to this claim for contribution towards costs it is important to point out that respondent issued summons for divorce and ancillary relief against the applicant on 2nd July 2020. Applicant contested the main action by entering appearance to defend. On 15th July 2020, through her legal practitioners, applicant demanded of the respondent, contribution towards her costs for divorce. In very clear and unambiguous terms, on the 24th July 2020, respondent's legal practitioners indicated that respondent was not prepared to pay applicant's legal costs as she had the means to meet her legal costs. The parties pressed on with pleadings up to pre-trial conference stage. A pre-trial conference was held before a judge in chambers on 13th September 2021. Respondent applied for trial dates and the main divorce matter was set down for hearing from 23rd and 24th November 2021. The allocation of trial dates seems to have triggered the application for contribution towards costs. On 20th October 2021 this present application was launched. In this application applicant avers that the work done as at the date of filing of the application amounted to US$8 015, 00 including VAT. In support of this assertion applicant attached a fee note from her legal practitioners. Applicant indicated that if this application is argued all the way it would cost her at least US$5 000. In addition, the main divorce matter would last an estimated 3 days. The first day of the trial would costs her US$3 500. The second day $2 500 and the third day would attract a fee note of US$2 000. All in all the trial would cost an estimated US$8 000, 00. Applicant averred that if the respondent opposed the application her legal costs would be a minimum of US$21 000. On the other hand if the respondent did not

oppose the application her claim would be for US$16 000. Applicant also seeks to recover her legal costs on a legal practitioners and client scale in order that she would not have to add costs of work done up to the date of the application.

RESPONDENT'S BASIS FOR OPPOSING THE CLAIM FOR CONRTRIBUTION TOWARDS COSTS

Respondent challenged the applicant's claims for contribution towards costs on various grounds. I summarise these grounds as follows:

(a) Applicant has adequate financial resources as prosecute her case.

(b) Applicant is a business woman in her own right, she runs a fully equipped events planning business.

(c) Applicant receives an amount of US$400 per month from the parties' mining venture.

(d) Applicant has not disclosed that she receives consistently monetary contributions towards her upkeep from the respondent.

(e) Applicant is further paid an average of RTGS$16 000, 00 being drawings from the parties' mining business for her personal use.

(f) Applicant also receives an additional amount of RTGS$90 000, 00 per month to cover general household expenses.

(g) Applicant draws US$100 per month allocated to her for fuel expenses.

(h) Applicant receives rentals of US$450 per month for personal use, from a property known as 9 Glenden Riverside, Bulawayo, a property registered in the names of the parties' minor children.

(i) Applicant has not disclosed that apart from monies earned from her own business she receives funds from the respondent, for her upkeep, as well as rentals and as such, the application has not been made in good faith.

(j) Respondent asserts that he takes care of school fees and other financial needs of the minor children without seeking any contribution from the applicant.

Respondent observed that the main matter was in its closing stages when this application was made. The trial of the main matter was indeed set down for hearing on the day this application was argued. The divorce action was concluded on the 2nd December 2020 when a decree of divorce and other ancillary matters was granted by this court. Respondent contends that a claim for contribution towards costs for work that had already been done was not competent.

THE LAW ON CONTRIBUTION TOWARDS COSTS

In *Dube* v *Mavako-Dube* 2006 (2) ZLR 97 (H) NDOU J outlined the law on contribution towards costs in divorce proceedings as follows:

> "*According to H. R. Hahlo – South African Law of Husband and Wife* 50th Edition, *page 424, the claim for contribution towards costs in a matrimonial cause is sui generis. It has its origin in Roman-Dutch procedure, and has been sanctioned through many decades of practice. See Chamani v Chamani 1979 (4) SA 804 (W) and Van Ripper v Van Ripper 1949 (H) SA 634 (C). Its basis is the duty of support spouses owe each other and its purpose is to enable a spouse, who would otherwise not be able to do so, to place his or her case adequately before the court. See Botes v Botes 1969 (2) RLR 238 (7); 1969 (3) SA 169 (R). The requirements for such an order are that:*
>
> *(a) There must be a marriage*
> *(b) The suit in question is a matrimonial one*
> *(c) The applicant has reasonable prospects of success*
> *(d) The applicant is not in a financial position to bring or to defend the action, as the case may be; and*
> *(e) The other spouse is able to provide the applicant with his contribution." (page 101).*

In *Chinyamakobvu* v *Chinyamakobvu* 2014 (1) ZLR 509 (H) MAWADZE J at p 512-513, put the same requirements in the following manner:

> *"H. R. Hahlo South African Law of Husband and Wife 5th Edition at page 424 sets out the requirements for an order for contribution towards costs. I shall proceed to discuss those factors and relate them to the facts of this matter.*
>
> *(a) There must be a subsisting marriage. In the present case the marriage between the parties is subsisting.*
> *(b) The suit in action must be a matrimonial one. In this matter the action relates to divorce, hence a matrimonial one.*
> *(c) The applicant must have reasonable prospects of success. I have already alluded to the nature of the dispute between the parties which relates to immovable assets. I am satisfied that the applicant has made out a case that it is unlikely for the court to award her one out of the seven immovable properties. The respondent seems to labour under the mistaken belief that in deciding how to share the immovable property the court only considers direct contribution. The court is guided by the provisions of s7 (4) (a) to (g) of the Matrimonial Causes Act (Chapter 5:13). See also Mundawarara v Mundawarara HH-151-12 in which I discussed these factors and referred to other cases. I am of the view that the respondent's position is untenable and that the applicant enjoys prospects of success.*
> *(d) The applicant is not in a financial position to bring or to defend the action without the contribution from the other spouse and*
> (e) *The other spouse is able to provide the applicant with this contribution. Dube* v *Mavako-Dube* 2006 (2) ZLR 97 (H)."
>
> I am of the view that items (d) and (e) above should be considered conjunctively. In other words, for an award to be made it should not only be shown that the applicant lacks financial means to bring or defend an action without assistance from a spouse but also that the other spouse has financial means to pay for such contribution." (at page 572)

The Supreme Court reiterated the requirements for an application for a contribution towards costs as set out in the above cited cases, in *Bowers* v *Bowers* SC-11-18.

APPLICATION OF THE LAW TO THE FACTS

It is evident that the first requirement for an order for a contribution has been met in that it is common cause that the marriage relationship between the applicant and respondent subsisted at the time the application was made. The second requirement was clearly met in

that the matter or suit in question is a matrimonial one. The third requirement was established in that applicant always had reasonable prospects of success. On the fourth requirement on whether the applicant was not in a financial position to defend the action these are some lingering questions. Applicant was not entirely candid with the court. She sought to downplay the contributions respondent made towards her directly. She did not disclose her income openly. Applicant clearly had various sources of income. She drew allowances from the company. She received rentals from a certain property. She also received fuel allocation and substantial sums of money towards household expenses. Applicant did not deny that she was a business woman. I make a specific finding that applicant was not without any financial means. I do accept however, that applicant did not have adequate financial resources at her disposal to meet all the legal costs. I take into consideration that applicant needed some contribution from the respondent to meet her legal bills. On the fifth requirement, I am satisfied that the applicant does have the means to contribute towards the applicant's costs. The respondent did not argue that he was financially indisposed. His contention is that applicant does have financial means to meet all the legal fees and that she has not made a full disclosure of her sources of income. Respondent argued that the claim for contribution towards costs was *mala fide* and meant to embarrass him. I am satisfied that although the applicant was not entirely candid with the court and did not fully disclose her income, she has substantially proved her case on a balance of probabilities. In *Dube* v *Mavako Dube (supra),* the court held that:

> *"The applicant has by design, decided not to disclose what her means are. She admitted that she make wedding gowns for sale. She has admitted that some of the gowns are for sale overseas. The applicant must surely be able, even with the failure of access to the overseas markets to sell her products locally. She has decided not to disclose to the court how much she makes from the business, contenting herself with stating that her income is not regular …"*

The court in the cited case, refused to make an award in favour of the applicant due to her lack of *bona fides*. In this matter I have taken into account the fact that applicant was substantially successful in the main divorce action. I have taken into consideration that applicant is well able to take care of most of her legal expenses from the income she receives from the parties' mining ventures. I have also taken into account that applicant for her part, has not been that candid about her income and for that reason she should not be allowed to recover the full amount of her legal costs. The applicant's attitude has been to recover every penny of her legal expenses from the respondent. I am of the firm view that is equitable in the circumstances for respondent to contribute towards applicant's legal fees, a portion of the legal expenses claimed. The respondent has the means to contribute towards applicant's legal expenses. Respondent did not argue that he was without financial means. It is just, equitable, therefore and fair, for the respondent to contribute half of applicant's legal expenses.

COSTS

As regards the issue of costs both parties did not make meaningful and persuasive submissions as regards their respective positions. The applicant did not justify why she was seeking to recover costs on a legal practitioner and client scale. The general principle is that a successful party is entitled to his or her costs. See *Mutyasara* v *Gonyoka & Anor* 2007 (1) ZLR 318 (S). In this case it is noted that the main divorce action has already been concluded. After two days of leading evidence the parties saw sense in settling the matter amicably. Further legal costs were saved by a resolution of the matter by consent. An order for costs on an attorney and client scale is punitive. The principles relating to an award of costs on the higher scale are settled. In *Paradise Investments (Pvt) Ltd* v *Matsa & Ors* HB-21-21, the court observed as follows:

> *"Respondent seeks costs on the scale of legal practitioner and client. Such costs are not merely for the asking. A litigant who desires his opponent to be mulct with punitive costs must make a proper motivation for such costs. To merely aver in the opposing affidavit that the application must be dismissed with costs on a legal practitioner and client scale is inadequate. Such costs are awarded when a court wishes to register its disapproval of the conduct of the litigant."*

In the instant case the applicant has not stated what aberration has been committed by the respondent to warrant an order for costs on a higher scale, let alone proven it.

For the aforegoing reasons, I conclude that applicant has substantially proved her case. She is not however entitled to costs on the higher scale.

I accordingly make the following order:

1. Respondent be and is hereby ordered to contribute towards applicant's legal costs in case number HC 1037/20, in the amount of US$8 000 (eight thousand dollars) or its equivalent at the prevailing bank rate on the date of payment.
2. Costs of suit on the ordinary scale.

Mathonsi-Ncube Law Chambers, applicant's legal practitioners
Masiye-Moyo & Associates, respondent's legal practitioners