

BONGANI MHLANGA

Versus

BUSISIWE MHLANGA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 11 & 26 MAY 2022

Court application

M. Chipetiwa for the applicant
S. Siziba for the respondent

DUBE-BANDA J:

Introduction

1. This is an application for rescission of judgement. The order sought to be rescinded was granted by consent in case number HC 1981/18 on the 23rd August 2018. In this application applicant seeks an order couched as follows:
 - i. The application for rescission of an order by consent be and is hereby granted.
 - ii. The divorce order by consent granted on the 23rd August 2018, under case number HC 1981/18 be and is hereby rescinded in as far as the property sharing is concerned.
 - iii. The respondent be and is hereby ordered to pay costs on a legal practitioner and client scale.

The application is opposed.

Factual background

2. This application will be better understood against the background that follows. In case number HC 1981/18 applicant instituted divorce proceedings against the respondent. The parties signed a consent paper leading to the finalisation of their matter on the 23rd August 2018.
3. On the 26 November 2018, applicant filed a court application (HC 3113/18) for partial rescission or alternatively variation of the ancillary relief in the divorce order in HC

1981/18. The application was made in terms of the common law and Order 8 rule 56 of the High Court Rules, 1971. On the 10 June 2019, HC 3113/18 was referred to trial and the matter is still pending before this court.

4. In this matter applicant contends that he now has information to the fact that during the subsistence of the marriage respondent bought an immovable property being stand number 3858 Magwegwe Township. This property was not disclosed to him during the subsistence of the marriage and during divorce proceedings in HC 1981/18. It is further contended that on the 30 March 2012, respondent took transfer of a certain piece of land being Lot 15 of Imbesu Park, measuring 4, 2345 hectares. It is averred that this property was again not disclosed to the applicant.
5. Cut to the bone, applicant's contention is that if he had known during divorce proceedings in HC 1981/18, that respondent had two immovable properties in her name, which had not been disclosed to him and the court he would not have signed the consent paper. Applicant argues that the order in HC 1981/18 was obtained through fraud. It is on this basis that he seeks that the order in HC 1981/18 be rescinded in so far as the property distribution is concerned.
6. In her opposing papers respondent contends that when the parties signed the consent paper in HC 1981/18, applicant was aware of these properties and nothing was hidden from him. Regarding stand number 3858 Magwegwe Township, respondent avers that applicant is aware that the property belongs to her mother, it was only transferred into her name for inheritance purposes so that it can devolve upon her when her mother dies. Regarding Lot 15 of Imbesu Park, respondent says it was purchased for her mother and applicant is aware of this position. In essence, respondent contends that these two properties were not matrimonial property, and as such were not subject distribution in case number HC 1981/18. It is against this background that applicant has launched this application seeking the relief mentioned above.

7. Other than resisting the relief sought by the applicant on the merits, the respondent also raised three preliminary points which were subject of intense argument in this matter. I heard arguments on the preliminary points and reserved judgment. The first preliminary objection is that applicant has approached this court with dirty hands, and that this court must decline jurisdiction and dismiss his application. The second objection is that there are material disputes of fact which cannot be resolved on the papers before court. It is contended that at the time of filing this application, applicant was aware of the material disputes of fact and filed this application regardless. It is contended further that this preliminary objection must be upheld and this application be dismissed.
8. The third preliminary point taken on the papers was that the application was a nullity in that it was not signed in violation of the peremptory provisions of rule 58(2) (b) of the High Rules, 2021. Mr *Siziba*, counsel for the respondent abandoned this objection when I brought it to his attention that the copy of the application in the court file was signed. No further reference shall be made to this objection.

I now turn to deal with these preliminary points.

Dirty hands objection

Submissions by the parties

9. In her papers and at the hearing of this matter, the respondent argued that the applicant should not be heard, since he was approaching the court with dirty hands. This objection is anchored on the fact that the order in HC 1981/18 provides thus:

Custody be awarded (*sic*) to the defendant and plaintiff be awarded reasonable access during weekends and, two weeks of the school holidays.

10. Respondent avers that in December 2020, applicant took custody of one minor child and up to now he has refused to return such child to the respondent. Respondent contends that applicant's conduct is in clear defiance of the court order in HC 1981/18.

11. Respondent has filed a court application for contempt of court and such application is pending under cover of case number HC 533/21. The contempt of court application is anchored on the applicant's alleged defiance of HC 1981/18, i.e. taking the custody of the minor child against the clear provisions of a court order.
12. According to Mr *Siziba*, applicant has defiled the very order that he seeks this court to rescind. It is argued that applicant made a unilateral decision to take custody of the minor child, in clear violation of the order of this court. Respondent's contention is that applicant's actions are in clear disregard of a valid court order, he has come to court with dirty hands and therefore should not be heard in this application. Counsel argued that this preliminary objection be upheld with costs of suit on a legal practitioner and client scale.
13. In his answering affidavit applicant contends that in December 2020, the parties agreed that the minor child would start his secondary education in South Africa. It is further averred that it was agreed that it would be in the best interests of the minor child to be educated in South Africa and that on holidays he would visit respondent in Zimbabwe. It is said the child is doing Form 1 in South Africa. It is further contended that respondent is bent on portraying a false image that applicant arbitrarily retained custody of this minor child, when in fact she agreed that the child stays in South Africa with applicant.
14. Mr *Chipetiwa* counsel for the applicant submitted that there is no *nexus* between the present application and the dirty hands complained about. Applicant is seeking rescission of judgment relating to the distribution of the matrimonial property, and he is not seeking a variation of the custody order. It is further argued that this objection would have been properly taken if applicant was seeking custody of the children. According to counsel, this preliminary point has no merit and must be dismissed.

The legal principles and the facts

15. The jurisprudence in this jurisdiction is that people are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-

honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions. See: *Nhapata v Maswi & Another* SC 38-16; *Econet Wireless (Private) Limited v The Minister of Public Service Labour and Social Welfare and Others* SC 31-2016.

16. A court would withhold its jurisdiction and protection against a litigant who is in defiance of the law. A court of law cannot connive at or condone the open defiance of the law. A court cannot come to the rescue of a litigant whose hands are dripping dirt. One cannot defy the court, undermine the orders of the court and when it suits him still approach the same court for assistance and relief. See: *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity & Ors* SC 20/2003. A court would withhold its jurisdiction against an errant litigant who is in defiance of a court order. It is on the basis of these legal principles that this preliminary objection must be viewed and considered.

17. It is common cause that this court in HC 1981/18 awarded the custody of the minor children to the respondent. The court order is extant. In December 2020, applicant took custody of one minor child of the parties. His argument is that respondent agreed that he takes custody of the child. According to respondent there was no such agreement. It is contended that he acted unilaterally in taking the custody of the child. Respondent placed before court a text message applicant sent to her. It opens as follows:

Morning and happy New Year. After serious considerations I have decided to keep uNtando here. As you know I would have wanted to take him to Dubai because I am a Resident there now but the whole Covid thing had complicated things (My emphasis).

18. In his answering affidavit, applicant does not challenge this text message. It clearly corroborates respondent's version that she did not agree that applicant takes custody of the minor child. For the purposes of this application, I take the view that applicant's taking of the child was a unilateral act. It is therefore incorrect to argue that respondent agreed that applicant takes custody of the child.

19. The applicant contends that the doctrine of dirty hands is inapplicable in this matter because as he alleges respondent agreed that he takes the child to South Africa and that it was in the best interests of the child that he does his secondary school in South Africa. This contention in my view is fallacious. The facts of this case show that the respondent did not consent that applicant takes custody of the child.
20. Applicant had a right, if he so wished to approach a court of law and seek variation of the order in respect of custody of the child. He had no right to take the law into his own hands and then conclude that it was in the best interests of the child that he does his schooling in South Africa. He snatched the child from the respondent in clear violation of an extant court order. He did this in December 2020, it is now approximately one year six months that he is keeping the child in violation of a court order.
21. Counsel's argument that applicant is seeking variation of provisions of the order relating to distribution of property, and hence the taking of the child is irrelevant in this application is of no moment. Applicant seeks rescission of HC 1981/18, this is a composite order, it deals with issues of property, custody etc. and one cannot defy some provisions of the order and argue that this court should look the other way, because he is not seeking to rescind those provisions that he has violated. Such is unattainable. Applicant is just drawing a distinction without a difference. It is the extant order in HC 1981/18 that he has violated with impunity.
22. This court, the upper guardian of all minor children in this jurisdiction decided that it was in the best interests of the minor child that its custody be awarded to the respondent. It is not for the applicant, unilaterally to vary such an order. Such is unlawful conduct. This court cannot countenance such conduct. This kind of conduct should be frowned upon, it undermines the rule of law.
23. This court cannot countenance this kind of conduct. It threatens the whole fabric of the administration of justice. The failure of the applicant to comply with a lawful order of this court has the effect of tainting his hands with legal dirt. Such dirty hands can only be cleansed upon his compliance with the court order in question. It hardly needs emphasizing that, even if one may not agree with a court order and as long as it is extant,

and execution thereof has not been stayed, one is obliged to comply with it before seeking to pursue other legal remedies. See: *Nhapata v Maswi & Another* SC 38-16.

24. In *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity & Ors*, SC 20/2003, the court said:

This court is a court of law and, as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. . . For the avoidance of doubt the applicant is not being barred from approaching this court. All that the applicant is required to do is submit itself to the law and approach this court with clean hands on the same papers.

See: *Sadiqi v Muteswa and 6 Others* SC 132 / 2021.

25. The applicant has openly and with impunity demonstrated disdain of the order of this court. It is now approximately one year six months he has unlawfully taken custody of the child. Despite this, he has the temerity to turn to this court for relief that would result in the court effectively 'condoning' or turning a blind eye to this open defiance of an order of this court. In the circumstances of this case, and on the basis of the authorities cited above, applicant conduct must attract censure from this court.

Conclusion

26. In the circumstances, I find that the doctrine of dirty hands has been properly taken against the applicant. In respect of this application this court withholds its jurisdiction until such time that applicant has purged his contempt by submitting himself to the law, i.e. the court order in case no. HC 1981/18.

27. Having found that the preliminary objection that applicant has dirty hands has merit, and that this court withholds its jurisdiction until such time that he purged his contempt by submitting himself to the court order in case no. HC 1981/18, it is not necessary for me at this stage to consider the other preliminary point regarding the material disputes of fact taken by the respondent. It is also not necessary to deal with the issue that arose during argument whether this matter is *lis pendens* on account of HC 3113/18 which is still pending before this court.

28. What remains to be considered is the question of costs. Respondent sought costs on a legal practitioner and client scale. It is clear that applicant snatched the child against the provisions of an extant court order. When it suits him he runs to this court for assistance, this court cannot countenance such conduct. Applicant's conduct is worthy of this court's rebuke. This is a case which merits costs on a legal practitioner and client scale.

In the result, it is order as follows:

- i. The preliminary point regarding dirty hands is upheld.
- ii. This application be and is hereby struck off the roll with cost on a legal practitioner and client scale.

Maringe & Kwaramba applicant's legal practitioners

Lazarus & Sarif respondent's legal practitioners