

TATENDA STEPHANIE NEZI (Nee KATSANDE)
versus
WARD TAFADZWA NEZI

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 14 July & 3 August 2022

Chamber Application

MAXWELL J: This application was placed before me on 14 July 2022. After perusing the record, a number of issues were of concern to me.

The draft order reads:

“IT IS ORDERED THAT:

1. The application for contempt of Court is hereby granted.
2. The respondent is and hereby declared to be guilty of contempt of Court.
3. The respondent is and hereby sentenced to 90 days imprisonment the whole of which is suspended on condition that the respondent complies with the order of this Court under HC 5990/21.
4. The Sheriff of the High Court or his Lawful deputy be and hereby authorized to sign all documents necessary to transfer the property known as Flat Number 12 Macamber Court, 166 Kwame Nkurumah Avenue, under Deed of Transfer 1245/2018.
5. The respondent shall pay the sum of US\$360 or its equivalent at the prevailing interbank rate, being monies collected as rentals from the tenants at Flat Number 12 Macamber Court, 166 Kwame Nkrumah Avenue.
6. The respondent shall pay costs on an attorney-client scale.”

The applicant states in her Founding Affidavit that she was married to the respondent in terms of the Marriages (sic) Act [*Chapter 5:11*] on 2 March 2017. Due to irreconcilable differences, they resolved to end their marriage and signed a Consent Paper to that end. In terms of the Consent Paper, respondent was to file for divorce, but he failed or refused to do so leading to applicant filing for same on 1 November 2021. She alleged that the relief which she sought in the divorce summons number HC 5990/21 is similar to that she had agreed with the respondent. She further alleged that in a bid to frustrate her matter, respondent filed his own divorce summons under HC 6315/21 seeking relief which is completely different from what they had agreed in the Consent Paper. Applicant indicated that she entered her appearance to defend the respondent's divorce action under HC 6315/21 and filed her plea. She further indicated that in HC 5990/21

respondent was barred for failure to file his plea even after being served with a notice to Plead and Intention to bar. Resultantly the bar was effected and she proceeded to set the matter down for hearing on the unopposed roll.

On 25 March 2022 applicant's legal practitioners received a letter from respondent's legal practitioners which was accompanied by an application for consolidation. No consolidation was done. The applicant's matter was heard on 31 March 2022 and the decree of divorce was granted with the ancillary relief requested by applicant. On 1 June 2022 applicant's legal practitioners wrote to respondent's legal practitioners demanding compliance with the order in case number HC 5990/21. On 3 June 2022 applicant was served with an application for stay of execution of the divorce order in HC 5990/21 pending the hearing of an application for rescission under HC 2430/22. Applicant avers that it is apparent that respondent is not willing to comply with a competent order of this court despite being called upon to do so. She therefore prays for the granting to the order with costs on an attorney-client scale.

What struck me first was that the order of my brother, WAMAMBO J, of 31 March 2022 did not make any reference to a Consent Paper. I therefore requested for the record HC 5990/21. Oddly, the index does not have the Consent Paper as one of the documents on record. Further perusal showed that it was not a mere omission on the index, the Consent Paper was not placed before WAMAMBO J. This was despite the fact that the Consent Paper was signed on 17 February 2021 and the summons in HC 5990/21 were issued on 1 November 2021.

The reason for the omission of the Consent paper is obvious when one has regard to the order applicant got in HC 5990/21. The Consent Paper on page 17 of the application has respondent as the plaintiff and applicant as the defendant. On pages 19 and 20 of the record, the parties had agreed that the immovable property be shared as proposed in the plaintiff's summons. The effect was that all the immovable property was to be awarded to the plaintiff, i.e.

- a) Flat Number 12 Macamber Court, 166 Kwame Nkrumah Avenue, Harare
- b) Stand 31485 Extension 4, Damafalls, Harare
- c) Stand 417 Tatenda Park, Gweru; and
- d) The communal farm in Bhora together with all improvements of the farm.

In the order granted in HC 5990/21, applicant, as the plaintiff, was awarded the property in (a) and (b) above whilst respondent was awarded the property in (c) and (d) above. Clearly, the order in HC 5990/21 was not in accordance with what the parties had agreed in the Consent Paper.

Secondly, though applicant complained of respondent's non-compliance with the order for maintenance of the minor child in paragraph 19 of her founding affidavit, the draft order is not seeking any remedy for that. Clearly, applicant's focus was on the immovable properties.

Thirdly, though applicant indicated that respondent is seeking relief which is completely different from what was agreed in the Consent Paper, page 33 of the application shows that respondent had actually departed from the Consent Paper for the benefit of the applicant. In the Consent Paper respondent was to get 100% of all the immovable properties. In the declaration in HC 6315/21 he is claiming 75% of Flat Number 12 Macamber Court, 166 Kwame Nkrumah Avenue, Harare.

Fourthly, considering that this is a matrimonial case in which applicant herself is acknowledging respondent's effort to have the order granted rescinded, coupled with the fact that the order granted is opposite what was agreed by the parties in the Consent paper, it is not in the interest of justice to ignore the pending applications and have the order in HC 5990/21 enforced. To do so would make a mockery of the law and bring the administration of justice into disrepute.

In any event, in *Clement v Clement* 1961 (3) SA 861 it is stated that before a person can be found guilty of contempt of court his disobedience of the order must be not only willful, but also *mala fide*. The circumstances of the matter as outlined in the Founding Affidavit and the annexures thereto make it doubtful that respondent's non-compliance is *mala fide*. In his Founding Affidavit to the application for Stay of Execution he stated in para(s) 11 and 12:

- “11. I wish to reiterate to this Honourable Court that the default was not willful; it was the applicant's view that the two separate actions which involved myself and the respondent had to be consolidated before a determination on either of the application could be made.
12. The actions arose from the same cause of action, the relief sought was almost similar hence it was in the interest of justice for the separate actions to be consolidated.”

For the above reasons, I am not persuaded to grant the relief prayed for. Accordingly I made the following order:

The application for contempt of court be and is hereby dismissed.

Mtewa & Nyambirai, applicant's legal practitioners
Hove Legal Practice, respondent's legal practitioners