

LINET NCUBE (Nee KHUMALO)

VERSUS

MADODANA NCUBE

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 20 JANUARY 2014 AND 30 JANUARY 2014

Mr. *C Dube* for the applicant

Miss *T. Nyathi* for the respondent

Opposed matter

MOYO J: This is an application for a variation of a divorce order that was granted in 2008 on the 12th day of June in HC 2909/07. The clause that Applicant seeks to vary is worded in the following terms:-

The Plaintiff to solely retain the ownership and administration of TipTop Smiles Infant School, while Defendant is awarded ZW\$1000 000 000,00 which is the monetary equivalent of a 50% share of the entire commercial venture.

I granted the order sought by applicant *ex tempore* in the following terms;

IT IS ORDERED THAT:-

(1) Clause 6 of the divorce order granted by this Honourable court under case number HC 2909/07 on the 12th of June 2008 be and is hereby varied to read as follows:

“The parties’ business venture TIPTOP Smiles Infant School be evaluated by a reputable Estate Agent after which the Plaintiff will retain sole ownership of the business upon paying to the Defendant a 50% share of the net value of the entire business’ within 3 months of the evaluation’ failing which the business be sold to best advantage with the parties sharing the net proceeds equally.”

(2) The Respondent pays costs at an attorney and client scale.

It is applicant’s case that Clause 6 of the divorce order was never put into effect. Respondent did not honour that order, he kept the business but did not pay the Applicant her dues in terms of the divorce order.

What is apparent from the order is that it did not have a Clause to protect Applicant’s interests in the event that Respondent did not honour same. That is the predicament that was

faced by the Applicant resulting in this application which is an application for variation of the original divorce order in terms of rule 449 so that there is a time limit with in which Respondent should pay applicant her dues. The variation also seeks to add that in the event Respondent does not pay applicant what is due to her in terms of the divorce order, then the business venture be sold to best advantage and the net proceeds therefrom shared equally between the parties.

Respondent opposed the application, he states that Applicant is coming to court with unclean hands in that she did not “claim” her share since 2008 to date. One does not understand how Applicant could claim what she was already entitled to in terms of a court order. Applicant states that she tried to liase with the Respondent for him to pay her what was due in terms of the court order to no avail. It is clear that Respondent took advantage of the fact that the divorce order did not provide Applicant with any enforcement mechanism and Applicant remained at his mercy all these years.

Respondent contends that Applicant is now claiming a share of the entire commercial venture yet he has improved it since 2008. One wonders why Respondent, who was the Plaintiff in the divorce matter, did not pay out Applicant’s dues in terms of the court order in 2008 if he believed she was entitled to the value of the business as at that time. In fact Respondent is being contemptuous of this Honourable Court. The court ordered him to pay ZWD1000 000 000-00 being 50% of the entire commercial venture to Applicant on the 12th of June 2008, he sits back does nothing about it, he invites his relatives to come and invest in a business where 50% has been awarded to Applicant by an order of the court. He does not honour a court order and in fact claims to have gone on to improve the business. He in fact claims that after divorce they reconciled with Applicant and lived together, meaning Applicant was still part of the business as a family member and a wife even after divorce. He clearly took advantage of the fact that the court order left the Applicant with no enforcement mechanism. Even if he says they reconciled after divorce, he does not say that Applicant then waived her rights in terms of the divorce order, neither did the parties approach this court for a rescission of the divorce order by consent. The court order therefore still stands and must be honoured.

Respondent should not have opposed this application as his opposition has no basis whatsoever. He further seeks to state that part of the business venture he had inherited from his parents. This is irrelevant as the order that he himself sought, (the decree of divorce) awarded

Applicant a 50% share in the business, he cannot seek now to give the court an impression that he has problems with that order. In any event, even if he did, he should not have waited for this application to correct what he perceived as an injustice, he should have applied for the rescission of that judgment a long time ago. The judgment itself having been granted obviously to Plaintiff's knowledge, more than 5 years ago, Plaintiff can not try to chicken out of it now. The court should frown at litigants who do not honour court orders. This is one case that indeed calls for costs at an attorney and client scale as Mr *Dube* for the Applicant rightfully contended.

In order for a litigant to successfully claim costs as between attorney and client, which is punitive, he must show that the other party deserves to be punished for its behaviour. In the case of *Michael Mahembe v Clever Matombo* HB 13/03 CHEDA J (as he then was) found the circumstances in which it would be justified to award costs at an attorney and client scale as the following:-

- (1) dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings themselves.
- (2) malicious conduct
- (3) vexatious proceedings
- (4) reckless proceedings
- (5) frivolous proceedings

In the present case Respondent was ordered to pay Applicant her 50% share in the business venture on 12th June 2008, he was the Plaintiff in that case and was therefore aware of the court order. He neglected to bring to fruition the contents of that order, apparently because Applicant had no enforcement mechanism in the event that Respondent failed to honour the court order. Applicant, despite his contemptuous conduct of having failed to honour the order of this court for a period in excess of 5 years, he then decides to oppose the application for variation on spurious grounds. Respondent should clearly bear applicant's costs at an attorney and client scale.

Mcijo Dube and partners, applicant's legal practitioners
Dube-Banda, Nzarayapenga and partners, respondent's legal practitioners