

SIMELENI DUBE  
versus  
CHRISTOPHER DUBE

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 11 FEBRUARY 2014 AND 19 FEBRUARY 2015

### **Opposed Application**

*Advocate Hilda Moyo* for the applicant  
*Miss L. Mguni* for the respondent

**MAKONESE J:** This application has been brought to court in terms of the provisions of Order 11 Rule 75 (1) of the High Court rules, 1971, for the dismissal of claims filed by the respondent in an action under case number HC 568/13. The applicant contends that the respondent's claims are frivolous and vexatious. The application is opposed by the respondent who forcefully argued through his legal counsel that the application for dismissal is misguided and an abuse of court process.

### Background

The parties were married to each other in terms of the Marriage Act [*Chapter 5:11*]. The marriage was terminated by order of this court on 28 June 2012. The respondent was in default. Both parties reside in the United Kingdom, having left Zimbabwe almost a decade ago.

The terms of the divorce order were as follows:

- “1. A decree of divorce be and is hereby granted.
2. Custody of the minor child namely Thabiso Dube (male) born on the 22 May 1995 be awarded to the plaintiff with the defendant enjoying access to the child.

3. An order for maintenance at £200 per month.
4. Plaintiff be awarded the following property as her sole and exclusive property:  
  
Wall Unit, plants and ornaments, 2 piece sofas, TV stand, desktop, computer, computer table, canon printer, fridge, 4 plate stove, ST Joseph stand and shops (plus movables thereat).
5. Defendant be and is hereby awarded as his sole and exclusive property and the movable assets at the Parklands Home, specifically the following:  
  
Double door fridge, 4 plate stove, six kitchen chairs and table, microwave, kitchen utensils, dining room suite, lounge suite, glass TV stand, 2 TVs, sharp radio, phone table, 3 beds, 2 bedroom suites, chest of drawers, dressing table and stool, curtains, Gwanda homestead (plus household goods thereat and livestock).
6. An order that the matrimonial home being number 16, St David's Road, Parklands, Bulawayo, be sold by the plaintiff or her lawful agents and the proceeds of the sale be shared equally between the parties.
- 7.1 For the purposes of sale and transfer of the matrimonial home to the successful purchaser the plaintiff be and is hereby authorized to nominate the conveyancer to attend to such transfer and the Deputy Sheriff, Bulawayo be and is hereby authorized and directed to sign all transfer documents *vide* the defendant.
- 7.2 No order as to costs."

On 1 March 2013 the respondent filed an action in this court seeking the following relief:

"An order directing defendant to deliver all movable assets awarded to the plaintiff by the High Court in case number HC 3446/11 housed at number 16 St Davids Road Parklands, Bulawayo, which assets the defendant unlawfully and wrongfully caused to be removed therefrom during the period extending from June 2012 to an unknown date or alternatively failing such delivery payment of the value of the assets in the sum of US\$22 960.00"

In paragraph 4 of his Declaration, the plaintiff states as follows:

“Paragraph 5 of the divorce order between the parties awarded the defendant all assets at the Parklands home of the parties including the movable assets listed in Annexure “A” hereto.”

I note that Annexure “A” referred to in paragraph 4 of the Declaration is in effect the Order for divorce issued by the court on 28 June 2012. The plaintiff then remarkably claims in paragraph 5 of his Declaration that:

“In addition to the assets named in paragraph 5 of Annexure “A” the parties had also acquired the assets listed in Annexure “B” attached hereto.”

What it of serious concern is that Annexure “B” is a two page long list of items of property not included or referred to in the original divorce order. Respondent alleges these assets were acquired by the parties during the course of the marriage. It is clear that paragraph 5 of the Declaration contradicts the order sought by the plaintiff. The clear intention of the respondent can only be to mislead the court because in the summons the plaintiff (respondent) in this matter purports to claim the assets (or the values thereof) which were awarded to him in terms of the divorce order. This is in fact not the case. The plaintiff is attempting to revisit the distribution of matrimonial assets via the back door. This cannot be proper. The assets have clearly been overvalued so that they equate to US\$22 960-00, an amount, which the Applicant claims will wipe out her half share in the sale of the matrimonial house as ordered by the court.

#### The legal position

The respondent is not the owner of the assets listed in Annexure “B” of the summons. The said assets are supposed to be matrimonial property or assets of the spouses as defined in section 7(a) of the Matrimonial Causes Act [*Chapter 5:13*]. It is settled law that matrimonial assets can only be dealt with in an action for divorce, judicial separation or nullity of marriage in terms of section 2(1) of the Matrimonial Causes Act which states as follows:

“Action for divorce, judicial separation or nullity or marriage means an action by which a decree of divorce, judicial separation or nullity of marriage or other relief in connection therewith is applied for ----.”

In this matter the established facts are that the parties were divorced by an order of this court granted on 28 June 2012. The divorce order was granted in default of the respondent. If the respondent was aggrieved with the terms of the divorce order, he should have applied for an order rescinding the judgment of the court in order to obtain what he may have considered to be a just and equitable distribution in terms of section 7 (1) (a) of the Matrimonial Causes Act which provides as follows:

“7 (1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to-

(a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other-“

It is my view that the respondent’s claim in the main action should have been dealt with as a matrimonial action in terms of the Matrimonial Causes Act. The respondent’s claims as presently framed are bad at law to the extent that they are frivolous and vexatious.

Rule 75 (1) of the High Court Rules is designed to assist a defendant by enabling him to apply to court to dismiss a frivolous and vexatious action. Such an application is the converse of an application for summary judgment and much the same considerations apply, namely whether the plaintiff has an arguable case. The court will not dismiss an action under this rule unless satisfied that the likelihood of the case succeeding stands outside the realm of probability altogether. An action is deemed vexatious if it is impossible to succeed.

See the case of *Wood NO v Edwards* 1986 (2) RLR 212, and the case of *Rogers v Rogers and Another* 2008 (1) ZLR 330.

In the latter case, MALABA JA had this to say at 333;

*“Summary dismissal of an action in terms of rule 79(2) of the Rules is an extraordinary remedy to be granted in exceptional cases. The reason is that granting the remedy has the effect of interfering with the elementary right of free access to the court. The object of the rule is to enable the court to stop an action which should not have been launched.”*

The learned Judge went on to state as follows:

*“It appears to me that a plaintiff who commences action in a court of law when he has no reasonable grounds to do so has no cause of action. An action without a good cause of action is obviously unsustainable.”*

In *casu* I am satisfied that when the respondent commenced legal proceedings in the manner he did under case number HC 568/13, he knew that he was misleading the court. At the very least he was aware that the property that he was seeking to obtain through legal process was property that fell outside the initial order of divorce. The respondent was clearly aware that if he sought to rescind the default judgment he could do so and invoke the provisions of the Matrimonial Causes Act for an equitable distribution of assets. He elected, however to proceed on facts that sought to mislead. The conduct of the respondent, in my view amounts to abuse of court process. The applicant is entitled to costs in a higher scale.

In the circumstances, I make the following order:

1. The action filed under case number HC 568/13 be and is hereby dismissed on the ground that it is frivolous and vexatious.
2. Judgment of absolution from the instance is hereby granted.
3. Respondent is ordered to pay costs on the legal practitioner and client scale.

*Lazarus and Sarif*, applicant's legal practitioners  
*Job Sibanda and Associates*, respondent's legal practitioners