

JOHN BOYCE MPALA
versus
ELFREDA BETTY MPALA (nee NYATHI)

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 16 JULY 2018 AND 26 JULY 2018

Urgent Application

N Mazibuko for the applicant
T Ndlovu for the respondent

MOYO J: This is an application wherein the applicant seeks the following interim relief:

“Pending determination of this application, the respondent is interdicted from accessing US 20000-00 of her share of the proceeds from the sale of stand No. 2744 Bulawayo Township of Bulawayo Township Lands also known as No. 3 20th Avenue Famona, held by the applicant’s Legal practitioners, Messrs Calderwood, Bryce Hendrie and Partners.”

The facts of the matter are that applicant and respondent are ex-spouses. They divorced under HC 2017/99 and part of the divorce order was to the effect that the parties’ immovable property be sold and the net proceeds be shared equally between the parties. As matters stand today, the house has been sold after the parties failed to exercise an option to buy each other out. The purchase price has been paid to applicant’s lawyers who are holding it in trust. The applicant on the other hand has instituted proceedings in HC 3159/16 wherein he claims rentals for the property which he avers were due to him but were collected by the respondent. He says he has good prospects of success in HC 3159/16. He thus wants this court to prevent the respondent from receiving part of her dues from the sale of the property until his claims in HC 3159/16 have been finalized. In paragraph 15 of the founding affidavit he states that:

“I fear that once respondent accesses her half share, she will disappear and I will not be able to recover anything from her in the event of judgment being entered against her in my favour in the main matter.”

Applicant avers that in some without prejudice negotiations the parties had agreed that he be paid \$20000-00. In paragraph 18 of the founding affidavit applicant avers that:

“The respondent is of advanced age and once she gains access to her share, I have no doubt that I would be greatly prejudiced as any judgment against her would not be recoverable. As it is, I presently have no idea where she resides.”

The respondent on the other hand opposes the application on the basis that it is purely premised on speculation. That the urgency is founded on speculation and is self-created. That the claims in HC 3159/16 are prescribed as they date back to the Zimbabwe dollar era. That the alleged prejudice likely to be suffered by the applicant is also speculative. The respondent avers in paragraph 19 of the opposing affidavit that:

“The alleged application has no basis and surely I am the one who stands to suffer the most prejudice. The applicant has received his half share and he will continue with his life. The house I have been living in has been sold and if I don't receive my money it is likely that I will be destitute as the applicant avers that I am of old age----.”

“I need my money to buy myself another property so that I can have accommodation and the tools to enforce the judgment will be available to applicant.”

The respondent also avers that she has a counterclaim against the applicant.

The applicant seeks an order that attaches respondent's share of the proceeds of the sale of their former matrimonial home. He avers that he will be prejudiced in bringing to fruition the judgment he is likely to obtain against respondent in HC 3159/16. He says this is because of respondent's advanced age and that respondent will disappear after getting her share. He does not tell us how advanced age is prejudicial to a claim that one has against a person, for it is their assets not their age which matters on whether a judgment debt is satisfied or not. He does not tell us why respondent would disappear after receiving her dues. He simply makes a bold assertion on the fear that respondent would disappear. These parties divorced in 1999 and 18 years later respondent has not yet disappeared. No solid factual foundation has been made on the fears of her imminent disappearance. Neither has it been shown how applicant will fail to

execute his judgment against respondent who has not been alleged to be indigent, neither has she been alleged to have no other assets of value. Respondent actually avers that she will find a house with the proceeds from her half share, that means she will most likely still own an immovable property after this. There is no factual foundation laid for the basis of a finding that as soon as she receives her share, she will squander it and not enrich herself from the proceeds.

The respondent has challenged the prospects of success of applicant's main claim, that it has prescribed and that she also has a counter claim. Not only are the prospects of applicants success in the main matter unclear, but no factual basis has been laid for the fear that applicant will be prejudiced by the receipt of the funds by respondent.

In an urgent application, an applicant seeking relief should meet the following requirements. These requirements were dealt with in the case of *Zesa Staff Pension Fund v Mushambadzi SC 57/02*.

1) An applicant must establish a *prima facie* right.

My question on this requirement is what right has applicant established? For there can be no right to retain or receive that which is not yours. In fact if there is any *prima facie* right in this case. It is with respondent, who by virtue of a court order, is entitled to 50% of the net proceeds of the sale.

Applicant is entitled to his own 50% and therefore has no *prima facie* right to respondent's own share.

b) There should be an imminent threat of irreparable harm.

It has not been shown that there is a *prima facie* right in the first place, and even if it were to be argued that it is there, where is the imminent harm? The imminent harm is that respondent is of advanced age and is likely to disappear? Surely the requirement is that there should be a well-grounded fear, a reasonable fear of irreparable harm. There is no basis at all for the fear exhibited by applicant. The fear is speculative. It cannot be held to be well grounded or reasonable. It is pure speculation.

c) There should be no alternative remedy.

Applicant is suing respondent in HC 3159/16, he is claiming a judgment that sounds in money and like any other creditor, he should obtain judgment and seek to execute it. It

has not been shown how respondent is likely to frustrate the execution of a judgment against her if any.

- d) The balance of convenience should favour the granting of the interdict.

In this matter it has not been shown that the balance of convenience favours the granting of the interdict. The applicant has just made bold assertions on the prejudice he is likely to suffer. He has made bold assertions on respondent's likely conduct after the receipt of the funds. His prospects of success are being challenged. He has not shown factually what difficulties he is likely to meet in executing a judgment even if he is successful.

What applicant seeks is in fact similar to an anti-dissipation interdict which is itself an extra ordinary, drastic and invasive remedy which cannot be granted likely on a party's mere say so but whose proper foundation should be laid fully before the court for the court to interfere with respondent's rights as the court would ordinarily be reluctant to interfere with a person's right to their property or funds on the basis of a claim that is pending before the courts.

It is for these reasons that I hold that applicant has not made a case for the relief sought. I accordingly dismiss the application with costs.

Calderwood, Bryce Hendrie and Partners, plaintiff's legal practitioners
Sansole and Senda, defendant's legal practitioners