JULIUS TAWONA MAKONI
versus
PAULINE MUTSA MAKONI

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HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 28 February 2022 & 1 & 29 March 2023

Opposed Matter

W Ncube & *W Uriri*, for the applicant
T Mpofu, for the respondent

WAMAMBO J: Before me are two cases namely HC 50/15 and HC 3500/16 which were consolidated. The parties were husband and wife whose marriage was solemnized in Harare on 31 December 1983 and which marriage was terminated by a decree of divorce issued by the High Court of England. A decree *nisi* was issued on 1 December 2013 while the final decree absolute was issued on 18 December 2014.

Considering that there are two matters which were consolidated for ease of reference, counsel for the parties are cited above as per HC 50/15 which is the matter filed earlier. The same counsel act for the parties in HC 3500/16. In other words, counsel for applicant in HC 50/15 is counsel for the respondent in HC 3500/16.

The husband is Julius Tawona Makoni while the wife is Pauline Mutsa Makoni. I will hereinafter refer to the two separately as husband and wife respectively for ease of reference and convenience.

The husband filed HC 50/15 impugning in particular the distribution of the property by the High Court of England. The wife under HC 3500/16 in turn seeks the registration of the order by the High Court of England. The decree *nisi* and decree absolute will be hereinafter loosely referred to as the English Court order/s or judgment.

It should be noted that the final decree absolute confirms the decree *nisi* issued earlier on 9 December 2013. The decree nisi is contained at pp 12 to 15 while the final decree absolute appears at p 11. The reasons for the decree are contained in the judgment of 28 October 2013 at pp 16 to 37.

Considering that the two cases were filed separately some of the documentation appears at different pages on the other case number. The husband in HC 50/15 seeks the following order as per the draft order contained at pp 38-39.

"**IT IS ORDERED THAT**:

1. The distribution of the matrimonial estate of the parties by the High Court of Justice of England in its decree absolute dated 18 December 2014 as read with the decree nisi dated 9 December 2013 to the extent that it awards the property known as No. 5, Reitfontein Close, Chisipite, Harare to the respondent is hereby declared to be against the public policy and the law of Zimbabwe and is accordingly not registrable for purposes of enforcement in Zimbabwe.
2. The respondent shall pay the costs of this application."

In HC 3500/16 the wife seeks the following order which appears at p 140:

"IT IS ORDERED THAT:

1. The final divorce order of the court of England between Pauline Mutsa Makoni entered at the Principal Registry of the Family Division of the High Court of Justice of England on the 18th of December 2014 confirming the decree nisi together with the judgment of Justice Richard Robinson and the financial order of 9 December 2013 stamp dated 20 December be and is hereby registered as an order of this court.
2. Respondent shall sign all relevant documents to effect transfer of properties awarded to applicant within 7 days of the order failure of which the Sheriff is hereby authorized to effect such transfers."

For the avoidance of doubt the stated properties are:

(i) No 5 Reitfontein Close, Highlands, Harare
(ii) Stand 159 Shawasha Hills Township, Harare

3. Respondent shall pay costs on a client/attorney scale."

Effectively the dispute between the parties in the consolidated cases is on the distribution of immoveable properties situated in Zimbabwe. The husband seeks that the award to the wife of No. 5 Reitfontein Close, Chisipite, Harare is against public policy and the Zimbabwean laws and should not be registered for enforcement purposes. The wife on the other hand seeks to have two properties namely No. 5 Reitfontein Close, Chisipite, Harare and Stand 159 Shawasha Hills Township, Harare registered in her name as an order of this Court. I note hence that the husband's focus is not on the two Zimbabwean properties but only on No. 5 Reitfontein Close, Chisipite.

The issues in the two matters are entangled and interwined.

Heads of argument including supplementary ones were filed by both parties. Long oral submissions were rendered. I must comment that counsel on behalf of both parties were very helpful in their written and oral submissions.

Mr *Mpofu* made the following submissions:

The parties are agreed that a decree of divorce should be granted. The wife is happy with the entire judgment while the husband is unhappy about one aspect namely the distribution of No. 5 Reitfontein, Chisipite. This court has no jurisdiction to issue a declarator from the judgment of another court. This court has no power to declare another court 's judgment as invalid. This court can recognize or refuse to recognize the judgement of another court.

The issue raised by the husband's counsel that the English Court had no jurisdiction to relate to the matter is but a red herring. The husband accepts the fact that he is now divorced and cannot run away from the proprietary consequences. The issue of jurisdiction was not raised before the English Court and it is further not contained in the husband's opposing papers. Mr *Mpofu* referred extensively to his heads of argument filed wherein this issue is canvassed in detail. Mr *Mpofu* also referred to s 3 and 2 of the Matrimonial Causes Act [*Chapter 5:13*].

Mr *Mpofu* further argued that he who raised the issue that the law of English Courts is different from local law bears the onus to prove that. He contended that Professor Ncube who argued the issue of jurisdiction on behalf of the husband is not an expert in English law as is required by the law.

Mr *Mpofu* argued that there is need for finality to litigation. The judgement of the English Court as are relevant in this case are final judgments.

On public policy it was contended on behalf of the wife that the husband was found by the English Court to have lied. He further elongated this argument and submitted that if I find for the husband I would have rewarded a liar. Reference is made here to the case of *NMB* v *Makoni* HH 466/18 and the specific findings of the English Court on this aspect.

It was further contended that if the husband is unhappy about the English Court judgment he must not only challenge one aspect.

Professor Ncube argued the issue of jurisdiction.

He contended that it is the wife who seeks registration of the English Court judgment and she has the onus to prove grounds on which this court should recognize the English Court orders. He argued that the English Court applied the wrong law and that is not in the interest of public policy. A proper enquiry was supposed to be made at the time of divorce of the proprietary consequences of the marriage. In this case this was departed from and it amounted to a departure from public policy. He averred that the issue of jurisdiction is always an issue of law and not fact. It does not depend on proof of any fact. He argued that the wife failed to establish on what basis the English Court exercised jurisdiction in this case.

Upon Mr *Uriri* taking over the oral submissions he submitted as follows. Public policy demands that the law applicable is that of the husband's domicile at the time of divorce. He questioned what law the English Court applied. His view was that the English Court applied English law to a

matrimonial dispute governed by the law of Zimbabwe. The English Court made no reference nor did it apply s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Further that there was no reference or application of Zimbabwean law. The principles as established in the case of *Takafuma* v *Takafuma* 1994(2) ZLR 103 were not applied. When the final determination was made the husband was not in attendance. Effectively a default judgment was rendered which judgment was not based upon Zimbabwean law.

Leave to appeal was sought and granted in the English Court on condition that the husband had to comply with the judgment first. The wife had the onus to prove this was substantially similar to Zimbabwean Law which she failed to do. He argued that under Zimbabwean law an appeal to a Superior Court suspends the decision appealed against.

Under Zimbabwean law in particular s 7 of the Matrimonial Causes Act [*Chapter 5:13*] the order granted should be just and equitable. In this case the only three (3) immovable properties known to the parties were awarded to one party. The English Court granted the immovable property in England to the wife. On immovable properties in Zimbabwe the wife was awarded the Shawasha Hills property and if she was to find more she should have all of them.

Mr *Uriri* was emphatic that Reitfontein property was awarded to the wife even though the same court found that the wife was based in London, England. In the same breath the English Court found that the husband resides at the Reitfontein property.

It was further contended that the husband was candid with the court contrary to the findings by the English Court. It was forcefully argued that it is contrary to Zimbabwean law to award all known property to one party. Mr *Uriri* was also quick to point out that what is sought by the husband is not to declare the English Court's judgment a nullity but to find that it is not enforceable in Zimbabwe.

A plethora of case law and the provisions of the Constitution of Zimbabwe and various legislation were referred to by both counsel particularly the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*] the Matrimonial Causes Act [*Chapter 5:13*] and the High Court Act [*Chapter 7.06*].

Effectively on behalf of both the husband and wife, the contention was that I should find on their behalf and grant an order as per draft order as already referred to.

Having considered the law as explained by counsel I propose to deal with the legal issued herein as follows:

The case of Gramara (Pvt) Ltd & Anor v *Government of Zimbabwe & Ors* 2010(1) ZLR 59(H) is instructive. In that matter PATEL J (as he then was) was dealing with the registration and enforcement of a foreign judgment. In that case the particular judgment emanated from the SADC Tribunal.

At p 66G the Learned Judge says:

> "In so far as concerns the registration of foreign civil judgments the relevant statutory provisions presently in force in Zimbabwe are contained in the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*]."

At p 67E the Learned Judge continues as follows:

"In South Africa, the procedure for and scope of recognition proceedings are lucidily expounded in Joubert, The Law of South Africa (First Reissue 1993) Vol. 2 at para 476 as follows:

"…the present position is that a foreign judgment is not directly enforceable in South Africa, but if it is pronounced by a proper court of law and certain requirements are met, any determination therein (for example of a party's rights or status) will be recognized and the judgment will in fact found a defence of *res judicata* if it would have founded such a defence had it been a South African judgment. In addition, an authenticated foreign judgment constitutes a cause of action and as such is enforceable by ordinary action in a South African court including where appropriate an action for provisional sentence or for a declaratory order or for default judgment.

A South African court will not pronounce upon the merits of any issues of fact or law tried by the foreign court and will not review or set aside its findings though it will adjudicate upon a "jurisdictional fact establishing international competency".

The general requirements for recognition and enforcement of foreign judgments are set out in *Joubert op ect* at para 477. These requirements were adopted and applied by the *Appellate Division in Jones* v *Krok* 1995(1) SA 677(A) at 685B-E and in *Purser* v *Sales* 2001(3) SA 445(SCA) at 450D-G.

In Jones' case CORBETT CJ summarizes these requirements as follows:

"As is explained in Joubert the present position in South Africa is that a foreign judgment is not directly enforceable but constitutes a cause of action and will be enforced by our courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognized by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence" (ii) that the judgment is final and conclusive in its effect and has not been superannuated (iii) that the recognition and enforcement of the judgment by our courts would not be contrary to public policy (iv) that the judgment was not obtained by fraudulent means, (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign state and (vi) that the enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1975 as amended."

In the present matter counsel have not referred me to any Zimbabwean case authority on the subject, either following or deviating from the South African position and I have been unable to locate any.

I accordingly take the view pursuant to the provisions of s 89 of the Constitution governing the law to be administered by our courts that our common law position is *ad idem* with the common law of South Africa as stated in the authorities cited above and that it has not been overtaken or significantly modified by local statute."

The Civil Matters Assistance Act [*Chapter 8:02*] in ss 5 to 7 deals with applications for registration of a foreign judgment, grant or refusal of such application and registration of foreign judgments and effect of registration.

It will be noted that the above sections are specifically confined to judgments from a designated country. A designated country is defined as "a foreign country or territory" declared to be a designated country in terms of subsection (2) of section three. Relevant for purposes of the instant matter is that the United Kingdom is not a designated country. Thus, the Civil Matters (Mutual Assistance Act) [*Chapter 8:02*] is not relevant in the instant matter.

The Matrimonial Causes Act [*Chapter 5:13*] in s 12 provides as follows:

> "12(1) An appropriate court may recognize the validity of any decree or an order of divorce, judicial separation or a nullity of marriage made in any country in any case in which the husband was not domiciled in that country if –
> (a) it is satisfied that the law of that country contains provisions which correspond substantially to the relevant provisions of section three or
> (b) the President has by proclamation in a Statutory Instrument declared that the law of that country contains provisions which correspond substantially to the relevant provisions of section three
> (2) No proclamation shall be issued in terms of paragraph(b) of subsection (1) unless the President is satisfied that adequate provision is made under the law of the country concerned for the recognition by the courts of that country of the decree and orders made under section three in any case in which the husband is not domiciled in Zimbabwe.
> (3) ……."

Section 12 of the Matrimonial Causes Act provides for recognition of decrees or orders of divorce, judicial separation or nullity of marriage made in any country in any case in which the husband was not domiciled in that country.

The rider as provided above is that the recognition of the foreign orders does not extend to orders dealing with proprietary rights as correctly pointed out by Mr *Mpofu*.

The other consideration is that the husband was not domiciled in that country.

The question then arises, was the husband not domiciled in the United Kingdom? The question has to be in the affirmative for the decree to be recognized.

It is the wife who seeks an order recognizing the decree of divorce who had the onus to prove that the husband was not domiciled in the United Kingdom.

From my reading of the whole documentation on file, the wife has not alleged nor proven that the husband was not domiciled in the United Kingdom. To the contrary, she alleges in her founding affidavit in para 7(a) at p 106 of the record that the parties submitted to the jurisdiction of the court of England "without contest".

I revert to the principles as enunciated in *Gramara (Pvt) Ltd & Anor* v *Government of Zimbabwe* (*supra*). I find that jurisdiction of the English Court was not proven. It could be proven by recourse to s 12 of the Matrimonial Causes Act [*Chapter 5:13*]. However, as pointed out earlier it has not been proven that the husband was not domiciled in England.

The next issue for determination relates to whether the judgment is not contrary to public policy. In dealing with the issue of public policy I am not sitting as a review or appeal court. I am determining whether or not to enforce the judgment of the English Court.

On public policy it was held as follows in *Zimbabwe Electricity Supply Authority* v *Maposa* 1999(2) ZLR 452(S) thus:

> "The approach to be adopted is to construe the public policy defence as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize the basic objective of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle in our law or morality or justice is violated. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Where however the reasoning or conclusion in an award goes beyond mere factual or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it …"

The proprietary rights that the husband seeks not to be registered relate to the matrimonial property situate at No. 5 Reitfontein, Chisipite, Harare.

One cannot ignore the background of the matter as given in the judgment of the English Court. The net effect of the final order is that the husband was not awarded any immovable property at all. The immovable property in England and two other properties in Zimbabwe including 5 Reitfontein, Chisipite, Harare were all awarded to the wife.

This award was made in the face of the fact that the English Court found that the husband resided at the said property while the wife resided in England (See para 77 at p 37 of the record).

The overall effect is that the husband is left with no place to reside in Zimbabwe and when one considers the full circumstances even in England were he inclined to reside there at some time in future.

I find the award of the matrimonial property in the above circumstances contrary to public policy. I say that after also considering our law on divorce as encapsulated in the Matrimonial Causes Act [*Chapter 5:13*] particularly s 7. Section 7 of the Matrimonial Causes Act [*Chapter 5:13*] makes it mandatory for the court dividing, apportioning or distributing the assets of the spouses to consider among others a host of factors. These factors are provided in s 7(4) (a) to (g).

The same section provides again in mandatory fashion that the court shall "endeavor as far as is reasonable and practicable and having regard to their conduct is just to do so to place

the spouses and children in the position they would have been had a normal marriage relationship continued between the spouses".

Rendering one of the spouses homeless does not appear to be a decision that took full consideration of the circumstances as enunciated above.

In the circumstances, I find that the order granting the matrimonial property to the wife is contrary to public policy and for the purpose of registration should not be so registered. I have already found that on a balance of probabilities the wife has not proven why the English Court order should be registered as per the draft order she proposed.

I therefore find that the order sought by the husband is appropriate while that sought by the wife is without merit. I therefore order as follows: In HC 50/15 it is ordered that:

1. The distribution of the matrimonial estate of the parties by the High Court of Justice of England in its decree absolute dated 18 December 2014 as read with the decree *nisi* dated 9 December 2013 to the extent that it awards the property known as No. 6 Reitfontein Close, Chisipite, Harare to the respondent (Pauline Mutsa Makoni) is hereby declared to be against the public policy and the law of Zimbabwe and accordingly not registrable for purposes of enforcement in Zimbabwe.
2. The respondent (Pauline Mutsa Makoni) shall pay the costs of this application.
3. In HC 3500/16 the application is dismissed with costs.

Thompson, Stevenson & Associates, applicant's legal practitioners in HC 50/15 & respondent's legal practitioners in HC 3500/16
Munangati & Associates, respondent's legal practitioners in HC 50/15 & applicant's legal practitioners in HC 3500/16