JOANNE ELIZABETH CROGHAM

Versus

GARY FRANCIS WELLOCK

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 14 OCTOBER 2021 & 21 OCTOBER 2021

Unopposed court application

Z. Ncube, for the applicant
Respondent in default

DUBE-BANDA J: This matter was placed before me on the unopposed Motion Roll on the 14th October 2021. This is an application for the variation of a court order granted in a divorce matter on the 6 December 2018. The application is made in terms of rule 57 of the High Court Rules, 2021 as read with section 9 of the Matrimonial Causes Act [Chapter 5:13]. The application is not opposed.

At the hearing I raised a number of issues which were of concern to me. Some answers where given. I was first concerned with the issue of service of the application. I was concerned whether there was proper service. The papers show that the application was served on the 31st August 2021, by the Sheriff at the offices of Messrs Sansole and Senda Legal Practitioners. On the 11 September 2021, Messrs Sansole and Senda addressed a letter to applicant's legal practitioners seeking an indulgency for ten days for the purpose of securing detailed instructions from respondent. By letter dated 14 September 2021, from Ncube and Partners Legal Practitioners, the indulgence sought was given. After the expiry of the ten day indulgency sought and given, applicant caused this matter to be enrolled on the unopposed roll. I assume that the court application was properly served.

The other question that vexed me was whether the amendment applicant seeks is not an attempt to subvert the provisions of the law, i.e. the provisions of section 4(1) (d) of S.I 33 of 2019 which provides that all assets and liabilities that were valued and expressed in United States dollars immediately before the effective date are deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar; S.I. 142/2019 which declared the local currency as the sole legal tender in all domestic transactions and the provisions of section 20 - 24 Finance (No. 2) Act, 2019.

This application will be better understood against the background that follows. In case No. HC 893/14 this court granted a decree of divorce and ancillary relief. The order was premised on a consent paper signed by the parties. Applicant contends that respondent has failed to fully comply with the provisions of the court order, particularly in respect of the maintenance of the minor children of the parties. She then engaged her present legal practitioners to assist her to achieve some fairness. There was no consensus with respondent on the way forward. She then resolved to approach this court for relief.

Applicant avers that as she was preparing to approach the court, she noticed that the value of the aircrafts was given without express mention that it is in United States dollars. She says at the material time, i.e. 2018 the currency in use was the United States Dollars. Respondent now desires to take advantage of the redenomination of the currency in Zimbabwe. It is contended that such will present an unfair and untenable situation. It is argued that fairness can only be achieved if the value is expressly given in United States dollars as per the understanding at the time. Alternatively, the aircrafts may be valued in their current state and the respondent pays applicant off within ninety days of the grating of the order.

It is further contended that the other amendment sought is in respect of the disposal of the house. It is averred that there would be no prejudice if the house was sold at this stage as the children have completed their secondary education. It is contended that the variation sought will achieve justice between the parties. It is said what the consent paper did was to divorce the parties but kept them tied together, financially at least, for four years. She said this was an oversight on her part at the time of signing of the consent paper. It is against this background that applicant has launched this application seeking the variation of the order made on the 6 December 2018.

On the issue whether this court is now *functus officio* regarding this matter, courts of law in this country have long accepted that once a court has pronounced a final order, it has no authority to correct, alter or supplement that order: the court's jurisdiction in the case having been fully exercised, its authority over the subject matter ceases. This principle of finality recognizes that it would lead to intolerable uncertainty if courts could be approached to reconsider final orders.

The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only

once in relation to the same matter. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker. However, this is not an absolute rule. The instrument from which the decision-maker derives his adjudicative powers may empower him to interfere with his own decision. See: *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) *para* 29; *De Villiers v BOE Bank Ltd* 2004 (3) SA 459 (SCA) *paras* 7, 8 and 16.

Applicant argues that the amendment she seeks is sanctioned on section 9 of the Matrimonial Causes Act [Chapter 5:13]. Section 9 of the Act says:

> 9 Variation, etc., of orders
> Without prejudice to the Maintenance Act [*Chapter 5:09*], an appropriate court may, on good cause shown, vary, suspend or rescind an order made in terms of section *seven*, and subsections (2), (3) and (4) of that section shall apply, *mutatis mutandis*, in respect of any such variation, suspension or rescission. (My emphasis).

This empowering provision gives this court jurisdiction to vary an order made in terms of section 7, and subsections (2), (3) and (4) of the Act. The synonym of the word "vary" is "change", this court has power to change such an order given in terms of section 7, and subsections (2), (3) and (4) of the Act. Section 9 of the Act provides an exception to the *functus officio* rule. I was also concerned whether this matter was not *res judicata*. In *Transalloys v Mineral-loy* [2017] ZASCA 95 para 22, with reference to *Prinsloo NO & others v Goldex* 15 (Pty) Ltd and Another [2012] ZASCA 28; 2014 (5) SA 297 (SCA) (para 10), *res judicata* was described as follows: "That the expression of 'res judicata' literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in the proceedings between the parties and that it therefore cannot be raised again." Again by sanctioning a variation of an order, section 9 of the Act provides an exception to this principle.

Of significance therefore is whether on the papers before court a good cause for a variation has been made out. In *Anstee v Anstee* HH 691 / 15 the court cited the case of *Beneke* v *Beneke* 1965 (1) SA 855 T at 856 H which defined "good cause" as "…. any reason which would render it equitable for the court to exercise its discretion in favour of the applicant…." This is an unopposed matter. The only version before court is that of the applicant. On that version, standing alone, I accept that good cause has been shown for the variation sought by the applicant. My fears emanating from the fact that the amendment applicant seeks might be

an attempt to subvert the provisions of the law, have been allayed. The order sought to be varied is anchored on a consent paper, and Mr *Ncube* submitted it expresses the intention of the parties. This being an unopposed matter, with only one version before court, I cannot find that applicant attempts to subvert the law. It is on the basis of the foregoing reasons that I concluded that on the papers, applicant has made a case for the relief sought.

Disposition

Finally, I am satisfied that on applicant's version, based on the papers before court, good cause has been made for the relief sought. In the result, I grant an order in terms of the draft, which is as follows:

1. The application for amendment of the order of this Honourable Court under HC 893/14, X-REF. HC 907/18, granted on the 6 December 2018, be and is hereby granted as follows:
   1.1. The parties agree that the value of the aircrafts is US$170 000.00 (one hundred and seventy thousand United States dollars). Defendant shall pay the plaintiff the sum of US$85 000.00 (eighty-five thousand United States dollars) within 90 days of granting of this order, alternatively, the aircrafts shall be valued and the defendant shall pay the plaintiff 50% of the value thereof within ninety (90) days of granting of this order.
   1.2. The immovable property known as number 9 Knight Bruce Road, Milton Park, Harare, owned by Mescal Investments (Pvt) Ltd, which company is jointly owned by the parties shall be valued by a firm of reputable Estate Agents registered with the High Court and be sold to best advantage within ninety (90) days of the granting of this order and the net proceedings thereof be shared equally between the parties.
   1.3. All other provisions of the order made on the 6th December 2018, which are not specifically amended or affected by the variation shall remain in force.
   1.4. The respondent shall pay the costs of suit.

Ncube and Partners, applicant's legal practitioners