

VIRGINIA TAMBUDZAI CHIYANGWA
versus
BENJAMIN CHIYANGWA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 22 October 2015 and 3 March 2016

Opposed Application

S Mpofu, for the applicant
Ms F Chandaengerwa, for the respondent

MWAYERA J: On 22 October 2015 having considered both written and oral submissions by the parties I granted an order in favour of the applicant. I promised to furnish reasons for the disposition and the same are outlined herein.

The respondent instituted divorce and ancillary issues proceedings against the applicant in 2011. The applicant defended the divorce proceedings. The applicant then filed the current application proceedings seeking for contribution towards the costs of litigation in the pending divorce matter. In defending the divorce matter under HC 2288/11 the applicant made a counter claim, wherein she disputes the respondent's proposed distribution plan of matrimonial property and also argues that the respondent has left out some of the matrimonial property. The contested divorce matter has been referred to trial and the applicant requires contribution towards legal costs. The applicant was retrenched in the year 2010 and sustains herself and three minor children from maintenance contributions from the respondent. The applicant presented argument that the respondent has the means to contribute to the legal costs for prosecution of the claim in reconvention and defending the divorce proceedings.

The applicant is entitled to legal representation in an important matrimonial matter but has difficulties in realising costs while the respondent is capacitated to contribute to the legal

costs. The law sanctions such an obligation on the affording spouse. A close look at Order 35 r 274 (1) of the High Court Rules 1971, acknowledges this obligation. It reads:-

“when a spouse is without means to prosecute or defend an action for divorce or judicial separation, the court may on application order the other spouse to contribute to his or her costs, and where necessary, to his or her maintenance pendente lite, such sums as it deems reasonable and just.”

In the case of *Barass v Barass* 1978 RLR 384 the court opined that:

“the sole principles applicable to granting the wife maintenance pendent lite apply to contribution towards costs” See also *Muzondo v Muzondo* HH 247-83.

The learned author Hahlo in his book *The South African Law of Husband and Wife 4th Ed* at p 520 confirmed the obligation of the spouse with means to assist on costs. He remarked as follows:

“where the husband is a rich man, the wife is not obliged to realise her possessions in order to finance her action and is entitled to litigate upon a scale commensurate with the means of the husband.”

The fact that spouses owe each other a duty of care is clearly spelt out in the Zimbabwean constitution, s 26 on marriage reads:

“The State must take appropriate measures to ensure that-

- (a)
- (b)
- (c) there is equality of rights and obligations of spouses during marriage and at its dissolution
- (d) in the event of dissolution of marriage, whether through death or divorce, provision is made for necessary protection of any children and spouses”.

In deciding whether or not an order for contribution of legal costs should be awarded, the court of necessity has to look at the parties’ financial status. In *casu*, it has not been disputed that the applicant is not financially sound. It is common cause she is relying on maintenance from the respondent as she was retrenched in the year 2010. The respondent, on the other hand, is a managing director in receipt of a salary from which he can afford to assist in the contribution of legal costs, which is not a continuous obligation. The contribution is for prosecution of the divorce and ‘ancillary issues’ proceedings. The court ought to give assistance to a deserving party provided the means are available.

In the case of *Sibongile Dube nee Msimanga v Sikhumbuzo Mavako Dube* HB 78/06 the court cited with approval the case of *Treger v Treger* GS 1 – 77 where Smith J had this to say at p 7 “The court must look at the means of both parties and try to determine what is reasonable and just” see also *Landry v Landry* 1970 (1) RLR at 134 and *Chamani v Chamani* 1979 (4) SA 804. Clearly the contribution is anchored on the duty of support spouses owe each other. The purpose of the contribution of costs order is to enable a spouse who would otherwise not be able to do so, be in a position where they can adequately place the case before the court.

The applicant is married to the respondent. The respondent brought a matrimonial suit for divorce and ancillary issues. There is contention as regards what constitutes the matrimonial assets and how the property should be shared. It would not be in the interest of administration of justice to adopt a dismissive attitude to the applicant’s counterclaim and defence of the divorce claim. The respondent’s argument is not that he is not the responsible person to contribute. The respondent again does not argue that he does not have the means. His argument is that the applicant ought to have conceded to divorce and the sharing of property regime he suggested. The respondent further argued that the property he excluded was not matrimonial assets. Such an assertion can only be decided on after ventilation of evidence, hence the need for assistance on legal costs for defending of the divorce proceedings and prosecution of the counterclaim. The applicant’s claim, given the marriage between the two parties, cannot be dismissed without evidence.

The requirements for contribution of legal costs order were ably pronounced in the South African case of *Botes v Botes* 1909 (3) SA 169 (B) as follows:

1. There must be a subsisting marriage
2. The suit in question is a matrimonial one
3. The applicant has reasonable prospects of success
4. The applicant is not in a financial position to bring or defend the action as the case may be, and
5. The other spouse is able to provide the applicant with his contribution.

In *casu* the parties are married to each other. There is a pending divorce matter before this court. Given the wording of the Matrimonial Causes Act s 7 (1) (a) on division, distribution

and apportionment of property the applicant's defence and counterclaim has to be looked at. Section 7 (1) (a) reads:

“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;” (underlining my emphasis)

One cannot, therefore, take a dismissive approach to the applicant's counterclaim on sharing property. There are prospects of success. The applicant cannot afford legal fees and requires financial assistance as she cannot rely on maintenance upkeep money for the minor children. The respondent is able to provide. From his submissions filed of record and oral submissions he has no quarrels with the claim on basis of inability to afford but on basis that the applicant' ought to have agreed to a consent order. The respondent does not dispute the existence of other property not alluded to in pleadings in the main divorce matter but argues that such property is not matrimonial property. In the absence of proof of such assertion then one cannot assume that the applicant's claim is just a bold assertion. There is need for ventilation of the matter so as to come up with a correct decision and that of necessity calls for adducement of evidence, hence the need for legal fees.

Given the duty of support and care spouses owe each other as provided for by the legislature and by the Constitution, in the absence of evidence militating against provision of financial assistance for pending litigation, the applicant ought to be afforded the opportunity. In this case the applicant and the respondent are husband and wife going through divorce proceedings. The respondent is in a position to assist the applicant. The claim has merit.

Accordingly the application is granted.

IT IS ORDERED THAT:

1. the respondent shall pay \$8 000-00 to the applicant's legal practitioners as contribution towards costs
2. the respondent shall pay costs of suit.

Munangati & Associates, defendant's legal practitioners
Mambosasa, plaintiff's legal practitioners