Judgment No. HB 66/07
Case No. HC 493/05
X Ref HC 3383/04 & 1416/03

**ELINAH SHOKO**

**Versus**

**MISHECK MUROMBWI**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 6 FEBRUARY 2006 & 21 JUNE 2007

*S S Mazibisa,* for the applicant
*Adv P. Dube,* for the respondent

Opposed Application

**NDOU J:** The parties were married to each other. Their marriage ended on 1 July 2004 in HC 1416/03 when this court granted the divorce together with ancillary relief. It is paragraphs 4 and 5 of the order in HC 1416/03 that is subject to these proceedings. The paragraphs are framed in the following terms:

"It is ordered that:

1. …
2. …
3. …
4. The immovable matrimonial property namely; stand number 7 Bernafay Lane, Riverside, Bulawayo be evaluated, sold and proceeds shared equally.
5. The immovable property namely, Hyundai vehicle registration number 649-530R to be evaluated, sold and the proceeds shared equally."

Somehow the implementation of these terms of the order proved a challenge to the parties. By December 2004 they were back for directions on the best way to implement the said terms of the order. This court made directives in the following terms:-

"The applicant be and is hereby authorised to engage the services of two reputable registered estate agents to evaluate house number 7 Bernafay Lane, Riverside, Bulawayo within 5 days of granting of this order and that the applicant be given the first preference to purchase the house using the average value of the two evaluations through any one of the chosen estate agents by paying out to the respondent his half share in the house."

The services of two reputable estate agents were engaged and the average value of the house was pegged at $125 000 000,00 as per the terms of the court order under case number HC 3383/04. The respondent did not accept the evaluation prompting the applicant to seek further directions in the form of the current application in the following terms:

"It is hereby ordered that:

1. The respondent be and is hereby ordered to pay to the applicant a sum of $8 000 000 being her half share of the Hyundai motor vehicle which is in the respondent's possession.
2. The respondent be and is hereby grated leave to purchase and transfer the matrimonial house, being stand number 7 Bernafay Lane, Riverside, Bulawayo for a sum of $125 000 000,00 and Messrs Cheda and Partners shall prepare the agreement of sale and the Deputy Sheriff, Bulawayo shall sign the agreement of sale on respondent's behalf and all transfer papers to effect transfer into applicant's name.
3. The respondent be and is hereby granted leave to pay out to the respondent a sum of $62 500 000,00 being his half share of the matrimonial house subject to deductions for capital gains tax, transfer fees and legal costs claimed under cases HC 3383/04 and HC 1416/03.
4. There be no order as to costs only if the respondent does not oppose the relief sought."

The respondent opposed the application on the basis that it is unnecessary as the original divorce is clear in its implications. The respondent further takes issue with the applicant's failure to timeously obtain valuation and negotiate with him for a possible buy out in terms of the first preference given to her in the order. Whatever the merits or demerits of this argument and other host of legal arguments raised by the respondent is important that this court must bring this matter to an end. I will endeavour to help the parties in the realisation of their respective rights and help in keeping the spirit of the orders granted under case numbers HC 1416/03 and HC 3383/04 alive. The court order under case number HC 1416/03 was by the consent of

both parties. The respondent did not oppose the order in HC 3383/04. It is trite law that all court orders are valid until and unless they are properly set aside or rescinded in terms of the law.

In the circumstances, it is improper for the respondent to try, by the backdoor, to make an application for rescission in his opposing papers. If he wishes to apply for rescission of any of the above-mentioned court orders he should do so properly. There is, therefore, no need to discuss the validity of any of the said court orders in this application. I do not wish to enter into the debate on whether or not the respondent was in contempt of court. This argument will require a determination of factual disputes. I think that all that the parties seek, without

necessarily say so, is my direction or interpretation on how to assert their respective rights emanating from the court order.

Looking at the papers, the applicant has not alleged that:

(a) she obtained valuations within 5 days given her by the order in HC 3383/04;

(b) she forwarded the evaluations to the respondent and the respondent refused to accept the values.

In such circumstances, then the applicant would be justified to approach the court. But even in such a situation, the application will have to be considered with the *functus officio* principle in mind. The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The court thereupon becomes *functus officio* because its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases – *The Civil Practice of the Supreme Court of*

*South Africa* – Herbstein and Van Winsen (4 Ed) at 688; *West Rand Estate Ltd* v *New Zealand Insurance Co Ltd* 1926 AD 173; *Firestone SA (Pty) Ltd* v *Gentiruco* A G 1977(4) SA 298(A); *First National Bank of SA Ltd* v *Jurgens & Ors* 1993(1) SA 245 (W) at 246J; *Sayprint Textiles (Pvt) Ltd & Anor* v *Girdlestone* 1984(2) SA 572 (ZH) and *Tshivhase Royal Council* v *Tshivhase* 1992(4) SA 582(A). There are a few exceptions to this rule. In these exceptions, the High Court will be exercising inherent or discretionary powers to supplement, clarify or correct its own judgment. These have been ably captured in *The Civil Practice of the Supreme Court of South Africa, supra,* at page 686. The learned authors correctly observed:

"Thus provided that the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases:

(i)The principal judgment order may be supplemented in respect of accessory or consequential matters for example costs or interest on the judgment debt that the court overlooked or inadvertently failed to grant.

(ii) The court may clarify its judgment or order if on a proper interpretation the meaning of it remains obscure, ambiguous or otherwise uncertain so as to give effect to its true intention, provided that it does not thereby alter 'the sense and substance' of the judgment or order.

(iii) The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order and does not extend to altering its intended sense or substance.

(iv) If counsel had argued the merits but not made submissions as to costs and the court, in granting judgment, also makes an order relating to costs, it may thereafter correct, alter or supplement that order.

It would appear that, save in so far as questions of costs are concerned, this list of exceptions is exhaustive" See also *Seatle* v *Protea Assurane Co Ltd* 1984(2) SA 527(C ) at 543H-543A and *S* v *Wells* 1990(1) SA 816(A) at 820C.

Further, where the parties consent, the court may amend, supplement or clarify the judgment in terms of such consent. There is no such consent here.

Further, in our jurisdiction, the court may vary, correct or rescind its judgment in circumstances outlined in Order 49 Rule 449 of the High Court Rules, 1971. Rule 449 does not apply to the facts of this case. It appears that the applicant is asking me to exercise my inherent or discretionary powers in order to grant the above-mentioned order.

If the applicant had timeously obtained the valuation and immediately served them on the respondent the issue before me would not have arisen. In these inflationary times, the delay may prejudice the one party at the expense of the other. Such an order, as one sought by the applicant would result in inequity and injustice and cannot be granted – *Dube* v *Khumalo* 1986(2) ZLR 103(SC) and *Young* v *Van Rensburg* 1991(2) ZLR 149 (SC).

The applicant obtained the order on 16 December 2004. She, however, only obtained the valuations in February 2005. The order required her to have obtained valuation 'within 5 days of the granting'. She has not explained her dilatory actions. Instead she seeks another order. Looking at the original order in HC 1416/03, the subsequent order in HC 3383/04 and the order sought in this application I hold the view that the order sought here would alter the sense and substance of the original order. As alluded to above, I do not think the application

is necessary. The order sought is unjustified and would result in inequity and injustice. The parties should not rely on legal technicalities but should implement the existing order.

Accordingly, the application is dismissed with costs.

*Cheda & Partners*, applicant's legal practitioners
*Calderwood, Bryce Hendrie & Partners*, respondent's legal practitioners