LEONARD DUBE

Versus

MAUREEN DUBE (NEE NDEBELE)

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 13 SEPTEMBER 2006 AND 22 MAY 2008

N Mazibuko for the plaintiff
Ndlovu for the defendant (IFP)

Civil Trial

NDOU J: The plaintiff issued out summons against the defendant for divorce and ancillary relief.

When trial commenced, the only issue left was one in the defendant's counter claim. This issue is whether stand number 61456, Pelandaba, Bulawayo, the two stands in Romney Park, Bulawayo and the two motor vehicles were matrimonial property, and if so, how such property should be distributed. In light of this, the duty to begin lay on the defendant. After the defendant testified, she closed her case. At that stage, Mr *Mazibuko,* for the plaintiff, applied for the court "to enter judgment in respect of issues agreed upon and enter absolution from the instance in respect of the other issues without putting the plaintiff on his defence." This type of application is novel to me. I am not sure whether the Rules provide for such an application. In any event, Mr *Mazibuko*, did not refer me to any authority for such a procedure. What can be gleaned from his submissions, is that he is praying the court to apply the Rules of procedure application at the close of the plaintiff's case, i.e. application for absolution from the instance – see *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971(1) RLR 1(A); 1971(4) SA 90 (RA); *Marine and Trade Insurance Co Ltd* v *Van der Schyff* 1972(1) SA 26(A); *Gascoyne* v *Paul & Hunter* 1917 TPD 170 at 171; *Mazibuko* v *Santam Insurance Co Ltd* 1982(3) SA 125 (A); *Munhuwa* v
Mhukahuru Bus Services 1994(2) ZLR 382(H); *Moyo* v *Knight Frank & Anor* HB-87-05 and *Ngwenya* v *Ndlovu* HB-118-07. What is clear from these cases, is that a case should not be summarily terminated merely because the evidence adduced on behalf of the plaintiff [in reconvention *in casu*] contains contradiction. The *locus classicus* of the cases dealing with procedure of absolution from the instance in this jurisdiction is the *Supreme Service Station* – case, *supra.* At page 92C-E, BEADLE CJ, stated:

> "The *locus classicus* of the cases dealing with the procedure of absolution from the instance is the old Transvaal case of *Gascoyne* v *Paul & Hunter*, 1917, TPD 170. In that case it was pointed out that an application for absolution from the instance stands much on the same footing as an application for discharge of an accused at the close of the evidence for the prosecution, but it is stressed (see p 173 of the judgment) that it wanted indeed be curious if in civil cases we were to apply a more stringent rule of practice than in criminal cases. It would seem to me that as in a criminal case the

onus of proof is always higher than in a civil case, evidence which in a criminal case would be insufficient to justify refusing an application for the discharge of an accused, might well in a civil case be sufficient to justify refusing an application for absolution from the instance." See also *Manhuwa* case, *supra* at 383G.

The learned Chief Justice at p 93C concluded:
"The test, therefore, boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make a definition which helps not at all."

The learned Chief Justice also stated that a defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance. The rules of procedure are made to ensure that justice is done between the parties, and, so far as possible courts should not allow rules of procedure to be used to cause an injustice. *In casu,* if I grant the application for absolution from the instance, the matrimonial case between the parties is not terminated completely. The main issue, the divorce, will not be terminated. The absolution only relates to an ancillary relief. As it is axiomatic that this application for absolution from the instance stands much on the same footing as an application for the discharge of an accused at the close of the stat case in a criminal case, the application must fail on this fact alone. The application, if successful, must have the effect of terminating the case completely. This procedure is not intended for the court to determine issues piecemeal in one trial – *R* v *Dzingayi & Ors* 1967 RLR 171 (G) and *A-G* v *Mzizi* 1991(2) ZLR 321 (S) at 323.

Further, the defendant alleged in her testimony that although the two motor vehicles are registered in the names of Galaxy Craft Services (Pvt) Ltd, these are business assets acquired by the parties. The same applies to the stand. She explained her contribution in this regard. The court should not at this stage evaluate and reject her evidence as suggested by Mr *Mazibuko*. The court should be extremely chary of granting absolution at the close of the plaintiff's case – *Claude Neon Lights (SA) Ltd* v *Daniel* 1976(4) SA 403(A) and *The Civil Practice of the Supreme Court of South Africa* (4th Ed) Herbstein and Van Winsen at page 683.

Mr *Mazibuko* relied heavily on the separation between business assets and personal assets acquired by the parties. He overlooked the acceptable practice by our courts to regard as matrimonial assets the net worth of both the business assets and the personal assets acquired by the parties during the duration of the marriage – *Sibanda & Anor* v *Sibanda* SC-117-04 and *Mangwendeza* v *Mangwendeza* HB-45-07. *In casu,* the defendant has testified why she regards the business assets as matrimonial property. The application is therefore misplaced and unnecessary.

Accordingly, the application for absolution from the instance is dismissed.

Calderwood, Bryce Hendrie & Partners, plaintiff's legal practitioners
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