

JAMESON ZOWA

Versus

SUSAN ZOWA

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 11 JUNE 2010

L Nkomo for applicant
L Mcijo for respondent

Opposed Court Application

Ex Tempore

KAMOCHA J: The applicant in this matter sought an order in the following terms:-

“It is ordered:

- (1) That the order of this honourable court made on the 4th day of December, 2008 be rescinded and the following substituted:
 - (a) A decree of divorce be and is hereby granted to the plaintiff.
 - (b) The parties proceed on trial of the division of matrimonial assets and ancillary relief.
 - (c) The parties be and are hereby permitted to make discovery in terms of the rules of court, with defendant having to make discovery within 5 days of the uplifting of this order.
 - (d) Henceforth the parties shall proceed in strict compliance with the rules.
- (2) The costs of this application shall be costs in the cause in the main action.”

The parties were husband and wife who married each other on 1 May 1996. When the parties developed irreconcilable differences the wife instituted divorce proceedings against her husband on 7 July 2006. The husband entered appearance to defend and filed his plea.

The husband failed to file discovery documents timeously resulting in the wife applying and was granted an order compelling him to do so within 5 days failing which his defence would be struck off and she would be granted leave to set down the matter on the unopposed roll

without notice to him. He was unable to comply and the matter was set down on the unopposed roll. A default judgment was granted on 4 December 2008.

Paragraphs 4 and 5 of the court order reads as follows:

- “(4) Plaintiff shall pay to the defendant the sum of \$11 000 000 000 000 (eleven trillion dollars) being his 20% share to stand number 10449 Bulawayo Township also known as 29 Heythrop Road, Montrose, Bulawayo within 30 days of the granting of this order.
- (5) Plaintiff be and is hereby granted ownership of stand number 29 Heythrop Road, Montrose, Bulawayo also known as number 10449 Bulawayo Township and the defendant shall transfer the said property into plaintiff’s name within 30 days of this order failure of which the Deputy Sheriff be and is hereby authorized to sign all relevant papers on defendant’s behalf to effect the said transfer.”

The applicant did not file his application for rescission timeously. He applied for condonation for the late filing of that application for rescission. His application for condonation was contested by the respondent but was, nevertheless, granted. The full reasons are contained in judgment number HB-36-10.

During the subsistence of their marriage the parties bought a house known as 29 Heythrop Road, Montrose, Bulawayo which they registered in their joint names. *Ex facie* they own the house in equal shares. Both parties sold their respective properties which they owned before they got married. The wife sold her flat while the husband sold his house in Nketa Township Bulawayo. Each party claimed that the proceeds from the sale of his or her property were channeled towards the purchase of the house.

The wife, however, would want the court to believe that only the proceeds from the sale of her flat were used to purchase the house. It is her word against that of her husband. If that was the case, one wonders why the parties registered the house in their joint names.

The wife also alleged that part of the money used to purchase the house came from monthly deductions made from her salary. She therefore felt that it was just and equitable to award her 80% of the market value of the said house while her husband got 20%. The husband on the other hand contended that a 50-50 share would be just and equitable.

On the above facts it seems to me, that gross injustice would result if the parties are not made to prove their respective cases in court.

Judgment No. HB 45/10
Case No. HC 790/09
X Ref HC 789/09; 1039/09; 1814/08; 1293/08 & 1496/06

In respect of the default judgment, I held the view that the applicant was not in willful default. He had always wanted to assert his rights but was let down by his legal practitioners who failed to file discovery documents timeously.

This court was advised that the parties were in fact negotiating an out of court just and equitable settlement which was about to be completed. The court was further advised that the wife had not even paid the 11 trillion dollars which was equivalent to 20% of the market value of the house.

I see a glaring injustice occurring in this matter if the default judgment were to be allowed to stand so far as it relates to the sharing of the matrimonial property. In the result I would grant the order sought in terms of the draft.

Lazarus & Sarif, respondent's legal practitioners