HB 02/17
HC 2122/15

EUSEBIA PEDZISAI (FORMERLY CHINGONZOH)

Versus

JOHN CHINGONZOH

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 23 SEPTEMBER 2016 & 12 JANUARY 2017

Opposed Application

B. Dube for the applicant
V. Majoko for the respondent

TAKUVA J: Pursuant to a divorce order under case number HC 630/14, disputes arose relating to the enforcement of that order. Specifically, the applicant complained about the respondent's failure to have all encumbrances on the property awarded to her totally removed. The divorce order provides *inter alia* that:-

"1. …
2. …
3. …
4. …
   4.1 …
   4.2 …
   4.3 …
   4.4 …
   4.5 …
   4.6 …
   4.7 …
   4.8 …
   4.9 …
   4.10 …
5. Defendant be and is hereby awarded the following as her sole and exclusive property:-
   5.1 Rights, title and interest in number 61 Arnold Way, Burnside, Bulawayo presently registered in the name of John Farayi Chingonzoh and all household goods and effects situate thereat.
   5.2 Plot in Kensington presently registered in the name of John Farayi Chingonzoh and all improvements on the said property;

…"

The applicant filed this application seeking an order in the following terms:

"1. The respondent be and is hereby ordered to deliver within 10 days of granting of the order to applicant and or her legal practitioners title deeds over stand 61 Arnold Way, Burnside, Bulawayo and a plot in Kensington, Bulawayo free of any financial or encumbrances, failing which the applicant at respondent's costs be and is hereby granted leave to apply for duplicate title deeds and the respondent be directed to clear all encumbrances within 10 days of notification by respondent.
2. The respondent be and is hereby directed to pay costs of suit on an attorney client scale." (my emphasis)

At the heart of this matter is the fact that the respondent secured a loan from CABS and had a mortgage bond registered against the Burnside property without the applicant's knowledge and consent. Applicant requires the title deeds delivered to her free of encumbrances. This obviously means that the respondent must clear the loan so that the mortgagor releases the title deeds after cancellation of the bond against the property.

Respondent opposed the application on a number of grounds. Firstly, it was contended that the divorce order cited above is silent on the issue of the mortgage bond. Secondly, applicant knew the property was bonded and she took it with and subject to that encumbrance. Thirdly, that in seeking in the draft order that respondent transfer the immovable properties "free of any financial encumbrances" and that the respondent within 10 days of the order "clear all encumbrances," applicant is not seeking to enforce the provisions of the extant consent order but is seeking a new order altogether.

As regards the 1st point, it is common cause that the divorce order does not say that the properties are awarded free of encumbrances. To grant the relief as prayed would be tantamount to read into the divorce order what it did not say. In my view, this is incompetent in that it is akin to a variation of the original order in the absence of a proper application. By filing this application the applicant simply requests this court to rewrite the consent paper or divorce order through the back door.

The second point raises a dispute of fact whose resolution is not in my view directly relevant to the determination of the issue *in casu.*

The 3rd point is similar to the 1st in that the application is defective in so far as it attempts to enforce a new and non-existent order altogether. In *Lupu* v *Lupu* 2000 (1) ZLR 120 (S) the court held at p 123C – D that;

> "The parties clearly agreed that appellant would take the property together with the burden of the existing mortgage bond …. In my view, there is nothing … in the consent paper to suggest that either party had to pay off his/her part of the mortgage bond in a lump sum. Had that been the intention of the parties, it would have been very easy to say so."

In casu, the consent paper does not in any way suggest what applicant prays for in the draft order.

In *Madziva* vs *Madziva* 1996 (1) ZLR 314 (H), the court cited *de Crespigny* vs *de Crespigny* 1959 (1) SA 149 with approval where HOLMES J (as he then was) said at p 150F – G that a party is free to approach a court for resolution in the interpretation of an order. The court stated that:

> "In such a case … a party's remedy would be to apply for a definition of his rights under the judgment."

In the present case, this has not been done. I must also point out that the applicant's "alternative" relief that it be allowed to apply for a duplicate title deeds is clearly incompetent for two reasons. Firstly, the bank as the mortgagor has not been cited. Secondly, a mortgage bond grants real rights over the property and to simply issue duplicate title deeds would extinguish rights granted in terms of the law of property.

Accordingly, it is ordered that:-

1. The application be and is hereby dismissed.
2. Each party shall bear its own costs.

Lunga Gonese Attorneys, applicant's legal practitioners
Messrs Majoko & Majoko, respondent's legal practitioners