

MICHAEL LESLIE MITCHELL STUBBS
versus
RENE STUBBS (nee DU PLOOY)

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 28 and 29 January 2015

Civil Trial

R M Fitches, for the plaintiff
F Girach, for the defendant

UCHENA J: The plaintiff is the defendant's estranged husband. They married each other on 9 March 1990 by ante nuptial contract and according to the matrimonial laws of South Africa at Simonstown, South Africa. They were blessed with three children who have all attained the age of majority. The couple immigrated into Zimbabwe in 1991, where they established businesses and have chosen it to be their country of domicile. In 2006 the plaintiff issued summons seeking a decree of divorce and ancillary orders.

They processed their case with reasonable speed resulting in its appearing on the unopposed roll before Kudya J on 15 May 2008. Issues were raised on the marriage certificate produced and the custody proposed leading to the case being postponed sine die. It remained dormant until it resurfaced on 22 November 2013 by letter from Coghlan, West & Guest (the plaintiff's Legal Practitioners, addressed to the Registrar asking him to;

“Please reconvene the Pre-Trial Conference in this matter (which was thought to be settled, but has not been capable of conclusion on an uncontested basis).”

The letter was copied to Atherstone & Cook the defendant's legal practitioners. A perusal of the file reveals that prior to its set down on the unopposed roll the parties had filed, a consent paper which they wanted to be made part of the court's order. The defendant had withdrawn her plea and filed an affidavit of waiver. The plaintiff had filed his affidavit of evidence and presented the unsatisfactory copy of the marriage certificate. But for the presiding Judges queries a decree of divorce and ancillary orders emanating from the consent paper could have been granted.

The parties in-explicably held another pre-trial conference at which the following issues were referred to trial.

1. The distribution of the couples' matrimonial home and
2. The distribution of their movable assets.

After a perusal of the file in preparation for the trial set down for the 28th January 2015, I on the morning of the trial date invited counsel for the parties to my chambers in terms of r 183 of the High Court Rules 1971 which entitles a judge to "call into his chambers the counsel for the parties with a view to securing agreement on any matters likely to curtail the duration of the trial." This was necessitated by my having observed from the file that both parties had not resurrected the issue of the movable assets in their papers filed after the case had come back from the unopposed roll. Counsel for both parties agreed that they had settled that issue. I with both counsel's consent deleted it from the issues in the joint PTC minute.

When the trial opened in court Mr *Fitches* for the plaintiff gave his opening address, after which Mr *Girach* for the defendant raised a point *in limine* on whether the plaintiff was going to call an expert witness to lead evidence on the South African law which is applicable to the distribution of the parties' matrimonial home. He required this information so that he can prepare his cross-examination on the basis of that information. Section 25 of the Civil Evidence Act [*Chapter 8:01*], requires that expert evidence be led to prove to the court the applicable foreign law as the court cannot take judicial notice of foreign law. It provides as follows;

- “(1) A court shall not take judicial notice of the law of any foreign country or territory, nor shall it presume that the law of any such country or territory is the same as the law of Zimbabwe.
- (2) Any person who, in the opinion of the court, is suitably qualified to do so on account of his knowledge or experience shall be competent to give expert evidence as to the law of any foreign country or territory, whether or not he has acted or is entitled to act as a legal practitioner in that country or territory.
- (3) In considering any issue as to the law of any foreign country or territory, a court may have regard to—
 - (a) any finding or decision purportedly made or given in any court of record in that country or territory, where the finding or decision is reported or recorded in citable form; and
 - (b) any written law of that country or territory; and
 - (c) any decision given by the High Court or the Supreme Court as to the law of that country or territory.
- (4) The law of any foreign country or territory shall be taken to be in accordance with a finding or decision mentioned in paragraph (a) of subsection (3), unless the finding or decision conflicts with another such finding or decision on the same question.
- (5) For the purposes of paragraph (a) of subsection (3), a finding or decision shall be taken to be reported or recorded in citable form only if it is reported or recorded in writing in a report, transcript or other document which, if the report, transcript or document had been prepared in

connection with legal proceedings in Zimbabwe, could be cited as an authority in legal proceedings in Zimbabwe.”

The section is clear on the court not being allowed to take judicial notice of foreign law. It also does not allow the court to presume that foreign law is the same as Zimbabwean law. Subsection 2 prescribes how foreign law should be proven through the evidence of a witness who is an expert on that foreign law. In considering any issue as to the law of a foreign country or territory the court can in terms of subs 3, 4 and 5 have regard to;

- (a) Authoritative citable reported or recorded decisions of the courts of that country whose decisions do not conflict with another such finding or decision on the same question.;
- (b) Written law (i.e statute law) of that country.
- (c) Zimbabwean High Court or Supreme Court decisions on what the law of the country in issue is. This refers to, proof through precedents by Zimbabwean superior Courts on the foreign law in question.

Mr *Girach* is therefore correct on the need to lead evidence on the South African law applicable to the distribution of the parties’ matrimonial home or the need to prove such law in terms of sub section 3 (a) (b) or (c).

Mr *Fitches*’s response was that there is no need for such evidence because the parties filed a consent paper which still stands. A perusal of the file confirms that the consent paper was not withdrawn. It still stands as the parties’ agreed position. Gubbay CJ in the case of *Tyser v Tyser* 2001 (1) ZLR 134 (SC) at 137 E-F cited by Mr *Fitches* and commented on with approval by Mr *Girach* said;

“Mr *de Bourbon* submitted that the learned judge was wrong in stating that a party who has signed a consent paper may resile therefrom at his or her volition at any time before the court embodies it in an order. I agree that to be relieved, of the consequences of having entered into a consent paper, albeit not yet sanctioned by the court, is not dependant simply on change of mind. Sound grounds for seeking to withdraw must be established.”

A consent paper signed by the parties after they will have made admissions at the pre-trial conference as happened in this case, is a compromise agreement which embodies, admissions which cannot be withdrawn without complying with Order 27 r 198 of the High Court Rules 1971, which provides as follows;

“The court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.”

Rule 189 therefore requires admissions to be formerly withdrawn. In terms of Order 27 r 185 admissions can be made through “pleadings or otherwise in writing”. Admissions can therefore be made in writing through a consent paper.

There is no court order granting the defendant a right to withdraw the admissions she made in the consent paper.

Parties cannot simply request for another PTC as happened in this case on the basis of an amended plea. The defendant’s plea and defence had been withdrawn, raising the question, as to, which plea was the defendant amending? One cannot, amend, a withdrawn plea as it ceases to exist on being withdrawn.

My ruling on the two issues which arose is as follows;

1. The consent paper is still in force and must be properly withdrawn before the trial of this case can proceed.
2. In the event that this case proceeds to trial the plaintiff will be required, to prove the South African law applicable to the issue of the distribution of the parties; matrimonial home.
3. Costs shall be in the cause.
4. The case is postponed *sine die*.

Messers Coghlan, West & Guest (Incorporating Stumbles & Rowe), plaintiff’s legal practitioners

Messers Atherstone & Cook, defendant’s legal practitioners.