FARISAI NANDO
versus
GODWILLS MASIMIREMBWA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 10 November, 2016, 23 February 2017

Opposed Application

M J Zindi, for the applicant
R. Masango, for the respondent

MWAYERA J: The applicant approached the court seeking an order for specific performance which would be occasioned by registration of a Deed of Settlement as an order of this court. The respondent opposed the application on mainly two grounds that the order would be incapable of performance due to financial constraints and secondly that the immovable property referred in the deed of settlement belonged to a 3rd party.

The brief background of the matter has to be put into perspective. The applicant and respondent were partners in an unregistered customary union which sired 3 minor children. In February 2013 the couple terminated their customary union. The parties thereafter on 15 March 2013, entered into a Deed of Settlement in which they entered into an agreement to regulate custody, access and maintenance of the couple's minor children. They also agreed on proprietary rights. The agreement duly signed by the parties. Annexure A pp 9-11 was reduced to a Deed of Settlement.

It can be discerned from the agreement that the parties agreed in brief as follows:

1. The applicant shall have exclusive custody of the minor children with the respondent being afforded flexible access to the minor children.
2. The respondent shall pay $2000 per month towards the maintenance of the minor children together with payment of school fees, yearly holiday within Zimbabwe and medical and clothing requirements for the minor children

3. The applicant shall retain all the movables and have the right with the minor children to continue staying or residing at 3 Grange Grove Drive Highlands until the respondent purchased a similar property for the applicant and children.

The parties encountered problems in meeting the terms of the agreement which then prompted the applicant to approach the court for purposes of registration of the Deed of Settlement so as to enforce the agreement. In other words, specific performance is to be triggered by registration of the Deed of Settlement.

It is observed that the deed of settlement which the applicant seeks to be incorporated as an order of this court is akin to a consent paper in divorce proceedings. The issue which falls for determination is whether or not the Deed of Settlement signed by the parties is capable of being incorporated as an order of the court. Basic requirements of an agreement have to be established before incorporating the Deed as an order of the court. Firstly the court must be satisfied that both parties to the agreement have freely and voluntarily concluded the agreement. Secondly that there is meeting of minds of the contracting parties in other words, that the parties are *ad idem* with regards the terms of the Deed of Settlement. The court also has to consider whether or not the terms of the Deed of Settlement are capable of enforcement without recourse to further litigation. The court, of necessity, should make a specific and enforceable order. These factors in my view fall for consideration cumulatively.

See *Thutha* v *Thutha* 2008 (3) SA 49, wherein it was held that the purpose of a court order is not to record the terms of an agreement between the parties, but to give final effect to the judgment which brings the dispute to closure. Although the *Thutha* case *supra* was dealing with a divorce of a civil marriage, in my view the principles applicable on requirement for registration of a consent paper as an order of the court would apply with equal force where parties who were customarily married have terminated their union and seek the Deed of Settlement to be incorporated as an order of the court.

There has to be a clear agreement between the parties and the terms ought to be capable of ready enforcement without recourse to further litigation. See also the case of *Grange* v *Le Grange* (984/2011) [2013] ZA EC GH C 75; 4 H SA 41 ECG. The deed of settlement or agreement should not as a matter of course be incorporated as an order of the court without scrutinising the terms to ascertain enforceability, and without establishing whether or not whether or not the parties are *ad idem*. It is trite law that a court order must be effective, enforceable and immediately capable of execution by the sheriff.

In the present case the parties freely voluntarily entered into an agreement in July 2015. At the time of seeking enforcement of the settlement by registration of the same as an order of the court, the parties presented divergent views on the terms of the Deed of Settlement. The applicant insisted on registration of Deed of Settlement while the respondent cited impossibility of performance of the contract and suggested novation of the maintenance clauses to be varied to be in line with his current financial standing. There are legal requirements to be fulfilled if a party is to successfully resile from a valid agreement on the grounds of impossibility to perform. The impossibility must be objective and absolute and not merely relative. The nature of agreement falls for scrutiny in that the contract being sought to be incorporated as an order of the court is a deed of settlement pursuant to termination of a customary law union. The agreement was entered into more than a year back and now the incorporation as an order of the court is contested as the parties are clearly not in consensus.

The question that sticks out is whether or not the parties are *ad idem* such that the order sought will be immediately enforced without resorting to further litigation. If the latter is to occur, then it would be improper for the deed of settlement to be incorporated for the mere say so without bringing the matter to finality. The evidence on paper shows disputes over quantum of maintenance and source of maintenance. Further, there is dispute over proprietary rights. In the absence of adducement of evidence and enquiry on the means of both parties being the parents of the children, who in terms of the Constitution and Maintenance Act have an obligation to maintain their minor children, the court cannot give a definitive order. In my view there are material disputes of facts which require further ventilation for a proper order to be issued. I subscribe to the sentiments of MAKARAU J (as she then was) when she ably defined material dispute of fact as follows:

> "A material dispute of fact arises when such material fact put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

The nature of conflict on the quantum of maintenance and proprietary rights is such that one cannot resolve it on paper without further enquiry for adducement of evidence. The issue which is a material dispute cannot be satisfactorily determined without the aid of oral evidence see *Room Hire Co* v *Jeppe Street Mansions* 1949 (3) SA 1155. The Room Hire case is quite instructive on what constitute material disputes of fact and clarifies that application procedures are not appropriate where it will lead to injustice to another party. See *Ex Combatants Security Company* v *MSU* 2006 (1) ZLR 531 and also *Zimbabwe Bonded*

Fibregrass Pvt Ltd v *Peech* 1987 (2) ZLR 338. In the present case the applicant sought to have a contentious deed of settlement incorporated as an order of the court in clear conflicting circumstances. The parties entered into a deed more than a year back and against the back drop of economic doldrums, which in the circumstances, it would not be folly for the court to take judicial notice of. Given the nature of agreement, there are inevitable material disputes of facts which would militate against opting for application procedure for the obvious reason that in the absence of further evidence on financial and proprietary standing of the parties, the court is not in a position to give a definitive order. As a way of illustration maintenance for example is governed by the Maintenance Act [*Chapter 5:09*]. For the court to give a maintenance order in contested circumstances, then of necessity evidence has to be adduced. Section 6 (2) (b) is opposite it reads:

> "A maintenance court shall not make an order in favour of the dependant unless it is satisfied that the person against whom the order is sought is able to contribute to the maintenance of the dependant".

Clearly a reading of the relevant provisions in the absence of consent cries loud for a detailed enquiry and evidence to be adduced. The applicant faced with a contested deed of settlement with not only maintenance but proprietary issues ought to have foreseen that material disputes of facts could not be resolved on paper. I share the sentiments echoed by MCVALLY J as he then was in *Masukusa* v *National Foods Limited and Anor* 1983 (1) ZLR 232 he stated:

> "It is appropriate for a court to dismiss an application when the applicant before launching it must have realized that serious material disputes would be inevitable".

In *casu* the applicant deliberately followed the wrong procedure despite the obvious contentious issues.

The applicant sought specific performance anchored on a deed of settlement in which there is no meeting of minds. The parties were poles apart on the maintenance and proprietary issues. Given the divergent views that the property belongs to a third part, and the alleged impossibility on maintenance quantum, in the absence of further evidence, I find no basis of incorporating a contested deed of settlement as an order of this court. Clearly in the circumstances, it would amount to opening up further litigation as opposed to giving final effect to the judgment which would bring the dispute to closure. The defence of impossibility presented requires ventilation for one to be able to make an informed decision whether to accede or dismiss it.

The supreme court had occasion to comment on a party resiling from a contract because of impossibility in the case of *Watergate Pvt Ltd* v *Commercial Bank of Zimbabwe* 2006 (1) ZLR as p 14 when it was stated:

> "…. when the court has to decide on the effect of impossibility of performance on a contract, the court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract. (my emphasis)
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> The relationship of the parties, the circumstances of the case and the nature of impossibility to see whether the general rule ought, in the particular circumstances of the case, to be applied. In this concretion regard must be had not only to the nature of the contract, but also to the causes of the impossibility. If the causes were in the contemplation of the parties they are generally speaking bound by the contract if on the contrary they were such as no human foresight could have foreseen the obligations under the contract are extinguished."

Although the facts of *Watergate case* are distinguishable from the facts of this case, the principles of impossibility are applicable, given the applicant, and respondent were customarily married and they terminated their marriage. The deed of settlement entered into more than a year back with monthly maintenance above US$5 000-00 and proprietary consequences which are subject of dispute at time of seeking registration cannot be said to have been contemplated given the suggested financial hardships and change of circumstances. The issues cannot be determined without further evidence.

In clear conflicting positions by the parties, to incorporate the deed of settlement as an order of this court would be absurd, as the order would be left to the discretion of the parties thereby amounting to injustice. The application, given the obvious material disputes of facts and that the parties are not *ad idem* was doomed to fail from the onset.

Accordingly the application is dismissed with costs.

Mtetwa & Nyambirai, applicant's legal practitioners
Musunga & Associates, respondent's legal practitioners