

SIMBARASHE PASIPAMIRE
versus
GLOBAL PROPERTY ADVISORY & TECHNICAL SERVICES

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 October 2017 & 8 January 2018

Opposed Application

Ms *E Drury*, for the applicant
Mr *K Gama*, for the respondent

MANGOTA J: An application in which the applicant moves the court to declare him the sole owner of the property which he and another person jointly purchased from the seller is misplaced. *A fortiori* when the application excludes his co-purchaser whose views remain unknown to the court.

On 12 February 2004, the applicant and his former wife, one Virginia Pasipamire, purchased Stand Number 172 of Roughlands Estate “A” (“the property”) from the respondent. The property is situated in the district of Marondera formerly Marandellas. It is 2346 square metres in extent.

The purchasers did not, for reasons known to them, move the seller to transfer the property into their joint names. They, therefore, have only personal rights against the respondent.

On 18 May, 2011 the applicant obtained a decree of divorce against his wife. The divorce proceedings took place at Leicester County Court in the United Kingdom.

Pursuant to the dissolution of their marriage, the applicant and his former wife filed a consent order with the mentioned court. They did so on 6 February 2013. Paragraph 11 of the

consent order is relevant to the present application. It regulates the parties' division of property post their divorce. It reads:

“II. TRANSFER OF PROPERTY CONDITIONAL UPON PAYMENT OF LUMP SUM

- (a) The Petitioner shall transfer to the Respondent upon payment of the lump sum referred to in paragraph 10 above all his legal estate and beneficial interest with full title guarantee in the freehold property 16 Southfield Close, Leicester LE 29 NW registered at the Land Registry under title number LT 131537 subject to the mortgage secured thereon in favour of HSBC.
- (b) The Respondent shall transfer to the Petitioner all her legal estate and beneficial interest within the properties known as “Marandellas” 2346 square metres, Zimbabwe and Good Hope Stands, Lot 11, West Gate, Zimbabwe on or before the 28th day of February 2013...”

It is mentioned, in passing, that the applicant was the petitioner and his *ex-wife* the respondent in the consent order which was filed with the court. Paragraph 10 of the order, it is observed, made reference to a lump sum order. The respondent was, in terms of the paragraph, enjoined to pay or cause to be paid to the petitioner a lump sum of €20 000. She was to pay or cause to be paid to him the sum in question on or before 28 February 2013.

It was on the basis of clause 11 (b) of the consent order that the applicant filed this application. He claimed that he is the sole owner of the property. He drew what he termed an addendum to the agreement of sale which his *ex-wife* and him concluded with the respondent on 12 February, 2004. He moved the court to:

- i. declare that the respondent infringed on his right to the property when it refused to sign the addendum to reflect that he is the sole owner of the property – and
- ii. compel the respondent to sign the addendum to the agreement of sale so as to give effect to his rights as the sole owner of the property [emphasis added].

The respondent opposed the application. It submitted that what he moved the court to grant him was/is akin to requesting the court to compel it to conclude a contract with him. It challenged the authenticity of the decree of divorce and the consent order which the applicant attached to his application. It insisted that the application could not succeed without a joinder of his former wife. It moved the court to dismiss the application with costs on a higher scale.

Four elements constitute the contract of purchase and sale. These are:

- a) the seller who wants to sell;

- b) the buyer who wants to buy;
- c) the thing or the subject – matter of the contract - and
- d) the price. (See *Norman's Purchase and Sale* in South Africa 4th ed, p 2:
Mackenrtain's Sale of Goods in South Africa, 4 ed, p 28 ff).

Where one of the elements is missing, the contract is not one of sale.

The respondent stated, and correctly so, that it sold the property to two purchasers. These are the applicant and his *ex-wife*. It insisted that the *ex-wife* should have been joined to the proceedings.

The applicant stated that what he was seeking was a novation of the parties. Whatever that meant remains anyone's guess. The term which he used to describe what he intended to achieve is not materially different from asking the respondent to enter into a new contract with him to the total exclusion of his *ex-wife* who, as he admitted, jointly purchased the property with him. The addendum which he attached to his application is nothing but a new contract which he wants to consummate with the respondent. That contract, if sanctioned, would have two and not three, parties as is the case with the parties' contract of 12 February 2004.

The word addendum does not, in fact, fit into the circumstances of the applicant's objective. Mirriam – Webster com/dictionary defines *addendum* to mean a *thing added; addition*. Free Dictionary defines the word to mean "*something added; an addition*. Business dictionary.com defines *addendum* to mean "*information attached or added to clarify, modify or support the information in the original document or written work*" and Cambridge English Dictionary defines the word to mean "*something that has been added to a book, speech document.*"

The above mentioned definitions show, in clear terms, that the applicant is seeking an alteration of the original contract. He wants something which excludes his wife added to it.

Whether or not the added information seeks to clarify, modify or support the contents of the original contract is not the issue. The bottom line is that the court cannot, legally speaking, compel the respondent to enter into this new contract with him. New in the sense that, whereas the original contract has two purchasers, the contract which the applicant intends to conclude with the respondent has only himself as the purchaser of the property which he jointly purchased with his former wife in 2004. I, in this regard associate myself with the *dictum* of INNES CJ who, in *Ambrose & Aitken v Johnson & Fletcher*, 1917 AD 327 at 343 eloquently enunciated the principle

that it is not for the court to remake a contract of the parties. In *Holmes v Palley* 1975 (2) RLR 98 (AD) at 105 C BEADLE CJ repeated INNES CJ's sentiments and said:

“when parties make an agreement , each party is entitled to expect that the other party will abide by it. One party is not entitled to expect that the other party will carry out an agreement which is different from the one agreed to simply because the other party is not prejudiced by the difference.”

In applying as he did, the applicant placed reliance upon the consent order. He submitted that his former wife fell out of the equation by virtue of the same. He stated, in paragraph 12 of his answering affidavit, that:

“12. My former wife no longer has any interest in the property, given the order already issued out by the Leicester County Court. The consent paper is akin to an agreement between the parties and there is no reason for the respondent's refusal to simply disregard the same.”

The respondent did not mince its words. It challenged the authenticity of the consent order. It did so in its opposing affidavit which it filed with the court on 21 March, 2017.

The applicant became aware of the respondent's challenge of the consent order when he received the latter's opposing affidavit. He, for reasons known to himself, did not move to address that concern of the respondent. All he did was to state in paragraph 12 of his answering affidavit that:

“if the Respondent's refusal to sign the addendum arose from a concern regarding the authenticity of the document, it ought to have advised me of the same and I would have dealt with that concern accordingly.”(emphasis added).

The question which begs the answer is has he addressed the respondent's concerns. He filed his answering affidavit on 17 May, 2017. He filed his heads of argument on 21 June, 2017. The application was heard on 25 October, 2017. What the respondent raised in March, 2017 remains unaddressed todate. That fact alone places the applicant's abovementioned statement into some very serious doubt.

The applicant relied on paragraph 11 (b) of the consent order. He, however, did not aver, in his founding or answering affidavit, that the parties complied with paragraph 12 of the same. The paragraph is critical to the present application in a number of respects. It deals with the parties' clean break. It reads:

“12 CLEAN BREAK: CONDITIONAL (INCLUDING UPON DEATH)

Upon completion of the transfer of 16 Southfield Close, Leicester LE 29NW provided by paragraph 11a and upon the completion of transfer of the properties known as “Marandellas”,

2346 square metres, Zimbabwe, and Good Hope stands, Lot 11, West Gate, Zimbabwe and payment of the lump sum as provided for by paragraph 10 of this order and compliance with the undertakings to the court provided for by the recitals of this order the parties' claims for financial provision, pension sharing and property adjustment orders do stand dismissed." (emphasis added).

The long and short of the above cited paragraph shows that each party to the divorce had to perform certain functions which were/are in line with the consent order. The applicant did not state that each party performed its own side of the order. All he did was to cling on to paragraph 11 (b) and apply as he did.

The position which the respondent took remains unassailable. It sold the property to two persons. It is being cautious not to sign the addendum which the applicant single-handedly prepared without its input or that of his *ex-wife*.

The respondent is not privy to the divorce proceedings which took place at Leicester County Court. It stated, and correctly so, that it does not know the authenticity or otherwise of the consent order. Where the order is not authentic and the respondent signs the addendum as the applicant insists it should, it runs the risk of having to content with his *ex-wife* for having disposed of her one- half share in the property without her consent or authority.

The applicant and his former wife do have personal rights against the respondent. Their rights arise from the contract of sale which the three of them concluded in 2004. It is, therefore, unclear on what basis the applicant states in the draft order that he is the sole owner of the property. Clause 1 of his draft order reads, in part, as follows:

"IT IS HEREBY ORDERED THAT:-

Respondent's refused to sign the addendum--- infringes on applicant's rights as the sole owner of this property and it is hereby declared unlawful." (emphasis added)

Clause 2 of the same reads:

"2. In order to give effect to applicant's rights as set out in para 1 above, the respondent is compelled to sign an addendum to the sale agreement reflecting the applicant as the sole owner of Stand No 172 of Roughlands Estate 'A' Marandellas." (emphasis added)

What the applicant moved the court to grant to him is incompetent. He is confusing real rights with personal rights. He has no real rights to the property. He has only such when the respondent transfers the property into the joint names of his *ex-wife* and him. The respondent

cannot transfer the property into his name alone when his former wife and him jointly purchased the same.

The consent order which the applicant relies upon does not suffice. *A fortiori* when, as *in casu*, the respondent challenges its authenticity. Some statement from the applicant's former wife stating her attitude to the issue of the parties' contract of February 2004 and the transfer of the property into the applicant's name is a *sine qua non* aspect to the resolution of the present matter.

The application was prematurely brought before the court. It has a lot of loose ends to it. It cannot succeed. It is, therefore, dismissed with costs.

Honey & Blanckenberg, applicant's legal practitioners
Gama & Partners, respondent's legal practitioners