HB 62-19
HC 1242/18
XREF HC 1602/18

BONANG FAKAZI DUBE
versus
EKHETHELENG ROSELYN DUBE (nee NOKO)

HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 28 FEBRUARY 2019 AND 2 MAY 2019

Opposed Application

T Masiye-Moyo for the applicant
N Mazibuko for the respondent

MABHIKWA J: This is an application wherein the applicant sought the following relief:

1. That respondent be ordered to sign all the necessary papers for the sale and transfer of stand number 598 Scone Drive, Killarney, Bulawayo, which sale and transfer shall be to the highest offeree or above US$140,000-00 as may be secured by the first of the following state agents; John Pocock and Co. (Pvt) Ltd, Ken Estates agents: Rodor Properties (Pvt) Ltd and Bulawayo Real Estates agents, failing which the Deputy Sheriff be authorized to sign the said papers.
2. That the respondent pays the cost of this application on a scale as between a legal practitioner and his client.

The brief facts are that on 30 April 2018, applicant filed his application, wherein he stated that the application was premised on the common and undisputed following facts:

a) That he presently resides at the said number 598 Scone Drive, Killarney, Bulawayo whilst the respondent resides in the United Kingdom.
b) That the parties were married but later divorced in terms of a judgment of the court by the Honourable JUSTICE MATHONSI handed down on 23 February 2018 in case number HB 33-17 (HC 2790-14)

c) That in terms of paragraphs 4, 5, and 6 of the said judgment the matrimonial home (No. 598, Killarney, Bulawayo) was awarded to both parties in equal shares. Firstly, that the property be valued by Estates agents appointed by the Registrar of this Honourable Court to determine its value, and;

Secondly, that each party be granted the right to buy out the other within three months following such evaluation failing which the house would be sold by estate agents to the best advantage and the proceeds be shared equally between the parties.

It was also common cause according to applicant that the Registrar of this Honourable Court, at the instance of the parties, appointed estate agents who valued the property at US$65 000-00. Respondent indicated by letter, her disapproval of the evaluation amount. Applicant concurred with her.

Documents attached also show that thereafter and for some time, the parties agreed to have various Estate agents marketing the house to the highest bidder. They eventually got an offer of US$140 000-00 although they had been of the view that the house was valued at US$150 000-00 or more. As the parties had agreed to sell the house to the highest bidder, applicant says he instructed his legal practitioners to accept that offer as it was apparent that it was the highest. He was advised by his legal practitioners that they were still waiting to hear from the respondent's legal practitioners.

Respondent then ultimately reneged on the agreement to sell to the highest bidder. Instead, her legal practitioners advised by letter that she had decided "to work harder" towards buying out the applicant. Applicant felt that this new stance by the respondent was contrary to the order of the court as well as the agreement by the parties to sell to the highest bidder through Estate agents and share the proceeds equally. Applicant averred and argued that whilst he has continuously resided in the said property for so many years, the respondent is now a citizen of the United Kingdom and that her conduct and change of goal posts was motivated by malice and meant to frustrate him. He argued that whilst he had the capacity to buy out the respondent himself, he submitted himself to the agreement the parties entered into and more importantly to the judgment of the court.

The respondent on the other hand, opposed the application and filed a counter application seeking the following relief.

1) That the counter respondent's application be dismissed with costs.
2) That it be declared that due to the parties' rejection of the valuation report by Knight Frank dated 31 May 2017, in respect of stand 598 Marvel Township 2 of Marvel A Bulawayo measuring 4 940 square metres in extant also known as No. 598, Scone Road, Killarney, Bulawayo, the option given to either party to buy the other out within 3 months as per No. HB 33/2007 did not come into effect and remained available to either party pending a further valuation.

In opposing the application, the respondent in short and in effect argues that it is true she never agreed with the initial evaluation report of US$65 000-00 by Knight Frank which applicant also rejected. She argues further that she never agreed that US$140 000-00 was to the best advantage.

Respondent argues that she insisted that there be a better offer than US$140 000-00, but that after realizing that the applicant was content with the US$140 000-00 offered, she then decided to buy him out of that price-albeit long after the expiry of the three months grace period to buy out as ordered in MATHONSI J's judgment. Respondent therefore contends that she should be allowed to work towards buying out the applicant on the offered amount or, alternatively, a new evaluation be done and the three months grace period starts counting afresh. Her counter application is somewhat similar to her notice of opposition with minor modifications. She submits that applicant in the main application will not be prejudiced in any way if she buys him out. She then submits also that CABS is willing and able to provide the finance to enable her to buy out the applicant (underlining is mine).

She thus seeks an order compelling applicant (respondent in-reconvention) "to co-operate with CABS" including signing all relevant papers "to enable CABS to process the mortgage finance." (Underlining is mine)

The Law

Court judgments and orders should be read and understood for what they say without contaminating them. Unless appealed against, set aside or otherwise reviewed by a superior court, their legal force and scope are common knowledge, and binding.

Paragraph 5 and 6 of MATHONSI J's order of 23 February 2017 was clear and unambiguous. In respect of the matrimonial home, subject of this application anyway, the parties were granted either option (1) contained in paragraph 5 of the order, failing which, option (2), which is contained in paragraph 6 of the order would then kick in. There was no room and in fact there is no reasons for any one party to surmise, speculate or re-negotiate the order, including the three months grace period after evaluation of the house by an Estate agent appoint by the Registrar. It should be noted that the order also does to give anyone party the monopoly of first option to buy out the other as respondent now appears to behave as if she had that monopoly.

A reading of the court order by MATHONSI J particularly clause 6 clearly means to me that if for any reason the parties fail to comply with, or decide not to take the option in clause 5, then clause 6 kicks in. it reads as follows:

> "In the event of the parties' failure to exercise the option given to them by clause 5 herein, then ----."

In the court's view, that is what the applicant is sticking to whilst respondent is seeking either a re-interpreted or a re-negotiated clause 5. This is what is shown by Annexure "K" (page 50) of the application and the generality of her opposing affidavit. In fact in her counter application and relief sought, she argues that applicant should, in effect, assist her to obtain the funds to buy him out. She does not even have the money but instead wants him to assist her get that money. If he does not, then she seeks an order from the court compelling him to do so. Surely, nothing can be stranger in the circumstances. It is the height of absurdity.

Further, the sum total and effect of the order sought in her counter application is a complete review of the judgment by MATHONSI J.

In *Godza* v *Sibanda and Another* -2013 (2) ZLR 175 (H) per GUVAVA J (as she then was) the parties lived in an unregistered customary law union. They agreed that they had a tacit universal partnership which had broken down leading to the need to share the assets they had acquired during the partnership. After initially disputing over the sharing of the said assets, they eventually resolved the dispute by entering into a deed of settlement. On 16 November 2010, the Deed of Settlement was incorporated into a court granted by GUVAVA J (again as she then was). The court order read in short that;

It is ordered that;

1. The dissolution of the universal partnership of the parties be and is hereby confirmed.
2. The deed of settlement signed by the parties be and is hereby incorporated into this order.
3. Each party bears his or her own costs.

It was common cause that the parties had not strictly complied with the court order. They had sold the Helensvale property through Robert Root instead of Kennan properties. They further agreed that the applicant's share of in the Helensvale property be retained by the respondent as part payment of the buying out of her share in the Eastlea property. In short, they, in a number of ways acted in contract to the terms of the court order. When the eventually disagreed again, one of them wanted them to stick to the court order whilst the other wanted novation, which in my view is the scenario in *casu*. UCHENA J then held that the parties cannot novate a court order, even in circumstances where their own agreement had been incorporated into a court order. The esteemed judge quoted with approval Herbstein and Van Winsen- *The Civil Practice of the Superior Courts in South Africa* 3rd edition at page 464 wherein commenting on the effect of a court order, the esteemed authors said;

> "As long as it stands unaltered or unrescinded, it is the conclusive proof as against the parties of finding of facts directly in issue in the case actually decided by the court."

The court held further that a court order has the same effect as a court's judgment, even if it was granted by consent. The parties must apply for its amendment or variation if they want to depart from its terms. The court hearing a subsequent dispute is bound by the terms of the initial court order or judgment. It cannot grant a court order which conflicts with its previous order.

Also in *Kassim* v *Kassim* 1989 (3) ZLR 234 (H) the court dealt with division of assets in a matrimonial matter and the extent to which the court may later expand or supplement its own orders.

It is clear from precedents, that the general principle is that once a court has dully pronounced a final judgment or order, it has no authority to correct, alter or supplement it because it becomes *fuctus officio*. The principal judgment or order may be supplemented only in respect of accessory or consequential matters such as costs of suit or the interest on a judgment debt, which the court had overlooked or inadvertently omitted. This is a power exercisable by a judge or court, irrespective of whether he, she or it had made the original order.

These were the sentiments of the court also in *Baron* v *George* -1994 (2) ZLR 141 (S) as well as in *Bottom Armature Winding (Pvt) Limited* v *Clamison and Plaskit (Pvt) Limited and Another* HB 38/18.

It is clear in *casu* that when the parties rejected the valuation of the house in terms of clause 5 which gave the value of US$65000-00 the intention and the effect was that clause 6 comes into effect. Respondent cannot be allowed to try and create a mixture of clause 5 and 6 to her advantage, neither can I be persuaded to revisit and purport to review a judgment reached and pronounced by my brother judge.

I re-iterate that judges need to take care and guard against the growing temptation to be asked and dragged by legal practitioners into revisiting their own earlier judgments or court orders.

Accordingly, the application by applicant succeeds and it is ordered that;

1. Respondent be and is hereby ordered to sign all the necessary papers for the sale transfer of stand number 598 Scone Drive, Killarney, Bulawayo which sale and transfer shall be to the highest offeree at or above US$140 000-00 as may be secured by the first of the following estate agents; John Pocock and Company (Pvt) Limited, Ken estate Agents, Rodor Properties (Pvt) Limited, and Bulawayo Real Estate Agents failing which the Deputy Sheriff be and is hereby authorized to sign all the said papers.
2. Respondent to pay the costs of this application.

Masiye-Moyo and Associates, applicant's legal practitioners
Messrs Calderwood Bryce, Hendrie and partners, respondent's legal practitioners