

BETTY RUZVIDZO  
versus  
JEREMIAH WARIKANDWA

HIGH COURT OF ZIMBABWE  
MAXWELL J  
HARARE, 9 June & 7 July 2022

### **Opposed Application**

*C Warara*, for the applicant  
*F G Gijima*, for the applicant

#### **MAXWELL J:**

Applicant approached this court seeking an order couched in the following terms

“IT IS ORDERED THAT:

1. The respondent shall pay market value of the property called 17 Duicker Close Borrowdale within 30 days of the order thereof being 15% of the value of the property as ordered, failing which the property shall be sold by an Estate Agent nominated by the Registrar of the High Court of Zimbabwe within 10 days after failure by the respondent to settle the value of the property.
2. The Estate Agent so nominated shall upon selling the property pay the applicant her 15% value of the property upon transfer which shall be done by the applicant’s legal practitioners.
3. The respondent shall pay the costs of this application on legal practitioner’s client scale.”

#### **BACKGROUND**

The parties were husband and wife who divorced in terms of a judgment dated 13 December 2018. In terms of that judgment the property known as 17 Duicker Crescent was distributed by awarding 85% share to the respondent and 15% share to the applicant. Respondent noted an appeal against the divorce judgment to the Supreme Court. On 13 March 2020 the Supreme Court set aside the distribution of the parties property and remitted the matter for a determination of what constitutes a distribution of the assets of the spouses on a 50-50 basis. On 8 July 2020 the parties signed a Deed of Settlement in which they agreed to revert to the distribution of the assets of the spouses as ordered in the judgment dated 13 December 2018. Subsequent to the Deed of Settlement, on 15 September 2020 an order was issued confirming that the distribution of the assets of the spouses shall remain as ordered on 13 December 2018.

Applicant stated in her founding affidavit that respondent has not been able to deliver payment of the 15% due to her since the recording of the order by this court. She further stated that respondent indicated that he wanted to pay ZW 30 000, which position is unfounded as the property is no longer valued at US\$30 000 which was the value in 2018 and also the conversion value is no longer the same. Applicant indicated that in his letter of 3 November 2020 respondent hides behind the case of *Zambezi Gas Zimbabwe (Pvt) Ltd v N. R Barber (Pvt) Ltd & Anor* SC 3/20. According to her that decision is not authority for her case.

Respondent pointed out in his opposing affidavit that the reason behind the Deed of Settlement was that the parties no longer had appetite to argue the matter as regards what constitutes a 50-50 distribution of the assets of the spouses. He argued that since the recording of the order by consent he has tendered payment to the applicant as per the Deed of Settlement and as per the judgment of this court. He further argued that the order of this court awarded him 85% share in the Duicker property and 15% share to the applicant. Respondent argued that the penultimate part of the relevant paragraph in the order provides him with an option to buy out the applicant's 15% share within six months failure of which the property should be sold on the open market and the parties share the net proceeds in the same ratio of 15% to the applicant and 85% to himself. Respondent further argued that he duly exercised his right of first option to buy out the applicant the moment the matter was finalised on appeal and by way of the Deed of Settlement.

Respondent indicated that the property was valued at \$200 000 on 13 April 2017. He argued that as at date of valuation the rate of the Zimbabwean dollar to the United States dollar was 1:1 and therefore he was obliged to pay \$30 000 to the applicant. He further argued that as the Supreme Court decided that pre-22 February 2019 debts expressed in United States can be discharged by payment in real time gross settlement (RTGS) dollars on a one to one basis as per the *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R Barber (Pvt) Ltd & Another* judgment, SC 3/20, he therefore tendered RTGS \$30 000 in full and final settlement of applicant's 15% in the market value of the Duicker property. Respondent prayed for the dismissal of the application with costs on the legal practitioner and client scale.

In her answering affidavit applicant indicated that the acceptable payment is of the value expressed in the valuation report. She argued that after the effective date of the opening 1:1 parity rate, variance from that rate would be determined from time to time by the rate at which authorised dealers exchange the RTGS for the USD on a willing seller willing buyer

basis. According to her, that value of the property was no longer ZWL \$30 000. She challenged respondent to choose the existing parity rate between the two currencies.

### **SUBMISSIONS BY THE PARTIES**

In her heads of argument, applicant argued that respondent is calling this court to participate in defrauding her and that payment of RTGS \$30 000 would unjustifiably enrich the respondent. She also argued that whilst the market value of the property remained the same, the parity rate at which the authorised dealers exchange the RTGS dollar for the United States dollar on a willing buyer willing seller basis changed.

She reiterated that respondent ought to pay 15% share of the market value of the property. In the event that respondent fails to do so, applicants prayed that the property be sold by an Estate Agent nominated by the Registrar of this court within 10 days after such failure. Further that Estate Agent so nominated shall upon selling the property pay to the applicant her 15% value of the property owed to her.

In his heads of argument, respondent narrated the factors in the case of *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R Barber (Pvt) Ltd & Another (supra)*. He went on to state that there is no argument that his liability to applicant is \$30 000,00 and that the sum is a pre-22 February 2019 judgment debt expressed in United States Dollars. He concluded that this sum can be discharged on and after that date by payment of RTGS dollars on a one-to-one basis.

In oral submissions, Mr Warara asked the court to take judicial notice of the fact that no property is sold on RTGS value, but properties are disposed of in USD. He argued that any party receiving RTGS value receives it on conversion as per the interbank rate. Mr Warara distinguished the *Zambezi Gas Zimbabwe* matter (*supra*) from the present case on the basis that in that case the debtor had already made payment whereas *in casu* there is no payment in the hands of the applicant to date. He argued that the position of the applicant is that the date that matters is 15 September 2020 when an order was given reviving the judgment respondent had appealed against. He further argued that by 15 September 2020 the exchange rate had moved on and therefore any payment to be made must be reckoned after 15 September 2020.

Mr Gijima submitted for the respondent that after the appeal in the Supreme Court, the Deed of Settlement and Order by Consent, respondent tendered payment to the applicant of RTGS\$30 000 being 15% of the sum of the valuation of the property. According to him, in terms of the *Zambezi Gas Zimbabwe* matter (*supra*) there is no room for the parties to convert

the debt owing at the bank rate or any other rate. He reiterated that respondent's argument is simply that he is entitled to pay RTGS\$30 000 and that sum has been tendered.

### **ANALYSIS**

I am persuaded by arguments for the applicant that the *Zambezi Gas Zimbabwe* matter (supra) is not applicable in this case. I say so for the following reasons. On 13 December 2018 the court gave respondent six months from the date of valuation of the property at number 17 Duicker Crescent Borrowdale within which to buy out the applicant's 15% share of that property. The valuation was done on 13 April 2017. It follows that the respondent had up to 13 October 2017 to buy out the applicant. Instead of doing so, applicant appealed to the Supreme Court. On 13 March 2020 the Supreme Court set aside the parts of the order of 13 December 2018 that are relevant to this case, remitted the matter for a determination of what constitutes a distribution of the assets of the spouses on a 50-50 basis. Rather than comply with the Supreme Court Order, the parties entered into a Deed of Settlement that revived the order of 13 December 2018. An order to that effect was given on 15 September 2020. I am of the view that prior to 15 September 2020 there was no judgment debt to talk about. The judgment of 13 December 2018 was suspended by the noting of the appeal by respondent. The judgment debt became owed on being revived by the order of 15 September 2020. It therefore follows that the Law that applied prior to 22 February 2019 cannot apply to this case. The obligation to pay the 15% value of the property became alive on 15 September 2020.

Respondent argued that he tendered payment after the appeal was determined by the Supreme Court. I believe he was tendering the payment on the basis that the relevant part of the judgment of 13 December 2018 gave a grace period within which he was to buy out applicant's share. His belief that that period was still available to him after the order by consent of 15 September 2020 defeats his request to be allowed to pay as if the obligation arose prior to 22 February 2019. Whilst the right to buy out applicant remained, the justice of the case requires that payment be done on the prevailing interbank rate on the date of payment. Sight must not be lost to the fact that the purpose for the payment is to transfer a 15% share of the value of the property to applicant. In my view if respondent was to be allowed to pay RTGS\$30 000 in the circumstances of this case, it would be tantamount to him being awarded a 100% share of the property in question. In the circumstances applicant was correct to argue that the Respondent would be unjustly enriched if he pays in RTGS.

For the above reasons the application succeeds. Applicant prayed for costs on a legal practitioner – client scale. I am not persuaded that they are warranted in this case. Ordinary costs will meet the justice of the case. Accordingly the following order is granted:-

1. The Respondent be and is hereby ordered to pay 15% of the value of the property called 17 Duicker Crescent Borrowdale within 30 days of this order.
2. The payment shall be in United States Dollars or the equivalent amount at the interbank rate prevailing on the date of payment.
3. In the event that respondent fails to pay within 30 days of this order, the property shall be sold by an Estate Agent nominated by the Registrar of the High Court of Zimbabwe within 10 days after the failure by the respondent to pay 15% of the value of the property.
4. The Estate Agent so nominated shall upon selling the property pay the applicant her 15% value of the property upon transfer which shall be done by the applicant's Legal Practitioners.
5. Respondent shall pay costs of suit.

*Warara & Associates*, applicant's legal practitioners  
*F G Gijima & Associates*, respondent's legal practitioners