

JEBES MUCHAPONDWA
versus
VENENCIA MADAKE
and
THE PROVINCIAL MAGISTRATE HARARE
and
MESSENGER OF COURT HARARE
and
MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 26 November 2010 and 13 October 2011

FAMILY LAW COURT

Opposed Matters

Ms T L Karemba, for the applicant
T Moyo, for the respondent

GUVAVA J: The applicant has approached this court seeking the following relief:

- "1. The agreement concluded between the deceased, the late Joseph Muchapondwa and the first respondent on 13 February 2009 be hereby confirmed.
2. Terms of the final order be effected to the point that the execution of the judgment granted in the Magistrate Court Case No 11317/05 be and is hereby set aside because the order was complied with when deceased bought off the first respondent.
3. That there be no order as to costs(unless either party opposes this application in which case the opposing party shall pay the costs thereof)"

The facts that have given rise to this matter are generally common cause and may be summarized as follows: The applicant in this matter is the executor of the late Joseph

Muchapondwa. The first respondent and the late Joseph Muchapondwa (“the deceased”) had a relationship which commenced in 2001 and ended in 2004. In 2005 the first respondent issued summons in the Magistrates Court in case number 11317/05 alleging that she was married to the deceased in accordance with customary law and seeking a share of the matrimonial estate. At the time the deceased owned an immovable property being stand 1110 South View Uplands, Waterfalls, Harare. On 29 April 2005 the court made an order for the sale of the property and also ordered that the respondent be awarded a 40% share of the net proceeds of the sale of this property.

On 16 May 2005 the deceased's legal practitioners filed a notice of appeal against that judgment. In response the first respondent filed an application for leave to execute the judgment pending the appeal, which application was granted on 18 July 2005.

On 30 August 2005, the deceased's legal practitioner filed an appeal against the judgment of the Magistrate Court granting the first respondent leave to execute pending appeal. On 14 October 2005 the deceased's Waterfalls property was advertised for sale in a newspaper. On 17 October 2005, the deceased filed an urgent chamber application in this court seeking to prevent the sale of his property under case no. HC 5273/05. The application was dismissed by this court.

On 5 November, 2005, the deceased through his legal practitioners wrote to the Provincial Magistrate stating that he had noted appeals against both judgments of the Magistrates' Court, and that the reasons in both cases had not been provided despite numerous requests for them. In response, the Provincial Magistrate indicated that she had given an instruction to stop the sale. She also indicated that the Magistrate who had given the judgments against the deceased had resigned and that the reasons for the judgment could therefore not be given.

On 22 November 2005, the deceased, again through his legal practitioners wrote to the Provincial Magistrate stating, *inter alia*, that in view of the failure by the presiding magistrate to give reasons for his orders, an application was being made to this court for these judgments to be set aside. In her response, the Provincial Magistrate reiterated that the reasons for the judgment could not be provided, and that the deceased could proceed to apply to this court for those proceedings to be set aside.

On 29 November, 2005 an application to have the two orders by the magistrate set aside was filed with this court by the applicant under case number HC 6252/05.

On 19 December 2005 the first respondent filed a chamber application in case number HC 6626/05. The deceased opposed that application. The application was granted by this court. No reasons were given. The order granted was in the following terms:

- “1) The first respondent, shall upon service of this order by the Deputy Sheriff confirm sale in execution in this matter forthwith.
- 2.) The fourth respondent proceeds with the distribution plan and transferring property to third respondent forthwith.
- 3.) The second respondent shall pay the costs of the application.”

Following the granting of the above order, the Provincial Magistrate confirmed the sale of the property in dispute to the third respondent on 9 February 2006. The deceased promptly appealed against the order in case number SC 49/06. The appeal was however noted out of time and condonation was declined. The deceased then decided to negotiate an out of court settlement with the respondent in order to save his house from sale. In terms of their agreement he was to pay the respondent US\$8 000-00. On 1 December 2008 and 13 February 2009 the respondent signed affidavits in which she confirmed the out of court settlement and asked the late Joseph Muchapondwa to deposit an amount of US\$12 800-00 (including legal fees) into her bank account being Skylite Trading at FNB bank. She also provided a bank account number in which the money was to be deposited. On 28 February 2009 the deceased then transferred the money from his Standard Bank account in South Africa to the Skylite bank account. A copy of the bank transfer transaction statement which was made by the deceased was filed in the papers. The deceased at the time was unwell and subsequently died in mid 2009. The applicant was appointed as executor to the deceased's estate on 3 November 2009. He has filed this application.

The first respondent opposed the application. In her opposing affidavit she challenged the applicant's *locus standi* to bring the application as she submitted that he was not a party to the agreement. She also stated that the application was not properly before the court as it had been filed outside the ten day period granted by CHATUKUTA J in her judgment. These two points were however not pursued as it was apparent that the executor of the deceased's estate would have *locus standi* to recover the deceased's

property. It was also clear from a proper calculation of the dates that the application had been filed within the time prescribed.

She argued further that the order setting aside the decision of the Magistrates Court under case number HC 11317/05 by MAVANGIRA J was set aside by the Supreme Court on 23 February 2009 and therefore the order authorizing the sale of the property and awarding her a 40% share of the proceeds still stands. She also alleged that she was successful in the application she made before KAMOCHA J as it was granted in default and the applicant was not successful in his appeal to the Supreme Court against that order. Finally she stated that the agreement which they entered into was illegal as it contravened the Exchange Control Act. In a supplementary affidavit she stated that the deceased was in breach of their agreement as he deposited the money outside the time that they had agreed upon. She stated that as time was of the essence in the agreement it was cancelled when he failed to perform.

The second, third and fourth respondents did not file any opposing papers and would no doubt have no interest in the order sought.

There is no doubt from the papers which have been filed before me that the late Muchapondwa and the first respondent entered into an agreement in an effort to settle the dispute between them. The clear intention of the deceased was to safeguard his house where the court had ordered him to pay the first respondent 40% share of the property. In terms of the agreement the amount to be paid and the period within which he had to pay was stated. The first respondent also undertook to withdraw an appeal which was pending in the Supreme Court against the decision of MAVANGIRA J setting aside the Magistrates Court decision once the money had been paid in full. It is also apparent from the papers before me that the deceased effected transfer into the agreed account on 18 February 2009.

It seems to me that the dispute between the parties may be resolved by deciding whether or not the deceased performed in terms of the agreement which he entered with the first respondent. Although this point was raised in a supplementary affidavit without the leave of the court the applicant did file an answer to it. During the hearing counsel of

both sides addressed me on the issue and in my view there would be no prejudice to either party if this evidence is considered.

The parties entered into the agreement by signing three separate affidavits. The first affidavit was by the deceased where he undertook to make the agreed payment within two months of signing the agreement. The agreement was signed on 27 November 2008. On 1 December 2008 the first respondent signed an affidavit agreeing to the terms proposed and stating that she would withdraw the pending case upon receipt of the money agreed upon. In my view at that stage a binding agreement was entered into as between the parties. The terms of the agreement were clear. The deceased was to pay an amount of US\$8 000-00 together with costs in the sum of US\$3 800-00. The amount would be paid within a period of two months. The first respondent would upon receipt of the money withdraw the matter before the Supreme Court and she would not have any further claims against the late Joseph Muchapondwa. In terms of the agreement, the deceased should have thus paid the money by 27 January 2009. The first respondent wrote a second affidavit on 13 February, I will set out in full the affidavit by the first respondent.

"I Venancia Madage agree that after Joseph Muchapondwa deposits money into the account at Skylite Trading Bank FNB account number 62120577012 Branch Code 257705 Eastgate.

And after I have confirmed receipt by the bank this amount of \$12 800-00 so paid is full and final settlement of the debt owed by Joseph Muchapondwa to myself and therefore I will not persue the current appeal in the Supreme Court being a case between me and Joseph Muchapomdwa."

The applicant submitted that this agreement had the effect of extending the time within which the deceased was obliged to pay as it was made after the time agreed. I am of the view that the applicant is mistaken in his interpretation of this affidavit. The respondent's affidavit of 13 February appears in my view to reconfirm the agreement which she had with the deceased on the 8th of December 2008. One can only assume that had the deceased advised the respondent of the payment before the date of hearing perhaps the matter in the Supreme Court could have been withdrawn. The first respondent states that the deceased did not advise her that the money had been deposited

into the account as agreed. This is not disputed by the applicant who states that the deceased had no obligation to inform the first respondent of the deposit. In view of the fact that the payment was made on 18 February 2009 which was after the agreed time, and the matter which was pending in the Supreme Court had been set down for hearing and on 23 February 2009, the deceased should have ensured at the very least that he advised the first respondent of the transfer or made certain that he was represented at the hearing. He did nothing and a default judgment was granted against him on appeal.

In my view the deceased failed to pay in accordance with the terms of their agreement and was in breach of a material term of the agreement.

It is a general principle of our law that a party which is in breach of an agreement or has failed to comply with its obligations in terms of an agreement cannot seek specific performance of the agreement. This principle is set out in the case of *Mbaiwa v Chitakunye* 2009 (1) ZLR 314 which is almost on all fours with the present matter. At p 318 F MALABA JA (as he then was) cited Anson's Law of Contract 26 ed at 452 which states as follows:

"Tender of payment to be valid performance....must observe exactly any special terms which the contract may contain as to time place and mode of payment" (See also *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391.)

The applicant in my view cannot seek to enforce the terms of the agreement that the deceased failed to comply with. The 1st respondent was entitled to treat the breach as a repudiation of contract releasing her from the duty to perform under the contract.

In the result I make the following order:

The application is hereby dismissed with costs.

Thondhlanga & Associates, applicant's legal practitioners
Mutamangira & Associates, 1st respondent's legal practitioners