

ANNA KUDAIDZA
versus
FREDDIE CHIMBARI N.O.
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 22 August 2013

Opposed application

F.M. Katsande, for applicant
First respondent, in person

CHITAKUNYE J. On the 21st March 2007 this court granted an order by consent in HC6497/05 stating, *inter alia*, that: -

- “1. Within 60 days of receipt of a valuation report issued by a valuator nominated by the second respondent, the applicant shall pay to the estate of the late Lovemore Mutandwa DR1135/05, 50% (fifty percent) of the assessed value of Stand 3693 Highfield (the property).
2. Within a further 10 days of the payment of the 50% share, the first respondent, failing which the Deputy Sheriff, shall sign such documents as may be necessary to pass transfer of the property to the applicant.
3. The third respondent shall register the transfer of the property in favour of the applicant.....”

On the 31 December 2011 applicant approached court seeking an order that:-

- “1. The delivery of the payment in the amount of ZW\$ 750 000 000 to the offices of the second respondent and received by second respondent on 21 November 2008 be and is hereby confirmed.
2. The receipt by the second respondent of the cheque be and is hereby deemed to be the applicant’s compliance with the order by MAKONI J in case 6497/05 dated 21 March 2007 to pay the estate Lovemore Mutandwa DR 1135/05 50% share of the assessed value of Stand 3693 Highfield, Harare.

3. The first respondent shall within 10 (ten) days of the service of this order on him sign such documents as may be necessary to pass transfer of the said Stand to the applicant.
4. Failing compliance, the Deputy Sheriff be and is hereby directed to sign the said documents.
5. The costs of the application shall be borne by the estate late Lovemore Mutandwa.”

The applicant’s case was premised on her assertion that she had complied with the court order of 21 March 2007. The first respondent opposed the application.

The applicant’s case was to the effect that after the judgment of 21 March 2007, an evaluator was appointed who duly evaluated the property for the first time. When she made effort to pay the 50% share to estate late Lovemore Mutandwa, the Widow of the late Lovemore Mutandwa could not accept the payment. A second evaluation was conducted and on 28 August 2008 the evaluation report was received. The assessed value was set at ZW\$1 500 000 000. The applicant was therefore required to pay ZW\$750 000 000 to estate late Lovemore Mutandwa.

On 23 October 2008 applicant’s legal practitioners wrote to the second respondent advising that applicant had secured the ZW\$750 000 000 (see annexure ‘d’).

On 21 November 2008 applicant’s legal practitioners wrote a letter to the first respondent and attached a cheque for ZW\$750 000 000. That cheque was returned. See annexure ‘d’ and ‘e’.

On 24 November 2008 applicant’s legal practitioners wrote a letter to second respondent to which they alleged a cheque for ZW750 000 000 in favour of estate Late Lovemore Mutandwa was attached.

After making the payment applicant expected transfer to be effected but alas nothing of that took place.

The first respondent contended, *inter alia*, that in respect of both occasions when evaluation was done applicant tendered payment late hence he could not accept the payments as by then the value would have been eroded by hyper inflation. He also alluded to the fact that the widow expressed reluctance to receive such devalued share.

From the submissions made it is common cause that the valuation relevant for this application is the one for the 28 August 2008. The main issue is whether applicant paid the

50% share to estate late Lovemore Mutandwa and whether such payment, if any, was made within the period provided in the court order.

The applicant's version shows that after receipt of the evaluation report on 28 August 2008, applicant secured the \$750 000 000 on 23 October 2008 and paid that to her legal practitioners on about 3 November 2008. In this regard her legal practitioners' letter to first respondent dated 21 November 2008 reads in part:-

“As we indicated on 3 November our client has remitted to us \$750 000 000 being the 50% award due to the estate Mutandwa.

Mr. Chimbari advised us that he would revert with written instructions on collection of the payment. To date there has been no communication on the payment.

We have conferred with the Master on the payment and we have been directed to remit the payment in favour of estate late Mutandwa to yourselves.

Please find attached our cheque in the amount of \$ 750 000 000 (seven hundred and fifty million dollars) which is in full and final settlement of our client's obligations in terms of the consent judgment dated 21 March 2007.”

It is common cause that the valuation report was received on 28 August 2008 and so the 60 days within which the 50% award was to be paid was to expire on or about 27 October 2008. As at that date no tender of payment had been made. The first respondent was thus justified in rejecting the tender of payment made on 21 November 2008 on the basis that it was out of time.

The applicant also argued that the purported payment to the Master's office on 24 November was in compliance with the order. Unfortunately that was way outside the time limit. In any case that payment is disputed. Apart from the applicant's legal practitioner's letter indicating that the cheque was attached to it, there was no other evidence or proof that the cheque was in fact attached to that letter or was received by second respondent. The documents filed by applicant show that the officer who applicant said received the cheque at second respondent's offices denied this. In the absence of proof that the cheque was in fact received, it remains applicant's word against the second respondent's word.

The applicant's legal practitioner confirmed that the account on which the cheque was drawn was in fact not debited with the amount of the cheque.

The suspicion by applicant's counsel that the Widow to the late Mutandwa may have influenced the officer in second respondent's office not to process the cheque remains only a suspicion. Counsel's contention that payment by cheque sent to second respondent is

compliance enough is without merit. If he sent the cheque but did not secure proof that the cheque was in fact received he only has himself to blame.

I am however of the view that the case should be determined on whether applicant met her obligation in terms of the court order. The pertinent clause of the order stated in no uncertain terms that:-

“Within 60 days of receipt of a valuation report issued by a valuator nominated by second respondent, Applicant shall pay to the estate of the late Lovemore Mutandwa DR 1135/05, 50% (fifty percent) of the assessed value of stand 3693 Highfield (the property)”

The documents filed of record show applicant did not do this. Neither tender nor payment was made to estate late Lovemore Mutandwa within 60 days of the date of receipt of the valuation report. Applicant's own documents confirm this. The fact that the widow of the late Lovemore Mutandwa was not happy receiving the share in a particular currency did not take away the applicant's obligation to pay within 60 days in the currency of the valuation. The scenario would have been different had he tendered payment within the 60 days and such payment rejected. In *casu*, the tender that was made was made after the expiration of the 60 day period. The applicant has no one to blame but herself for the delay in tendering payment. Accordingly the application is hereby dismissed with costs.

F. M. Katsande & Partners, applicant's legal practitioners
First respondent, in person