

LEON GODZA
versus
MAVIS SIBANDA
and
REGISTRAR OF DEEDS.

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 25 June & 15 August 2013

OPPOSED APPLICATION.

J Mutizwa, for the Applicant
B Diza, for the 1st Respondent.

UCHENA J: The applicant and the 1st respondent lived together in an unregistered customary law union. They agree that they had a tacit universal partnership which has broken down leading to their having to share the assets they had acquired during the universal partnership. They initially disputed over the sharing of their assets but eventually resolved the dispute by entering into a deed of settlement. The deed of settlement records the party's agreement on the existence of the universal partnership. It provides for the custody and maintenance of their minor children and the distribution of their movable and immovable property.

The further dispute which I have to resolve is on their immovable property for which their deed of settlement had provided for as follows;

“5. Immovable Property

A. No 21 Smit Crescent, Eastlea, Harare

- (i) It is agreed that immovable property known as No. 21 Smit Crescent, Eastlea Harare, be shared in such a way that the defendant gets 60% with the plaintiff getting 40%.

- (ii) The immovable property in question shall be valued and sold on open market by Kenan Properties with the proceeds being shared in percentages provided for in paragraph (i) here above.
 - (iii) That valuation fees and any other related costs shall be shared in proportions of each party's entitlement.
- B. Stand No 222 Helensvale Township, Harare.
- (i) The parties to this settlement agree that property known as Stand No. 222 Helensvale Township (undeveloped stand) of Lot D. E Helensvale be shared in such a way that each party gets 50%.
 - (ii) That the immovable property in question shall be valued and sold by Kenan Properties on open market with the net proceeds being shared equally between the parties.
 - (iii) That valuation fees and related costs shall be shared equally between the parties."

The deed of settlement was on 16 November 2010 incorporated into a court order granted by GUVAVA J. The court order reads as follows;

"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/her costs".

It is common cause that the parties have not strictly complied with the court's order. They sold the Helensvale property through Robert Root instead of Kenan Properties. They further agreed that the applicant's share in the Helensvale property be retained by the respondent as part payment of the buying out of her share in the Eastlea property. They initially agreed on a purchase price of US\$85 000 -00 for the Eastlea property. That agreement failed, but the parties entered into written communication on a further agreement in which the applicant was to buy out the respondent's share of the

Eastlea property which the applicant was to buy at the price of US\$110 000 -00. The correspondence between the parties indicates that an agreement had been entered into.

Mr *Mutizwa* for the applicant submitted that they had novated their Deed of Settlement. Mr *Diza* for the respondent argued that the agreement for the sale of the Eastlea property to the applicant had not been concluded because the parties' minds had not met on the purchase price of the Helensvale property whose sale was linked to the sale of the Eastlea property. He referred to an agreement of sale of the Helensvale property for US\$55 000 -00, which is on pages 56 to 62 of the record, and another agreement of the sale of the same property on pages 82 to 87 at a price of US\$65 000 -00. An examination of the two agreements reveals that the agreement for US\$55 000-00, was not signed by both parties and their witness's. That agreement, was therefore superceded, by the later agreement, for the sale of the same property for US\$ 65 000 -00, which was signed by both parties. Mr *Diza* for the respondent later conceded that a binding agreement had been entered into for the applicant to buy the Eastlea property for US\$110 000-00. He however relied on the parties being bound by the court order which incorporated their Deed of Settlement. He argued that while the parties can novate their agreement they can not novate a court order as that is alien to our law. This argument while sound at law is not being honestly made as the respondent participated in departing from the terms of the court's order in respect of the Helensvale property. His argument can only be sound in the sense that parties can not ask a court to enforce their departure from the terms of a court order without first seeking the variation or amendment of that court order.

Mr *Mutizwa* persisted with his submission, that a court order can be novated. He submitted that parties frequently depart from the terms of court orders they will have obtained. He however told the court that he could not find any authorities for his argument in spite of a spirited research.

Novation is an agreement between a creditor and a debtor to an existing obligation whereby the old debt between them is extinguished and a new obligation is created in the place of the old one. The parties in such an agreement are the creditor and the debtor. It

does not include a court. Therefore where the old agreement has been incorporated into a court order the parties can not novate it.

Herbstein And Van Winsen in their book “The Civil Practice Of The Superior Courts In South Africa” Third edition, at p 464, commending on the effect of a court’s judgment said; it

“as long as it stands unaltered or unrescinded is the conclusive proof as against the parties of findings of facts directly in issue in the case actually decided by the court.”

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 the subsequent dispute is bound by the terms of the court order. It can not grant a court order which conflicts with its previous order. In the case of *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (HC)

2000 (1) ZLR p503 at page 519 F to G CHINHENGO J said;

“ It is indeed true that “all orders of this court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside” (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494), but the same cannot be said where the person affected by an order of court goes back to that court, timeously in the circumstances, to explain himself and his perceived inability to comply with the order issued against him. He is in a sense purging his contempt, as it were. This I find to be the situation in casu in respect of the applicant's conduct relative to paras 6, 7 and 8 of the consent order. The application filed by the applicant cannot in my view be construed as a willful intention to disregard the order of the court. I would not find that the applicant is in contempt of the consent order in respect to his inaction relative to paras 6, 7 and 8 of the order.”

In the case of *Commercial Farmers Union v Mhuro & Ors* 2000 (2) ZLR 405 (SC) at page 408 E GUBBAY CJ commending on the force and effect of a court order said;

“The fact that an order of the Supreme Court was made by consent does not alter the situation. It remains an order of the Supreme Court and may only be varied, set aside or, in any way interfered with by the Supreme Court.”

These cases confirm that GUVAVA J’s order remains in force even though it was granted by consent. I am therefore satisfied that the applicant’s application to enforce

what it calls a novation of the parties' deed of settlement which was incorporated into a court order, can not be granted because its terms conflict with the terms of a standing court order.

The applicant's application is therefore dismissed with costs.

Messers Chihambakwe, Mutizwa & Partners, applicant's Legal Practitioners.
Messers Mtetwa and Nyambirai, first respondent's Legal Practitioners