

GRAIG NEIL EVANS
versus
HEATHER JANE EVANS

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 13 July 2016 and 14 July 2016

Application to strike out Admission and include same as an issue for trial

T Zhuwarara, for the plaintiff
F Girach, for the defendant

MWAYERA J: The matter was set down for trial following issuance of summons for divorce and ancillary issues thereto, to which the defendant entered appearance to defend and subsequent pleadings. At pre-trial conference stage the parties entered joint admissions filed of record on 4 December 2015. The Joint Pre-Trial Conference minute filed on 19 January 2016 presided over by my sister judge Ndewere is reflective of attendance by both the plaintiff and defendant. With their legal practitioners the parties agreed on all issues as reflected on the Joint Admissions and sought to refer the only disputed aspect of maintenance for trial. At hearing the trial-able issue was what is the correct level of maintenance payable by the plaintiff in respect of the minor children.

It is with this background that Mr *Zhuwarara* sought, before hearing of trial to strike out the admission as reflected in para 5 of the Joint Admissions. Para 5 reads as an admission:

“That the immovable property comprising the land and the two residential properties situate thereon is the inheritance of the defendant and as such, the plaintiff will not pursue his claim for compensation in these proceedings against the defendant, but in place thereof will claim against the Executor of the Deceased Estate of the defendant’s late mother in which Estate the said property is still registered.”

It is not in contention that the immovable property referred to in para 5 of the Joint Admissions is not under title of either the plaintiff or the defendant neither is it under their joint title but that it is part of the deceased Estate of the late defendant’s mother, Meri De Wilten Perrow. This is deduced from the pleadings and the submissions by both counsels in

the application. Para 9:4 of the plaintiff's declaration outlines the circumstances under which the couple in this case accessed the defendant's mother's property and build their matrimonial home. Paragraph 9:4 reads:

"The plaintiff and the defendant entered into a verbal agreement with the defendant's late mother, Meri De Wilton Perrow sometime in the 1990's, and in terms of the said Agreement, the plaintiff and the defendant were allowed to build their matrimonial home and effect improvements thereon for the benefit of the plaintiff and defendant on a certain piece of land being the remainder of Lot 484 Greendale situate in the district of Salisbury, commonly known as No. 222 Arcturus Road, Greendale, Harare."

The property and improvements so accessed remained at the defendant mother's Estate and in the absence of evidence to the contrary basic principles of the law of contract are that whatever is built on land in so far as ownership is concerned accrues to the land owner. The recourse open to a party for improvements would lie with a claim for compensation. When the parties entered the Admission which the applicant seeks to resile from the fact that the couple built on the defendant's mother's land was common knowledge.

Given this background what falls for determination is whether or not the plaintiff has shown a reasonable explanation of the circumstances in which the admission was made and the reason why it is being resiled from. Further for consideration is whether or not it is just and proper to grant leave for the admission to be withdrawn.

As a general rule an application for leave to withdraw an admission can be made to the court at any stage. Section 36 Civil Evidence Act and Rule 189 of the High Court Rules is instructive.

"The court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just." my emphasis.

What is just would involve a balancing of the facts and circumstances requiring that law is complied with while at the same time not prejudicing any of the parties. The exercise of the wide discretion in deciding whether or not to allow the amendment or withdrawal of an admission has of necessity to be underpinned on the interest of administration of justice. The circumstances of each individual case therefore fall for scrutiny.

In the case of *Eastern Highlands Electrical (Pvt) Ltd v Gibson Investments (Pvt) Ltd* 2002 (1) 417 (S) it was held that an application for withdrawal of an admission may be made at any stage and may be granted if the admission was made by mistake and contrary to the facts. In the *Eastern Highlands Electrical supra* the application for withdrawal of admission was actually during the trial. See also *Chimutanda Motor Spares Pvt Ltd v Musare and Anor*

1994 ZLR (1) 310. In the present application Mr *Girach* argued that there is no application before the court because for about 9 months the applicant did not give notice of the application for withdrawal of the admission. In light of case law above even that referred by the respondent counsel *DD Transport Pvt Limited v ABBOT* 1988 (2) ZLR 92 there is no time frame within which the application for withdrawal and or amendment of Admissions can be made. The application is therefore properly before the court.

However, that is not the end of the matter. What falls for consideration is determining whether or not to grant the application. The case of *DD Transport* referred to by the Mr *Girach* in opposing the application is quite illustrative on requirements that have to be satisfied before the application is granted. This is clearly so because the leave to withdraw on admission is not a matter of right but indulgence extended to a litigant. Worth noting is the argument by Mr *Zhuwarara* in reply to opposition that the case of *DD Transport Pvt Ltd v ABBORT* referred by Mr *Girach* is not applicable because in that case the applicant sought to amend pleadings unlike in this case where the applicant is seeking to withdraw admissions which came in at the close of pleading during pre-trial conference. It is my considered view that such a distinction brought in by Mr *Zhuwarara* is erroneous in so far as principles for withdrawing admissions made at pre-trial conference or in pleading are the same. In an event the pre-trial admissions and issues are derived from the pleadings. The requirements for withdrawal of admissions at PTC and amendment of pleading are the same and ably spelt out in the *DD Transport* case.

1. There must be reasonable explanation of circumstances under which the admission was made.
2. There must be reason why the admission is sought to be withdrawn
3. The withdrawal must be made with *bona fideness*.

Turning to the circumstances of this case the admissions were made from an informed position as highlighted earlier on. The applicant was legally represented. In the face of the history of access to the property as a home it is apparent the property does not belong to the couple. None of them owns the property which as conceded by both counsel belongs to a deceased estate. If there is a claim it would be for compensation against a 3rd party the deceased estate who ought to be sued through the executor. The Estate is not part to these proceedings hence the admission in para 5. Mr *Zhuwarara* presented argument that the property referred to in para 5 is matrimonial property and hence falls under the umbrella of

distribution apportionment and transfer as outlined in s 7 of the Matrimonial Causes Act [Chapter 5:13].

Section 7 (1) (a) makes clear use of the term matrimonial assets of spouses for the avoidance of doubt which would be created by the term Matrimonial property s 7 (1) (a) subject to this section in granting a decree of divorce, judicial separation or nullity of marriage, or at any time there after an appropriate court may make an order with regard to:

- (a) the division, apportionment or distribution of assets of spouses including an order that any asset be transferred from one spouse to the other see also *Gonye v Gonye*.

spousal assets gives wide discretion of even transfer of asset registered in the other spouse's name to the other spouse.

Section 7 (2) (a) which Mr *Zhuwarara* sought to rely on as a basis of withdrawing the admission calls for close scrutiny it reads s 7 (2):

“An order made in terms of subsection (1) may contain such consequential and supplementary provisions as the appropriate court thinks necessary or expedient for purposes of giving effect to the order or for purposes of securing that the order applies fairly as between the spouses and may in particular, but without prejudice to the generality of this subsection-

Order any person who holds any property which forms part of the property of one or other of the spouses to make such payment or transfer of such property as may be specified in the order.”

Clearly the wording of s 7 (2) (a) does not suggest transfer of property belonging to a 3rd party. The property in the admission which forms the subject of this application belongs to the defendant's deceased mother as confirmed by the parties and as such it is not property held on behalf of either of the spouses falling for transfer as envisaged in s 7 (2).

A wholistic reading of s 7 (1) and (2) does not cast a spider web across 3rd parties property to fall for distribution, apportionment and transfer.

I am alive to the need to place spouses in as much as it is reasonably practical in the same position they would have been in had the marriage subsisted but clearly this does not bring property of 3rd parties so as to cushion the spouses. It is important to highlight that even s 7 (3) referred by Mr *Girach* does not apply in as far as the matter before hand is concerned since from the pleadings the property is not owed by either of the spouses and from pleading the Estate still has to be wound up. Given the totality of the circumstances of this case when the admission was made it was an informed decision informed by the facts and

law. The property belongs to a deceased estate and the defendant is just a potential beneficiary. This brings to question the genuineness of the intention to resile from the admission. The owner of the property is not part to the proceedings and any order which would be issued in respect of the property would be incompetent and not capable of enforcement. The admission is couched in such a way that whereas the couple constructed accommodation to house themselves by agreement with the defendant's late mother the property remained owed by the defendant's late mother and therefore for improvements on that land recourse would be in getting compensation from the Deceased Estate. That certainly cannot be contrary to the law neither is it an admission based on mistaken facts. The admission is not contrary to the facts such that one would be justified in withdrawing the admission.

Having made such observations it is important to highlight the underpinning principle in exercise of discretion to grant or dismiss leave for application to withdraw an admission. The primary consideration for the court is the interest of administration of justice. In the circumstances of this case whilst it is appreciated a matter has to be fully ventilated the loop hole of seeking to deliberate on property which is not a matrimonial asset in the sense that title vests with a 3rd party in the absence of that 3rd party offence against the interest of justice. The matter would not have been expediently disposed of for it cannot be fully ventilated to the exclusion of the property owner. In any event where there is no prejudice to the party seeking the withdrawal of an admission made in conformity with the law and facts there are no reasonable grounds for granting such leave. Section 7 (1) does not bar claims at any other stage by the use of the words "or at any time thereafter" I am alive to the clean break but the clean break principle should not be misconstrued to mean that where there is good cause, future claims of divorced coupled cannot be entertained. In fact the principle has a wider meaning in avoiding unnecessary and uncalled for clinging to an otherwise dissolved marriage. The way the admission in para 5 is couched showing futuristic claim for compensation further buttresses that the admission was a well inferred admission. The admission is not at variance with the circumstances and facts outlined in the pleadings and PTC admissions. The request to resile from an admission is not granted for the mere asking but one ought to go further and satisfy that the request is genuine and backed by a reasonable explanation for the intended withdrawal. The court in coming up with a decision, in exercise of its discretion has to consider the circumstances of the case anchored or underpinned on what is just.

Given the background of law the couple came to access the property as a “matrimonial home” and not asset. Also that the title holder of the property is not part to the proceeding and that the admission speaks to the facts and suggests legal recourse it would not be just in the circumstances to allow the application. The application is accordingly dismissed.

Kantor & Immerman, plaintiff’s legal practitioners
Atherstone & Cook, defendant’s legal practitioners