

MONICA HOPE SIBINDI
versus
MARTIN SIBINDI

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 14 & 31 October 2019

Civil Trial-Special Plea

J Mandizha, for the plaintiff
Defendant in person

MANZUNZU J: This matter was set-down for trial for the 14th of October 2019. Before the trial could start, I invited the parties to my chambers for a pre-trial meeting. It was agreed at this meeting that the court would first deal with plaintiff's application to amend the summons, and then proceed to deal with defendant's special plea.

The application to amend the summons was granted by consent.

What remained contentious was the defendant's special plea in which he challenged the jurisdiction of this court to hear the matter and secondly alleged that the matter was *res judicata*. The special plea was argued and at the conclusion of argument, I reserved my ruling. This is the ruling in respect of the special plea.

The background to this matter is that on the 29 November 1999, under cover of case number HC 17513/99, plaintiff (Mrs Monica Hope Sibindi) caused to be issued a summons against defendant (Martin Sibindi) seeking a decree of divorce and other ancillary relief. The matter was concluded on the 27th of September 2000. The court order that concluded the divorce matter is framed in the following terms:

- “1. That a decree of divorce be and is hereby granted.
2. That the consent paper signed by the parties and filed of record and annexed to this order shall regulate the following matters:
 - (a) Custody and access of the minor child of the marriage;
 - (b) Property rights of the parties as between themselves;
 - (c) Other matters specified in the Consent Paper including costs. “

Amongst other issues, the Consent Paper referred to in the court order, provides in paragraph 3, “that the property listed in Annexure A herewith is donated to Martmon Sibindi

Trust (Trust) and that henceforth, the property will be governed and administered in terms thereof.” Annexure A referred to in the Consent Paper can no longer be found. This is partly the challenge that is created by court orders that are not complete, which refer and incorporate other documents. It is preferable that a court order be complete and be a stand-alone. It must specify the terms of the order in detail without reference to another document or documents. However, in this case the issue is solved by the Consent Order in case number HC 3585 /10, (another matter involving the same parties), which refers to the following properties as the assets of the Martmon Sibindi Trust, being Remainder of Lot 12 Tynwald; Lot 1 of Lot 14 of Tynwald Harare and stand 475 Tynwald Township 15 of Lot 13A Tynwald, Harare. Furthermore, Clause 23 of the Notarial Deed of Trust lists the same three immovable properties as the assets of the Trust. Therefore there should not be a dispute as to the identities of the properties that belong to the Trust.

Before the court now is a summons issued out by the plaintiff (Monica Hope Sibindi) wherein she seeks as against the defendant (Martin Sibindi) the following relief:

- a. An order that the defendant renders an account of all the assets, transactions, accounts and activities of the MARTMON SIBINDI Trust from 2011, being the date of divorce, to the date of judgement as appears in the plaintiff’s declaration.
- b. An order for the dissolution of the MARTON SIBINDI TRUST and for the matrimonial assets which are;
 - (i) Stand 475 Tynwald Township, Harare, deed number 2326/86 which is ordinarily known as 15 of Lot 13 A, Tynwald, situate in Salisbury measuring 798 square metres and;
 - (ii) Remainder of Lot 12 Tynwald Situate in the district of Salisbury, deed number 4209/86 measuring 30 5172 Hectares and;
 - (iii) Lot 1 of Lot 14 of Tynwald, deed number 5356/88, measuring 16 1883 Hectares. to be distributed equally between the plaintiff and defendant in terms of section 7 of the Matrimonial Causes Act.
- c. an order authorising, directing and empowering the defendant, or failing him, the Sheriff of the High Court to sign any and all such transfer documents as will become necessary in passing transfer of any of the property stated herein, to the plaintiff.
- d. An order that defendant pay costs relating to such subdivision of the properties as may be necessary in implementing paragraph 16 thereof.
- e. An order that the defendant pay the costs of suit on legal practitioner client scale.”

As alluded above, at the commencement of the hearing, plaintiff made an application for an amendment of the summons, the amendment was granted by consent. The following additional relief was introduced by the amendment:

- (i) An order authorising, directing and empowering the Sheriff of the High Court to, in consultation with the Council of Land Surveyors of Zimbabwe, together with Plaintiff’s Legal Practitioners, appoint a qualified and registered surveyor to survey and or ascertain or establish all such stands as remain an encumbered, or not sold, in terms of the judgement in HC 5182/15, and upon compiling such list, avail same to the Sheriff

- and plaintiff's legal practitioners, to enable the Sheriff to transfer such of them to Plaintiff as is consistent with the terms of this order
- (ii) An order authorising, directing and empowering the defendant, or failing him, the Sheriff of the High Court to sign any and all such transfer documents as will be necessary in passing transfer of any and all such property as is awarded to the Plaintiff."

Defendant raised, in response to the plaintiff claim, two special pleas. The raising of a special plea is sanctioned by rule 137 of the High Court Rules, 1971 (Rules), which reads:

"A party may take a plea in bar or abatement where the matter is one of substance which does not involve going into the merits of the case and which if allowed will dispose of the case."

A special plea, if successful knocks out the plaintiff's case before the merits of the case are even considered.

Defendant raised two special pleas, the first is that this court has no jurisdiction to entertain this matter and the second is that the matter is *res judicata*.

Jurisdiction

The plea in respect of the lack of jurisdiction is anchored on clause 11 of the Notarial Deed of Trust of the Martmon Sibindi Trust, it says,

"in the event of any disagreement between the trustees, at any time, the decision of the majority of them shall prevail and be of the same force and effect as if it were unanimous decision of all the trustees. In the event of the trustees being equally divided in opinion then, the matter shall be referred for decision to the donors, or on the death of either of them, to the other. After the death of the donor and his wife the matter shall be referred for decision to the eldest major male or female beneficiary/trustee/child of a sound mind. Should there still be no way to reach a decision then the matter shall be referred to the senior partner for the time being of Bryon Venturas and Partners whose decision shall be final, non-appealable and binding upon all parties."

Clause 11 of the Notarial deed of Trust, relied upon by the defendant, does not oust the court's jurisdiction; it merely imposes an obligation on an aggrieved trustee to exhaust internal remedies, before seeking redress before the courts. Plaintiff is a trustee in the Trust, in that capacity she has an obligation to exhaust internal remedies provided in the Trust Deed before resorting to litigation. The general rule is that a party must exhaust internal remedies available before seeking judicial redress, unless it can show exceptional circumstances to by-pass the general rule. Both parties did not address this issue in detail. However a court has a discretion to condone a failure to exhaust internal remedies. In this instance, I find that the failure to exhaust internal remedies is not fatal to plaintiff's case. Therefore the special plea of jurisdiction is dismissed.

Res judicata

The second special plea taken is that the matter is *res judicata*. I decided to deal with the special plea, as any one of them, if successful, without delving into the merits could be

dispositive of the matter. In *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1977 (1) 861 (R) the court said the requirements of a plea of *res judicata* are that the previous judgment must have been given with respect to the same subject-matter, based on the same cause of action and between the same parties. GUBBAY JA (as he then was) commented on the plea of *res judicata* in *Wolfenden v Jackson* 1985 (2) ZLR 313 (S) at 316 B-C as follows:

“the *exceptio res judicata* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies are not permitted to dispute its correctness.”

In *Banda & Ors v Zisco* 1999 (1) ZLR 340 (SC) the court said, “in order to determine the cause of complaint, the pleadings and not the evidence in the case must be looked at.” The question that now arises is whether the decisions in cases number HC 17513 / 99 and HC 3585 / 10 were given under circumstances which preclude the plaintiff from bringing this present action? Is the defendant entitled to set-up these decisions as *res judicata* in the present action? To answer these questions it is necessary to enquire whether those judgments were given in an action with respect to the same subject-matter, based on the same cause of action and between the same parties?

In respect of the *res judicata*, the contention by the defendant is that the immovable properties plaintiff is asking this court to share between the parties are Trust property. They were donated to the Trust in terms of a court order in case number HC 17513 / 99. It is argued that this is now Trust property and beyond the reach of the Matrimonial Causes Act. In case number HC 17513 / 99 (the divorce matter) plaintiff in her summons had proposed that she be awarded Lot 1 of lot 14 of Tynwald, deed number HC 5356/88, measuring 16 1883 Hectares and that the defendant be awarded Remainder Lot 12 Tynwald. The parties agreed through a Consent Paper, that the properties be donated to the Trust. Clause 4 of the Notarial Deed of Trust list the three immovable properties as the assets of the Trust, these are Lot 12 of Tynwald, Lot 1 of Lot 14 of Tynwald and stand 475 of Tynwald Township. These are the properties that plaintiff ask this court to share between the parties in terms of the Matrimonial Causes Act. In case number HC 3585 / 10 (a matter between the same parties) the same properties are listed as Trust property. Defendant argues that the issue of the properties have been sealed by the courts and cannot be reopened. Defendant argues that this court has exercised its jurisdiction in respect of these properties, and it is now *functus officio*.

Plaintiff argued that the court order referred to by the defendant did not divide, apportion or distribute the matrimonial property in terms of section 7 of the Matrimonial Causes Act. She further argued that the Remainder Lot 12 Tynwald and stand 475 Tynwald Township are registered in the name of the defendant. The only property registered in the name of the Trust is Lot 1 of Lot 14 of Tynwald.

It is too late in the day for the plaintiff to contend that the divorce order in case number HC 17513/99 did not divide, apportion and distribute matrimonial property in terms of the Matrimonial Causes Act. The divorce order sealed the dispute in respect of the properties plaintiff claims in this case. This case relates to the same subject-matter, substantially based on the same cause of action and between the same parties as the divorce matter. Further plaintiff's contention that the two properties are not Trust properties because they are in the name of the defendant, does not hold. The Notarial Trust Deed deals with this issue in clause 4 B, which says:

“The objectives of this trust are as follows: to own movable and immovable property of whatever description including land, immovable improvements, farming machinery and implements, vehicles, tools, households effects, etc, in the name of the trustees in their fiduciary capacities.”

This means that notwithstanding that the two properties are in the name of the defendant, they are Trust property.

I agree with defendant that this matter is *res judicata*. This court has exercised its jurisdiction, and may not revisit it again. The matter is now *res judicata* in respect of the matter involving the division, apportionment or distribution of the former matrimonial property in terms of s 7 of the Matrimonial Causes Act.

The general rule is that the costs follow the cause, and I see no reason to depart from such rule in this case. The special plea in respect of *res judicata* is upheld with costs.