MUTSAI NDLOVU
versus
NHLANHLA SIBANDA
And
BRIGHTON MUSIIWA
And
REGISTRAR OF DEEDS- BULAWAYO

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 28 November 2023 & 15 April 2024

Opposed application

N. Mugiya, for the applicant
G. Nyabawa, for the second respondent
No appearance for first and third respondents

ZISENGWE J: This is an application for a declaratory order and consequential relief, the subject matter of which is a certain residential property identified as No. 2748 Makwasha, Lot 2 Zvishavane ("*the property*"). The property is registered in the name of the second respondent after it was sold to him by the first respondent. The applicant claims that the property is "matrimonial" property which she and the first respondent acquired during the currency of their now doomed unregistered customary law union. She seeks an order declaring the sale of the property by the first respondent to the second respondent and all consequences flowing from it null and void. According to her this is an account of the fact that the sale of the property was a fraud contrived by the first and second respondents to circumvent pending matters before the Zvishavane Magistrates Court, one relating to the sharing of matrimonial assets as between her

and the first respondent and the other relating to an interdict barring first respondent from disposing any of the Matrimonial assets pending her "divorce" from the first respondent that married.

The applicant avers that the first and second respondents, well aware of the pendency of those two matters colluded to fraudulently backdate their agreement of sale in respect of the property to create the impression that it was concluded prior to the institution of those two court cases. The applicant claims to have filed the summons for sharing of property under ZV224/20 on 9 December 2020 and the application for an interdict under case 193/20 thereafter. She avers that she filed the latter application specifically to forestall any attempt by the first respondent to sell the property upon her apprehension of his intention to do so.

The mainstay of her proof not only that the first and second respondents antedated their agreement of sale but also that they did so with fraudulent intent, are the averments by the first respondent contained in the papers in the various court cases. In particular she refers to the denial by the first respondent in opposition to the application for the interdict under Case No. 193/20 that he harboured no intention to sale the property. She avers therefore that that if the first respondent had as of that date, had already sold the property to the second respondent he would have been naturally expected to disclose that fact. According to applicant the agreement of sale was dated 15 October 2020 yet the first respondent's opposing affidavit in Case No. 193/20 was dated 20 November 2020.

Similarly, she avers that on 21 December 2020 in Case No 224/20, the first respondent filed further particulars wherein conspicuous by its absence is any averment suggesting that he had since disposed of the property.

Thirdly, the applicant states that in case No. DV165/20 she filed an application for a protection order under the Domestic Violence Act and tellingly the first respondent never alluded to having disposed of the property in circumstances where he was reasonably expected to have done so.

Finally, she refers to an appeal decision by this court delivered on 3 November 2021 under CIV A 11/21 (HC295/21) stopping her eviction from the property. According to her the basis of upholding the appeal was that the agreement of sale between the first and second respondents was clearly fraudulent and no rights could be created by a fraudulent document.

According to her to her, therefore, these related albeit discrete pieces of evidence show that the agreement of sale could not have been concluded on 15 October 2020, that is, prior to the institution of all the court cases that came after that date.

She therefore seeks an order in the following terms:

IT IS ORDERED THAT:

1. The sale of house No. 2748 Makwasha Lot 2 Zvishavane by the first respondent to the second respondent be and is hereby declared to be unlawful and wrongful and accordingly is set aside.
2. The further transfer of House No 2748 Lot 2, Zvishavane from the first respondent's name to the second respondent's name at the third respondent's office be and is hereby set aside.
3. The third respondent is ordered to reverse the transfer and registration of House No. 2748 Lot 2 Zvishavane from the second respondent to the first respondent forthwith.
4. The parties are ordered to prosecute the matter before Zvishavane Magistrates Court under Case No. ZV 224/20 which shall determine the fate of the said property.
5. The first and second respondents are ordered not to evict the applicant from house No. 2748 Makwasha Zvishavane under case No. ZV 224/20 referred to in paragraph 4 above and through a lawful court order.
6. The first and second respondents are ordered to pay costs of suit on a client- attorney scale.

Interestingly, the first respondent did not file any opposing papers and was accordingly barred. However, second respondent did. He sternly opposed the application and disputed all the key averments by the applicant, chief amongst them that there were any legal impediments to the disposal of the property by the first respondent to anyone. According to him the first respondent acquired the property from his former employer Mimosa mining company (Mimosa) as an employment benefit. He claims that this benefit was facilitated via the vehicle of a mortgage scheme ordinarily extended to employees by Mimosa following which monthly deductions are made on such an employee's salary until his indebtedness is extinguished. He attached as

annexures to his notice of opposition, a copy of the mortgage bond and the deed of transfer from the the first respondent's employer to the first respondent. He avers that prior to purchasing the property he carried out due diligence over the property which revealed that there were no encumbrances thereto.

He therefore disputes applicant's assertions that the first respondent was precluded from disposing of the property purportedly on the basis of it being matrimonial property. He contends that the mere fact that the applicant was married to the first respondent does not make the house in question "matrimonial" property as such and rights relating thereto remained vested in the first respondent.

Regarding applicant's position that there is a court application for an interdict, it is second respondent's position that the applicant's failure to attach a copy of the application for an interdict leaves her averments in that regard hollow and of no probative value.

The second respondent equally disputes that he connived with the first respondent to fraudulently back date the agreement of sale to reflect an earlier date. His asserts that should that have been the case one would expect the applicant to have reported that fraud to the police, something which she did not do. Further, he points out that not only did the applicant not report to the alleged fraud to the police but that she did not attach the impugned agreement of sale to the present application, forming as it does the basis of her claim. He insists that the agreement of sale between him and the first respondent was valid and both parties thereto duly performed their respective obligations thereto. Pursuant to the agreement of sale, the property has since been registered in the Deeds office in his name which registration as far as he is concerned is above board. He pointed out that the process of registering the property went through the required process of advertising the same and no objection was lodged against it implying that its registration was sound and proper.

With regards to the case no. ZV224/20 relating to sharing of property, the first respondent asserts that from a perusal of the record of proceedings in question, the property was never listed as one of the asserts subject to sharing as between the first respondent and the applicant.

He further disputes the applicant's interpretation under CIVA 11/21. According to him that court order merely discouraged the proceedings for the ejectment of the applicant from the property without going through the first respondent who at that time held tittle to the property.

However, according to him that was not the end of the matter as he subsequently approached the court under case No. ZVGL 406/22 seeking the ejectment of the first respondent (and all those claiming right of occupation through him) from the property. According to him that matter is still pending.

He denied allegations of his collusion with first respondent to fraudulently antedate the agreement of sale to frustrate the applicant's claim for sharing of property. According to him the history of litigation as between the parties, points to a contrary position. According to him, applicant's counsel represented the first respondent in some of the cases (ZVGL 346/22 and ZVGL 406/22)

Ultimately therefore, the second respondent prays for the dismissal of the application in light of the fact that the applicant enjoys no recognised rights to challenge the sale and transfer of the property.

In her answering affidavit the applicant sticks to her guns. She insists that the property constitutes matrimonial property in the sense that the property was not allocated to the first respondent as an employment benefit as such. Rather, according to her the fact that monthly deductions were made to the first respondent's salary meant that she too contributed towards its acquisition (albeit indirectly) by virtue of her marriage to the first respondent.

She further insists that she had attached to her founding affidavit, copies of the summons under GL224/20, the application for the interdict under 193/20 and the impugned agreement of sale and that if the second respondent had not seen these documents all he needed to do was request for them. She also insists on the interpretation of the High Court order in the civil appeal under CIVA 11/21.

The applicant and second respondent filed their heads of argument on 3 and 25 August 2023 respectively. However, on 10 November 2023 the applicant filed supplementary heads of argument addressing a point of law which she deemed important in the resolution of the dispute namely that the property is covered by the doctrine of *res litigiosa.*

The doctrine *res litigiosa* refers to property subject to a law suit which under Roman Law cannot be alienated, see *Zimbank (Pvt) Ltd* v *Shiku Distibutors (Pvt) Ltd & Ors* 2000 (2) ZLR 11 (H); *Opera House (Grande Parade) Restaurant (Pvt) Ltd v Cape Town City Council* 1986 (2) SA 65 (C) & *Chenga* v *Chikadaya & Ors* SC-07- 13

The second respondent, however, as a point *in limine* urged the court to disregard the applicant's supplementary heads of argument and to expunge them from the record as no leave of the court was sought for their introduction Reliance was placed on the case of *Quarrying Enterprises* (*Pvt) Ltd* v *StoneZim (Pvt) Ltd & Another*, *StoneZim (Pvt) Ltd* v *Quarrying Enterprises (Pvt) Ltd* HH37-22.

In countering the above preliminary point, it was submitted by applicant's counsel that the second respondent had not objected to the introduction of the supplementary heads of argument and all that his counsel did was to request for time to file its own supplementary heads of argument to address the point raised in the applicant's supplementary heads of argument.

Whereas r59 of the High Court rules, 2021 envisages a single set of heads of argument by each of the contesting parties, circumstances may arise necessitating the filing of additional heads of argument. This may arise due to a variety of reasons not least the discovery by a party of a particular legal point which may assist the court in the determination of the dispute at hand. To my mind some of the requirements which should be satisfied for reception of such supplementary heads are:

(a) Leave of court must first be obtained.
(b) The point must be relevant for the resolution of the main dispute
(c) The opposing party should be afforded an opportunity to file its own supplementary heads of argument in response.

In the present matter though the applicant did not file a formal request for leave to file supplementary heads of argument, counsel did intimate that it was desirous of filing such supplementary heads of argument. Ms Nyabawa for the second respondent did not register any objection against that course of action. All she did was to request for time within which to file second respondent's own supplementary heads of argument. This gave the impression that she had acquiesced and consented to the filing of such supplementary heads of argument.

The *Quarrying Enterprises* case (Supra) which she seeks to rely upon hardly comes to her aid given that the court admitted the supplementary heads of argument on the basis (as here) that there appeared to be consensus as between the parties that such supplementary heads of argument

be filed. Secondly, the court found that the legal points raised therein where relevant for a just resolution of the matter.

In the present matter I find that the applicant, did make such an application, though not expressly and the second respondent did consent albeit indirectly to the filing of supplementary heads of argument. The second respondent also filed her own supplementary heads. I also find that in her answering affidavit the applicant did by factual basis for the legal argument in question, she averred as follows in paragraph 10 thereof-

> "The property was subject to litigation at the time he allegedly bought it and this court has already averred an appeal in a similar matter between the same parties and held that the sale was dubious" (my emphasis).

The first part undoubtedly alludes to the question of the property being *res litigiosa.*

It is for the foregoing that I dismiss the objections by the second respondent against the admission into the record of proceedings of the applicant's supplementary heads of arguments.

On the merits

There are two broad inter-related premises upon which the application is predicated, namely that the second respondent's title to the property is defective and must be vacated. She contends that the first respondent could not legally dispose of the property and pass transfer to a third party without her consent on account of the following-

a) The property is matrimonial property whose acquisition she indirectly contributed towards.
b) The property was subject to litigation (i.e. it is *res litigiosa*) between herself and the first respondent.

In both instances the alleged backdating of the agreement of sale is key and central as evidence of the attempt at circumventing the consequence of each.

Whether the first respondent was precluded from disposing of the property by virtue of it being "matrimonial" property.

In her founding affidavit acknowledges, correctly so, that marriages in Zimbabwe are out of community of property. The consequences of this position for married couples are far reaching in so far as they relate to the administration of their respective estates. The trite legal position that

a marriage only bestows limited rights as between husband and wife, which rights are only of a personal nature. In *Muzanenhamo & Anor* v *Katanga & Ors* 1991 (1) ZLR 182 (SC), McNally JA quoted with approval the words of Lord UPJOHN in *National Provincial Bank Ltd v Ainsworth* [1965] ALLER 472; [1965]AC 1175 (HL) at 485G where the following was said:

> "The right of the wife to remain in occupation even as against her deserting husband is incapable of precise definition; it depends so much on all the circumstances of the case, on the exercise of purely discretionary remedies, and the right to remain may change overnight by the act or behaviour of either spouse. So, as a matter of broad principle, I am of the opinion that the rights of husband and wife must be regarded as purely personal inter se and these rights as a matter of law do not affect third parties."

Similarly, in *Maponga* v *Maponga & others* 2004 (1) ZLR 63 (H) at 68D-E MAKARAU J (as she then was) after reviewing a number of cases involving the status of a married woman in relation to the matrimonial home concluded thus;

> "It would appear to me in summary that the status of a wife does not grant her much in terms of rights to the immovable property that belongs to her husband. She only has limited rights to the matrimonial home that she and her husband set up. Those rights are personal against the husband and can be defeated by the husband providing her with alternative suitable accommodation or the means to acquire one. The husband can literally sell the roof from above her head if he does so to a third party who has no notice of the wife's claim."

The term "*matrimonial*" when used to refer to the property acquired by the parties during the subsistence of their marriage is often misleading. In Gonye v Gonye MALABA JA (as he then was) cautioned against the use of the term "matrimonial" pointing out that the correct terminology is "the assets of the spouses" The fact therefore remains that each spouse holds such property in their individual capacity and is therefore at liberty to dispose of the same.

However, this is not necessarily an immutable principle as a party can be precluded from dealing with the property as their wish. One such case is where to allow a party to do so would amount to defeating a pending divorce case. This is where the allegations of the backdating of the agreement of sale assumes greater prominence.

For the applicant to succeed in upsetting the transfer of the property to the second respondent she needs to satisfy the court on a balance of probabilities firstly that the issue of the sharing of the value of the house was placed into contention under ZVGL 224/20 making it *res litigiosa*. Additionally, or as an alternative thereto, the applicant needs to demonstrate that in case

No. 193/21 she mounted a court application to interdict the first respondent from disposing of the property pending the matter in ZVGL 224/20. Most importantly, however, the applicant needed to demonstrate that the agreement of sale in question between the first and second respondents was backdated designedly to circumvent the matter in ZVGL 224/20 or ZVGL 193/21 or both. She could do this either by direct evidence of such backdating or through circumstantial evidence. The case seems to be anchored on the latter species of evidence.

By necessary implication the applicant needed to attach the relevant pleadings in ZVGL 224/20 and the one on193/21. She also needed to attach the agreement of sale which ultimately led to the property being registered in the name of the second respondent.

When the second respondent pointed out to the applicant that those critical documents were not annexed to the founding affidavit despite being serialised as annexures in that founding affidavit, the applicant threw caution to the wind and adopted a rather disdainful attitude. She flippantly retorted that these documents were attached and that if the second respondent had not seen them he should request for them.

As it turned out those documents were in fact not attached to the founding affidavit. A perusal of both the physical file and the one uploaded on the Integrated Electronic case Management System (IECMS) reveals that the said documents were not attached.

When this was pointed out to applicant's counsel during oral submissions in court, he obliquely attributed this to some administrative hitch in the transition from the physical to the digital filing of court process. He implored the court not to dismiss an application owing to what he termed as the absence of judicial documents.

As for the impugned agreement of sale, counsel submitted that it being in the possession of the second respondent, the applicant was not in a position to attach it to her founding affidavit and the rules of procedure precluded her from attaching it to her answering affidavit.

The applicant's assertions regarding the existence and attachment of the relevant court documents are insupportable for a number of reasons. Firstly, if the physical documents had been attached to the applicant's founding affidavit, they would still be in the physical record/file. They are not. Crucially, the absence of those court documents emanating from the Magistrates Court sitting at Zvishavane was brought to the attention of the applicant as early as May 2023 well before

the migration from paper based to digital based litigation, the latter which was ushered in by IECMS.

Further, when the absence of the documents in question was brought to the attention at various stages of this suit leading up to the hearing of the application, the applicant should have at the very least attempted to ascertain that these documents were indeed attached. She however opted to take an over-confidant stance and literally told the second respondent off. She has only herself to blame.

The onus being on the applicant to show on a balance of probabilities that she is entitled to the relief sought meant that she had to place all documents undergirding her application was reposed on her. She cannot relegate the responsibility of searching for court documents to the court. That responsibility rested squarely on her shoulders.

At the risk of repetition, I am constrained to reiterate that since the application was predicated almost entirely on the proceedings in ZVGL 224/20 and 193/21, it was incumbent upon the applicant, and no one else, to ensure that those court documents were indeed attached to her founding affidavit or were introduced with leave of court to any subsequent (either answering or supplementary) yet she took a nonchalant attitude. Such an attitude is surprising if regard is had to the second respondent's averments as contained in her opposing affidavit that he had perused Case Number 224/20 and nowhere was the property in question listed as one of the assets which are subject to sharing following the demise of the unregistered customary law union. Such assertions, going as they did to the very foundation of the applicant's case should have set off alarm bells in the applicant's mind deserving a verification of her position in that regard.

Further, without the record of proceedings in ZV224/20, one cannot tell whether or not the proceedings had reached *litis contestatio*. This is important because in personal claims the subject matter of the claim does not become *res litigiosa* until the stage of *litis contestatio*. In *Chenga* v *Chikadaya & Ors* (supra) OMERJEE AJA summarised the position as follows:

> "It is trite that all personal actions have the effect of rendering their subject matter *res litigiosa* at the stage of *litis contestatio*. The relevant stage is not the time of commencement of action, but the time of *litis contestatio*. In the case of *Opera House (Grand Parade) Restaurant (Pvt) Ltd* v *Cape Town City Council* 1986 (2) SA 656 (C), it was held that in a real action (action in *rem*) the land becomes *res litigiosa* on the service of summons while in a personal action, that status was achieved at the closure of pleadings."

Similarly, the agreement of sale, lying as it does at the heart of the applicant's case needed to be attached. Without it the court will be left to second guess when it was executed and whether or not it was fraudulently backdated purportedly to defeat applicants claim under ZVGL 224/20. The applicant simply left too much to chance.

The applicant laments the fact that the agreement of sale is in the possession of the second respondent. That does not in the least absolve her of the burden to adduce that evidence. The burden was reposed on her as part of her evidence gathering and presentation obligation to acquire a copy of that agreement. She had to take the appropriate legal steps to acquire it attach it to her application. Again, she could not delegate that evidence gathering evidence to someone else. Although the sentiments expressed in *I Lasha Mining (Pvt) Ltd v Yakatala Trading (Pvt) Ltd t/a Viking Hardware Distributors* SC-61-18 were said in the context of attaching an impugned court judgment to review or appeal matter, it finds relevant in the context of the present matter. At page 3 of the judgment, BHUNU JA aptly noted that:

> 'Apart from the above irregularity the application is a parody of more serious fatal procedural irregularities, chief among them failure to provide a copy of the impugned judgment. It is an exercise in futility for a litigant to attack a judgment of a lower court in a higher court without availing the court *a quo's* judgment for scrutiny by the higher court to assess the veracity of the applicant's criticism of the judgment. The applicant's failure to avail the impugned judgment before me renders its criticism of the judgment hollow and nugatory."

By the same token, *in casu* where exclusive reliance is placed on the contents of some prior court proceedings a copy of such court proceedings needed to be attached. Without them there is virtually no evidence either that the property in question is subject to litigation, (i.e. it is *res litigiosa*). Without a copy of case 193/21 there is no evidence that applicant mounted an application interdicting the first respondent from disposing of the property. Without the impugned agreement of sale there is no evidence as to when in relation to the above matters it was entered into, let alone evidence that it was fraudulently backdated to unlawfully circumvent those the aforementioned cases. The applicant's averments in that regard are rendered hollow and nugatory.

Ultimately, due to the paucity of the evidence the applicant woefully failed to discharge the evidential burden reposed on her to show that the first and second respondents fraudulently

backdated their agreement of sale in respect of the property to frustrate her claim under ZVGL 224/20 and the application stands to be dismissed.

Costs

The general rule is that the substantially successful party is entitled to his or her costs. Needless to say, the second respondent is by virtue of the foregoing entitled to his costs. However, there is no justification for costs on the punitive scale as sought by the first respondent. There is no evidence of recklessness or *mala fides* in mounting the application, costs on the ordinary scale suffice.

Accordingly, the application is hereby dismissed in its entirety with applicant meeting the second respondent's costs.

Mugiya & Muvhami Law Chambers; applicant's legal practitioners
Nyabawa Legal practice; second respondent's legal practitioners