MARIA ALICE DA SILVA NEVES
versus
JOSE DE BRITO
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 16 June & 5 August 2021

Opposed application

T Dondo, for the applicant
Respondent barred
No appearance for the 2nd respondent

[1] TSANGA J: Applicant seeks that the immovable property known as 92 George Road Chegutu, be registered in the names of herself and her former husband the first respondent. She specifically seeks that the first and second respondents be ordered to sign all necessary documents to have the property jointly registered in the names of the applicant and the first respondent. In the event of non-cooperation from Jose De Brito who is the first respondent and former husband, the order sought is that the Sheriff of Zimbabwe, being the second respondent be empowered to sign such papers on his behalf.

[2] The applicant and respondent divorced in 2017 having filed a consent paper regarding distribution of their matrimonial property. In terms paragraph 2 of that consent paper the applicant was awarded a 60% share in the immovable property known as a 92 George Road Chegutu, which at the time was registered in the name of the respondent and remained so registered.

The paragraph read more specifically as follows:

> "That the plaintiff be and is hereby awarded a 60% share of the immovable property known as 92 George Road Chegutu currently registered in the name of the Defendant with the defendant being awarded a 40% share in the property."

[3] Paragraph 3 of their consent paper stated that applicant would retain control and management of the said property with the respondent herein being entitled to receive an amount equivalent to 40% of the rentals in respect of the property after factoring municipal and water charges relating to the property. It read thus:

> "3. That the plaintiff shall retain the control and or management of stand 92 George Road, Chegutu with the Defendant being entitle to receive an amount equivalent to 40% of the rentals in respect of the property after factoring Municipal and other charges relating to the property".

[4] As evident from the above clause nothing was said about changing the ownership of the said property. What the applicant as plaintiff was therefore granted in the initial instance was a 60% share of the property. The consent paper then dealt with the rental sharing arrangement according to the same stipulated formula of 60:40. It also granted the plaintiff management and control. The purported registration is nonetheless claimed to be intended to reflect the position in the consent paper. An order to compel joint ownership is regarded by the applicant as the best way of safeguarding her interests.

[5] Whilst at the time of filing her founding affidavit, the applicant averred that she did not know whom the property had been sold to, this was clearly not true as emerged from her answering affidavit. She admitted therein that the alleged purchaser was notified of her interest in the property as way back as March 2020. Indeed correspondence on record shows applicant learnt in February 2020 that the property was being sold. Her lawyers wrote to the respondent at the time highlighting that she had been given control and management of the said property in terms of the consent paper and that the respondent was only entitled to receive 40% after payment of rates and other charges. They also wrote to the purported purchaser in March 2020, one Joseph Moyo, advising of the status of the property as per divorce settlement and that the respondent had no right to sell the property. Her answering affidavit also reveals that her control of the property following the divorce was through a professional agent.

[6] However, the respondent who was opposed to the registration of property in both names, was barred for filing his notice of opposition and heads of argument out of time. No order for upliftment of bar had been made. As *per* rules in the absence of the respondent's papers, this court exercised the option of dealing with the matter on its merits.

[7] Applicant's core argument is that the sale was illegally done without her consent and that joint registration will accord her protection against the respondent's illegal conduct. Whilst applicant rightly acknowledges that the property, in terms of the Deed of Transfer 05978/91 is with the respondent, she argues that the effect of the consent paper was to confer 60% share in the immovable property on her. The conferment of a share without the consent paper having addressed the issue of title cannot be said to have affected the title of the property. The property was never co-owned. It remained registered in the respondent's name with the applicant entitled to a specified share. Indeed the very fact of applicant bringing this application is in itself in full appreciation that the consent paper did not and was not intended to confer any form of joint ownership of title. If the parties had intended to affect the actual ownership of the property they would have done so in specific and clear language. The matrimonial Causes Act [Chapter 5:13] in section 7 (1) as read with s 7 (5) in this instance allows for the transfer of property from one spouse to another on divorce.

[7] Section 7 (5) of the Matrimonial Causes Act [*Chapter 5:13*] provides as follows:

> "(5) In granting a decree of divorce, judicial separation or nullity of marriage an appropriate court may, in accordance with a written agreement between the parties, make an order with regard to the matters referred to in paragraphs (*a*) and (*b*) of subsection (1)".

It is this provision that allows parties to a divorce to reach settlement on the issues that the court would otherwise deal with, namely "the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other" in terms of s 7(1) of the same Act.

[8] In this instance the parties' proprietary consequences were dealt with by consent in that the parties entered into an agreement which was made part of the final divorce order. The consent paper did not include any order that the asset in question be transferred from one party to their other. It simply apportioned shares with respect to that property. In reality what the applicant is therefore seeking is a variation of the consent paper a so as to register the property in her name. Where parties have reached settlement and their agreement has been incorporated as an order of the court, it is only in relation to maintenance in terms of s 9 of the Matrimonial Causes Act that the court can be re-approached thereafter for variation of an order. In other words, variation cannot be sought on proprietary consequences in the absence of a permissive

clause in the agreement allowing the consent paper to be revisited on proprietary consequences or the parties agreeing to the variation.

[9] The South African case of *Ex parte Petrus Jacobus Le Grange & Yolanda Le Grange* [2013] 4 All SA 41 examined the import of South Africa's similarly worded s8(1) of Divorce Act 70 of 1979 which allows only for variation of maintenance;

> "This means that the court is excluded from ordering a variation of any settlement relating to the assets of the parties, and for the parties, in the absence of an agreement to the contrary, to seek such an order. This conforms with the policy underlying the notion of a **"clean break"** or a **"once-and-for-all"** settlement of the proprietary consequences of a divorce, aimed at bringing finality in relation to any issues arising therefrom, thereby allowing the parties to **"put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down."**

[10] Besides the clean break principle the rationale is quite straight forward. Such agreements will have been arrived at in accordance with what the parties themselves would have freely and voluntarily agreed should be the proprietary consequences of their divorce. As stated in *David Richard Kempen v Carol Kempen* SC 14 / 2016:

> "Generally speaking, lawful agreements freely concluded by persons of competent capacity are sacrosanct and therefore enforceable at law without let or hindrance by courts of law and tribunals".

And also

> "Our legal system pays great honour to the doctrine of sanctity of contract to the effect that lawful agreements are binding and enforceable by the courts. In *Book v Davidson* 1988 (1) ZLR at 369F, the court held that, it is in the public interest that agreements freely entered into must be honoured."

[11] In the absence of a provision allowing for a variation of the order on proprietary issues, the consent paper cannot now sought to be varied surreptitiously or otherwise without agreement. What the court retains in this instance is jurisdiction, if approached, to enforce the order that was granted by the court which incorporated their consent paper with a 60:40 share arrangement.

[12] Suffice it to observe that this is an example of a consent paper which was dealt with cryptically. It is the stuff that later disputes are usually made of as has happened herein. Time and time again the court has urged parties to abandon a cursory approach to consent papers, even more where they are supposedly competently legal represented. There is an obvious need for

proprietary issues to be dealt with thoroughly and be examined from the angle of all possible eventualities in order to avoid future squabbles. If the consent paper herein had clearly and categorically stated that the property was to be transferred to the applicant that would be a different matter. Applicant cannot now seek ownership when that was never the thrust of the consent paper. It makes virtually no sense to force co ownership of the property at this point which the parties never intended. What was vested was management and control. The authorities cited by the applicant namely *Chapeyama* v *Chapeyama* 2000 (2) ZLR 175 (S) *and Takafuma* v Takafuma 1994 (2) ZLR 103 (S) on the import of real rights are distinguishable as there was already joint registration of the property in those cases. Such is not the case herein. Applicant is seeking to register joint ownership after the ship has sailed. It was known at the time that the property was registered to a single owner. Without transfer of the asset having been part of the deal the respondent was free to dispose of the property as he wanted as its owner as long as he honoured the 60:40 sharing agreement.

[13] It would therefore be improper at this point to register the property in joint ownership when it was never the intention. It makes even less sense to do so when the property by her own acknowledgement has been sold by the registered owner. She is entitled to her 60% share of the sale of that property and that is what she should pursue. There is no reason why the respondent has failed to pay the 60% share of the sale proceeds.

Accordingly:

1. The application is dismissed.
2. There shall be no order as to costs.

Dondo & Partners: Applicant's Legal Practitioners