HB 92/20
HC 2553/18
X REF HC 1780/11

PAMHAYI MAPIYE

Versus

DARIO MAPIYE

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 24 MAY 2019 & 4 JUNE 2020

Opposed application

Miss Q. Chimbo for the applicant
R. Ndou for the respondent

MABHIKWA J: The parties in this matter are former husband and wife. In apparently acrimonious and protracted divorce proceedings, my brother TAKUVA J wrote a full and comprehensive ten (10) paged judgment to resolve the divorce matter. The part of that judgment, that is relevant for these proceedings reads as follows:

"Accordingly it is ordered that,

1. A decree of divorce on the grounds of irretrievable breakdown of marriage be and is hereby granted.
2. …
3. Each party be and is hereby awarded a half share of the value of the property known as stand 631 Senga Township Gweru.
4. Each party be and is hereby awarded 50% of the value of the kiosk in Gweru.
5. The matrimonial home being stand 167818 Romney Park also known as number 5 Whistler Road, Romney park Bulawayo is hereby awarded to the plaintiff and the defendant on a ratio of 55% for the plaintiff and 45% for the defendant.
6. The immovable properties mentioned in paragraph 3, 4 and 5 shall be valued by a registered estate agent appointed by the Registrar of this court to determine their market

values after which either party shall be entitled within 3 months from the date of the valuation to pay to the other his or her share and retain full ownership of it.

7. The cost of evaluation shall be shared equally between the parties.
8. In the event of the parties' failure to exercise the option given to them by clause 6 herein, then the properties shall be sold by an estate agent appointed by the Registrar of this court at the best advantage and the proceeds shared in terms of this order between the parties".

This order was handed down on 23 March 2017. Exactly eighteen months later on 25 September 2018, applicant filed the current application. She complains in her application that following the court order, she offered to buy out the respondent of his 50% share of the immovable properties. Annexure "B", a letter from the respondent's lawyers confirmed acceptance of the offer.

She stated also that thereafter, the Registrar appointed a registered estate agent who evaluated the two properties and determined their respective values. She says that pursuant to the buy-out offer and its acceptance on 13 April 2018, she deposited $9 125,00 with the Registrar being the value for the 50% share of both properties. She complains further that despite numerous requests to the respondent to transfer his 50% to her and despite undertakings to do so, respondent has to date refused or neglected to effect transfer. The applicant also complains that, respondent made a sudden turn. He allegedly now disputes the valuation of the properties despite the same having been evaluated by a registered estate agent appointed by the Registrar of the High Court and despite that he (respondent) had consented to the buy- out.

Finally, applicant implored the court to compel the respondent to comply with the court in judgment number HB-66-17 (HC 1780/11).

Respondent on the other hand submitted that the evaluator appointed by the Registrar has "a close relationship" with the applicant and therefore biased. Respondent also claims that on 5 February 2018, he queried the appointment of the evaluator through a letter written by his legal

practitioners of record. He claims that because of the alleged relationship between the applicant and the evaluator, number 631 Senga Township, Gweru was undervalued.

Secondly, respondent averred that the acceptance of the offer to buy him out was made "without prejudice. However, there was no proof attached in the form of a letter to show the "without prejudice" acceptance. Further, there was no explanation given otther than saying that the offer was made without prejudice. This is because an offer or acceptance made without prejudice legally may still remain a valid offer or acceptance unless the party repudiating it successfully explains that it should not be accepted as a valid acceptance.

The law

Court judgments and orders should be read and understood for what they state without contaminating them. Unless appealed against, set aside or otherwise reviewed by a superior court, their legal force and scope are binding. The parties therefore should understand that this court cannot re-hear their matter and "review" a fellow judge's work. That is not permissible.

In *Godza* vs *Sibanda & Anor* 2013 (2) ZLR 175 (H) GUVAVA J (as she then was), quoted with approval Hebstein and Van Winsen – *The Civil Practice of the Superior Courts in South Africa* 3rd edition at page 464 wherein the esteemed authors said;

> "As long as it stands unaltered or unrescinded, it is the conclusive proof as against the parties of finding of facts directly in issue in the case actually decided by the court."

Also in *Kassim* vs *Kassim* 1989 (3) ZLR 234 the court dealt with the division of assets in a matrimonial matter and the extent to which the court may later expand or supplement its own orders.

In *Bonang Fakazi Dube* v *Ekheteleng Roselyn Dube* HB-62-19 both parties had not complied with a court order per MATHONSI J (as he then was) in a matrimonial matter. In their frolic, they later disagreed and took each other back to court. One of the parties argued that since both parties had initially agreed on something outside the court order, the court now had to

adjudicate between the parties as if the earlier divorce order had not existed. The second part argued that the parties had no option but to revert to the original court order by MATHONSI J.

This court held that it could not legally act in a manner that would amount to an alteration and in effect a review of another judge's order. It bound the parties to the original court order, strongly warning all persons to abide by court orders and to generally resist the temptation to depart therefrom. In any event, clause 6 of MATHONSI J'S judgment had been very explicit that in the event of any disagreement or breach of the condition in clause 5 that either party could buy out the other within 90 days of evaluation of the matrimonial property, then clause 6 would come into effect. Its effect was that the property would be sold to best advantage and the proceeds shared equally.

It is therefore clear from precedent that the general principle is that once a court has pronounced a final order, it has no authority to correct, alter or supplement it because it becomes *functus officio*. The principal judgment or order may be supplemented only in respect of accessory or consequential matters such as costs of suit or interest on a judgment debt which the court had overlooked or inadvertently omitted. This is a power exercisable by a judge or court irrespective of whether or not it had made the original order.

In any event, *in casu* the court noted the following;

1. That indeed exhibit B is a letter from Messrs Mugiya & Macharaga Law Chambers who are respondent's legal practitioners confirming their client's acceptance of the offer to buy him out and also undertaking "to sign the requisite documents to facilitate change of ownership" to the applicant.
2. That the respondent does not deny that the amount of nine thousand and one hundred and twenty five dollars ($9 125,00) being the half share of the value of the two (2) properties was deposited with the Registrar following evaluation and his acceptance of the offer to buy him out.
3. That clause 6 of Honourable TAKUVA J's order states:

> "The immovable properties mentioned in paragraph 3, 4 and 5 above shall be valued by a registered estate agent appointed by the Registrar of this court to determine their market values after which either party shall be entitled within 3 months from the date of the valuation, to pay to the other, his or her share and retain full ownership of it."

Clearly, the order does not state that parties could have an input on the appointment of the estate agent or his/her valuation. Respondent seems to import meanings that are not part of the order. The courts will not allow parties to take them back and forth on the flimiest of excuses. The parties shall be bound by the terms of the order by TAKUVA J.

Accordingly the application succeeds and an order is granted in the following terms:

It is ordered that:

1. The respondent be and is hereby ordered to sign all the documents necessary to effect transfer to applicant of stand 631 Senga Township, Gweru within seven (7) days of the granting of this order against the respondent.
2. The respondent be and is hereby ordered to sign all the documents necessary to effect transfer to applicant of Kupakwashe Kiosk, Senga Road, Gweru within seven (7) days of the granting of this order against the respondent.
3. The Sheriff of Zimbabwe be and is hereby authorized to attend to the signing of all relevant transfer documents in place and stead of respondent should respondent fail to do so within seven days of granting of this order.
4. Respondent be and is hereby ordered to pay costs of suit, on the ordinary scale.

Messrs T. Hara & Partners, applicant's legal practitioners
Mugiya & Macharaga Law Chambers , respondent's legal practitioners