GIBSON KATSANDE
versus
CHINDEGA KATSANDE (NEE MUNGOFA)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 24 May 2019

Application for absolution from the instance

F M Katsande, for plaintiff
J C Muzangaza, for defendant

CHITAKUNYE J. This is an application for absolution from the instance at the close of the plaintiff's case. The plaintiff and defendant are husband and wife having married on 7 June 1997 in terms of the Marriage Act, [*Chapter 37*] (now *Chapter 5:11*). On 3 October 2006 the plaintiff instituted action against defendant seeking a decree of divorce and other ancillary relief. Though the prayer was inelegantly crafted, it was apparent from the declaration that besides a decree of divorce plaintiff sought ancillary relief in the manner of custody of a child who was still minor at the issuance of the summons, distribution of the parties' movable and immovable properties.

The plaintiff referred to two immovable properties; namely Number 6 Jacana Drive Greystone park Harare (hereinafter referred to as the Greystone park property) and Number 17214 Fox Close, Borrowdale West, Harare (herein after referred to as the Borrowdale Park property). He sought that he be awarded the Greystone Park property whilst defendant is awarded the Borrowdale park property.

The defendant contested the distribution of the assets of the spouses as stated by plaintiff. In her plea and counter claim filed on 10 January 2007, the defendant introduced the following dimension to the matter:

a) That plaintiff had omitted to mention Stand 4041 Salisbury Township of Stand 4004 of Salisbury Township Lands commonly known as number 7 Hampden Street, Belvedere, Harare (hereinafter referred to as the Belvedere property) which he had stealthily transferred to his son from a previous marriage on the 30th June 2006;

b) That the Greystone Park property belonged to a third party, one Eunice Savanhu, the defendant's daughter from a previous marriage.

In her claim in reconvention defendant suggested, *inter alia*, that the plaintiff be awarded the Belvedere property or proceeds therefrom whilst she is awarded the Borrowdale property. This suggestion was rejected by plaintiff who insisted on the distribution as per his declaration. He also insisted that the Greystone property was acquired by the parties and not by Eunice Savanhu.

At a pre-trial conference held on 25 August 2008 the matter was referred to trial on the following issues:

1. What property constitutes the matrimonial estate and how should it be distributed?
2. What is the quantum of maintenance the plaintiff should pay for the minor child?

On 25 November 2008 Eunice Savanhu applied to be joined as a party to the proceedings. Whilst a determination was being awaited on 8 July 2009 she issued summons in HC 3003/09 against both plaintiff and defendant seeking that they transfer Stand 268 Quinnington Township 11 of Lot DC Quinnington, known as number 6 Jacana Close, Greystone Park, Harare under deed of transfer number 1199/2001, dated 12 February 2001 into her name. She alleged that in about 2000 she had provided funds to the defendants to purchase a residential property for her in Harare and they had purchased the property in question for her. The property had however been registered in the joint names of the defendants for convenience but she met all the costs associated with the purchase and transfer of the property.

The plaintiff disputed Eunice's claim whilst the defendant gave her consent to judgement in favour of Eunice.

On 18 October 2010 a pre-trial conference was held in respect of HC 3003/2009 and issues referred to trial were couched as follows:

1. Whether Plaintiff (Eunice) provided the funds for the purchase of the property in question?
2. Whether there was an agreement that the first and the second defendants would transfer the property to the Plaintiff on demand?
3. Whether the plaintiff has been the bearer of all risk and profit in the property since its acquisition?
4. Whether plaintiff is entitled to the transfer of title in the property from the first and second defendants?

The two action matters HC 6255/2006 and HC 3003/2009 were consolidated for purposes of trial due to the fact of the linkage on the Greystone park property.

The trial was beset with several challenges leading to several postponements as Eunice was said to be based in the United Kingdom and was not readily available. However, on 5 November 2018 the parties ran out of excuses for the postponement of the matter. Eunice was again not available and her legal practitioner could not continue with excuses as it was apparent she would not avail herself anytime soon. She was thus deemed to be in default.

Counsel for plaintiff and defendant in this matter out of their wisdom opted to refine the issues between the parties to capture the real dispute on the Greystone Park property.

In that regard the issues for trial were couched as follows:

a) Who between the spouses and Eunice Savanhu is the owner of 6 Jacana Close, Greystone Park?
b) If the court were to find that Eunice Savanhu never paid for the property, whether the property should not be awarded to the plaintiff?
c) If the court were to find, as the defendant assets that there is the possibility that Eunice paid for the property which the plaintiff denies, whether the parties should not be left to pursue their claims to prove their respective contentions.

It was agreed that the burden of proof in respect of issues (a) and (b) was on the plaintiff and on issue (c) was on the defendant.

The plaintiff gave evidence and called no other witness. In his evidence he tendered exhibits, which include, *inter alia*:

1. the Marriage certificate;
2. 3 receipts towards payments for 6 Jacana close, which receipts are in his name; and
3. an agreement of sale for the said property wherein the parties to the agreement are stated as:

   NEWALK INVESTMENTS (PVT) LTD as represented by Roderick Hochin, he being duly authorised, on the one party and Gibson Katsande & Chindega Mungofa, on the other party.

   On signatures someone signed on behalf of Newalk Investments (Pvt) Ltd whilst Mrs Chindega Mungofa signed as purchaser.

4 The deed of transfer number 1199/2001 was registered in the names of both plaintiff and defendant on 12th February 2001.

By virtue of such registration the property is deemed to be jointly owned by the parties in equal shares.

It was also apparent that plaintiff maintained his stance that 6 Jacana Close is the parties' property.

As regards the other properties the next contentious one was the Belvedere property of which the plaintiff maintained that he sold it to his son with defendant's agreement. In that regard he went at lengthy in explaining how other properties the parties had acquired had been dealt with in consultation with each other and so in his view there was nothing untoward in the manner the Belvedere property was disposed to his son.

It was in the above circumstances that defendant's counsel applied for absolution from the instance. He however, in the same vein sough court to decide on other contentious matters in his client's favour. He thus sought an order as follows:

a) That a decree of divorce be and is hereby granted;
b) That notwithstanding its transfer to the plaintiff's son, Stand 4041 Salisbury Township Lands, commonly known as 7 Hampden Road, Belvedere, Harare be and is hereby declared to be matrimonial property between the plaintiff and the defendant;
c) That the said property, or alternatively, whatever consideration the plaintiff may have received in lieu of the aforesaid transfer, be and is hereby awarded to the plaintiff;
d) that Stand 17214 Borrowdale Estate, otherwise known as 17214 Fox Close, Borrowdale, be and is hereby awarded to the defendant;
e) that absolution from the instance be and is hereby decreed in respect of the plaintiff's claim regarding Stand 268 Quinnington Township, otherwise known as 6 Jacana Close, Greystone Park, Harare; and
f) that each party shall pay its costs.

It is apparent that defendant seeks absolution from the instance only on the ancillary issue as court still has to deal with the issue of divorce. Amongst the ancillary issues it is only on the aspect pertaining to 6 Jacana Close that he seeks absolution from the instance.

In Herbstein & van Winsen *The Civil Practice of the High Courts of South Africa*, 5th ed, at 920 the learned author stated as follows on the issue of absolution from the instances at the close of the plaintiff's case:

> "The correct approach to an application for absolution from the instance at the close of plaintiff's case was stated by Harms JA in *Gordon Lloyd Page & Associates v Rivera*:
>
> The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA)Ltd v Daniel* 1976(4)SA 403(A)at 409G-H in these terms:
>
> > ' …. When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at173*; Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958(4) SA 307(T).

> This implies that a plaintiff has to make out a prima facie case—in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff. ….
>
> Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice."

In this jurisdiction the test has been restated as in the South African jurisdiction. For instance, in *United Air Charters (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341(S) at 343, GUBBAY CJ had this to say:

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him."

See also *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971(1) RLR 1(A) and *Taunton Enterprises (Pvt) Ltd & Another* v *Marais* 1996 (2) ZLR 303(H).

Upon considering a number of authorities on the subject ZHOU J in *Megalink Investments(Pvt) Ltd* v *Reserve Bank of Zimbabwe* HH 4/17 at page 5 of the judgement aptly opined that:

> "What emerges from the preponderance of judicial thinking evidenced by the authorities cited above is that a court should not readily dispose of a matter by way of absolution from the instance at the close of the plaintiff's case unless the evidence tendered is such that the court might not or could not give judgement in favour of the plaintiff should the defendant decide not to lead any evidence. If there is that chance that a court might or could give judgement in favour of the plaintiff then the matter ought to proceed to the defendant's case. The reference to the chance of making a reasonable mistake is intended to underscore the lightness of the burden upon the plaintiff at this stage of the proceedings. I need to point out, too, that at this stage the court is not so much concerned with questions of the credibility of the witnesses and the probabilities of the case as there is nothing to measure those aspects against in the absence of the defendant's evidence. The court at this stage is presented with only one side of the story which alone must be examined to determine whether the requirements for absolution have been satisfied."

It is apparent from the above that court should lean in favour of a matter continuing unless plaintiff has not established a prima facie case.

In *Dube* v *Dube* 2008 (1) ZLR 326(H) the nature of the issues were such that defendant was required to testify first. After his evidence plaintiff applied for absolution from the instance on an ancillary issue and the grant of judgement on aspects parties had seemingly agreed on.

In determining the application NDOU J aptly alluded to the need not to abuse such procedure where other issues between the spouses were still to be determined. At p 328E- the learned judge opined that:

> ".. a defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance. The rules of procedure are made to ensure that justice is done between the parties and, so far as possible, courts should not allow rules of procedure to be used to cause an injustice."

As regard the anomaly of applying for absolution on an ancillary issue which would not lead to a complete termination of the issues between the parties, the learned judge at 328E-G opined that:

> "In *casu*, if I grant the application for absolution from the instance, the matrimonial case between the parties is not terminated completely. The main issue, the divorce, will not be terminated. The absolution only relates to an ancillary relief. As it is axiomatic that this application for absolution from the instance stands much on the same footing as an application for the discharge of an accused at the close of the State case in a criminal case, the application must fail on this fact alone. The application, if successful, must have the effect of terminating the case completely. This procedure is not intended for the court to determine issues piecemeal in one trial."

The above sentiments speak well into this case. The net effect of the defendant's application is for court to deal with the matter in a piecemeal manner. Counsel for defendant was fully cognisance of this hence he sought the determination of the fate of other properties on the evidence adduced and to find for his client even on aspects where the onus lay on his client.

As already alluded to above the test for absolution is very clear, the plaintiff must have failed to establish a *prima facie* case. In *casu*, it cannot be said with any sense of seriousness that plaintiff has not established a prima facie case on the ancillary issue of the Greystone Park property.

It is common cause that plaintiff s evidence was supported by receipts for the purchase of the property which are in his name; the agreement of sale itself as already pointed out states the other parties to the agreement as plaintiff and defendant. To crown it all the title deeds are in the names of plaintiff and defendant. If such documents cannot be *prima facie* proof of ownership of the property then one wonders what defendant expected.

It is trite that the registration of immovable property in terms of s 14 of the Deeds Registries Act [*Chapter 20:05*] has the effect of transferring real rights to the person in whose the registration is done.

In *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) at105 H McNALLY JA aptly noted that:

> "The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. .."

As it is common cause that the property is registered in the joint names of plaintiff and defendant, it follows that plaintiff has established a *prima facie* case for joint ownership. If it is the defendant's contention that such registration did not convey real rights to those in whose name the property is registered, then the onus is on defendant to prove her contention. That *prima facie* evidence of ownership cannot be wished away.

I thus find that the application for absolution from the instance has no merit and must be dismissed.

F M Katsande & Partners, plaintiff's legal practitioners
Muzangaza Mandaza & Tomana, defendant's legal practitioners.