GLADYS CHANGA
versus
CLIFORD CHANGA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE June 01, 2010 and February 10, 2011

MATRIMONIAL TRIAL

*D Sigauke*, for applicant
*A Rutanhire*, for respondent

CHITAKUNYE J: On 14 May 1983 the applicant and the respondent were happily joined in holy matrimony as husband and wife. On 21 April 2004 that union was brought to an end by virtue of a decree of divorce granted by this court at the applicant's instance. In granting the decree of divorce the court also dealt with other ancillary issues as between the parties such as the custody of the minor children of the marriage, access by the non custodian parent, maintenance requirements for the children and the distribution of both the movable and immovable property that the couple had acquired during the subsistence of the marriage. In the distribution of the assets the court order, *inter alia*, provided that:

> "5. The defendant is to transfer to the plaintiff's sole ownership of stand 2609,(10 Beit Avenue), Milton Park, Harare and the defendant shall take all necessary steps to effect transfer of such property to the plaintiff within six weeks of the date of this order. For the avoidance of doubt, the defendant shall cease to operate his business from the Milton Park premises upon a date to be agreed with the plaintiff and in any event not later than six (6) months from the date of this order unless the plaintiff agrees in writing to an extension of the six months period.
> 6. The plaintiff is awarded a 35% share of the matrimonial home, namely Stand 568 (27 Amton Avenue), Mount Pleasant, Harare, which property is to be evaluated within six weeks of the date of this order by a registered estate valuer with the costs of the valuation to be shared equally by the parties.
> 7. In the event that the parties fail to reach an agreement upon the identity of a valuer referred to in para 5, above, within three weeks of the date of this order either party may approach the Registrar of the High Court who shall appoint a valuer from his list of approved evaluators.
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> 8. The defendant is to pay to plaintiff her 35% share in the property within three (3) months of the date of valuation failing which the property is to be sold on

the open market with the plaintiff to receive her 35% share from the net proceeds of such sale.

9. The plaintiff is to retain her sole and exclusive property the Peugeot 306X XN motor vehicle and the defendant shall take all necessary steps to ensure that such vehicle is in good state of repair and in sound running order. The defendant is to effect change of ownership of the fore mentioned motor vehicle within 6 weeks of the date of this order…"

On 29 April 2004 the respondent noted an appeal "against the whole of the judgment of the Honourable Mrs JUSTICE MUNGWIRA, delivered ... at Harare in case number 6299/00 on 21 April 2004…" The grounds of appeal included among others that-

"6. The court *a quo* erred in finding that the respondent's contributions to the acquisition by the appellant of the former matrimonial home (27 Amton Avenue), the joint crèche/ company premises (10 Beit Avenue), the crèche business (at 10 Beit Avenue) and the parties movable assets equaled those of the appellant.

7. The court *a quo* overlooked the fact that if the appellant is prevented from using the company's (separate) premises at 10 Beit Avenue for the purposes of company business, this will substantially prejudice the company's financial position and thus the appellant's financial ability to meet his financial commitments in respect of himself and the children's education.

8. The award of 10 Beit Avenue, together with the crèche business to the respondent was overly generous, in the circumstances.

9. An award to the respondent of 35% of the value of 27 Amton Avenue, together with the Peugeot, 50% of the crèche business and 50% of the parties' movable assets would have been fair in the circumstances…."

In February 2007, and before the appeal was heard, the respondent sold the matrimonial home number 27 Amton Avenue. He sold the property without adhering to the provisions of clauses 6 to 8 of the court order. That is, he did not consult the applicant for them to agree on an evaluator and neither did he approach the Registrar of the High Court for the appointment of a valuer. The applicant asserted that the sale was without her knowledge and consent. After the sale the respondent did not pay the applicant her 35% share. Up to this date he has not done so.

It is in these circumstances that the applicant has now approached this court seeking an order for the execution of the judgment pending appeal. In her grounds for the application she stated that:–

"1. The respondent's appeal against the main judgment was not noted with a *bona fide* intention of seeking a reversal of the main judgment.
2. The appeal lacks prospects of success.

3. In any event the balance of equities is in my favour should this application be granted in comparison to the respondent."

The respondent opposed the application. In his opposition he raised a preliminary point to the effect that the application before the court is defective as it is not dated and is not signed by the applicant's legal practitioners as required by the rules of this court. The applicant's quick response was to the effect that the application filed with the court is properly dated and signed. Even counsel's copy of the application is in the same state. On checking with papers filed of record I noted that indeed the application filed with the court is properly dated and signed by the applicant's legal practitioners. It may be a case of the copy served on the respondent being the only one not dated and signed. It is my view that that omission is not fatal to the application.

On the main application the respondent contended that the appeal he noted was *bona fide* and has merits. He alluded to the fact that it had taken the applicant about 5 years to apply for execution because she also realized there was merit in his appeal.

It is settled law that the court has a wide discretion in determining an application of this nature. In *ZDECO* (*Pvt*) *Ltd* v *Commercial Carriers College (1980)* (*Pvt*) *Ltd* 1991 (2) ZLR 61 (H) SMITH J dealt with the factors to consider in such applications. In the process the learned judge quoted the words of CORBET JA in *South Cape Corporation* (*Pty*) *Ltd* v *Engineering Management Services* (*Pty*) *Ltd* 1997 (3) SA 534 (A) at 545D-F wherein the Honourable judge of appeal enunciated the factors to which a court should have regard to in exercising its discretion in considering an application for leave to execute. The judge said that:-

> "In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard , *inter alia*, to the following factors:
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> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal ("respondent in the application") if leave to execute were to be granted;
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal ("applicant in the application") if leave to execute were to be refused;
> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
> (4) where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent, the balance of hardship or convenience, as the case may be."

In the exercise of the wide discretion SMITH J went on to say court must take cognizance of the fact that an appellant has a right to appeal. In that regard he quoted with approval the words of LEWIS J (as he then was) in *Wood NO* v *Edwards & Anor* 1966 RLR 335 at 340 that-

> "The position is this: that the appellant has an absolute right to appeal, and to test the correctness of the judgment appealed from in the Appellate Division, and if, by ordering execution the whole object of the appeal would be stultified, then this court would, in effect be usurping the functions of the appeal court if it ordered execution merely on the basis that it thought, in its opinion, that the prospects of success on appeal were slight. It seems clear, from the authorities, that it is only where the court is satisfied that the appeal is not brought genuinely with the *bona fide* intention of testing the correctness of the judgment in the court below, but is only brought as a delaying tactic and as a means of staving off the evil day, that the lower court may order execution to proceed in such circumstances."

In *casu* it is common cause that the respondent noted his appeal timeously. However after noting the appeal he did not seem to have made any follow up. Instead it is the applicant who made several inquiries on the progress of the appeal. It is common cause that in February 2007 the respondent sold the matrimonial home without following the terms of the court order. The result of that sale is that a material term of the court order which was to the applicant's benefit was disregarded. The applicant thus has reason to be concerned that with such an attitude she may wake up one day to find that the matrimonial estate has been disposed of to her detriment. That action by the respondent may have prompted the applicant to act to protect her interest.

In as far as whether to grant the order or not, I believe that the basic factors must be considered. The applicant has alleged that the respondent's noting of appeal was not *bona fide* and with a genuine intention to reverse the main judgment. To this she pointed out the fact that the respondent never made any follow up to the appeal which fact the respondent did not deny in his notice of opposition. She also said the respondent has not even complained about the delay, which fact the respondent did not deny in his opposition as well. Instead the respondent opted to act in bad faith by disposing of the matrimonial home behind the applicant's back and without following the terms of the court order. After the sale the respondent did not and has not remitted the applicant's share. Instead of remitting the share the respondent has instead touted/invited the applicant to chase after him for her share. The applicant argued that this serves to confirm that the respondent was not *bona fide* in noting the appeal.

Whilst the respondent is conducting himself in this way instead of pursuing his appeal diligently, the applicant has suffered and will continue to suffer irreparable harm. Ever since the court order she has been renting accommodation when she could have occupied some of the cottages awarded to her. She has been deprived the benefit of her 35% share in the matrimonial home. The respondent has continued to disturb her crèche business. He also rents out cottages that were awarded to her hence she continues to lose income from those cottages.

The respondent's response to the applicant's assertion that she is being irreparably prejudiced was akin to arrogance. Whilst not seriously denying not complying with the terms of the court order the respondent had the gutsy to virtually say that if the applicant wants her share she must chase after him. If she catches him he will pay her the 35% of the value as at the time of the sale, meaning if she does not catch him tough luck. For instance in paragraph 9 of his opposing affidavit he acknowledged that the applicant's erstwhile legal practitioners wrote numerous correspondence for him to remit her share and one of the letters was annexure D. Annexure D confirmed that he had sold the matrimonial house without their client's knowledge and consent and that an evaluation be done of which the legal practitioners concluded by saying:-

> "Please let us have your client's response within seven (7) days from the date of this letter failing which we shall proceed with the evaluation of the property and bill your client for 50% of the valuation charges as per court order."

The respondent's response as in paragraph 9.3 of his opposing affidavit was to the effect that:-

> "The applicant's failure to mitigate her loss cannot be blamed on me. I am advised which advise I believe to be correct that the applicant should and can only claim the value of her personal rights against myself to the said immovable property at 27 Amton Avenue, Mt. Pleasant, Harare as at the date of my sale of the property to the Chihotas in line with the observations by the Honourable JUDGE PRESIDENT MAKARAU in case HC 2576/07(Annexure "E" herein). Effectively this means that the applicant can only claim 35% of the value of the Mt. Pleasant property as at the date of sale to the Chihotas."

In paragraph 11.2 he re-emphasized the point when he said that:-

> "Even if I had not consulted her, the respondent (applicant) failed to assert her rights to the 35% in the said property once she became aware of its sale to the Chihotas. The applicant can and should however still get her 35% of the market value of the property as at the date of the agreement of sale to the Chihotas, meaning 35% of the purchase price paid by the Chihotas."

Despite such knowledge up to this stage he has not deemed it fit to tender the 35% of the purchase price, waiting to see if the applicant can catch him. Such attitude in my view is consistent with one out to harass another. A careful reading of the rest of his opposing affidavit confirms this.

I am satisfied that the respondent's notice of appeal was not made with a *bona fide* intention to reverse the main judgment. It was meant to delay the execution of the judgment and to harass and frustrate the applicant.

On the question of irreparable harm it is clear beyond doubt that the applicant stands to suffer irreparable harm if the court order is not executed. She has already lost rentals to premises she was awarded and she continues to suffer such losses. In terms of real value she may not be able to realize the full 35% value of the matrimonial home as the price at which it was sold was never shown to have been the market value at the time and may not be so at the time she will recover it. It is common cause that at the time of the sale the Zimbabwe dollar was the currency in use for most transactions. That *de facto* demise of the Zimbabwe dollar and the introduction of multi-currencies as the dominant means of transacting has its own hurdles to the recovery of the 35% in real value. The respondent on the other hand has not shown what irreparable harm he stands to suffer. He was awarded adequate immovable property to easily relocate his business to. Should he succeed in his appeal he can always claim back no. 10 Beit Avenue.

I am of the view that the balance of convenience favours the applicant when the hardships each is likely to suffer if the order is or is not executed is taken into account. The financial loss the respondent may suffer in relocating his offices and in paying transfer fees is nothing compared with the harm suffered and likely to be suffered by the applicant in trying to recover her 35% share in real value and by the respondent's continued occupation and use of premises awarded to her when she could be occupying the premises herself and leasing out some of the cottages.

The issue of prospects of success on appeal is next. It is my view that unless the respondent adopts a more diligent attitude his prospects of success seem deem. He clearly appears disinterested in prosecuting the appeal. Had he been convinced of the chances of success the probability is that he would have put more effort in pursuing the appeal. His attempt to refer to the delay as being occasioned by the registrar's office was not convincing at all. It is not the respondent who made the inquiry and was informed of the problem, it is the

applicant. The respondent is simply trying to benefit from the applicant's inquiries without himself taking any positive steps to prosecute the appeal.

Accordingly it is hereby ordered that:-

1. Pending the outcome of an appeal filed by the respondent in the Supreme Court of Zimbabwe, under case number SC 148/04, it is hereby ordered that the judgment passed by the Honourable JUSTICE MUNGWIRA on 21 April, 2004 under case number HC 6299/2000 be executed in full.

2. The respondent shall pay the costs of this application.

*Mavhunga & Sigauke*, applicant's legal practitioners
*Scanlen & Holderness,* respondent's legal practitioners