REPORTABLE ZLR (73)

Judgment No. S.C. 138/99
Civil Appeal No. 439/97

JENNIFER MARIETTA LUFU vs JONA GWALALE NCUBE LUFU

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
BULAWAYO, NOVEMBER 29, 1999 & JANUARY 7, 2000.

W Sansole, for the appellant

T A Cherry, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which granted the respondent's application for a declaratory order with costs, and dismissed the appellant's cross-application with costs.

The facts are as follows. Prior to 16 June 1995 the parties were husband and wife. When they divorced on 16 June 1995, it was ordered that their proprietary rights were to be governed by a Consent Paper previously signed by them. The respondent was then a bank manager employed by the Standard Chartered Bank ("the bank").

Only two paragraphs of the Consent Paper are relevant for the purposes of this appeal. They are paras 1 and 4.

The relevant part of para 1 reads as follows:

"1. That the defendant (the appellant) shall be awarded the following items of movable and immovable property:

1.1 Stand Number 1494 Khumalo Township of Bulawayo Township Lands, situate in the District of Bulawayo. The defendant (the appellant) takes the property subject to the Bond to the extent of $70 000.00 as at the date of signing this document.

It is hereby recorded that the balance of the mortgage calculated as at the date of signing this agreement is to be met by the plaintiff (the respondent)."

At the relevant time, the total amount outstanding on the mortgage bond was $168 000.00. As the sum of $70 000.00 was to be paid by the appellant, the balance of $98 000.00 was to be paid by the respondent.

Paragraph 4 of the Consent Paper reads as follows:

"4. Further, it is recorded that the plaintiff (the respondent) shall retain the defendant (the appellant) in his medical aid."

Following the dissolution of the marriage, the parties agreed to split the mortgage bond into two and, with the concurrence of the Building Society concerned, two separate mortgage bond accounts were created, one in the appellant's name in respect of the sum of $70 000.00 and the other in the respondent's name in respect of the sum of $98 000.00. Thereafter, for about twenty months each party paid his/her monthly instalment into his/her account without any complaint. The respondent was the registered owner of the property in question.

Then, suddenly the appellant demanded that the sum outstanding on the respondent's account be paid off immediately as she wanted the property to be

transferred to her. She alleged that by making that demand she was merely enforcing the provisions of para 1.1 of the Consent Paper.

Whilst the respondent was prepared to make arrangements for the transfer of the property to the appellant, he refused to make a lump sum payment of the balance outstanding on his account. He maintained that in terms of para 1.1 of the Consent Paper he was entitled to discharge his liability by means of monthly instalments.

As the parties could not agree on the interpretation of para 1.1 of the Consent Paper, the respondent filed a court application seeking a declaratory order to the effect that the provisions of the paragraph in question did not require him to make a lump sum payment of the balance outstanding on his account. The application was opposed by the appellant who filed a cross-application.

In that cross-application, the appellant sought an order directing the respondent to (a) pay off the balance on his account and transfer the property to her, and (b) give her a medical aid card or arrange with his Medical Aid Society to issue a medical aid card to her. The cross-application was opposed by the respondent.

The learned judge in the court *a quo* granted the declaratory order sought by the respondent but dismissed the cross-application. Aggrieved by that decision, the appellant appealed to this Court.

There are two issues to be determined in this appeal. The first issue concerns the interpretation of the provisions of para 1.1 of the Consent Paper, the question being whether those provisions require the respondent to make a lump sum payment of the balance on his account. The second issue concerns the provisions of para 4 of the Consent Paper, the question being whether the respondent should be directed to give a medical aid card to the appellant or arrange with his Medical Aid Society to issue a medical aid card to her.

I now proceed to deal with the first issue. As already indicated, in terms of the Consent Paper the property was awarded to the appellant "subject to the Bond to the extent of $70 000.00". The phrase "subject to" has been judicially interpreted in a number of cases and its meaning depends upon the context in which it is used.

In an old case, *Re Morrison, Morrison v Morrison* (1910) 102 L.T. 530, referred to in *Words and Phrases Judicially Defined* Vol 5, PARKER J said the following at p 531:

> "In this case the testator has, by his will, given to his trustees a sum of £270 000, subject to death duties, upon trust to invest the same and deal with the investment in the manner directed in his will. Now, when a property or legacy is given subject to duties, or subject to death duties, it appears to me that it may mean one of two things: it may mean that the testator in describing the property is describing the legal incidents to the property and connoting in his own mind the fact that the duties will have to be paid, or the intention may be to subject the subject of the gift to some burden in favour of somebody else which would otherwise be borne."

In the present case, it seems to me that the second meaning referred to by PARKER J is more appropriate than the first. The parties clearly agreed that the

appellant would take the property together with the burden of the existing mortgage bond to the extent of $70 000.00, whilst the balance of $98 000.00 was to be paid by the respondent.

In my view, there is nothing in para 1.1 of the Consent Paper to suggest that either party had to pay off his/her part of the mortgage bond in a lump sum. Had that been the intention of the parties, it would have been very easy to say so. In addition, the parties would have stated by what date the money had to be paid.

The conclusion I have reached is strengthened by what happened after the dissolution of the marriage. The parties agreed to split the mortgage bond into two and, with the concurrence of the Building Society concerned, two separate mortgage bond accounts were created. One account was in the appellant's name in respect of the sum of $70 000.00, and the other was in the respondent's name in respect of the sum of $98 000.00. Subsequently, for more than twenty months both parties paid their monthly instalments into their respective accounts. During that period the appellant did not call upon the respondent to pay off the balance on his account, nor did she give him a date by which the sum had to be paid.

In the circumstances, I am satisfied that the learned judge in the court *a quo* correctly interpreted the provisions of para 1.1 of the Consent Paper.

I now wish to deal with the second issue raised in this appeal. This concerns the provisions of para 4 of the Consent Paper. That paragraph provided that the respondent was to retain the appellant on his medical aid scheme. When the

parties signed the Consent Paper the respondent was a member of the bank's medical aid scheme ("the medical aid scheme") which was intended for the bank's employees, as well as their spouses and children. At the time of signing the Consent Paper the parties overlooked, or were unaware of, the fact that the medical aid scheme did not cover former spouses of the bank's employees.

Nevertheless, after the dissolution of the marriage the appellant continued receiving benefits from the medical aid scheme. She, however, complained that every time she required medical treatment she had to go through a cumbersome procedure because she did not possess a medical aid card. She averred as follows in her cross-application:

> "The applicant (the respondent) has refused to give me written authority or a card to facilitate my use of his Medical Aid. Each time I need to avail myself of his Medical Aid I have to go through a process of writing to the Medical Aid Society for written authority to use the applicant's Medical Aid. It would be a simple matter if the applicant (the respondent) were to arrange for a card to be issued to me outright, so that I may use it whenever the need arises. Accordingly, … I ask that the court direct the applicant (the respondent) to give me written authority or (a) Medical Aid card for my use at all times."

It is pertinent to note, however, that the respondent did try to accommodate her as far as the medical aid card was concerned. Unfortunately, this was very much to her detriment because as soon as the bank's Medical Aid Society became aware that the parties had divorced, it informed the respondent that the appellant was no longer entitled to any medical benefits under the scheme.

In the circumstances, it was submitted on behalf of the respondent that he could not carry out the obligation set out in para 4 of the Consent Paper because it was impossible for him to retain the appellant on the medical aid scheme as

previously agreed. I must add that the allegation that after the dissolution of the marriage the appellant was no longer entitled to the benefits of the medical aid scheme was not challenged by the appellant. Whilst the respondent is no longer employed by the bank, having retired some time ago, he remains a beneficiary of the medical aid scheme.

The issue which arises from the submission made on behalf of the respondent is what happens when an agreement concluded by the parties becomes impossible of performance. That issue has been considered in a number of cases.

In *MacDuff & Co Ltd v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 600 SOLOMON JA commented as follows:

> "Now it is a clear principle of our law that a contract is discharged if it has become impossible of performance after it has been entered into, *Peters Flamman & Co v Kokstad Municipality* (1919 AD 427)."

That principle was subsequently applied in *Rossouw v Haumann* 1949 (4) SA 796 (C). In that case the parties concluded an agreement which was later made an order of court by consent. The agreement provided, *inter alia*, that the parties would share equally the cost of constructing certain works for the protection of their respective farms, and that certain named engineers should be requested to formulate a scheme which was not to cost more than a certain agreed amount. When the engineers reported that the amount required to furnish the scheme would far exceed the amount agreed upon by the parties, Haumann started certain works which were in direct conflict with a certain clause in the consent paper. Rossouw then sought an interdict restraining Haumann from proceeding with the works. Haumann

opposed the application and contended that he was no longer bound by the agreement because it had become impossible of performance. The court held that as the parties agreed that the agreement was impossible of performance, Rossouw no longer had any right under the agreement. His application for an interdict was, therefore, dismissed.

Finally, in *The Law of Contract in South Africa* 3 ed by R H Christie, the learned author has this to say at pp 101-102:

> "The Roman law principle that a contract is a nullity if at the time it was made it was impossible of performance forms part of our law.
>
> > 'By the Civil Law a contract is void if at the time of its inception its performance is impossible: *impossibilium nulla obligatio* (D50 17 185).'
>
> But the principle thus stated may easily be misunderstood and requires immediate qualification in four respects. First, the impossibility must be absolute as opposed to probable. The mere likelihood that performance will prove impossible is not sufficient to destroy the contract. Second, the impossibility must be absolute as opposed to relative. If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. Third, the impossibility must not be the fault of either party. A party who has caused the impossibility cannot take advantage of it and so will be liable on the contract. Fourth, the principle must give way to the contrary common intention of the parties. This intention may be expressed, as when a seller expressly represents or promises that the *merx* exists. If it is found not to have been in existence at the time the contract was made, he will be liable for damages for breach of his promise or for his false representation if fraudulent or negligent. Or the common intention of the parties may be implied, as in the case of the sale or lease of a *res aliena*. The seller or lessor impliedly undertakes to deliver the property or to pay damages if he is unable to do so."

I am entirely satisfied that the learned author has accurately stated the law on this topic.

Applying the principles set out above to the facts of the present case, I am satisfied that the agreement set out in para 4 of the Consent Paper is a nullity because at the time it was concluded and made part of the court order it was impossible of performance.

I am also satisfied that the impossibility of performance of the agreement in this case satisfied all the requirements laid down by Professor Christie.

First, the impossibility was absolute as opposed to probable. It was common cause that the medical aid scheme did not cover the former spouses of the bank's employees. It was, therefore, absolutely certain that the respondent could not retain the appellant on the medical aid scheme.

Second, the impossibility was absolute as opposed to relative. What the respondent promised to do (i.e. retain the appellant on the medical aid scheme) was not something which, in general, could be done. It could only be done if the appellant were the respondent's wife, which she no longer was after the dissolution of the marriage.

Third, the impossibility was not the fault of either party. This was common cause. Neither party, therefore, could be said to have caused the impossibility.

Lastly, the parties did not have any contrary common intention. They genuinely believed that what they had expressly agreed upon could be implemented.

In the circumstances, the learned judge in the court *a quo* correctly dismissed the appellant's cross-application.

However, in the view of the fact that the respondent had undertaken an obligation to retain the appellant on the medical aid scheme, the appellant should, perhaps, have made an application for the amendment of para 4 of the Consent Paper in order to remove the impossibility referred to above. This she can still do if so advised by her legal practitioner.

The appeal is, therefore, dismissed with costs.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Sansole & Senda, appellant's legal practitioners

Joel Pincus, Konson & Wolhuter, respondent's legal practitioners