REPORTABLE ZLR (66)

Judgment No. SC 70/07
Civil Appeal No 134/07

MICHAEL TAYLOR v HEATHER MARGARET TAYLOR

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & GARWE JA
HARARE, NOVEMBER 20, 2007 & SEPTEMBER 15, 2008

R M Fitches, for the appellant

J C Andersen SC, for the respondent

GARWE JA: At the conclusion of the hearing of this matter the High Court granted an order in favour of the respondent confirming the revocation of a donation consisting of a piece of land known as Lot 2 of Subdivision 1 of Stand 185 of Matsheumhlope Bulawayo. The High Court also ordered that the piece of land be transferred back to the respondent. This appeal is against that judgment.

The facts of this case are to some extent common cause. The parties met in Bulawayo in 1982 and during the same year started co-habiting. They eventually got married in December 1983. The marriage subsists to this day. After living together for a period of over ten years, the respondent decided to donate the vacant piece of land to the appellant. The appellant accepted the donation and the property was formally transferred to him in 1998.

The court *a quo* made a finding that the appellant had engaged in an adulterous relationship with one Miriam Nkomo during the subsistence of the marriage. The court also found that the donation to the appellant had been a simple donation and not a remuneratory one. As a result the court found in favour of the respondent and made an order revoking the donation.

The grounds upon which the appellant has appealed to this Court are as follows:

1. The learned Judge erred in disposing of the matter on the papers as there were material disputes of facts. The matter should therefore have been referred to trial.

2. The learned Judge erred in finding that the donation was a simple donation when in fact it was a remuneratory donation.

3. The learned Judge erred in ordering a revocation of the donation without *mero motu* considering the question of compensation for the dwelling built by the appellant.

4. The judgment of the court *a quo* has the effect of unjustly enriching the respondent.

It is clear, from the above grounds of appeal, that there are three issues that require determination. These are firstly whether the court *a quo* erred in disposing of the matter on the papers instead of referring the matter to trial; secondly whether the court *a quo* erred in coming to the conclusion that the donation in this case was a simple donation rather than a remuneratory one; and thirdly whether the court *a quo* should have *mero motu* dealt with the question of unjust enrichment and consequently ordered the respondent to pay compensation for the dwelling constructed on the donated piece of land.

The first and second issues are related and raise one fundamental issue. That issue is whether the court *a quo* should have referred the dispute on whether or not the donation was remuneratory to trial. The position is now well established that not every dispute of fact in motion proceedings has to be sent for trial. The correct approach in this regard was enunciated by this Court in *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 where GUBBAY JA (as he then was) stated at p 339 C-D:

> "It is, I think, well established that in motion proceedings a court should endeavour to settle the dispute raised in affidavits without hearing of evidence. It must take a robust and common sense approach and not an over-fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned … ."

It is common cause that there was a dispute on the papers as to the extent to which the appellant contributed towards the household expenses of the couple and whether the donation made to him was in exchange for some services that he had

rendered to the respondent's late mother. The court *a quo* reached the conclusion that the donation was a simple one. I am not persuaded that the court erred in reaching this conclusion. The court *a quo* did accept that the appellant had been generous with cash gifts for birthdays and anniversaries. The court also concluded that the sum of 10 000 pounds sterling given to the respondent was not a gift at all as it had subsequently been taken and paid over to the appellant's daughter who was in need of financial assistance. This was in the year 2002. On the papers the sum of 10 000 pounds given to the respondent could not have induced the respondent to donate the piece of land to the appellant. In other words it could not have been a reciprocal donation. I say this because the agreement to transfer the land in question was signed at Bulawayo in 1995. This was long before the appellant gave the respondent the sum of 10 000 pounds. In her answering affidavit the respondent says that the sum was only given to the respondent in the year 2000 but was subsequently taken away in the year 2002. The court *a quo* also dismissed the appellant's claim that the donation had been made because of services he had rendered to the respondent's late mother during the last few months of her life. That claim is highly improbable and in my view the court *a quo* cannot be said to have misdirected itself in rejecting it. The assistance the appellant says he gave was not out of the ordinary. It was the kind of assistance that any son-in-law would have been expected to give to an ailing mother-in-law. In the particular circumstances of this case it seems improbable that the donation would have been made because of the assistance he gave.

The claim by the appellant that he expended certain sums of money to improve security at the residence of the respondent's mother and in improving a piece of

land donated to the respondent's son remained a bald one. The law is clear that bald and unsubstantiated allegations are not sufficient. See *Akhtar v Min of Public Commission* SC 173/97.

In all probability the donation was made because at that time the respondent was happy with the appellant and the relationship between the two was a good one. All the facts considered I am satisfied that the disputes of facts were capable of resolution on the papers and that the court *a quo* did not err when it came to the conclusion that the circumstances pointed towards a simple rather than remuneratory gift.

Both parties have made submissions on whether or not the respondent was entitled to revoke the donation on account of ingratitude and whether such ingratitude was proved on the papers. For reasons that will follow shortly there is no requirement in our law that a spouse should prove ingratitude before revoking a donation made during the subsistence of a marriage i.e. *stante matrimonio*.

In general a donation *inter vivos*, once made is irrevocable, except in a few instances, notably ingratitude – JOUBERT, *The Law of South Africa vol. 8 Delict to Elections* para 120; 127; Manfred Nathan, *Common Law of South Africa*, vol. 11 - 2nd ed para 1090.

In the case of a remuneratory donation, there can be no revocation, even for ingratitude – *Common Law of South Africa op.cit* para 1090.

In the case of donations between spouses the common law position has been that a donation *inter vivos* between spouses is prohibited subject to certain exceptions – LEE & HONORE, *Family Things and Succession 2nd ed by Erasmus* p 45. That common law rule no longer applies in this country – see s 11 of the General Law Amendment Act, [*Cap* 8:07]. Consequently donations between spouses are now permissible. The common law position, however, remains that the donor may at any time revoke such a donation – LEE & HONORE op cit p 45, para 61. That position has previously been accepted in this country. See for example *Hay v Hay* 1956(3) SA 527. *Phoenix N O v Dyer Smith N O & Anor* 1968(3) S.A. 145. Reciprocal and remuneratory gifts between spouses however are not revocable, - JOURBERT, *The Law of South Africa op cit* p 163, para 138; *Phoenix N.O. v Dyer Smith N.O. & Anor supra* at p 148H.

The issue that now remains to be determined is whether the court *a quo* should have *mero motu* raised the question of unjust enrichment and ordered the respondent to pay compensation to the appellant. Unjust enrichment now forms a cause of action in terms of our common law – See *Industrial Equity v Walker* 1996 (1) ZLR 269 (H). The issue of unjust enrichment was not before the court *a quo* and indeed no submissions in that regard were made by either party. The issue before the court was whether the respondent could revoke the donation and if so whether it was necessary to prove ingratitude on the part of the respondent. At no stage was the court asked to direct its mind to the question of compensation for improvements effected on the land. In these circumstances I see no basis upon which the court *a quo* can be said to have misdirected

itself in not *mero motu* dealing with an issue that was never before it. The suggestion that the judgment of the court *a quo* has the effect of unjustly enriching the respondent is not entirely correct as the issue does not arise at this stage. It is clear that the appellant is entitled to take any action he considers appropriate in order to recover any monies he may have expended in effecting improvements to the donated land.

In all the circumstances therefore I find that there is no merit to this appeal.

The appeal is accordingly dismissed with costs.

CHEDA JA: I agree

ZIYAMBI JA: I agree

Ben Baron & Partners, appellant's legal practitioners

Lazarus & Sarif, respondent's legal practitioners