

THEMBEKILE MDLONGWA

Versus

NDUMISO MDLONGWA

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 17 NOVEMBER 2003 & 1 APRIL 2004

Mrs N Moyo for applicant
J Sibanda for 1st respondent

Judgment

CHEDA J: Applicant applied to this court and the order sought is as follows:

1. That respondent be and is hereby compelled to transfer stand number 6096 Luveve 5 to applicant failing which the Deputy Sheriff shall be authorised to sign the transfer papers on 1st respondent behalf.
2. That 2nd respondent be and is hereby restrained from transferring stand number 6096 Luveve 5 to any person other than applicant.
3. That 1st respondent pays the costs of this application.

The parties were married to each other but divorced on 3 October 2002 on the basis of a consent paper signed by applicant on 4 July 2002 and by respondent on 3 July. Paragraph 4 of the consent paper reads-

“The defendant shall be given first preference and if by the 90th day he has failed to raise plaintiff’s half share of \$750 000,00, then plaintiff shall be allowed to purchase defendant’s share failing which the house shall be sold to best advantage and the proceeds therefrom shared equally between the parties.”

On 8 October 2002 1st respondent's legal practitioner wrote to applicant's legal practitioner. In that letter they stated that they required a copy of the consent paper, as without it, they would not know whether the period the parties had agreed to had expired. They also acknowledged receipt of \$750 000 being 1st respondent's share in the matrimonial property. In addition to this, they intimated that in their view the period given to their client starts running from the date of the initialling of the consent paper and not the date of the signature.

It is applicant's argument that the day of reckoning should start on 4 July, which is the last day of the last party's signature. She further argued through her legal practitioner that the initials on the consent paper were merely to change the distribution or awarding of the movable property and therefore it did not affect the immovable property which is the subject matter here.

On the other hand 1st respondent argued that initialling of the consent paper which was previously signed by both parties, now shifted the date of reckoning to a date when initials were appended. Of note however, is that, there is no date inserted alongside the initials.

While this argument may appear sound but it presents the court with a little difficulty in that there is no date upon which the court can start reckoning. I find as a fact that the parties entered into an agreement to dissolve their marriage on the basis of a consent paper based on their signatures and not on the initials. The initialling was merely for the alteration of the movable property. And not the immovable property.

First respondent has also argued that the initialling of the document interrupted the agreement. This I do not agree, with, in my opinion the initials only

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affected the movable property and 1st respondent knew it. In any event if he understood that the initials were to dominate the signatures, he should have inserted the date of the second signing (initialling). As it is we do not know when it was initialled save for speculations. The court is unfortunately not given to base its conclusions on speculations.

I also find that the parties knew and fully understood that their options were regulated by paragraph 4 of the consent paper.

The issue which falls for determination is whether the signing of the consent paper should be overridden by the subsequent initialling of the agreement. In my view whereas “signature” means full names, initials, mark or thumb print, the signatures on the consent paper have a dominant effect on the whole document moreso, that the initials were appended as a recognition of the amendments relating to movables only. Where a signature appears at the foot of the written matter, it is to be taken conclusively to apply to the whole document unless something is expressed to rebut that presumption, see *Chitty on Contracts: – General Principles* 22nd Ed paragraph 169.

I find that respondent knew very well that the day of reckoning started on the day they signed the consent paper and not on the day of their initials, hence his legal practitioner’s letter wherein he stated,

“As explained to you, the writer has no knowledge, without the consent paper, of knowing whether the period that the parties agreed on for our client to raise funds, expired.”

This letter in my opinion, is so clear that even he who runs can read. It means exactly what it says. 1st respondent was desirous to see the consent paper in order to start reckoning the dates. However subsequent letters from his legal practitioner

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sought to shift that position. 1st respondent's conduct is reprehensible and can not be allowed as it no doubt casts doubt on his bona fides in this matter. He should have started securing funds from the date of signing of the consent paper. His failure, can not be visited upon the applicant who met her part of the agreement and even sent him a cheque for \$750 000.

Applicant has therefore made a good case for her self and this application accordingly succeeds and the following order is made.

1. That respondent be and is hereby compelled to transfer stand number 6096 Luveve 5 to applicant failing which the Deputy Sheriff is authorised to sign the transfer papers on 1st respondent behalf.
2. That 2nd respondent be and is hereby restrained from transferring stand number 6096 Luveve 5 to any person other than applicant.
3. That 1st respondent pays the costs of this application.

Moyo-Hara & Partners, applicant's legal practitioners
Job Sibanda & Associates, 1st respondent's legal practitioners