

HEATHER MARGARET TAYLOR

Versus

MICHAEL TAYLOR

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 27 OCTOBER 2006 AND 31 MAY 2007

Ms N Ncube, for applicant
S Nkiwane, for respondent

Opposed Application

KAMOCHA J: The parties in this matter got married on 31 December 1983. The marriage still subsists although it is currently at the brink of breaking down. During the hay days of the marriage the applicant donated to the respondent a piece of land known as Lot 2 of subdivision 1 of stand 185 of Matsheumhlophe situated in the District of Bulawayo.

Due to certain allegations contained in her founding and replying affidavits she has decided to revoke the donation and now seeks an order confirming the revocation in the following terms:-

“It is ordered that:-

1. Applicant’s revocation of her donation to respondent of certain piece of land, known as Lot 2 of subdivision 1 of stand 185 of Matsheumhlophe, Bulawayo be and is hereby confirmed.
2. Respondent be and is hereby ordered to effect transfer of the property to applicant within 14 days of the date of service upon him of this order, or immediately upon being called upon by conveyancers to do so, respondent shall sign all documents, and perform all acts necessary to effect the transfer, failing which the Deputy Sheriff is hereby authorised to sign all documents in his place and stead.
3. The respondent shall pay costs of this application on the attorney and client scale.”

The applicant’s legal practitioners formulated the issues to be determined by the court which were adopted by the respondent as follows:-

- “1. Whether the donation in this matter was a simple donation, or a donation so called rather than a remuneratory donation.
2. Whether as a point of law, a donation can be revoked after delivery of the donated object.
3. Whether in the circumstances of this case, valid legal grounds exist for the revocation of the donation. Put differently, the issue is whether gross ingratitude has been displayed by the respondent; and also whether gross ingratitude has to be proved at all

to justify the revocation of the donation in this kind of matter.”

The parties met at the beginning of 1982 and by April 1982 they decided to live together at 52 Cardwell Road Matsheumhlophe, Bulawayo. After having lived together for more than a year they decided to formalise their relationship by getting married on 31 December 1983.

According to the applicant when the respondent moved in to live with her, the house was fully furnished and fully equipped. Whatever furniture and decorations that the respondent brought with him were not put to use by the parties, but stored. After living together for over twelve years the wife (who is the applicant) decided to donate to her husband (respondent) a piece of land known as Lot 2 of subdivision 1 of stand 185 of Matsheumhlophe situate in District of Bulawayo. The respondent accepted the donation and a Deed of Transfer was signed on 25 June 1998. The piece of the donated land was valued at \$30 100,00 although being a donation respondent paid nothing towards its value.

The applicant averred that she made the donation to her husband out of her love and affection for him. They had been together for more than 10 years then, and she stated that at the time, his lack of contribution to housekeeping aside, he was a good partner and husband. Because at that time she did not make money an issue, she was happy with him. For that reason she did not expect or require the respondent to do anything for her in return. She simply donated the land to him because she loved him, and as a gesture of her love for him.

Applicant alleged that she was financially comfortable during the first years of their marriage because her parents were, at that time, running a family business, Personality Dry Cleaners. She became a director of the company when her father died on 27 November 1983. As a director she received an annual dividend. In addition to that income she received a monthly salary from her employment. Hence when respondent went to live with her she continued to pay for house keeping without getting any assistance from him. He did not even offer any assistance at all, and did not disclose to her what his financial status was.

Applicant stated that respondent lost his job as a lecturer at the Bulawayo Polytechnic so she had to continue supporting him. Surprisingly, respondent commenced building operations on the donated piece of land yet he was not paying anything towards his own upkeep or the running of the house. He suddenly had money to spend on building. She, on several occasions, asked him where the money which he was using to build on the donated property came from he told her it was none of her business. Also when she asked him several times why she did not have access to some of the money she never got an answer.

However, at some stage the respondent told her that the dwelling that was being built on the donated property, once completed, would be used to accommodate their visitors and also that it would be let out to lecturers at the nearby National University of Science and Technology and generate income. This explanation led her to accept the building venture, and she provided the following:

- a) furniture inherited from her mother's estate;
- b) her own personal furniture which she had acquired with her first husband; and
- c) when the family business, Personality Dry Cleaners closed down she moved some of the furniture into the cottage.

Applicant averred that she eventually became aware that respondent was receiving a Navy and old age pensions. She also became aware that respondent had sold a house that he had owned in Norwich, in England. None of the funds were ever disclosed or accounted for to her.

She alleged that while she had been open and generous with him with the little resources that she had, he had been less so with her. He was much less than forthcoming financially particularly in the recent times. In later years the parties had some financial tension between them with respondent neglecting his share of the expenses for his own upkeep, let alone his responsibility at law to maintain his wife.

Further, the respondent's drinking problem also caused some tension between them, with the result that instead of letting the cottage out as understood by both of them initially,

respondent started using it as his own get away, a place where he would retreat to be away from her. The net result was that she had limited access to the said dwelling. Respondent had kept certain parts of the cottage locked and secured against her. He kept and used it as his exclusive property and declared that what he did there was none of her business.

The respondent during the course of the marriage and while still living with the applicant, carried on a relationship with one M.N., whose husband it is common cause, died of HIV/AIDS related disease. Respondent admitted that M.N. contracted the HIV virus and so did her daughter.

The applicant alleged that the respondent had an affair with M.N.. She had overheard respondent over the telephone making intimate remarks to M.N.. The call ended with the words "Love you".

Respondent offered substantial economic assistance to M.N. even at a time when applicant had to seek legal assistance to obtain maintenance from him. He took M. out to lunch. He did not deny that he had driven her from work to her house on a regular basis. He had been driving her around in his car.

M.N. sent respondent intimate greeting cards. One of the cards, annexure "F" with lovely roses and has words "You are wonderful", M. addresses respondent as "Darling" the message ended with the words "All my love".

The applicant begged respondent for an explanation which he did not give. She asked him to terminate his relationship with M. but he declined. Applicant felt very hurt, humiliated and injured by respondent's conduct especially when he continued without regard to her feelings. When asked to explain respondent would instead retreat to the cottage at the donated property. That distressed her greatly.

In conclusion the applicant submitted that respondent's conduct of:

- a) Carrying on an improper adulterous relationship with another woman whose partner has died of an HIV/AIDS related illness and whose child is believed by herself to have AIDS;

b) Refusing to terminate the relationship, even while she begged him to terminate it;

c) Proceeding publicly with the relationship, without regard to her deeply injured feelings;

and

d) Assisting M. N. financially while neglecting her, constitutes and displays gross ingratitude.

In the result she wished to revoke her donation of the land to him on grounds of gross ingratitude.

The respondent admits that he and M. were friends but denied that they had an affair. He stated that he had had a platonic friendship with her for the past year.

I have no difficulty in rejecting his story on that point since the evidence clearly reveals that the two were lovers. If proof for that is needed one just looks at annexure "F" a card that M. sent to respondent which applicant found in his bedside drawer at the cottage. Applicant also found condoms in the bedside drawer. Respondent and applicant never used condoms.

The card has the following printed message-

"Having your love, your affection and understanding is a beam of joy that brightens up even those moments of darkness in life ...

And because its your love that makes happiness more intense and complete, my heart loves you, thanks you and belongs to you ... always"

In addition to the printed message she added the following handwritten one:

"Darling

Thanx for your kindness and support at least I know there's someone who cares for me. I never thought I would get somebody who will love me except my late husband, lets hope you mean what you say cause I don't want somebody who will give me a heartache. Its difficult to find a good heart these days.

May God bless you and all the best of luck.

All my love."

The court makes a specific finding that respondent was in love with M.N. during the subsistence of his marriage to the applicant. It is common cause that M.N.'s husband died of an AIDS related disease and she herself is HIV/AIDS positive. Instead of being a platonic friendship as respondent would want the court to believe, it is in fact an improper adulterous relationship. I further find that respondent was using the cottage on the donated land to arrange meetings with M.N.. He was making telephone calls from there.

It is also highly probable that he used to have sexual intercourse with M. in the cottage which would explain why he kept condoms in his bedside drawer. He has never used condoms with his wife.

The respondent in his opposing papers suggested that applicant made the donation in recognition of the things that he did for her meaning that the donation was a remuneratory donation.

Respondent alleged that applicant had a number of all expenses paid holidays to the United Kingdom, South Africa, Malawi and Tiger Bay, Kariba. Applicant explained that the trip to the United Kingdom was undertaken before the parties got married. The purpose for the trip was two fold: first was for applicant to meet respondent's family and the other was to arrange for the sale of his house in Norwich.

Respondent claimed that he had been responsible for the maintenance and repair of the property, the up-keep of the swimming pool, paying the worker, payment of electricity and water. He went on to allege that he had supervised the construction of a durawall around the property, and manufactured the large security gates.

Further, it was his assertion that he had given the applicant a gift of ten thousand pounds and also facilitated applicant to obtain an old age pension from Britain based on his contributions over 45 years. Her pension was approximately 150 British pounds per month which she is still receiving up to now. He said at the time he deposed to his affidavit that money translated to \$150 million per *mensem* Zimbabwe dollars.

In response to the above allegations by the respondent, applicant revealed that

respondent did not have much money to meet the expenses he claimed to have taken care of. To start with he used to remit part of his salary to the United Kingdom every month. Secondly, he had hire purchase instalments to be paid plus purchase of a vehicle. So there was not much left out of his salary. Applicant therefore did not find it reasonable to ask for financial assistance from him until he was in a more favourable financial position. She therefore carried the burden of running the house with minimum support from him. Applicant said respondent only paid some service accounts and gardener's wages in 1989.

She, however, conceded that he was usually very generous with cash gifts for birthdays and anniversaries but that was expected from a good husband who was very well looked after by his wife.

In relation to the durawall around the property which he merely supervised the funds for the construction came from her pension when she resigned from the Ministry of Higher Education.

Applicant stated that the amount of ten thousand pounds was not an outright gift to her since that was taken away from her in the following circumstances.

When the respondent's mother died in 1997 there were some financial bequests to her four children, the respondent being the eldest son. The respondent used some of his inheritance to buy premium bonds but as there was a limit to the number of bonds one person could hold at a time, the respondent put some of these into the name of the applicant. That was in about 2000.

Some time in 2002, respondent's daughter, who lived in the United Kingdom, required certain financial assistance. Out of family loyalty applicant agreed to cancel her premium bonds and transfer the money to respondent's daughter. That was done in march 2002. The respondent had told applicant that that was a loan which would be repaid but to date it has not been repaid. Thus in essence, applicant never got the benefit of the gift.

In the light of the above explanation this court finds that the alleged gift of ten thousand pounds was no gift at all since applicant derived no benefit from it.

Respondent also claimed that the donation by applicant was a remuneratory one because of the efforts he had put into assisting the applicant's mother during the last years of her life. He said after the death of her husband he and applicant used to go on a daily basis to check that she was safe and to assist with her day to day problems.

When her health deteriorated respondent allegedly took the responsibility for maintaining her house, grounds, domestic workers and security. He provided transport for the nurse aids who had been hired to take care of applicant's mother when she became bed ridden. He installed security gates, security lights and alarm system at that house at his own expense.

Applicant refuted the respondent's claims. She said her late mother paid for the fuel when respondent transported nurse aids. The nurse aids were paid by her mother without any assistance from respondent. Respondent never paid for security gates or any alarm system installed at the applicant's mother's house. Those items were paid for by Personality Dry Cleaners. Apart from the dwelling he built on the donated land, he never contributed for any structural improvements to the properties. Even the ZESA connection on his donated property was paid for by Personality Dry Cleaners.

Respondent admitted helping M.N. with medication and whatever he could. *Inter alia* the respondent used to give M.N. money which he refused to give his wife who had to seek the services of her lawyers to get maintenance from him. He carried out household repairs at M.'s house.

Finally, the respondent submitted that while a donor could withdraw a donation at any time before delivery he or she could not do so after delivery like *in casu*. This submission is erroneous. I shall return to it later in this judgment.

I now turn to deal with the issues seriatim:

1. Whether the donation *in casu* was a simple donation or a donation so called rather than a remuneratory donation

Respondent claimed that the donation was made in recognition of assistance that he gave to applicant's sick mother. He said he supervised applicant's mother's workers and

transported nurse aids who were caring for her. But it turned out that the fuel that he used came from the sick old lady herself. His claim that he had, from his own resources, installed security gates, security lights and alarm system was refuted. The money came from Personality Dry Cleaners. A look at the evidence contained in the affidavits filed of record clearly shows on a balance of probabilities that the donation was a simple, rather than a remuneratory donation. Having made that finding I need to consider the next issue.

2. Whether on a point of law, a donation can be revoked after delivery

I stated earlier in this judgment that the respondent's stance that a donation could not be revoked after delivery was erroneous. In *Hay v Hay* 1956(3) SA 527(SR) although reported in the South African Law Reports this was a Rhodesian case which dealt with similar circumstances as the case under consideration. In that matter, Mr Hay had, *stante matrimonio* donated to his wife a certain piece of land. Later, still during the course of the marriage Mr Hay sued Mrs Hay for an order that she transfer the land to him, seeking to revoke the donation. The relief of transfer of the land to Mr Hay was granted. See cases such as *Allen v Allen* 1951(3) SA 320; *Burns v Burns* 1937 NPD 67; *Campbell v Cambell* 1942 EDL 49; *Wulff v Wulff* 1956(4) SA 297 which are precedent for the proposition that such donations are revocable, even after transfer of the donated property.

3. Whether valid legal grounds exist for the revocation of the donation in this matter

It was the respondent's case that there was no legal basis for the revocation of the donation in this matter. But applicant alleged some emotional cruelty on the part of the respondent and gross ingratitude.

To my mind there can be no doubt that respondent displayed gross ingratitude especially by his (undisputed) actions of using the donated property to facilitate his adulterous relationship with M.N.. His failure to terminate such relationship when begged to do so several time by the applicant. He instead proceeded with such relationship publicly with a complete disregard to the applicant's deeply injured feelings. While applicant was

finding it very difficult to make ends meet, respondent was assisting M.N. financially.

Even if I had not found that there was gross ingratitude still applicant would have been entitled to the order she seeks. I say so because case law on donation *stante matrimonio* seems to suggest that it is not necessary to prove ingratitude for the donor to revoke the donation. In all cases cited supra, notably *Hay v Hay supra* and *Allen v Allen supra* the courts did not go into the reasons for the revocation at all.

Applicant prayed for costs on an attorney and client scale on the basis that she was no longer gainfully employed and was elderly, and has only limited financial resources at her disposal. She has had to claim maintenance from the respondent.

In all fairness, the respondent is also elderly. Apart from his pensions from the United Kingdom he is also no longer employed. Applicant also receives a monthly pension from the United Kingdom.

In the circumstances I shall award an order of costs on the ordinary scale.

In the result it is ordered that the application be and is hereby granted in terms of the draft as amended.

Lazarus & Sarif, applicant's legal practitioners
Coghlan & Welsh, respondent's legal practitioners