

ALICE HINZE
Versus
BONGANI MACHIRORI N.O.
(In her capacity as the Executive Dative in the Estate at the Late Duggan Hinze Dr Number
1802/14)
And
DIRK HINZE
And
LEONA ROSE
And
CAILEAN MASUKO
And
DERMOIT HINZE
And
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUZOFA J
CHINHOYI, 30 August 2024

Application for a declaratory order

T. James with T.E. Chikore for the applicant
S. Chimedza for the 3rd respondent
No appearance for 1st, 2nd, 4th & 6th respondents.

MUZOFA J: After hearing parties in this case, I granted the application for a declaratory order and ancillary relief in an *extempore* judgment delivered in court. The 3rd respondent requested for written reasons and these are they.

The 1st respondent is cited in her representative capacity of the estate late Duggan Hinze. The 2nd-5th respondents are siblings born to the applicant and the late Duggan Hinze. The 6th respondent is cited in its official capacity responsible for deceased estates.

Factual Background

The applicant was married to the late Duggan. They later divorced. During the subsistence of their marriage they acquired certain five pieces of property known as stands 1 to 5

of Wilmar Park, Banket “the properties” registered in their joint names. The properties are at the centre of this dispute.

The brief background to the case makes sad reading. The protracted dispute pitting mother and daughter, the 3rd respondent who is the only one opposed to the relief sought is as follows.

In November 1998 a decree of divorce was granted by consent of the parties. It was part of the court order issued that the properties be evaluated and the late Duggan buy out the applicant within a specified period, failure of which the properties were to be sold on the open market to the best value. The two were then to share the net proceeds.

It is in dispute what transpired thereafter as regards the pay out to the applicant. However, the late Duggan then passed on. The estate late Duggan was duly registered with the 6th respondent.

On the 18th of October 2016 the 1st respondent submitted the first and final distribution account of the estate. Only the half share of the properties was subject to distribution. The 2nd to 5th respondents were each awarded an equal share of the said half share. The distribution was duly authorized by the 6th respondent.

According to the applicant, the distribution was only on paper. The beneficiaries, the 2nd to the 5th respondents failed to agree on how to proceed. The properties remained as registered in her name and the late Duggan.

The applicant therefore seeks a declaratory order that she owns 50% in the properties, that the 2-5th respondents buy her out, failure of which the properties be sold so that she can get her 50% share.

The 1st, 2nd, 4th-6th respondents did not oppose the application. It is the 3rd respondent only who opposed the application. In addition, the 3rd respondent also filed a counter application for a declaratur that the Estate of Late Duggan Hinze be declared the owner of 100% shares of the properties and setting aside of the first and final distribution account dated 18 October 2016.

The preliminary points

In her opposing affidavit, the 3rd respondent raised two preliminary points that of a material non-disclosure and that the relief sought is not supported by the facts. The preliminary points were withdrawn after a few exchanges with the Court. Another preliminary point on prescription was raised orally before the Court and it was also withdrawn after a concession was made that the cause of action was the title deed and not the Court order.

The counter application

In her counter application, the 3rd respondent sought a declaration as already stated. The counter application is based on the reasons for opposing this application save that a substantive order is sought.

During the proceedings and interaction between the court and the 3rd respondent's legal representatives, the counter application was withdrawn. Costs on an ordinary scale were tendered. Despite the withdrawal some of the issues raised in the counter application shall be addressed in the judgment since they form part of the opposition. In my view the withdrawal was well advised.

Issues for determination.

The only issue for determination then is the main matter. Whether the declaratory order and ancillary relief should be granted.

The submissions

The applicant's claim is based on the title deed wherein she is the joint owner of the properties with the late Duggan. She averred that she had separated with the late Duggan. In her answering affidavit she indicated that despite the Court order of divorce the order was not enforced.

In opposing the application, the 3rd respondent raised a number of issues that the applicant was paid off her 50% share following the divorce order that the late Duggan died testate and his will distributed 100% shares in the properties to his children the 2nd to the 5th

respondents. Reference was made to a will supposedly marked annexure E. Annexure E was not part of the pleadings. Even before the court after an inquiry, no will was produced. So this reference to a will is simply a smokescreen.

Further to that, in no uncertain terms, she labeled the applicant a greedy mother intent to rob her children of their inheritance. According to the 3rd respondent, one of the beneficiaries in Zimbabwe (I take it that the rest including the applicant are not based in Zimbabwe) misled the 1st and the 6th respondent and submitted the title deed without disclosing the divorce order. It was not disclosed that the applicant was paid off in terms of the divorce order. Thus, she filed the counter application to undo the whole distribution.

In any event the submissions went on the applicant's claim has prescribed. She cannot competently rely on the Title Deed when the Court Order created new contractual obligations. The Court order created a debt that the applicant could recover. She failed to do so within the prescribed three years. For the submissions the 3rd respondent relied on the authority of *Saltana Enterprises (Pvt) Ltd. v Takundwa & Anor* HH 143-17.

In her answering affidavit, the applicant explained why she did not purse the court order. She explained that it was not her intention to have the properties sold as that would render the late Duggan destitute. She also had an acrimonious relationship with her mother-in-law. She then relocated to the United Kingdom. The fact remained that she was a joint owner of the properties with the late Duggan. Her claim being based on the Title Deed is not subject to prescription.

The law

For such an application to succeed the applicant must have a direct and substantial interest in the subject matter. The interest must be in an existing, future or contingent right as provided in Section 14 of the High Court Act (Chapter 7:06). In *Johnsen v AFC* 1995(1) ZLR 65 the Court succinctly summarized the requirements as follows,

‘The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially

affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction. See *Ex p Chief Immigration Officer* 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (ZS) at 376G-H; *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) and the cases cited.’

Analysis

The applicant’s cause is that she is a joint owner of the properties based on the title deed. Registration of title confers the holder real rights enforceable against the whole world. See *Silberberg and Schoeman*¹ . In *Takafuma v Takafuma* 1994 (2) ZLR 103(S) referred to by the applicant, the court lucidly explained the import of registration as follows;

“The registration of rights in immovable property in terms of the Deeds Registries Act (Chapter 139) is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition at “real right” in S 2 of the Act. The real right of ownership or *jus in re propria* is “the sum total of all the possible rights in a thing” see *Willie’s Principles of South African Law* 8 Ed @ p255”

There is no doubt that the applicant has, by virtue of registration established that she is a co-owner of the properties. She therefore has a direct interest in an existing right.

That would not be the end of the matter. The next issue is whether the divorce order created a new contractual obligation which interfered with her rights.

It is not in dispute that a Court order was issued. What is in doubt is whether it was enforced. The 3rd respondent’s submission that the applicant was paid out is without support. Firstly, there was no proof placed before this court that the applicant was paid off. The applicant and the late Duggan were legally represented during the divorce proceedings. All the communication was made through their respective legal practitioners. There is evidence that at one point the applicant’s then legal practitioners followed up on the payment, just like they

¹ The Law of Property 4th Ed @ p32

pursued the issue of maintenance. It is my considered view that had there been a payment, both legal practitioners would have acknowledged such payments.

It is trite that he who alleges must prove. The 3rd respondent alleged that the applicant was paid off, the onus was on her to prove such payment. She failed to do so. Instead, the court was urged to draw an inference that she was paid since she once demanded payment then she did not take the matter further.

The principles applicable in drawing inferences are somewhat stringent. It is common cause that there is no direct evidence to prove the facts as alleged by the 3rd respondent. The case falls to be determined on the basis of circumstantial evidence which then calls for drawing of inferences. The principles applicable in the drawing of inferences is similar to those applicable in criminal matters. In *Zacharia Amons Simango v S* SC 42/14 and *Abraham Mbovora v S* SC 75/14, the Supreme Court held the principles in *R v Blom* 1939 AD 188 still hold good in this jurisdiction. In the *Simango* case (*supra*) the Court stated that there are two cardinal rules which govern the use of circumstantial evidence in a case being,

- “(1) the inference sought to be drawn must be consistent with all the proven facts—
- (2) The proved facts should be such that they exclude every possible inference from them save the one to be drawn.”

The starting point is that there must be the proved facts. In this case the established facts are that a court order granted that the applicant be paid her 50% share. There is evidence that the applicant followed up on the payment. That was the end of the road. The late Duggan was the defendant and was supposed to pay the money through the applicant’s legal practitioners then. There was no evidence of such payment.

The question is, could the silence by the applicant mean she was then paid? I donot think so. Such payments would have involved the parties’ legal practitioners who could have set the record straight. The applicant’s explanation why she did not pursue payment is reasonable. The applicant and the late Duggan had been married, they had four children some were still minors. Despite their acrimonious marriage relationship, they still had a relationship. The 2nd-5th respondent’s remained their children. In my view that she was paid cannot be the only reasonable

interference. There is a high probability that she was not paid which explains why the 3rd respondent could not prove by such payment. On that basis the Court cannot draw the inference sought by the 3rd respondent.

Since a declaratory order is a discretionary remedy, I look at other circumstances in this case raised by the 3rd respondent. The late Duggan died in August 2003. The estate as represented by the 1st respondent was duly registered and distributed. The Administration of Estates Act (Chapter 6:01) comprehensively deals with the administration of estates. It has in built checks and balances to ensure that deceased estates are properly dealt with. The 1st respondent appointed in terms of the said Act was the mouthpiece in this estate. In the event that the 3rd respondent was not satisfied by the conduct or developments during the winding down of the estate late Duggan she was at large to use the Act as provided. She did not do so for almost 20 years.

The 3rd respondent's averment that one sibling in Zimbabwe mislead everyone is difficult to accept. What comes to mind is if that was the case why did the 3rd respondent sit on her laurels from 2016 to challenge the distribution. In fact, to refer to 2016 is a misnomer, the process obviously started way back and late Duggan's estate comprised of half share in the properties, she did not raise a finger. She was aware of the final distribution of 2016. She did not challenge it. She was only jostled to action by this application over 6 years later. She was content with the distribution until this application.

On 27 January 2023 the 6th respondent's office responded to the 3rd respondent's queries of the 11th and 24th of January 2023 on the distribution of the Estate. I reproduce the relevant part of the response

'We acknowledge receipt of your emails dated 11th and 24th January 2023, contents therein have been noted.

A reading of the record will show that our office authorised distribution of assets on 18th October 2016, which distribution plan was in accordance with the laws of succession of the country. The beneficiaries then attempted to enter into a redistribution agreement which has not been successful as not all the beneficiaries have signed the said agreement. It is against this background, that we advise the executrix to stick to the approved distribution plan.

With regards your share you may deal with it as you please as it is not under our jurisdiction.

By copy of this letter, we return the approved distribution account to the executrix to deal with as per above guidelines.

Be guided accordingly.'

Despite that direct response that the distribution was water under the bridge the 3rd respondent did nothing about the matter. The 3rd respondent's inaction only shows or confirms that the beneficiaries to the estate late Duggan were well aware that the applicant was not paid off. She was entitled to the other half share. Thus, they participated in the distribution of the half share in the properties.

The applicant has demonstrated that she jointly owned the properties with the estate late Duggan. It is the court's finding that the divorce order was not enforced it did not interfere with the applicant's rights.

There were no valid reasons given to depart from the time honoured principle that costs follow the cause.

It is from the foregoing that the following order was issued.

1. The application for a declaratur be and is hereby granted.
2. It is hereby declared that the applicant is the owner of 50% shares in a certain piece of land being;
 - a. stand 1 of Wilmar Park situate in the District of Lomagundi measuring 2359 square metres;
 - b. Certain piece of land being stand 2 of Wilmar Park situate in the District of Lomagundi measuring 2379 square metres;
 - c. Certain piece of land being stand 3 of Wilmar Park Situate in the District of Lomagundi measuring 2379 square metres;
 - d. Certain piece of land being stand 4 of Wilmar Park situate in the District of Lomagundi measuring 2379 square metres;
 - e. Certain piece of land being stand 5 of Wilmar Park situate in the District of Lomagundi measuring 2379 square metres.

held under deed of transfer number 9558/88 dated the 20th of December 1988.

3. The 2nd to the 5th Respondents shall, buy out the applicant in the properties within two months from the date of this order.
4. The applicant's value of her 50% shares shall be determined through an evaluation carried out by an independent evaluator agreed to by the parties within fourteen (14) days of the court order, failing that agreement, any party shall approach the Registrar of the High Court who shall appoint an evaluator from the list of evaluators held in the Registrar's office. The Registrar of the High Court shall appoint an evaluator within fourteen (14) days of being asked to do so.
5. In the event the 2nd to 5th Respondents are unable to buy the applicant out the properties shall be sold on a willing buyer-willing seller basis and the proceeds therefrom shall be shared proportionately between the applicant, on one hand, and the 2nd to 5th Respondents on the other hand.
6. The 3rd respondent to bear the costs on an ordinary scale.

Counterclaim

1. The application be and is hereby withdrawn.
2. The 3rd respondent to pay costs on an ordinary scale.

Cyprian's Law, applicant's legal practitioners

Mudimu Law Chambers, 3rd respondent's legal practitioners.

