HH 130-03
HC 5007/02
HC 5693/02
HC 17712/99
DANIEL EDOUARD GERMAIN LALLEMAND
versus
MICHELE LUCIENE MARGUERITTE LALLEMAND
and
MICHELE LUCIENE MARGUERITTE STEEMANS (LALLEMAND)
versus
DANIEL EDOUARD GERMAIN LALLEMAND

HIGH COURT OF ZIMBABWE
MAVANGIRA J,
HARARE, 23 January and 3 September, 2003

Mr for applicant
Mr for respondent

OPPOSED APPLICATION AND COUNTER-APPLICATION

MAVANGIRA J: The respondent in this matter instituted divorce proceedings in this Court against the applicant herein in Case No. HC 17712/99. On 7 February, 2002 the Court handed down judgment and a decree of divorce. The germane part of the Order provides -

> "2. That in respect of the matrimonial home, the Defendant shall pay the Plaintiff $8 million within 3 months of the date of this order, failing which the property shall be sold to best effect and the net proceeds shared equally between the parties".

The applicant herein however failed to pay the $8 million within 3 months of 7 February, 2002. He wrote a letter on 24 May, 2002 to the respondent's legal practitioners attaching thereto a bank certified cheque in the said amount. The respondent's legal practitioner wrote back on 27 May,. 2002 returning the said cheque on the basis that the $8 million was not paid within the three month period ordered by the court or within the extended period promised by the applicant.

The applicant herein has thus brought the present application seeking an order in the following terms:-

"It be and is hereby ordered that:-

(a) The Respondent accept the payment of $8 000 000 tendered by the applicant as payment of the respondent's share of the matrimonial home.
(b) The Respondent attends to the signing of all the necessary documents to facilitate the transfer of her half share of the matrimonial home to the applicant.
(c) The Applicant is to effect payment to the Respondent of the sum of $;;; 780,82 being interest at the prescribed rate of 30% *per annum*on the sum of $8 000 000,00 from the 7th May, 2002 to the 24th May, 2002.
(d) Respondent to pay the costs".

The applicant makes the present application on the basis that not only did he give notice of the fact that payment would have been made outside the three month time limit, but as late as 13 May, that is, a week after the expiry of the three month time limit, the respondent's legal practitioners made the following observation:

> "We note that the $8 000 000 due to our client for her undivided one-half share in the former matrimonial home will be paid to her within the next few days".

Furthermore, the first protest in relation to the "alleged" late payment of the monies was made after payment had been effected.

The applicant contends that there was thus an agreement between the parties in relation to the late payment of the $8 million. This, he contends, is not surprising when one has regard to the background and the events that occurred between the handing down of the order and the date upon which payment was effected. Furthermore, the applicant had effected certain payments that he was not legally obliged to do and the respondent was naturally grateful for that.

The events that the applicant refers to are the following. Although the judgment and decree of divorce were handed down in open court on 7 February, 2002 the order that was subsequently issued was undated and there were various amendments that needed to be effected to the order. Correspondence was addressed to the trial judge who was then away on leave. Eventually, and on 20 May, 2002 the trial judge effected the amendments and issued the amended order, stating therein the date of the judgment or

order as 21 January, 2002 as opposed to 7 February, 2002.

It is however important to note at this stage that it is common cause that the date of the judgment and order is 7 February, 2002 and the calculation of the three month time limit has been with effect from that date on the part of both parties.

The applicant thus prays for an order in the terms already referred to above.

The respondent on the other hand has opposed the application and also filed a counter-application wherein she seeks an order in the following terms-

"IT IS ORDERED THAT:

1. Case Numbers HC 5007/02 and this application be and are hereby consolidated.
2. The former matrimonial home known as No 3 Woodham Road, Mandara, Harare be sold to best effect and the net proceeds shared equally between the parties.
3. The term 'best advantage' shall be deemed to be the highest figure offered by a prospective purchaser within a period of fourteen days from the date upon which the legal practitioners for applicant and respondent engage the services of estate agents to sell the property.
4. Once the sale has been concluded, the parties be and are hereby directed to sign the agreement of sale, the transfer documents and any other documents necessary to effect transfer to the purchaser. Failing this, the Deputy Sheriff for Harare be and is hereby empowered to sign such documents on behalf of the defaulting party.
5. ……
6. The Defendant shall pay the costs of this application".

Both matters, that is, the application and the counter-application were, by the agreement of the parties, heard simultaneously.

Paragraph 5 of the draft order in the counter-application was abandoned at the hearing.

The respondent makes the counter-application on the following basis. Firstly, that the order of the Court in Case No. HC 17712/99 is very clear and that in terms of paragraph 2 thereof, the applicant was to pay $8 million to the respondent within three months of the date of the order, failing which the property would be sold to best effect and the net proceeds shared equally between the parties. The applicant did not pay the said sum within the given time limit. The fact that she had granted the applicant the indulgence of a few more days, should not be taken, as urged by the applicant, to be an election on her part to abandon the part of the judgment as reflected in paragraph 2 cited above or as a waiver of her rights in terms thereof. In any event payment was only

attained by the applicant when he became aware that a firm of estate agents had been instructed by the respondent to provide a market assessment of the matrimonial home, which assessment they did provide, and they also intended to "show-case" it to clients or potential buyers.

The respondent also averred that the applicant earns all of his income by way of foreign currency and there was nothing to prevent him from importing foreign currency at any time to settle the debt. Furthermore, in the letter dated 27 May 2002 the applicant's legal practitioners were pleading with the respondent's legal practitioners for the respondent to accept the $8 million. They were not alleging a legal right to pay the respondent $8 million.

The respondent thus prays for the dismissal of the main application with costs and of the granting of the order that she seeks in the counter-application.

The issue that I have to decide is, in my view, whether or not the respondent waived her rights in terms of paragraph 2 of the order in Case No. HC 177712/99.

In *The Law of Contract in South Africa* 3rd ed R H Christie, in dealing with "The requisites of waiver" says at page 488:

> "…That means not only that the onus is upon the party asserting waiver to prove it, but that although, as in all civil cases, the onus may be discharged on a balance of probability, it is not easily discharged. In *Hepker* v *Roodepoort-Maraisburg Town Council* 1962 (4) SA 771 (A) STEYN CJ said:
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> > 'There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue (*Smith* v *Momberg* (1895) 12 SC 295 at p 304; *Victoria Falls and Transvaal Power Co Ltd* v *Consolidated Langlaagte Mines Ltd* 1915 AD l at p 62). But in *Martin de Kock* 1948 (2) SA 719 (AD) at p 733 this Court indicated that that view may possibly require reconsideration. It sets, I think, a higher standard than that adopted in *Laws* v *Rutherfurd* 1924 AD 261 at p 263, where INNES CJ says:
> >
> > > 'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it'.
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> > This accords with that applied in *City of Cape Town* v *Kenny* 1934 AD 543 and was followed in *Collen* v *Rietfontein Engineering Works* 1948(1) SA 413 (AD) at p 436 and *Linton* v *Corser* 1952 (3) SA 685 (AD) at p 695. (*Cf. Ellis and Others* v *Laubscher* 1956 (4) SA 692 (AD) at p 702). In my opinion the test is more correctly stated in these cases'.
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> To this it is only necessary to add that it has repeatedly been held that clear proof is required, especially of a tacit as opposed to an express waiver".

In *Estoppel "Cases and Materials*" the authors, P I Visser and J M Potgieter, say at page 96:

> "In *Mutual Life Assurance Co of New York* v *Ingle* 1910 TS 540 at 550 INNES CJ remarked that 'after all, waiver is the renunciation of a right'. How this takes place as a matter of law has been stated in the following two Appellate Division decision. In *Laws* v *Rutherfurd* 1924 AD 261 at 263 it was held that:
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> 'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by

> conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances'".

The question then is whether on the facts of this matter, the respondent conducted herself in a manner that is plainly inconsistent with an intention to enforce her rights in terms of paragraph 2 of the order in Case No. HC 17712/99. The effect of the applicant's contention is that by the letter dated 13 May, 2002 the relevant portion which has already been cited above, the respondent made an observation or conducted herself in such a manner as is plainly inconsistent with an intention to enforce her rights. What appears to be clear however is that as at 13 May, 2002 the respondent appears to have indulged the applicant with a few more days in which to pay the $8 million. What is also clear is that the respondent decided to enforce her right in terms of the court order, that is, the right to have the property sold in the event of the applicant failing to pay the $8 million within the three month time limit. This decision is clearly stated in the letter from her legal practitioners dated 27 May, 2002 which was written in response to the applicant's legal practitioners of 24 May, 2002 under cover of which the cheque for $l million had been sent to the respondent's legal practitioners.

There appears to be no indication that the respondent renounced or abandoned her rights. What is clear is that she delayed in enforcing her right. R H Christie says at page 491 of the same work already quoted above:

> "In *North Eastern District Assn (Pty) Ltd* 1932 WLD 181 at 186 KRAUSE J said that -
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> > "it is not by mere delay that a man loses his rights, even if he is aware of the fact that another has infringed his rights. Delay or 'standing by', as it is called, may be taken into consideration by the Court in arriving at the conclusion as to whether or not the man did or did not lose his rights'."

In my view, there is no evidence of an indication by the respondent of abandonment or renunciation of her rights. In the circumstances, there is no basis for the granting of the order sought by the applicant. On the other hand, for the same reasons, there is justification for the respondent to succeed in her counter-application but only to the following extent. In my view, the first three paragraphs of the

order sought are unnecessary as the issue covered therein has already been properly dealt with or covered in paragraph 2 of the order in Case No. HC 17712/99. However, in view of the unchallenged averment by the respondent stated in the following terms in her founding affidavit in the counter-application: "Respondent denies my entitlement to sell the property and, by implication, refuses to sign any and all papers necessary to effect transfer to a purchaser", it is, in my view proper to grant paragraph 4 of the draft order.

My decision to dismiss the main application necessarily means that the respondent is at liberty to enforce her rights forthwith in terms of paragraph 2 of the order in Case No. HC 17712/99.

In the result, I order as follows:
IT IS ORDERED:

1. That the main application is dismissed with costs.

2. The counter-claim succeeds to the following extent:

   (a) that once the sale has been concluded, the parties be and are hereby directed to sign the agreement of sale, the transfer documents and any other documents necessary to effect transfer to the purchaser. Failing this, the Deputy Sheriff for Harare be and is hereby empowered to sign such documents on behalf of the defaulting party.

   (b) that the respondent, that is the applicant in the main application, pays the costs of the counter-application.

Gill Godlonton & Gerrans, applicant's legal practitioners
Honey & Blanckenberg, respondent's legal practitioners