LYDIA MAURO (NEE) NYAMBO
versus
REGIS MAURO

HIGH COURT OF ZIMBABWE.
UCHENA J
HARARE, 2, 3 September 2013 and 17, October 2013.

CIVIL TRIAL

T Mpofu, for the Plaintiff
S Simango, for the Defendant.

UCHENA J: The plaintiff is the defendant's wife married to him in terms of the Marriages Act [*Cap 5:11*]. They were married at Harare on 18 June 2003. She sued him for a decree of divorce and ancillary relief on the basis that their marriage has irretrievably broken down. The defendant agrees that their marriage has irretrievable break down.

They at their pre-trial conference agreed on all issues except the distribution of their immovable properties namely the matrimonial home at stand No 293 Vainona Township of Vainona and Stand No 3505 Dhonza Close Budiriro 2 Harare and a generator. In her claim the plaintiff wants the immovable property to be sold and shared equally, when their youngest child attains the age of majority. She in evidence said the generator is used to electrify the matrimonial home during Zesa's load shadings therefore it should not be distributed until the youngest child attains the age of majority.

In his amended plea the defendant wants the immovable properties to be distributed in two alternative ways;

1. That they be sold on divorce and the proceeds be shared equally between the parties. Alternatively,
2. That the Vainona property be subdivided with the developed part being awarded to the plaintiff and the undeveloped party on which there is a two bed roomed cottage being awarded to him together with the Budiriro house.

The plaintiff replicated setting the stage for a trial on the parameters created by their pleadings. When the plaintiff took to the wittiness stand, she wasted no time but tactfully sought to closethe litigation by accepting the defendant's alternative option. She told the court that she accepts the subdividing of the Vainona property, and an award to her of the developed portion, with the defendant taking the undeveloped portion and the Budiriro house. She said this would insure that their children will not have to move away from the house and environment they are used to. They would continue to enjoy the standard of life they are used to.

The defendant refused to accept, the plaintiff's pre-emptive measure. He opened his defence case and testified that it would be unjust for the plaintiff to be awarded the developed portion while he takes the undeveloped portion and the Budiriro house. He explained that the Vainona house is a 20 roomed double story house on 5378 square meters. The developed stand was to be 2500 square meters in extend, with the 20 roomed double story house. The undeveloped stand was to be 2878 square meters in extend, with the two bed roomed cottage. He told the court that the whole Vainona property is valued at about US$ 500 000-00, while the undeveloped portion would be valued at about US$60 000-00. The Budiriro house is valued at about US$40 000-00, giving him a total of US$100 000-00, from their immovable properties against the plaintiff's net value of about US$ 440 000-00 from their immovable properties. He argued that such distribution of their immovable properties will not be equitable. He urged the court to distribute their immovable properties in terms of his main option, in terms of which both properties should be sold on the granting of divorce and be shared equally between him and the plaintiff.He though he had not mentioned this in his pleadings offered to accommodate the plaintiff and his children in alternative rented accommodation in Vainona.

In his address Mr *Mpofu* for the plaintiff submitted that the defendant in his amended plea committed himself to the two options he gave, and cannot resile from any of them the plaintiff chooses to accept. He submitted that the plaintiff's acceptance of the defendant's alternative option left no dispute on which the court has to make a determination. He referred the court to the case of,Shill v Milner 1937 AD 101 at 105 where DE VILLERS J.A said;

> "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would, prevent full inquiry".

He also referred the court to the case of *Robinson* v *Randfontein Estates G.M. COLTD*1925 AD 173 at 198 where INNES C.J made the same observation. Mr Mpofu

stressed that the parties where locked into and confined to the parameters created by their pleadings and should be kept strictly to their pleas. He submitted that the plaintiff's replication did not reject or put in issue the defendant's offers as in it she merely said, "The plaintiff denies each and every allegations of fact or law in the defendant's plea and joins issues for pre-trial conference". He submitted that the defendant's offered options are not allegations of fact or law so they remained available for the plaintiff to accept as long as they remained un-withdrawn. He submitted that once an admission is made it remains in existence until it is withdrawn by leave of the court on an application to amend or withdraw it. He referred to rule 189 of the High Court Rules which provides as follows;

> "The court may at any time allow any party, to amend, or withdraw any admission so made on such terms as may be just".

It is true that the defendant did not withdraw,or amend his amended plea in which he gave the two options. That means he can be held to his options but only if the legal principles enunciated in the cases referred to by Mr *Mpofu* justifies that approach.

Mr *Simango* for the defendant did not challenge the authority of the cases referred to by Mr *Mpofu* but sought to rely on the quoted passages allowing departure, where departure will not cause prejudice. He submitted that taking the defendant's main option or the plaintiff's own option will not cause prejudice to the plaintiff. He also argued that, the effect of pleadings also binds the plaintiff to her suggested manner of distributing the parties' immovable properties. The case can if possible, be resolved on the basis of there being no prejudice to the plaintiff if the defendant's main option,or her own option is used.

I am however of the view that the case of *Shill* v *Milner (supra)* was quoted out of context. DE VILLERS J.A actually said;

> "The importance of pleadings should not be unduly magnified. The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would, preventfull inquiry. But within those limits the court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been." Robinson v Randfontein Estates G. M. Co. , Ltd 1925 AD. 198). In another case, *Wynberg Municipality* v *Dreyer* (1920) A. D. 443), an attempt was made to confine the issue on appeal strictly to the pleadings, but it was

> pointed out by INNES , C.J., that the issue had been widened in the court below, by both parties. "The position should have been regularised of course"said he, "by an amendment of the pleadings; but the defendant cannot now claim to confine the issue within limits which he assisted to enlarge."(emphasis added)

The decision starts by admonishing against unduly magnifying the importance of pleadings which are made for the Court and not the Court for the pleadings. It then clearly states that the Court has a wide discretion,which it judiciously exercises guarding against causing prejudice or preventing full inquiry. The Court should also be guided by whether or not the parties have, enlarged, the inquiry from that strictly necessitated by the pleadings. The plaintiff could have simply accepted the alternative option without replicating. She chose to replicate leading to the trial which could have enlarged the confines within which the parties' dispute can be resolved, but for her accepting the defendant's alternative option on taking to the wittiness's stand. The plaintiff's Counsel extensively cross-examined, the defendant on his options inviting from him the reason why he was reneging from the alternative option he had sanely and freely given. That cannot be termed an enlargement of the issues as the cross examination concentrated on the accepted option. I must therefore carefully consider the effect of the defendant's resistance to the plaintiff's acceptance of his alternative option.

The defendant's alternative option may as already explained in the defendant's evidence, result in giving the plaintiff an unfair advantage in the distribution of the immovable's which they acquired through equal contributions. The reason for its being belatedly embraced by the plaintiff and belatedly abandoned by the defendant seems obvious. It may unduly give an advantage to the plaintiff at the defendant's expense. That however has not been substantiated by an evaluation of the properties and the proposed subdivisions. It must also be considered that the defendant at his own initiative proposed that option with his eyes wide-open. He may well have made that offer appreciating the cost of accommodating his children till the youngest attained the age majority as put to him by Mr *Mpofu* for the plaintiff. He appeared to have appreciated that responsibility as demonstrated by his offering to accommodate them in alternative accommodation in the Vainona area if his main option was accepted.

The defendant was made aware of the effect of his admission. He did not apply to withdraw it. In view of the need to hear the parties on the real dispute and to avoid preventing a full inquiry, if the defendant had made an application to withdraw the admission,I would have been inclined togrant it. In the case of *DD Transport (PVT) LTD* v *Abbot* 1988 (2) ZLR

92 (SC) @ 98 F to 99 A to BGUBBAY CJ commenting on when a Court can grant a withdrawal of an admission said;

> "The general and broad approach to be adopted by the court in determining whether to allow the withdrawal of an admission, and one which has been followed time without number over the past seventy years or so, is that enunciated by WESSELS J in Whittaker v Roos & Anor 1911 TPD 1092 at 1102-1103:
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> "This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. it is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. but we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties."
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> These, then, are the principles to be applied by a court concerned with an application to amend a plea which would, if granted, have the effect of withdrawing an admission."

The defendant chose to lead evidence on why his alternative option should not be accepted. The Court tried to guide his counsel to the effect of the plaintiff's acceptance of his client's alternative option to the distribution of the Vainona property. Counsel for the defendant persisted in leading evidence against his client's admission.That is not permissible. In the case of *DD Transport (supra),*GUBBAY CJ at page 97 G to 98 A- B said;

> "The effect of a formal admission made in pleadings was underscored in Gordon v Tarnow 1947 (3) SA 525 (AD) where DAVIS AJA at 531-532 said:
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> > "But this admission in the plea is of the greatest importance, for it is what Wigmore (paras 2588-2590) calls a 'judicial admission' (of the *confessiojudicialis* of Voet (42.2.6)) **which is conclusive, rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it.** (See also H Phipson 7 ed p 18)).Wigmoreloccit, speaking of judicial admissions in general, refers to the Court's discretion to relieve a party from the consequences of an admission made in error.**It does not seem to me**

that such a discretion could be exercised,in a case where the admission has been made in a pleading, in any other way than by granting an amendment of that pleading."

These dicta were approved by MACDONALD ACJ (as he then was) in *Moresby-White* v *Moresby-WhiteB* 1972 (1) RLR 199 (AD) at 203E-H; 1972 (3) SA 222 (RAD) at 224." (emphasis added).

The defendant's evidence as to why he wants to resile from his option to subdivide the Vainona property was therefore given in circumstances where it should not have been given as a litigant cannot lead evidence against his own admission without first amending it or withdrawing it. The plaintiff was entitled to accept the defendant's option for as long as it remained un-withdrawn. An admission as already demonstrated through the case of DD Transport (supra), can only be withdrawn through an application for amendment of the pleading. The defendant despite being guided towards that route chose to lead evidence against his own admission.

In the result the dispute between the parties on the distribution of the immovables, was extinguished by the plaintiff's acceptance of the defendant'salternative option.

It is common cause that the generator is required to electrify the premises on which the parties and their children will be staying. It is however clear that once the Vainona property is distributed and subsequently subdivided each party will become an independent owner of the subdivided properties. In view of most of the movables having been given to the plaintiff and the plaintiff getting the developed part of the Vainona property it is only fair that the generator be awarded to the defendant.

The Budiriro house, will as per the defendant's alternative option be granted to him together with the undeveloped portion of the Vainona property. He will however be entitled to live on his portion of the Vainona property which has on it a two bed roomed cottage. The defendant gave the extend of each subdivision as 2500 square meters for the portion on which there is the 20 roomed double storey house for the plaintiff, and 2878 square meters on which there is a two bed roomed cottage for himself.

I am aware that the parties will have to apply for a subdivision permit to the local authority, but once the decree of divorce is granted each party cancommence to live on his or her proposed subdivision.

In the result it is ordered as follows;

1. That a decree of divorce be and is hereby granted.

2. That custody of the minor childrenGracious Mauro, born on 8th February 2001 and Ngonidzashe Mauro born on 30th June 2oo6, be awarded to the plaintiff.
3. That defendant shall have access to the minor children on alternative weekends (and shall collect the children not later than 6pm from the Plaintiff's residence as given and returning them at 8am on the following Monday by dropping them at home during holidays or at their respective schools in full uniform, well groomed and intact, with the provision for break and lunch for the day).
4. (i) The defendant shall pay the sum of US$ 125-00 (One hundred and Twenty five United States Dollars) per child per month as maintenance.
   (ii) Each party shall contribute 50% towards the school fees, levies and other charges related to tuition outside the school curriculum for the minor children.
   (iii) Defendant shall buy all school uniforms in triplicate for each child and deliver the same to the plaintiff at the very least five clear days before the opening of the 1st term of the year, and in case of winter uniforms five clear days before the opening of the second term.
   (iv)The parties shall contribute 50% towards sports and educational trips as the children may from time to time prefer to participate in.
   (v) Plaintiff shall buy all sport uniforms for the minor children.
   (vi) Defendant shall maintain the minor children on the current medical insurance package.
   (vii) Defendant shall provide children with social clothing at least two times a year until each child attains the age of majority.

5 The Plaintiff shall retain as her sole and exclusive property the following;

(i) Toyota Corolla Registration No AAT 9793.

(i) All the household movable property acquired during the subsistence of the marriage.

The Defendant shall retain as his sole and exclusive property the following;

(i) Mazda B1600 Registration No AAM 1973
(ii) Toyota Camry Registration No ABG 3047.
(iii) Motor spares building materials and tools.
(iv) A bed.

6 Leerage Haulage Private Limited is awarded to the defendant whilst Plaintiff gets Leereg fashions Boutique

7. The generator be and is hereby awarded to the defendant, as his sole and exclusive property.

8. Stand No 3505 Dhonza Close, Budiriro 2, Harare, be and is hereby awarded to the defendant as his sole and exclusive property.

9. Stand No 293 Vainona Township of Vainona shall be subdivided into two properties as follows;

9.1 A subdivision measuring 2500 square meters on which there is a 20 roomed double storeyhouse, which is hereby awarded to the plaintiff as her sole and exclusive

property.

9.2 A subdivision measuring 2878 square meters on which there is a two bed roomed cottage, which, is hereby awarded to the defendant as his sole and exclusive property.

9.3 The parties shall equally contribute towards the cost of applying for a subdivision

permit.

10. Each party shall bear his or her own costs.

Messers Eureka Ndhlovu Attorneys, Plaintiff's Legal Practitioners.
Messers Nyikadzino, Simango & Associate, Defendant's Legal Practitioners.