TRACY LEE FLEINER
versus
ALBURY DEANIS FLEINER
and
SHAY FLEINER (nee SAYEED)

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 11 March, 11 April 2018 & 23 May 2018

Trial

R Stewart, for the plaintiff
T R Mugabe, for the defendants

MUNANGATI-MANONGWA J: The plaintiff and first defendant are former spouses having divorced in 2006. They jointly own the former matrimonial home being No 10 Loerie Lane Borrowdale. The first defendant and his new wife the second defendant, occupy the property. The plaintiff issued summons against the first defendant in July 2016 seeking payment of US$10 400 (ten thousand four hundred United States of America dollars) being rentals for the occupation of the aforementioned property for the period between March 2015 to July 2016. The second defendant was roped in through an order for joinder. By way of an amendment the defendant further seeks payment by the defendants of $650-00 *per* month as rent from July 2016 to the date the property known as No 10 Loerie Lane is disposed or until the defendant's spouse vacates the property which ever shall occur first. The claim is contested.

The first defendant raised a counter-claim wherein he seeks a declaration that a certain clause being 3.2 of the consent paper entered into between the parties applies only to the defendant in-reconvention while she is residing at the property and not vice versa. He further seeks a refund of US$46 800-00 (forty six thousand eight hundred United States Dollars) and interest thereon being rentals he paid to defendant in reconvention as monthly rentals at US$650-00 *per* month. The counter-claim is contested.

The agreed issues for determination are

a) Whether or not the plaintiff is entitled to the monthly rental of $650-00 for the property known as No 10 Loerie Lane Borrowdale.

b) Whether or not the defendant is entitled to repayment of any sums paid to the plaintiff as rental.

The following facts are common cause.

The second defendant is married to the first defendant and was joined to the proceedings on 22 February 2017 through a Court Order by MATANDA-MOYO J. Thus, the plaintiff is claiming against the defendants the aforementioned amounts jointly and severally the one paying the other to be absolved.

When the plaintiff and the first defendant divorced, the ancillary matters pertaining to divorce were handled through a consent paper which is part of the order. The parties decided to retain the immovable properly No. 10 Lorie Lane as joint owners. Pertinent to the consent paper are the following clauses *viz* the immovable property.

> "3.2. Until both the said children leave home, the plaintiff shall be entitled to live rent free upon the property provided that if the plaintiff remarries or cohabits continuously with another person upon the property, the defendant shall have the right to demand the payment of a market related rental by such third party and
> Clause 3.4 The plaintiff recognizes that the defendant shall have the right to procure the construction of a further residence upon the property and to reside therein, provided that the property shall not be mortgaged for this purpose and further provided that if the defendant re-marries or cohabits continuously with another person in such residence, the plaintiff shall have the right to demand the payment of a market related rental by such third party."

It is common cause that the plaintiff and the first defendant agreed that the first defendant occupies the matrimonial house after the plaintiff moved out and settled in Zambia. The ex-spouses agreed that the first defendant would pay market related rentals which they agreed at $650-00 *per* month. It is not in dispute that the defendant started paying rentals around 2009 and decided to stop paying the agreed rentals in March 2015. It is further not in dispute that the first defendant gave the reason for stopping to pay rentals as pressing obligations and financial challenges as he had taken an overdraft facility *viz* his company and he had to provide for tertiary education for the children.

When the plaintiff instituted this claim the first defendant in his plea and at trial pleaded that the payment of rentals was a mistake common to both parties emanating from the failure to interpret Clause 3.2 of the consent paper. The second defendant denies liability on the basis that she has no lease agreement with plaintiff and subscribes to the first defendant's interpretation of clause 3;2

The plaintiff was the only witness in her case. She gave the following evidence. She stated that the first defendant was not mistaken with regard to payment of rentals. At the end

of 2008 she had moved to Zambia to reside there with her now current husband. The parties agreed that the first defendant move into the main house with the children. In 2010, she demanded rentals for her half share and at that time the defendant was not cohabiting with anyone as he used to travel a lot. The defendant had suggested $500-00 but parties agreed on $650-00 it being taken that market rentals payable by a third party would be about $1300-00. Such rentals were paid up to 2015 and to date the defendant remains in occupation without paying rentals to the plaintiff. As there was an agreement for defendant's occupation and the rentals payable defendant was bound.

The plaintiff indicated that defendant's reason for stopping payment of rentals was communicated to her as that defendant's business was not doing well and the children's educational requirements were now heavy on him. She insisted that there was never a mistake as parties agreed, and, she still wants 50% of the market related rentals. She referred to exh 3 the emails exchanged between the parties which bring out the parties discussion. She further indicated that as the second defendant was staying in the house she was liable to pay rentals as it was within the parties contemplation that should the first defendant cohabit or marry and reside with such spouse or cohabitee in the house plaintiff would be entitled to rental the reverse of clause 3.2. It was her argument that she had to seek rentals from the second defendant because the first defendant sought to change his stance and say the 3rd party was liable for rentals (second defendant) yet in their correspondence the first defendant initially indicated that he was liable. She stated that as the second defendant moved into the house with her children she had to pay her rentals. As *per* her reading, clause 3.2 imparted a responsibility on the second defendant to pay her rentals.

At the close of the plaintiff's case the defendants' legal practitioner applied for absolution from the instance on the basis that there was no evidence to support the plaintiff's claim. I dismissed the application and gave full reasons. In summary the court felt it was unsafe to throw out the plaintiff's case at that juncture being the practice of courts to lean more on the cautious side especially when in doubt that the plaintiff's case is hopeless. Also applying the test "what might a reasonable court do?" the court was of the opinion that sufficient facts had been placed before the court to require the first defendant to be put to his defence. There was no specific reference to the second defendant by the applicant Mr Mugabe. Nonetheless, it was incumbent upon the defendants to be called upon to render their defence and explain the justification why rentals are not due to the plaintiff who owns 50%

share of the property especially were allegations of an agreement between her and the first defendant had been made and also the issue of acquiescence had been raised.

The first defendant gave evidence to the effect that he had indeed signed a consent paper with his wife upon divorce which referred to the occupation of the main house in issue. He explained that clause 3.2 meant the wife could reside with the children in the main house but upon being married or continuous cohabitation with a partner her partner would pay him rentals. Although he believed that his wife's partner who would sometimes visit was due to pay him rentals he never demanded same.

When his wife left for Zambia the house was empty for a year. He started renovating it and ultimately decided to move in. The parties agreed on rentals of $650-00. He would pay rentals in one lump sum at the beginning of the year. He conceded that he suggested the idea of paying rentals and indeed this is confirmed by exh 3 (b) an email he wrote. He believes he started paying rentals in 2009. He also admitted that the reason he stopped paying rentals in 2015 was because his business was suffering financially, and he had to take an overdraft and the burden of paying for tertiary education was heavy on him. He claims to have paid $39 000-00 by the time he approached plaintiff to reconsider the issue. He had tried to engage the plaintiff but the plaintiff had insisted on being paid.

For him, his partner was only liable to pay rentals to the plaintiff if he had constructed a cottage as per clause 3.4. He had not done so, the cottage he worked on was for his son Karl and this used to be plaintiff's office. He had thus made payments to the plaintiff in error and hence the monies had to be paid back and were to come off the sale of the house.

Under cross-examination the defendant conceded that he personally brought up the issue of rentals and he offered to pay although he did so reluctantly. He conceded he never took steps to challenge this but had verbally challenged the move. He indicated that he came to realise that he was not obliged to pay rent when he received a letter of demand from plaintiff's lawyers. He further insisted that he does not believe that he has to pay rent when the burden of looking after the parties' children lays solely on him and his wife, the second defendant. He stated that nowhere in the consent paper is he entitled to stay in the main house, he moved in because the plaintiff said he could move in with the children. He admitted that there was a verbal agreement that varied the terms of the consent paper. He denied that the second defendant was supposed to pay any rentals.

The second defendant's evidence was clear and straightforward. She permanently moved in with the first defendant around October 2014 and the parties married in November

2014. The first defendant had been paying rentals before the parties got married that is since 2009. The first defendant stopped paying rentals in 2015 citing financial difficulties. She corroborated the plaintiff and the first defendant on the issue of cessation of payment of rentals. She stated that the issue of rentals was never discussed between them until a letter of demand was received by the first defendant, that is when they sought legal advice. She stuck to her defence that no rentals are due from her as she has no lease agreement with the plaintiff. Further, her right to occupation of the property in question derives from her being married to the first defendant who is also an owner of the property in issue. She stated that she has no interest in the property and the plaintiff has never demanded rentals from her. This witness answered questions well and was a credible witness.

The defendants in their submissions had raised a point *in limine* that the plaintiff had not pursued the amendment of the summons and declaration seeking to include a claim for prospective rentals. In that regard same must be taken as abandoned so it was argued. Of note is the fact that the notice to amend had been filed on 6 January 2017. A joint pre-trial conference minute was filed on 12 June 2017 after parties had appeared before a pre-trial court judge on the 8th June 2017. One of the issues agreed to clearly shows that the amendment had been agreed to or taken into consideration. It reads

> "1.1. Whether or not the plaintiff is entitled to a market-related rental for the property known as No 10 Loerie Lane, Borrowdale."

This speaks to "the present" and future. Further, at the hearing, the parties agreed to the issues being amplified to read

> "Whether or not the plaintiff is entitled to $650-00 rentals for the property known as No 10 Loerie Lane Borrowdale."

The manner the issue is couched incorporates the aspect brought in by the amendment. The court thus accepts the submission by Mr *Stewart* for the plaintiff that the issue of the amendment had come up at the pre-trial conference and had been accepted. In any case, after trial, I called both parties to clarify the issue which surfaced in defendants' submissions since the parties had agreed before me on the amplification of the issues just before the trial. A concession was then made that the amendment had been incorporated. The point *in limine* is thus without merit and is dismissed.

It has been submitted on behalf of the defendants that the plaintiff has no cause of action since she placed reliance on the consent paper in her action, only to prove a subsequent agreement, as such the claim before the court must be dismissed. With due respect, the

defendants seem to miss the point. The consent paper which is part of the order does provide for the occupation of the house and it is the variation thereto that is the basis of this claim. The submission that this is a new cause of action is thus misplaced.

Analysis

It is common cause that clause 3.2. pertains to the occupation of the house by the plaintiff. The occupation of the main house by the defendant is a development that came about 3 years after the divorce. The plaintiff had moved on leaving the house vacant for the whole of 2008 as *per* evidence. It is common cause that the plaintiff and first defendant agreed to have defendant occupying the property. It is on record that the first defendant brought up the issue and suggested the rentals which were ultimately agreed at US$650-00. The defendant has throughout trial conceded to the existence of this agreement. In essence the terms of occupation of the main house as *per* the consent order were varied by the parties themselves.

Clearly this new agreement between the plaintiff and first defendant had nothing to do with anyone of them cohabiting with a third party. This is because when the defendant moved into the house he was not cohabiting with anyone, the fact all the parties agree to. In fact it has not been disputed that the second defendant permanently moved in with the first defendant in October 2014. I thus conclude that the agreement between the plaintiff and the first defendant had nothing to do with a third party but was a new arrangement beneficial to the two parties. The first defendant could not have been mistaken as he seeks to allege because clause 3.2 never referred to him and clause 3.4 only deals with a situation were first defendant had constructed a further residence on the property in which event if he were to cohabit in such residence with another person the plaintiff would have the right to demand market related rentals from such a party. Being divorced from both the stated situations, I find that the agreement to pay rent was freely entered into by the defendant who was not under any mistaken view. As such, the parties varied the terms of clause 3.2 of the consent paper.

Mr *Mugabe* for the defendants submitted that as the plaintiff had sought to rely on clause 3.2, the first defendant had no restrictions regarding his residence in the main house either alone or with a third party. Indeed the first defendant had no restriction but the consent paper had no provision for that hence the parties reached a new arrangement. In my view this verbal agreement which is not in writing (because the first defendant refused to have it

written: see exh 3 (c)) is still binding. In any case, the clause pertaining to variations did not cover post-divorce arrangements, it reads:

> "And whereas this settlement constitutes the entire agreement between the parties and no addition to or variation of its terms prior to the divorce of the parties shall be of any force or effect unless reduced to writing and signed by the parties,….."(my emphasis)

This means after the divorce the parties could add or vary the terms without reducing them to writing.

This aside, it is appreciated that the consent paper becomes or is part of the divorce order. The defendants have submitted that the plaintiff ought to have applied for the variation of the court order so as to incorporate the new arrangement between the plaintiff and the first defendant. In my view this was not necessary especially where the agreement is not being challenged. Evidence from plaintiff and the first defendant confirms that the movement into the house and the rentals were agreed to by the parties. As submitted by the plaintiff the case of *David Richard Kempen* SC 14/2016 is very instructive on this aspect. BHUNU JA stated as follows:

> "….. while in *Godza* v *Sibanda* HH- 254-13 the High Court expressed the need for parties to apply to court before departing from a lawful binding court order it was not laying down a hard and fast rule but a general rule subject to alteration or modification depending on the exigencies of each case.
>
> A survey of the authorities shows that it is permissible for parties to agree to vary such court orders without reference to court. This prompted BEADLE AJ, as he then was, to remark in *Exparte Boshi & Anor* 1978 (H) 382 at 383 F that:
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> 'In matters such as this where the amendment can be of interest only to the parties themselves, I do not think the court would require formal amendment of the original order or consider it discourteous to the court if no normal amendment was applied for.'
>
> In this case, it is clear that the parties tacitly agreed to amend the original consent order in the best interest of their minor child and the subsequent claim for arrear maintenance arising from that agreement could only affect none other than the parties themselves. That being the case, the parties were within their rights to amend the consent order regulating their divorce without reference to court.
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> The agreement was therefore, lawful and enforceable at law like any other contractual agreement. In the words of BEADLE AJ, as he then was, in *Exparte Boshi & Anor* (*supra*):
>
> "the parties having entered into an agreement, it may be enforced as an ordinary contract and to apply to court for the amendment seemed a waste of costs."

I agree with the Honourable Judge of Appeal that seeking an amendment to the court order would be a waste of resources where parties are *ad idem* and the arrangement suits both of them. It was thus not necessary to seek an amendment of the court order *in casu*.

The first defendant seeks to say he is not entitled to pay rentals, rather he should be refunded all the monies he paid. What is patently clear is that without the agreement the first defendant cannot occupy the main house as such occupation is not provided for in the consent papers. His occupation of the property constitutes a variation of the original agreement. Such variation was by agreement and hence he is bound. Had it not been for financial difficulties faced by the first defendant this matter would not have been brought to court. This is borne by the evidence of all the three parties. It is common cause that the reason given by the first defendant to the plaintiff for stopping payment of rentals was that his company was distressed and was relying on an overdraft and the tuition fees for the children was heavy on him. The plaintiff, the first defendant himself and the second defendant confirmed this as the reason for the stoppage. It is only when demand was made that the issue of "mistake" of law was brought up.

I find it difficult to accept that the first defendant paid the plaintiff in the *bona fide* and reasonable but mistaken belief that rent was due. He is the one who approached the plaintiff when the house was unoccupied, he was not cohabiting with anyone. He is the one who proposed the rental. Even after being advised that he should not have paid the plaintiff any rentals he did not seek redress. It had to take the plaintiff to institute the claim for outstanding rentals to then raise the defence. This conduct is not consistent with someone who has paid over $40 000-00 mistakenly and despite legal advice he sits back not taking any action.

Even if it were to be said I am wrong in my analysis on the issue of the binding nature of the agreement the issue of acquiescence comes into play. From 2009 to 2015 the first defendant paid rentals to the plaintiff for occupation of space which the plaintiff was originally supposed to occupy. Such conduct made the plaintiff to believe that the first defendant had but abandoned any claim he may have had pertaining to his rights viz occupying the house without paying any rentals as a co-owner. The first defendant thus acquiesced to the varied terms of the consent paper. The consent paper did not provide for such occupation thus, if the first defendant's rights had been infringed he should have sought recourse. Failure to do so points towards acquiescence. The first defendant's conduct points to acceptance of the arrangement fully aware that the consent paper did not provide for his occupation.

I find that the US$10 400-00 claimed is due by the first defendant as rentals for March 2015 to July 2016. As the agreement is binding and as long as the first defendant remains in

occupation of the main house the agreed sum of $650-00 *per* month remains to be paid by the first defendant until the agreement is cancelled. It is my view that the first defendant's defence had no merit and this led to the plaintiff seeking costs on a higher scale. However, from the evidence the first defendant mistakenly thought that since he saw to all the children's requirements beyond terms provided by the consent paper he had no obligation to continue to pay rentals. This genuine but mistaken view led him to defend the case. For this reason I will not order costs on a higher scale.

As regards the second defendant, I find her joinder to have been unnecessary. She moved in with the first defendant in October 2014 and wed him in November 2014 long after he had taken occupation of the house in issue and was already paying rentals to the plaintiff as *per* the duo's agreement. She is staying in the house on account of her husband as a spouse. She owes no obligation to the plaintiff by virtue of her status as a spouse. She is not a tenant. That second defendant has her own immovable properties that she is renting out whilst she stays with her children in the plaintiff and the first defendant's house is neither here nor there.

The submissions that clause 3.2 or 3.4 places an obligation on her to pay rentals to the plaintiff read *vice versa* is of no legal sense. It is baffling how the aforementioned clauses can seek to bind prospective parties of divorcing parties to a contract which they were not party to. In as far as third parties are concerned, the clauses are a nullity. Legal practitioners must be wary of clauses that they put into consent papers. Indeed the litigants may have their wishes reduced into writing but it is for the legal practitioner not only to clothe the terms with legal apparel but to ensure that what is put down is not a legal nullity. How a prospective partner of the divorcing parties can be liable to the other ex-spouse by way of rentals should they cohabit with one party is a mockery to principles of contract. A third party cannot answer to a contract to which they were not party to, it being trite that a party to a contract has to agree to the terms and the minds of the contracting parties be *ad idem*.
The second defendant is simply not bound by whatever the plaintiff and the first defendant agreed to upon their divorce.

The second defendant's involvement in this matter was ill-informed moreso when demand was not even made to her for payment of the rentals. If demand was made, it may have dawned on the plaintiff that the second defendant had no claim to answer. Accordingly it is the court's conviction that she should be entitled to her full legal costs for being unjustifiably dragged to court where there was absolutely no basis for her to be so arraigned.

Accordingly the following order is made.

1. The 1st defendant shall pay the sum of US$10 400-00 to the plaintiff being rentals for the period March 2015 to July 2016 together with interest thereon at 5% per annum calculated from 30th July 2016 to date of full and final payment.
2. 1st Defendant to pay the plaintiff rentals in the sum of US$650-00 *per* month from August 2016 to the date the property known as No 10 Loerie Lane is disposed of or until the agreement between the parties is cancelled.
3. All the amounts due in clause 2 as at date of judgment shall accrue interest at 5% *per* annum calculated from the date of judgment to date of full and final payment.
4. 1st defendant to pay plaintiff's costs.
5. The plaintiff's claim against second defendant is dismissed with costs on an attorney client scale.

Matizanadzo & Warhurst Legal Practitioners, plaintiff's legal practitioners
Nyakutombwa Mugabe legal Counsel, defendants' legal practitioners