PARADZA TRUST
versus
MESSRS MTETWA & NYAMBIRAI
and
TSITSI MUTANGA
and
BERNARD MAHARA MUTANGA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 12 September 2017 & 5 October 2017

Urgent Chamber Application

P. Mangwana, for the applicant
B. Mtetwa, for the 1st & 2nd respondent
3rd respondent in person

NDEWERE J: On 4 July, 2017 I issued an order by consent in case number HC 3167/10. The order read as follows:

"It is ordered that:

1. A decree of divorce be and is hereby granted.
2. Custody of the parties' minor child, Krystal Akatendeka, born on the 31st October, 2009, be and is hereby awarded to the plaintiff, subject to the defendant's rights of access to her at all reasonable times and upon reasonable notice having been given.
   2.1 It is recorded that the parties' older children, Tanatsa Bernard born on the 22nd April, 1997 and Ropafadzo Lucinda, born on the 11th April, 1999 have since attained majority status but still require maintenance for their educational advancement.
3. In respect of the parties' proprietary rights, and in lieu of the children's maintenance and their educational needs, it is agreed as between the parties and with the agreement and consent of the Paradza Trust, that:
   (a) The property known as Quinnington Re of SA also known as No. 15 Hawkeshead Drive, Borrowdale, Harare, be awarded to the plaintiff and the three children of the marriage, namely Tanatsa Bernard born on the 22nd April, 1997, Ropafadzo Lucinda born on the 11th April, 1999 and

Krystal Akatendeka born on the 31st October, 2009, in equal shares of twenty five percent (25%) each.

(b) The property known as Stand 3077 Salisbury Township Measuring 1706 square metres also known as Hamilton Court No. 7 Frank Johnson Avenue, Eastlea, Harare, be sold at best advantage in the open market and the net proceeds thereof, after the deduction of Capital Gains Tax, arrear rates and other municipal, electricity, phone and other expenses in respect of 15 Hawkeshead Drive, Borrowdale, and No. 7 Frank Johnson Avenue, Eastlea, and any agent's commission, be distributed as follows:

(i) $150 00.00 be set aside for the children's education, including any tertiary education, which amount shall be paid into a Trust account to be jointly administered by Messrs Mtetwa & Nyambirai and Mangwana & Partners Legal Practitioners.

(ii) The balance thereof be shared equally amongst the plaintiff, Tanatsa Bernard, Ropafadzo Lucinda, Krystal Akatendeka and the defendant's mother Rusiya Mutekenya in equal shares

(iii) The amounts due to Tanatsa Bernard, Ropafadzo Lucinda and Krystal Akatendeka be used to purchase an immovable property for each child, which process shall be supervised by Messrs Mtetwa & Nyambirai and Messrs Mangwana & Partners.

3.1. The Chairman of the Paradza Trust sign all documents necessary to put into effect the provisions of this order within 14 days of being presented with such documents failing which the Sheriff or his lawful deputy be and is hereby authorised to sign such documents.

4. The plaintiff's claim in respect of Lot 1 of 4 of Lot FA Quinnington in the District of Salisbury also known as No. 16 Hawkeskead Drive, Borrowdale, Harare, be distributed by the court as determined by the evidence led by the parties during the trial.
5. All other ancillary issues, including the costs of action, be determined by the court in the usual course after hearing evidence from Mr Chirima."

The background to the consent order was that the applicant's chairman was subpoenaed to come to court to testify about the properties held by the applicant for the benefit of the second respondent and the children of the marriage between the second respondent and the 3rd respondent. A sticking issue throughout the divorce trial of the second and the third respondent in HC 3167/10 was that of payment of the children's school fees. Although the third

respondent had accepted full responsibility on paper, most of the time the fees remained in arrears and I used to mediate on this issue during adjournments of the trial.

Consequently, when the applicant's Chairman came to testify during the trial, one of the questions I put to him was whether the Trust was amenable to disposing one of the Trust properties and utilise the proceeds towards the children's educational fees. After the applicant's Chairman indicated that the Trust would have no problems with that, parties were then requested to discuss a settlement which culminated in the Consent Order which I issued on 4 July, 2017.

On 8 September, 2017 the applicant filed an 'Urgent Chamber Application for Correction, Variation of Judgment in terms of r 449 (1) (a) of the High Court Rules, 1971'.

The application stated that the applicant was applying to the High Court 'for direction from Justice NDEWERE' on the basis that it had complied with the order of 4 July, 2017 and had concluded an Agreement of Sale for stand 3077 Salisbury Township and was in possession of more than $75 000.00 paid as a deposit which it intended to deposit into a Trust account for the benefit of the children in terms of Clause 2 (b) (1) of the Consent Order. The applicant said it was approaching the court because the applicant, the first respondent and second respondent had failed to reach agreement in terms of interpretation and application of the order of 4 July, 2017.

In his founding affidavit, the applicant's Chairman said the applicant had always intended to dispose of the property to raise educational funds for the children and that Panavest Properties had advertised the property about 10 times between 17 January, 2017 and 22 July 2017. The applicant also said it had obtained a valuation report which valued the property at $280 000.00 on 11 July, 2017. The applicant stated that it accepted the highest offer of $300 000.00 from the purchaser. The applicant said the purchaser paid the deposit for the property and Mangwana and Partners were in possession of more than $75 000.00 which the applicant wanted to be put into a Trust Account for the children's educational expenses in terms of the Court Order. However, when they approached the first and second respondent, they confronted serious opposition.

The interim relief which the applicant sought was the authority to pay fees for Bernard Tanatsa Mutanga, arrear and third term fees for Ropafadzo Lucinda at Girls College, Bulawayo and the third term fees for Krystal Akatendeka, at the Dominican Convent.

The final order which the applicant sought was the variation of the court order.

On 12 September, 2017, the first and second respondent opposed the urgent application. First respondent said it had been incorrectly cited as a party since it had no interest in the matter, apart from representing the second respondent. The second respondent said the application was not urgent because the reason that was being cited, that of school fees, had fallen by the way side for two of the children because their fees had since been paid. As regards Bernard Tanatsa's fees, she said he had been out of school for more than a year anyway so he would not be prejudiced further by a short delay while the second respondent's objections to the sale were being considered.

On the merits the second respondent said the property had not been sold to best advantage as stipulated in the court order and that the sale was actually to the prejudice of the beneficiaries who included the second respondent because of the low price.

The third respondent also filed an affidavit. He said the second respondent and the third respondent were wrongly cited as parties as they had nothing to do with the order being sought. He said it is the first respondent and the applicant's lawyers who have the mandate to manage the children's educational funds without any recourse to the second and third respondent. He said there had been no need for the applicant to seek a variation of the order of 4 July, 2017; the need only arose when the first respondent refused or neglected to take part in the setting up of the Educational Trust Fund with the applicant's lawyers, Mangwana and Partners. His view was that the first respondent was in contempt of court.

The third respondent attached what he called a supporting affidavit from Bernard Tanatsa Mutanga. This was done unprocedurally. In terms of the application procedure, all affidavits ought to have been filed and supported before the hearing of this application. The third respondent did not file any papers, but on the hearing date, he was granted, by consent, the opportunity to file a written response after he had made his oral response. No consent was given for Bernard Tanatsa to file documents after the hearing. Indeed the applicant who was relying on Bernard's Tanatsa's issue was criticised by the court during the hearing for not having attached a supporting affidavit from Bernard Tanatsa to its founding affidavit. But the fact that the applicant was criticized for not attaching supporting affidavits from the major children is no license for the third respondent to smuggle in Bernard Tanatsa's affidavit without an application for leave to belatedly file the affidavit or consent from the other parties. It is trite law that supporting affidavits should be attached to the founding affidavit before the hearing and this is what the respondents respond to.

Additional affidavits cannot be allowed after the hearing because allowing them means the other parties are denied the opportunity to respond to the facts in those additional affidavits. Consequently, the affidavit of Bernard Tanatsa Mutanga is hereby struck off from the record for being improperly before the Court.

On the issue of the alleged misjoinder of Mtetwa and Nyambirai, my view is that the order of 4 July, 2017, elevated Mtetwa and Nyambirai to a level beyond that of mere legal representatives for the second respondent. Paragraph 3 (b) (i) of the order states the following:

> "$150 000.00 be set aside for the children's education, including any tertiary education, which amount shall be paid into a Trust Account to be jointly administered by Messrs Mtetwa & Nyambirai and Mangwana and Partners Legal Practitioners."

The above paragraph establishes a Trust Account to be administered by the two law firms. This means the two law firms shall now be Trustees of this Trust account, not mere legal representatives of the applicant and second respondent. Indeed, the reason why Mtetwa and Nyambirai was appointed to jointly administer this Trust Account is because that law firm has been representing the second respondent who is the custodian parent of the minor child in the proceedings. However, Mtetwa and Nyambirai shall now be required to administer the Trust Account once it is set, in terms of the court order and the law and not in accordance with the second respondent's instructions. The applicant cannot therefore be faulted for citing Mtetwa and Nyambirai as a party in view of the new role assigned in para 3 (b) (i). The point *in limine* on misjoinder is therefore dismissed.

The third respondent also raised issues of improper citation of the second and third respondent although he did not formally refer to his submission as a point *in limine*. In my view, the two have properly been cited because they have a substantial interest in the case. The court order which the applicant seeks to have varied is their divorce order and the contents of the order were crafted by them during settlement discussions. This means that the order cannot be corrected or varied without their input. Indeed, r 449 of the High Court Rules being relied on by applicant requires, in r 449 (2) that all parties whose interest may be affected must have notice of the order proposed to be corrected or varied. Furthermore, the children who are beneficiaries of the Educational fund are their children. One of these children is still a minor and second respondent is the custodian parent as well as co-guardian. She therefore has an interest. The third respondent is co-guardian of the minor child and until the Educational fund is set up, he has the school fees obligation in terms of an earlier settlement. Therefore he has an interest. Indeed, from the affidavits filed by both parties, it is clear they have a substantial

interest in the matter as they both cite pertinent issues. Consequently, I find that the second respondent and third respondent were correctly cited as parties in this application.

On the issue of urgency, suffice to say that the High Court, as upper guardian of all minor children, is quick to hear cases that affect minor children. The other two children are majors, but the last child, Krystal Akatendeka Mutanga is still a minor. Consequently, because of the involvement of a minor child, the application warrants urgent attention. The arguments raised by the second respondent that the fees for the minor child have already been paid go to the merits of the application and will be considered as part of the merits. The point *in limine* on urgency is hereby dismissed.

On the merits, the applicant and the second respondent submitted that the sale contravened para 2 (b) of the court order which provided as follows:

> "The property known as stand 3077 Salisbury known as Hamilton Court, No. 7 Frank Johnson Avenue, Eastlea, Harare, be sold at best advantage in the open market and the net proceeds thereof, after the deduction of Capital Gains tax, arrear rates and other municipal, electricity, phone and other expenses in respect of 15 Hawkshead Drive, Borrowdale, and No. 7 Frank Johnson Avenue, Eastlea and agent's commission, be distributed as follows:-
>
> (i) $150 000 be set aside…..
> (ii) The balance thereof be shared equally amongst the plaintiff. Tanatsa Bernard, Ropafadzo Lucinda, Krystal Akatendeka and Rusiya Mutekenya in equal shares.
> (iii) The amounts due to Tanatsa Bernard, Ropafadzo Lucinda and Krystal Akatendeka be used to purchase an immovable property for each child which process shall be supervised by Messrs Mtetwa and Nyambirai and Messrs Mangwana & Partners."

The second respondent who is also an estate agent submitted that the purchase price was too little and if she was given a little bit longer, she could get a better price than what has been offered. She feared that if the sale was allowed to go through at the current price, the residue after all expenses have been deducted, will not be sufficient to cover the benefits given to her and the children in para 2 (b) of the Court Order of 4 July, 2017. Her fear was that the amount will not be sufficient to cover all the educational costs for the three children and in particular, that they may be nothing left for the minor child. She thought there will be nothing left to give a share to the three children, herself and the children's grandmother as provided in para 2 (b) (ii). She was worried that there will be insufficient funds left to buy each child an immovable property as stipulated in para 2 (b) (iii).

Her other concern was the fact that the sale is conditional upon a mortgage bond being approved and if that failed the deposit was supposed to be refunded. The disputed sale

agreement did not specify who will refund the deposit and from what source, if the sale got cancelled for failure to get a mortgage bond.

Second respondent was therefore asking to be given some time to seek a better purchase price in order to fulfil the terms of the consent order. She produced receipts to show that she had come up with some measures to ensure that the two children remained in school. She produced receipts showing that Ropafadzo Lucinda is registered for A Level examinations and the fees were paid. She produced receipts to show that the minor child's fees were also paid at Dominican Convent. The receipts show that payments were effected before the Urgent Application. In view of the prior payment of the fees, she submitted that there will be no prejudice to the school going children if she is given a chance to get a buyer who will pay more than what has been offered. She argued that the older child can wait a little longer since he has been out of school anyway while she tries to get a sale "at best advantage."

The second respondent argued that the only persons who stood to benefit from the sale were the agents, through payment of the Agents Commission and the Conveyancers through payment of the conveyancing fees. She also said the sale was a conditional sale and therefore incomplete until a mortgage bond had been approved. So how could the beneficiaries utilise proceeds from an incomplete transaction? Who would refund the deposit if the sale fell through?, asked the second respondent. The first and second respondent also argued that r 449 of the High Court Rules did not apply because the consent order was a product of extensive negotiations between the parties and it required no correction.

On the other hand, the applicant submitted that the property had been on the market since January 2017 and the $300 00 offer was the best they could get, given the state of the property.

It is important to point out that the sale "at best advantage" in terms of the 4 July, 2017 court order started after the court order; not before. Indeed, the applicant may have put the property on the market earlier, but the relevant period for purposes of the Court Order is from 4 July, 2017.

This means that in terms of the Court Order, the property had been on the market for just two months when the disputed sale agreement was concluded. The second respondent was not interested in the earlier effort to sell, from January 2017. She got interested from 4 July 2017, as a beneficiary from the sale in terms of the court order, para 2 (b) (ii); as a mother to the two older children and as the custodian parent and co-guardian to the minor child. Given the date of the Order, is her request to be granted more time to ensure the sale is at best

advantage unreasonable? Are her fears of there being insufficient funds to meet the provisions of the 4th July order unfounded? Are her fears of the sale being aborted and the beneficiaries being saddled with a refund bill unfounded? In my view, her fears are legitimate.

In fact, the final relief which applicant seeks confirms that if the current sale goes through, there will be less funds than envisaged in the negotiated Consent Order of 4 July 2017. The final relief sought by the applicant has done away with para 2 (b) (ii) and 2 (b) (iii) of the Consent Order. The final relief sought simply ends with a provision of $150 000.00 for the educational fund. Nothing is said about the balance. Who will get the balance? Or does the applicant already know that there will be no balance?

The applicant asked for directions. While the court's sympathy goes to the children for the delay on clearing the fees, I am of the view that second respondent has legitimate concerns and fears which need to be addressed before the disposal of the property is finalised. In my view, the children's interest will be better served if the applicant allows more time to the agents' to find a buyer who will buy the property at best advantage to the beneficiaries. Whether the applicant involves the second respondent in the sale is immaterial. What is material is that the sale be at best advantage in the open market as stated in the order. The parties should however ensure that the sale is finalised by the end of the year to avoid prejudicing the minor child when the school term starts in January, 2018.

As regards the application itself it was for correction, variation of the order of 4 July 2017 in terms of r 449 (1) (a) of the High Court Rules.

Order 449 provides as follows:

> "The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgment or order –
> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
> (b) in which there is an ambiguity or a patent error or omission but only to the extent of such ambiguity, error or omission; or
> (c) that was granted as the result of a mistake common to the parties."

In my view, r 449 does not apply to the present case**.**

None of the requirements of r 449 are met in the present case. The order was not granted in default of the other party; both parties were present and they jointly crafted it. There is no ambiguity, patent error or omission. Thirdly, there was no mistake which resulted in its issuance. The affidavits by all the respondents confirm that the order was not granted in error. First and second respondents are content with the order as it is. Third respondent is also happy with the order; his only issue being first respondent's failure or refusal to open a joint Trust

Account. The applicant appears to be the only one who is not happy with the order and that is not surprising since the applicant was not party to the case which resulted in the order but was just brought in briefly through its chairman to testify.

Even the application itself does not provide any particulars of the alleged error, omission or ambiguity. Instead, on p 14 para 5 of the application, the applicant states the following;

> "The applicant, first and second respondents have failed to reach an agreement in terms of the interpretation and application of the court order given by Honourable Justice NDEWERE**.**"

The question that then arises is whether the failure by the parties to agree on the interpretation and application of a court order means that the order was granted erroneously. That cannot be. The reason for most litigation is failure to agree on the interpretation or application of written instruments but that failure to agree is not evidence of an error, omission or ambiguity in the written instrument.

In my view, the applicant has approached the court on the wrong basis. Consequently, I have no legal basis to correct, rescind or vary the 4th July, 2017 order.

1. The application is therefore dismissed with costs.
2. In the best interest of the minor child, the applicant is hereby directed to finalise the sell of stand 3077 Salisbury Township at best advantage in the open market before 31 December 2017.
3. After the sale at best advantage, Messrs Mtetwa and Nyambirai are directed to co-operate with Mangwana & Partners and finalise the formation of the Trust Account before the beginning of the school term in 2018, in the best interests of the minor child.

Mangwana & Partners, applicant's legal practitioners
Mtetwa and Nyambirai, 1st & 2nd respondents' legal practitioners