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Judgment No. SC 98/05
Civil Appeal No. 306/04

NDUMISO MDLONGWA v THEMBEKILE MDLONGWA

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & NDOU AJA
BULAWAYO, NOVEMBER 28, 2005

J Sibanda, for the appellant

N Moyo, for the respondent

NDOU AJA: After hearing the appellant's argument in this matter, we dismissed (with costs) the appeal without hearing the respondent's counsel and indicated that the reasons would follow. These are the reasons -

The salient facts of the matter are the following:

The parties used to be married to each other but divorced on 3 October 2002 on the basis of a consent paper signed by the appellant on 3 July 2002 and respondent on 4 July 2002. This much is apparent from the consent paper. Paragraph 4 of the consent paper (now an order of the High Court) reads:-

"The defendant (appellant) shall be given first preference if by the 90th day he has failed to raise plaintiff's half share of \$750 000,00 the plaintiff (respondent) shall be allowed to purchase, defendant's share failing which the house shall be sold to best advantage and the proceeds therefrom shared equally between the parties."

After the signing of the consent paper, but before the divorce was granted, it became necessary to initial every paper. The consent paper comprised some four pages, and apart from the last page which was signed all

the other pages had not been initialed. The need for initialing the consent paper arose after the respondent's legal practitioner noted an obvious difference in the type of print on the various pages of the consent paper. The different print was occasioned by the correction of errors in respect of movable assets. The corrections were done before, and not after the parties' signatures.

The fear of the respondent's legal practitioner was that a judge dealing with the divorce might query this, and decline to grant the order until the said papers were attended to. The consent paper was sent back to the appellant to initial on every page which he did. *Ex-facie*, there is no date showing when the initialing took place. The appellant said, in the court *a quo*, that he initialed it on 23 July 2002. There is nothing to contradict him on this.

It is common cause that the appellant failed to exercise the option given to him to buy out the respondent within ninety days (i.e. by 3 October 2002), of the date of the last signature, which is 4 July 2002. The appellant's case is that the reckoning of the ninety days commences on the date of the above-mentioned initialing, i.e. 23 July 2002 and not the date of the last party's signature. In other words the appellant's submission is that the above initialing of the pages of the consent paper interrupted the day of reckoning. The court *a quo*, held that signing of the consent paper was not overridden by the subsequent initialing of (the unsigned) pages of the consent paper. This finding cannot be faulted. First, the consent paper in paragraph 4 *supra*, clearly states "within three months of the date of signature on this paper ..." (emphasis added). The last party was signed on 4 July 2002. There is no other date thereafter of the signature. The appellant's alleged date of 23 July 2002, even if it is correct, is not on the consent paper. On this point alone the appeal should fail.

The object of initialing is to remove any suspicion that may be created by the use of different print as alluded to above. The difference was

occasioned by the need to correct genuine errors in respect of the allocation of the movable property. This correction took place before the consent paper became an order of the court.

Further, the signing of the consent paper in the form outlined above, by the appellant as being a party to it, created a presumption that he is acquainted with its contents. In terms of the caveat subscriptor rule he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature, for the other party is entitled to assume that he has signified his assent to the contents of the document.

Wille's Principles of South African Law (8th Edition) *D Hutchinson* at p 426; *Glenburn Hotels (Pvt) Limited v England* 1972 (2) SA 660 (RAD), *Dutoit v Atkinson's Motors BPK* 1985(2) SA 893 A and *The Principles of the Law of Contract*, *AJ Kerr* 4th edition at 86-90. Even without the initialing the signatures of the parties would have sufficed because where a signature appears at the foot of the written document, it is to be taken conclusively to apply to the whole document unless something is expressed to rebut that presumption – *Chitty on Contracts: General Principles* 22nd edition at paragraph 169.

Finally the appellant knew very well that the day of reckoning started on the day they signed the consent paper and not on the day of the initialing, hence his legal practitioner's letter wherein he stated:

"As explained to you, the writer has no knowledge, without the consent paper, of knowing whether the period that the parties agreed on for our client to raise funds expired" (emphasis added).

The appellant was desirous to see the consent paper in order to start reckoning the dates. Surely, the last date he would find in the consent

paper is 4 July 2004. The later date of 23 July 2002, which he introduced by evidence, does not appear on the consent paper at all.

The appeal, is therefore, without merit.

CHEIDA JA: I agree.

MALABA JA: I agree.

Job Sibanda & Associates, appellant's legal practitioners

Moyo & Partners, respondent's legal practitioners