INNOCENT HLAMBELO

Versus

THANDIWE THEBE

And

STEPHEN GONYE

And

REGISTRAR OF DEEDS [N.O]

And

THE MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 6 MAY 2022 & 12 MAY 2022

Urgent chamber application

H.Shenje for the applicant
T. Ndebele for the respondent

DUBE-BANDA J

Introduction

1. This is an urgent application. This application was filed during vacation. It was first set-down before MOYO J and the Judge directed as follows: that the matter is removed from the roll to enable 1st respondent to file opposing papers no later than 26 April 2022; the matter will then be placed before the next duty judge for set-down; and that the applicant can serve 1st respondent with the notice of set down and file a certificate of service. This matter was then placed before when I assumed my vacation duty.

2. In this urgent chamber application applicant seeks an interim relief couched in the following terms:

Pending finalisation of these proceedings an interim interdict be and is hereby granted restraining 1st respondent from selling or otherwise dealing with the property being Stand No. 1356 Cowdray Park, Bulawayo in such a way as may lead to the transfer or alienation of the current rights, of Mlamleli Somfula Thebe in the said property.

3. The application is opposed by the 1st respondent. 2nd, 3rd and 4th respondents neither filed opposing papers nor participated in the hearing of this matter. I take the view that 3rd and 4th respondent having been cited in their official capacities have taken the position that they will abide by the decision of this court.

Background facts

4. This application will be better understood against the background that follows. The dispute turns around the ownership of Stand No. 1356 Cowdray Park, Bulawayo (property). In case number HC 1243/20 2nd respondent (Gonye) sued out an urgent chamber application citing 1st respondent (Thebe) herein and the Registrar of Deeds. He approached the court because Messrs Lazarus and Sarif Legal Practitioners had informed him that they were in the process of transferring the property into the name of Thebe. He sought an interim order that the transfer of the property from himself to Thebe be suspended. The court in HB 64/21 *per* TAKUVA J found *inter alia* that Gonye sold the property to Hlambelo – applicant herein, and Hlambelo sold the property to Thebe's late husband. The court also found that Thebe is a widow who has been in occupation of the property since 2003. A period close to 18 years. The court dismissed the application on the basis, *inter alia* that notwithstanding the fact that the property was still registered in Gonye's name, he had no *prima facie* right to make the application because he sold the property to Hlambelo. HB 64/21 was handed down on the 8th April 2021.

5. Applicant contends that on the 14 January 2002, he purchased the property from Gonye. In case number HC 325/21 *per* Order dated 11 June 2021, this court *per* Makonese J confirmed the agreement of sale between applicant and Gonye, and

ordered that the property be transferred into the Hlambelo's name within 5 days thereof.

6. Thebe contends that on the 4th February 2003, Hlambelo sold the property to her husband who is now late. She contends that it was agreed amongst Gonye, Hlambelo and her late husband that the property be transferred directly from Gonye to her late husband. She has attached to her papers a letter dated 20 September 2004, which shows that the City of Bulawayo consented to the transfer of the property from Gonye to her husband. She has also attached conveyancing papers necessary to transfer the property from Gonye to her late husband. The property has since been transferred to her husband's name. The Deed of Transfer number 1131/2020 is dated 31st December 2020. There is an issue about the correctness of the date on the Deed of Transfer. That would be a dispute for another day. Thebe contends that there is a connivance between Gonye and Hlambelo to cheat the estate of her late husband.

7. There are serious material dispute of facts in this matter. Mr *Shenje* counsel for the applicant conceded that there are serious factual disputes in this matter which cannot be resolved on the papers. In turn counsel argued that all applicant is seeking is that the *status quo* be maintained pending the finalisation of case number HC 607/22 pending before this court. It is against this background that applicant has launched this application seeking the relief mentioned above.

8. 1st respondent took two preliminary points. These are: that the application is not urgent and that the failure to join the estate of the late Mlamleli Somfula Thebe is fatal to this applicantion.

Non-joinder

9. Firstly, the 1st respondent has argued that the non-joinder of the estate of the late Thebe is fatal to the proceedings. This contention is anchored on the premise that the property subject to this application is registered in the name of the late Thebe. 1st respondent is a beneficiary and executor of the estate of Thebe. In *Mwazha And*

9 Others v Mhambare SC 116 / 2021, the court said the effect of non-joinder is a well traversed subject in this jurisdiction.

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10. The remedy for non-joinder is provided for in rule 32(12) of the High Court Rules 2021 itself. A party who is aggrieved by the non-joinder of another party must proceed in terms of rule 32(12) and make the necessary application for the joinder of that other party. It is thus permissible for a court to order the joinder of any party either on its own motion or on the application of any of the parties before it, or, for that matter, any other party who may have an interest in the outcome of the matter. The 1st respondent, being of the view that the estate of the late Thebe ought to have been joined in this application should have applied for such joinder. See: *Mwazha And 9 Others v Mhambare* SC 116 / 2021.

11. In *casu* the non-joinder of the estate of Thebe is not fatal to this application. This court can determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to this application. This preliminary point has no merit and is dismissed.

Urgency

12. It is upon the certificate of urgency that the judge formulates an opinion as to whether or not the matter is urgent. In *Chidawu & Ors* v *Sha & Ors*, the Supreme Court held at page 264D as follows:

> It follows that a certificate of urgency is the sine qua non for the placement of an urgent chamber application before a Judge. In turn the judge is required to consider the papers forthwith and has the discretion to hear the matter if he forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application the Judge is guided by the statements in the certificate by the legal practitioner as to its urgency in certifying the matter as urgent.

13. In the certificate of urgency it is submitted that:

    i. That the applicant and 1st respondent are now locked in a dispute in a dispute about ownership of the property in issue, Stand 1356 Cowdray Park, Bulawayo. The applicant is in possession of a valid court order granted under case No. HC 325/21 which compels the 2nd respondent to transfer the property to the applicant.
    ii. Despite being a party to proceedings in HC 325/21, and being aware, thereof, of the applicant's interests in the property the 1st respondent has caused the property to be transferred into the names of her deceased husband, Mlameli Somfula Thebe under Deed of Transfer No. 1131/20.
    iii. 1st respondent's actions are clearly meant to subvert the applicant's interests. 1st respondent has demonstrated some cunningness that will clearly defeat the applicant's interests in the property if not stopped through this urgent chamber application.
    iv. As things stand the 1st respondent's actions have left the applicant clutching at a court order while she facilitated transfer of the property through what, at face value, appears to be a fraud.
    v. In my view, therefore, the applicant faces real danger that the property may now be sold to third parties, an event which will be difficult for the applicant to undo if and when it materialises. The solution for the applicant therefore lies with this court through the urgent chamber application.
    vi. For the reasons above, I am satisfied the applicant's case passes the test and should be heard on an urgent basis.

14. In his oral submissions Mr *Shenje* counsel for the applicant argued that the trigger of urgency are the events that occurred in the Magistrates' Court. It is contended that following the proceedings at the Magistrates' Court the eviction of the 1st respondent from the property was set for the 31st March 2021. Applicant was expecting that 1st respondent would be evicted on that date. However, the messenger of court informed the applicant that 1st respondent obtained a *rule nisi* staying eviction. The *rule nisi* was allegedly obtained on the grounds that the property was registered in the name of 1st respondent late husband. Applicant is said to have carried out a Deeds search and confirmed that indeed the property was registered in the name of the late Mlamleli Somfula Thebe. It was argued that this discovery triggered this application.

15. It is clear that the high watermark on the case on urgency is the averment that the spark or the trigger of urgency is what occurred in the Magistrates' Court. What allegedly occurred in the Magistrates' Court is not set out in the certificate of urgency. Generally a litigant cannot be permitted to rely on factual averments that have not been included in the certificate of urgency. A certificate of urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. It must accurately contain the factual averments that anchor the application.

16. In *casu* the averments in the certificate of urgency are at variance with the submissions made in support of the alleged urgency of this application.

17. In *Documents Support Centre P/L v Mapuvire*, MAKARAU JP, (as she then was) said the following in relation to urgent chamber applications:

> Urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible to the prejudice of the applicant.

18. In *Seventh Day Adventist Association of Southern Africa v Tshuma* & Ors HB 213-20, I made the following remarks:

> In the ordinary run of things, court cases must be heard strictly on a first come first served basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. … … An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue, and have its matter given preference over other pending matters. ….. …. …. In assessing whether an application is urgent, this court has in the past considered various factors, including, among other others; … whether the urgency was self-created; the consequence of relief not being granted and whether the relief would become irrelevant if it is not immediately granted.

19. Applicant seeks an interim interdict to stop 1st respondent from selling or otherwise dealing with the property being Stand No. 1356 Cowdray Park, Bulawayo. Therefore, there must be a factual basis in the certificate of urgency showing that

1st respondent intends or has initiated the process of selling the property or do deal with the property in any way.

20. There are no facts that support the averment that 1st respondent intends to sell nor deal with the property in any way. There is simply no factual basis for this contention. It is merely based on speculation. The fact that there is a dispute between the applicant and 1st respondent concerning the property is not standing alone indicative of the fact that the latter wants to sell or deal with the property in a manner suggested by the applicant. The fact that there is an allegation, which is denied that she got the Deed of Transfer by improper means, standing alone is no indication that she wants to sell or deal with the property in any way.

21. It is common cause that there is a dispute about the property. Applicant like all other litigants with such disputes has to join the queue. This is what other litigants who have their matters waiting in the queue have to contend with. This is what applicant has to contend with. Applicant cannot be permitted, by a mere allegation, based on no factual basis, and merely based on speculation to jump the queue and gain an advantage over other persons whose disputes are being dealt with in the normal course of events. There is nothing imminent in this case to cause this court to permit applicant to have his matter hear ahead of other matter in the queue.

22. It is for these reasons that I take the view that this matter does not pass the test of urgency. There is no reason why it should be heard on the urgent roll and not on the ordinary roll. There is no emergency in this case. See: *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188. This matter is not urgent and it cannot be afforded a hearing on the roll of urgent matters. It falls to be struck off from the roll of urgent matters.

23. The general rule is that the costs follow the result. There is no reason why this court should depart from such rule in this case. The applicant is to pay the 1st respondent's costs on the scale as between party and party.

In the result, I make the following order:

a. The point *in limine* on urgency is upheld.

b. This application is not urgent and is struck off the roll of urgent matters with costs of suit.

Shenje and Company applicant's legal practitioners
Lazarus and Sarif 1st respondent's legal practitioners