

**THABANI LIHLE SIZIBA N.O.**

**Versus**

**MEMORY CHADA**

**And**

**ZIBUSISO SAMUEL MOYO N.O.**

**And**

**THE MASTER OF THE HIGH COURT**

**And**

**THE REGISTRAR OF DEEDS**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 17 October 2023 & 4 January 2024

**Opposed court application – preliminary points**

*N. Ndlovu*, for the applicant  
*S. Chingarande*, for the respondent

**DUBE-BANDA J:**

[1] This is a court application for a *declaratur*. The applicant seeks an order couched in the following terms:

- i. A declaratur be and is hereby granted that the property known as Lot 5 Sunninghill of Willsgrove measuring 8, 6321 hectares held under deeds of transfer 332/2021 and 2770/1985 is registered and owned by the Estate Late Simon Kubvoruno Nhema.
- ii. A declaratur be and is hereby granted that the agreement of sale entered into between the 1<sup>st</sup> and 2<sup>nd</sup> respondents over Lot 11 Sunninghill of Willsgrove is unlawful and void *ab initio*.
- iii. The 1<sup>st</sup> respondent and anyone claiming occupation of Lot 11 Sunninghill of Willsgrove through him be and is hereby ordered to vacate the property within five

(5) days of the granting of this order failing which the Sheriff of the High Court be directed to evict any person in occupation of the property.

- iv. The 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby ordered to pay costs of suit at an attorney and client scale one paying the other being (*sic*) absolved.

[2] The application is opposed by the first and the second respondents. The third and fourth respondents neither filed opposing papers nor participated in these proceedings, which I take to mean that they have taken the position to abide by the decision of this court.

#### Background facts

[3] During their life time, Simon Kubvaruno Nhema (Simon) and his wife Lizzie Nhema (Lizzie) were the registered owners of an immovable property known as Lot 5 Sunninghill of Willsgrove, measuring 8,6321 hectares. The property is registered under Deeds of Transfer numbers 2770/85 and 03321/21. Lizzie died in 2005 and Simon died in 2008. The deaths of Simon and Lizzie ignited a wave of appointment of executors, which appointments are the underlying cause of this litigation. On one hand the second respondent contends that on 8 January 2018 and in terms of Letters of Administration number D.R.B.Y. 20/18 he was appointed the executor dative of both the estate of Simon and Lizzie. On the other hand, the applicant contends that on 26 June 2019 the second respondent was in terms of Letters of Administration number D.R.B. 648/18 appointed the executor dative of the estate of Lizzie. The final liquidation and distribution plan of the estate of Lizzie was confirmed on 10 February 2020.

[4] In her answering affidavit the applicant depones that the estate of Simon was registered in 2014 and she was then appointed the executrix. The papers show that the estate of Simon was registered in 2014, however the Letters of Administration number D.R.B. 458/14 is date-stamped 4 April 2018. On 20 April 2019, the Master generated an internal office memorandum addressed to one KS and directing that a special meeting be convened. In the memorandum the Master noted that DRBY 20/18 has been combined with DRB 458/14 and that the appointment of Dr Z. Moyo (the second respondent) in DRB 20/18 was *ultra vires* the Act. At this moment there is no evidence that has been adduced to show that a special meeting was convened as directed by the Master.

[5] The revocation of Letters of Administration is provided for in s 30 of the Administration of Estates Act [Chapter 6:01]. At this point in time, this court cannot make a factual finding regarding the validity and / or revocation of any of the Letters of Administration before court. It is so because at this moment this court is dealing with the preliminary points and their resolution does not turn on whether any Letters of Administration was revoked or not.

[6] On 19 July 2018 the second respondent applied for a subdivision permit of Lot 5 Sunninghill of Willsgrove measuring 8,6321 hectares. A subdivision was approved and a permit under SDC 39/18 was issued on 4 September 2018. Pursuant to the issuance of the subdivision permit, and on 5 September 2018 the second respondent sold Lot 11 Sunninghill of Willsgrove measuring 4201 square meters to the first respondent. This is the agreement that the applicant seeks to be declared unlawful and void *ab initio*.

[7] The first and second respondents raised two preliminary points. The first preliminary point is that the applicant has no *locus standi* in this matter, and the second is that the applicant has approached this court in bad faith. At the commencement of the hearing of this matter, I informed counsel that I will hear the two preliminary points taken, and should I find that they have merit, that will signal the end of this matter. However, should a finding be made that the preliminary points have no merit, the matter will be set down for continuation of the hearing.

#### Preliminary points

[8] The first respondent has placed the applicant's *locus standi* in dispute. *Locus standi* relates to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue. In terms of the common law a litigant must show a "direct and substantial interest" in the subject matter and the outcome of the litigation. See *Matambanadzo v Goven* SC-23-04; *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49/18. In *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H) the court pointed out that *locus standi in judicio* refers to ones right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the outcome of the litigation. Such interest is a legal interest in the subject matter of the action which would be prejudicially affected by the judgment of the court. See *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07.

[9] The attack on the *locus standi* of the applicant is anchored on that the second respondent was on 5 January 2018 issued with Letters of Administration (DRBY 20/18) and on the basis of such Letters of Administration he is the executor of the estate of the late Lizzie Nhema and Simon Kubvuruno Nhema. It was contended that the applicant's Letters of Administration was issued on 4 April 2018, a period of three months after the second respondent was issued with his Letters of Administration. It was contended further that her appointment to be executrix was a nullity because the estate on which she was appointed had an executor i.e., the second respondent. Moreso that the appointment of the second respondent as the executor was not revoked in terms of the law.

[10] Per *contra*, the applicant contends that she has *locus standi* in this matter. Mr *Ndlovu* counsel for the applicant submitted that the estate of Simon Kubvuruno Nhema was registered in 2014 under DRBY 458/14 and the applicant was appointed the executrix on 17 October 2017. It was submitted further that the subsequent registration of the same estate in January 2018 was a nullity and as such the appointment of the second respondent as the executor was invalid. The applicant made a number of submissions in support of the contention that she has *locus standi* in this matter.

[11] This matter turns on the sale of the property in the estate of Simon Kubvuruno Nhema. The applicant is in possession of Letters of Administration issued in her name citing her at the executrix of the estate Simon. At this moment this court makes no finding whether the Letters of Administration issued to the applicant is impeachable or not, this is an issue that might be determined and resolved at the moment the merits of the matter are considered. This court cannot at this stage of the proceedings find that the appointment of the applicant was a nullity. The question whether or not her appointment was a nullity will have to be considered with the merits of the matter. It is not an issue that this court can resolve at this moment and non-suit her. *Prima facie* she was issued with Letters of Administration in her name, and the dispute turns on the property of the estate answering to the Letters of Administration in her name. she cannot be non-suited in this matter. She has a direct and substantial interest in the subject matter and the outcome of the litigation. In the circumstances the preliminary point attacking the *locus standi* of the applicant has no merit is stands to be refused.

[12] The second preliminary point is that the applicant has approached the court in bad faith. It is trite that in urgent applications, utmost good faith must be shown by the applicant. It is the duty of the applicant to lay all relevant facts before the court, so that it may have full knowledge of all the circumstances of the case before making an order. In *Anabas Services (Pvt) Ltd V The Minister of Health N.O. & Ors* HB 88/2003 NDOU J made a pertinent observation that:

“The courts should, in my view, always frown on an order, whether *ex parte* or not, sought on incomplete information. It should discourage material non disclosures, *mala fides* or dishonesty. They may, depending on the circumstances of the case, make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants.”

[13] In the Namibian case of *Van Wyk v Matrix Mining (Pty) Ltd* (HC-NLD-CIV-MOT-EXP-2020/00013) [2020] NAHCNLD 109 (19 August 2020) JANUARY J held that:

“It is trite law in that an applicant bringing an *ex parte* application must act in the utmost good faith and if any material facts are not disclosed, whether it be willfully or negligently, the court may on that ground alone dismiss an *ex parte* application or discharge the rule nisi on the return date.”

[14] In *casu*, the respondents contend that the applicant is hoodwinking the court in that by her conduct she recognised the sale agreement between the first and the second respondents. It is alleged that she demanded a top up of the purchase price, and when the first respondent refused to pay the top-up, she then turned to this court to seek an order that the agreement be declared a nullity. The contention is that this issue about a top up of the purchase price was not disclosed in the founding affidavit, and that such non-disclosure amounts to bad faith in this litigation. It was further contended that the applicant failed to disclose that she was aware that the first respondent was in occupation of the property since 2008, and that she was aware of the construction at the property.

[15] The applicant contends that there have been efforts to reach a settlement in this matter, and such efforts did not succeed in resolving the dispute between the parties. It is said it was the failure to reach a settlement that resulted in the filing of this application. It was contended further that at the time of the purchase there was no sub-division permit, and no authority issued in terms of s 120 of the Administration of Estates Act [6:01]. Mr *Ndlovu* submitted that without a sub-division permit and a s 120 authority the first and second respondents should neither have entered into an agreement of sale nor made developments on the property. Cut to the bone, the

contention is that issue of the alleged bad faith is not central to the resolution of this matter, and therefore this preliminary point has no merit and must be dismissed.

[16] The rule against non-disclosure is more pronounced in chamber applications, particularly *ex parte* applications and for good cause. See *Anabas Services (Pvt) Ltd V The Minister of Health N.O. & Ors* HB 88/2003; *Van Wyk v Matrix Mining (Pty) Ltd* (HC-NLD-CIV-MOT-EXP-2020/00013) [2020] NAHCNLD 109 (19 August 2020); *Prosecutor-General v Lameck and others* 2010 (1) NR 156 at paragraph 24-26 at 167 I to 168 B. I take the view that it cannot be underscored that in all litigation parties must disclose all the relevant facts within their knowledge. However, this as it may be, in court applications the respondents will always be given notice of the application and have an opportunity to file opposing papers and highlight the non-disclosures made in the application, which opportunity might not always be available in chamber applications. This is the reason the rule against non-disclosure is enforced in chamber applications, particularly *ex parte* applications. This is a court application and the first and second respondents have filed opposing papers and placed their respective versions before court.

[17] The applicant contends that the issues raised by the respondents are not germane to the resolution of this matter. In any event my view is that this court cannot at this moment make a finding whether the issues allegedly not disclosed by the applicant are central to the resolution of this matter or not. This is an issue that cannot be determined and resolved at the preliminary stage of the proceedings. It is an issue that might turn on the merits of the matter. It is at that moment that this court will have the benefit of argument in respect of the entire case and be able to determine whether indeed there has been non-disclosure, and if so, the consequences thereof. It is for these reasons that the preliminary point on bad faith cannot be determined at this stage of the proceedings.

#### Costs

[18] What remains to be considered is the question of costs. In civil litigation, the general approach is that costs orders should follow the result. The rationale behind this rule is that if a party is brought to court to defend a claim with insufficient merit, then it could hardly be fair to expect it to pay legal costs to defend an action that, objectively, ought not to have been brought in the first place. There is no reason to depart from the general rule in this matter.

Notwithstanding that this is an interlocutory ruling, the applicant must be awarded her costs. To me it seems more in accordance with the principles of justice that costs incurred in the course of litigation as a general rule be borne by the party responsible for such costs. In *casu*, the first and second respondents raised preliminary points which did not find favour with this court and they must bear the costs associated with the preliminary points taken. To say costs to be in the cause will mean that if the applicant happens to be the unsuccessful party on the merits, then she will have to bear the burden of all the costs including those associated with the preliminary points taken by the first and the second respondents. Such cannot be fair. It is for these reasons that the first and the second respondents must pay the costs associated with the taking of these preliminary points.

In the result, it is ordered as follows:

- i. The preliminary points in respect of *locus standi* and bad faith be and are hereby dismissed.
- ii. The first and the second respondents jointly and severally and each paying the other to be absolved pay the applicant's costs on a party and party scale.
- iii. The Registrar is directed to set down this matter for the hearing on the merits.

*Cheda & Cheda Associates*, applicant's legal practitioners  
*Sansole & Senda*, 1<sup>st</sup> and 2<sup>nd</sup> respondent's legal practitioners