

SIBUSISIWE MHLANGA

Versus

BONGANI MHLANGA

And

DEPUTY SHERIFF OF THE HIGH COURT

And

REGISTRAR OF DEEDS N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 11 JULY 2022 & 14 JULY 2022

Opposed chamber application

S. Siziba for the applicant
M. Chipetiwa for the respondent

DUBE-BANDA J:

1. This is an opposed chamber application. Applicant seeks an order to compel 1st respondent to sign all necessary papers to transfer certain properties into her name. The properties that are sought to be transferred into applicant names are these: house number 70942 Lobengula West, Bulawayo; Lot 5 of Stand 188 of Matsheumhlope, Bulawayo; Subdivision 12 of Subdivision 21 of Subdivision A called Gumtree Claremont, Bulawayo, also known as number 12B Alwin Park Road, Gumtree, Bulawayo; and Subdivision 21 of Subdivision A called Claremont.
2. The application is opposed by the 1st respondent. 2nd and 3rd respondents were cited in this application so that in the event the order sought is granted they may sign documents to effect the transfers sought by the applicant.
3. The background to this application is that applicant and 1st respondent were married and had their divorce order (HC 1981/18) granted on the 23rd August 2018. In terms of

the court order applicant was awarded the properties she seeks to be transferred into her name.

4. Other than resisting the relief sought on the merits, 1st respondent in his opposing affidavit took a preliminary objection. The objection taken was that this application was not served in terms of the rules of court, in that it was served at number 5312 Magwegwe West, Bulawayo when 1st respondent does not reside at such address. It was contended that 1st respondent was resident in South Africa, and therefore serving the application at number 5312 Magwegwe West, Bulawayo was not proper service.
5. I brought to the attention of Mr *Chipetiwa*, counsel for the 1st respondent that the factual basis of the preliminary objection was at variance with the certificate of service before court. The certificate of service was clear that the application was served on 1st respondent's erstwhile legal practitioners R. Ndlovu and Company. Counsel abandoned the objection and argued the matter on the merits. No further reference shall be made to this preliminary objection.
6. Mr *Siziba*, counsel for the applicant contended that it was not in dispute that the properties sought to be transferred into the name of the applicant were awarded to her *per* the order. It was submitted further that the properties are registered in the name of the 1st respondent. Counsel argued that the court was extant, and that the defence by 1st respondent that he had filed an application for recession of the court order was of no consequence. It was contended that even if a litigant considers that a court order was irregular or void it remains binding until such time that it was set-aside or varied by a court of competent jurisdiction. It was argued further that in any event the application for rescission of judgment was struck off the roll by this court. Mr *Siziba* argued that 1st respondent had no defence at law to this application, and that in turn a case has been made for an order sought by the applicant.
7. *Per contra* 1st respondent submitted that after signing the consent paper and after the court order was granted it came to his attention that during the subsistence of the marriage applicant bought two immovable properties and did not disclose them to him.

It was contended that the two properties were registered in the name of the applicant, and were not included in the consent paper and the court order. It was submitted further that the general principles of contract apply to a consent paper in that a misrepresentation vitiates a consent paper. It was contended that applicant's failure to disclose the two properties registered in her name vitiates the consent paper signed by the parties. It was submitted further that the court order was obtained by fraudulent means, and a court cannot order the transfer of the properties when the order itself was obtained through fraud. It was contended that the application be dismissed with costs of suit on a legal practitioner and client scale.

8. In her answering affidavit applicant averred that the two properties mentioned by 1st respondent belong to her mother. One is registered in her name for inheritance purposes, and the other was purchased for her mother and it is said 1st respondent is aware of these facts.
9. The court order is extant. In terms of the court order applicant was awarded the properties she seeks to be transferred into her name. The properties are registered in the name of the 1st respondent. The 1st respondent has not complied with the court order, i.e. he has not transferred the properties to the applicant. The court order has not been varied or set aside. In *Mauritius and Another v Versapak Holdings (Private) Limited and Another* SC 2 / 2022 the court said:

It is trite that once a court has made an order it binds all and sundry concerned. Everyone bound by the court order has a duty to obey the order as it is until it has been lawfully altered or discharged by a court of competent jurisdiction or statute. In *Hadkinson v Hadkinson* ROMER LJ recited the duty to obey court orders with remarkable clarity when he said:

It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of the obligation is shown by the fact that it even extends to where the person affected believes it to be irregular or even void.

10. This statement of the law applies to the facts of this case. The court order applicant seeks to enforce is extant. It has not been varied or set aside.
11. The 1st respondent cannot resist this application on the grounds that the consent paper was induced by fraud. The matter turns on the consent paper, but a court order which is extant. 1st respondent just has to comply with it. The order of court must be obeyed and given effect to unless it has been varied or set aside by a court of competent jurisdiction. In *Magauzi & Anor v Jekera* SC 54/22 the court said:

When a court grants an order all subsequent acts affecting the dispute between the parties rely on the court's order and not the reason or facts the court based its judgment on. Execution of judgment debts is based on court orders and not the reason for which the court order was granted. Therefore a party or the parties cannot disregard a court order as they are bound by it. In the case of *Chiwenga v Chiwenga* SC 2/14, it was stated that: The law is clear that an extant order of this Court must be obeyed or given effect to unless it has been varied or set aside by this Court and not even by consent can parties vary or depart therefrom. See also *CFU v Mhuriro & Ors* 2000 (2) ZLR 405 (S).
12. 1st respondent's contention that he has made an application for rescission of the court order is of no moment. It cannot assist the 1st respondent to resist this application by contending that he has since filed an application for rescission of judgment. The point is that the court order has not been varied or set aside. In any event the application for rescission of judgment has been struck off the roll. See: *Mhlanga v Mhlanga* HB 132/22.
13. In the circumstances 1st respondent has no defence to this application and it must succeed.
14. The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the 1st respondent.

In the result, I order as follows:

- i. 1st respondent is to sign all the necessary papers to facilitate the transfer of the following immovable properties to the applicant:
 - House number 70942 Lobengula West, Bulawayo.
 - Certain piece of land situate in the District of Bulawayo being the remaining extent of Lot 5 of Stand 188 of Matsheumhlope measuring 1, 1248 hectares including vested roadway. Also known as number 59 Harwich Road, Matsheumhlope.
 - Certain piece of land being Subdivision 12 of Subdivision 21 of Subdivision A called Gumtree Claremont situate in the District of Bulawayo, measuring 2, 3916 hectares also known as number 12B Alwin Park Road, Gumtree, Bulawayo.
 - Certain piece of land situate in the District of Bulawayo being the remaining extent of Subdivision 21 of Subdivision A called Gumtree of Claremont.

- ii. Should 1st respondent fail to sign all the necessary papers to facilitate transfers of the above mentioned immovable properties into the name of the applicant within seven (7) days of this order, the Sheriff of the High Court be and is hereby authorised to sign all the necessary papers to facilitate the transfer of the above mentioned properties from the 1st respondent to the applicant.

- iii. The 1st respondent to pay the costs of this application.

Lazarus and Sarif applicant's legal practitioners
Maringe & Kwaramba 1st respondent's legal practitioners