

CLIFFORD MANUNGO

And

TANAKA MANUNGO

Versus

PAUL SIBUSISO MTAZU

And

DECIDE TANYARADZWA KUTYAUROPO

And

**ASSISTANT MASTER OF THE HIGH COURT,
HARARE (NO)**

And

DEPUTY SHRIFF BULAWAYO (NO)

And

REGISTRAR OF DEEDS, BULAWAYO (NO)

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 2 NOVEMBER 2021 & 17 FEBRUARY 2022

Urgent Chamber Application

V. Majoko, for the applicants
Adv L Nkomo, for the respondents

MAKONESE J: This matter was filed under a certificate of urgency. The order sought in the interim relief is for the applicant to have restoration of occupation of the immovable property situate at stand number 206 Matsheumhlophe Township, Bulawayo. The order sought in the draft order is worded as follows:

“Term relief sought

1. Pending the final determination of this application and final determination of the application in case number HC 1083/21 pending before this court the 1st and 2nd applicants be and are hereby restored into occupation of the immovable property situate at stand number 206 Matsheumhlophe Township, Bulawayo.
2. The deputy Sheriff is directed to take all steps as may be necessary to restore the applicants into peaceful occupation of the immovable property aforesaid.

Terms of final order sought

1. Having been in occupation of stand 206 Matsheumhlophe, Bulawayo, by virtue of the said agreement between 1st applicant and Gamuchirai Lilosa Madondo the 1st and 2nd applicants claim occupation of stand 206 Matsheumhlophe through Gamuchirai Lilosa Madondo and not through the 2nd and/or 3rd respondents.
2. The judgment order and writ of execution granted in case number HC 4751/21 against the 2nd and 3rd respondents is not binding nor is it executable as against 1st and 2nd applicants.
3. In evicting the 1st and 2nd applicants on the basis of the order obtained in case number HC 4751/21 the deputy Sheriff acted wrongfully and unlawfully.
4. The 1st, 2nd and 3rd respondents pay costs of the application on the scale as between legal practitioner and client.”

The application is opposed by the respondents. Respondents raised various preliminary objections, which they contend, if upheld would be dispositive of the matter without even going into the merits. I shall deal with the points *in limine* in turn. Before doing so I shall set out the brief background to the matter.

Factual background

Sometime in March 2021 1st respondent saw an advertisement that was flighted in a local Newspaper by Stonebridge Real Estate (Bulawayo). A second advert was inserted in a newspaper by Guest and Turner Real Estate, wherein stand 206 Matsheumhlophe Township of subdivision C of Farm 11 of Matsheumhlophe was up for sale. The estate agents produced Letters of Administration issued by 3rd respondent in favour of 2nd respondent. A consent to the sale dated 23 November 2020 was also furnished. The Title Deed in respect of the

immovable property was verified by the 5th respondent. The property was viewed by 1st respondents' representative. On 16th June 2021 an agreement of sale was entered with 2nd respondent Transfer into 1st respondent's names was effected on 31st August 2021. In accordance with the agreement of sale 2nd respondent was required to give vacant possession of the property upon transfer but did not do so. Summons for the eviction of 2nd respondent and all those claiming occupation through him were instituted. An order was granted on the 5th of November 2021. A writ of execution was obtained and applicants were evicted from the property. 1st respondent obtained vacant possession of the property. The order under case number HC 4751/21 as well as the writ are extant. 1st applicant claims that he purchased the property from Gamuchirai Lilosa Madondo in March 2018. 2nd applicant claims to have been in occupation of the property since it was purchased.

Applicants contend that Gamuchirai Lilosa Madondo had purchased the property from one Stuart Grimshaw in March 2010. Grimshaw died at Bulawayo on the 2nd of May 2018 before transfer the property to Madondo. 1st respondent contends that he has no knowledge of the agreement of sale between Madondo and the applicants. What seems to be clear is that applicants have not real rights with respect to the property and whatever issue they have is between them and Madondo.

Points in limine

Urgency

1st respondent contends that applicants have wantonly failed to meet the rudiments of an urgent chamber application as required by the law and that on that basis alone the application cannot succeed. 1st respondent argues that the urgency in this matter is contrived and self-created. It is submitted that the courts have time and again stated in numerous

decided cases that it is not the arrival of the day of reckoning that makes a matter urgent, but that the matter is only urgent if at the time the need to act arises, the matter cannot wait. See; *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H).

In this matter, applicants were aware that the property was being sold in March 2021. They chose not to act. On 7th September 2021 the applicants were aware that they were required to remove their tiles from the house which had been sold and that occupation was being demanded by the purchasers. Applicants did not act. They did not take positive steps to protect their interests. The urgent chamber application was only filed on 19th November 2021 after vacant possession had been rendered to 1st respondent by the Deputy Sheriff. It is trite that where there is a delay in instituting legal action, the founding affidavit must contain an explanation on the failure to act timeously. The founding affidavit does not proffer an application for the failure to act urgently. The applicants have failed to take the court into its confidence to warrant this matter jumping the queue on an urgent basis. A letter addressed to Ritha Muthazu by the Estate Agents is in the following terms:

“Dear Ritha Mutazu,

Re: Viewing of 23 Sable Road, Matsheumhlophe, Bulawayo

This is to confirm that 23 Sable Road, Matsheumhlophe was listed for sale and we took Rita Matazu for viewing on 26th March 2021 around 10am through Tanaka Manungo.

Yours

Joel Pande
Property Consultant
Stonebridge Real Estate”

It was not disputed that 2nd applicant was present at the property in dispute when viewing took place on 26 March 2021. No explanation has been advanced as to why the applicants did not act at that stage.

A litigant who brings proceedings on an urgent basis gains considerable advantage over persons whose disputes are being dealt with in the normal case of events. The courts will allow litigants to bring legal proceedings on an urgent basis where it is clearly established that there is good cause for treating the litigant differently. There is need for the applicant in an urgent applicant to demonstrate that there is justification to jump the queue and be heard before other litigants. See; *Triple C Pigs & Anor v Commissioner General*, ZRA 2007 (1) 27 (H) and *Transport & Engineering (Pvt) Ltd & Ors v Zimbank* 1998 (2) ZLR 301 (H) at 302.

It is my view that the applicants have not established the urgency that is contemplated by the Rules. On that point alone this application does not meet the requirements on urgency and ought to be removed from the roll of urgent matters.

Order sought is incompetent

The respondents contend that the order sought is incompetent. The applicants have not established a case to justify restoration into the immovable property. For such an application to succeed on an urgent basis the applicant must satisfy the following:

- (a) Urgency
- (b) The right to approach the court. The applicant's relief lies in an action against Gamuchirai Lilosa Madondo with whom they have an agreement.
- (c) The balance of convenience does not favour the applicants. The premises were vacant at the time of the eviction. The premises were always vacant save for a

few tiles that were inside the premises at the time the premises were viewed by the respondents.

(d) The applicants have an alternative remedy. They ought to sue Madondo for whatever relief is appropriate in the circumstances.

I observe here that the order sought is clearly incompetent as the eviction has already been carried out. At the time this urgent application was filed the applicants were not in undisturbed occupation of the premises. What is sought by the applicants is an order for spoliation and yet the founding affidavit does not speak to spoliation at all. See *Meyer v Meyer* 1948 (1) SA 484 (T) and *Applied Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S) at 517E-H.

The interim relief is not competent at law as it seeks under a certificate of urgency, an order that has been overtaken by events.

See *Botton Armature Winding & Cleminson & Plaskit (Pvt) Ltd & Anor* HB-105-18.

On the basis of the competency of the ordered the application ought to be dismissed without delving into the merits.

Non-Disclosure of material facts

It is significant to note that the applicants did not disclose that full eviction was carried out on 18th November 2021. This non-disclosure was deliberate. In paragraph 9 of the founding affidavit 2nd applicant avers that the applicants' fear is that the Deputy Sheriff will hand-over the property to 1st respondent or his agents who may throw out or damage the property in the house. At the time of the filing of this application eviction had already occurred and the averments made by the applicants were calculated to misrepresent the facts to his court.

In *Delco (Pvt) Ltd v Old Mutual Properties & Anor* 1998 (2) ZLR 130 (S) the Supreme Court held that:

“a tenant who has lost possession of premises through an ejection in pursuance of a court order, even if that order is wrong, cannot regain possession of the premises.”

In this case the applicants are not only seeking to regain possession of the premises but also seek to interdict that which has already occurred. The application ought to fail as the order sought is incompetent. In any event, the provisional order is not competent because it seeks *via* the back door to use the court to help it disregard the court and writ under HC 4751/21. The Rules of the High Court on joinder, non-joinder and mis-joinder are clear. An improper procedure was used by the applicants.

In the result, and for the foregoing the following order is made:

1. The application be and is hereby dismissed.
2. The applicants to bear the costs of suit.

Messrs Majoko & Majoko, applicants' legal practitioners
Messrs Coghlan & Welsh, respondents' legal practitioners