

HB 193-18
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XREF HC 3284/17, HC 252/17
XREF HC 1946/16, HC 2530/16
XREF HC 1811/16, HC 1261/16

BELINA BELINDA NDHLOVU
versus
RACHAEL MALUNJWA
and
NHAMODZENYIKA MUPINDU
and
THE REGISTRAR OF DEEDS (N.O)
and
THE REGISTRAR GENERAL

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 4 JUNE 2018 AND 26 JULY 2018

Urgent Chamber Application

H Shenje for the applicant
J Ndubiwa for the respondents

MOYO J: This is not an urgent application wherein the applicant seeks the following interim relief:

- That pending the finalization of these proceedings an interdict be and is hereby granted restoring the first, second and third respondents, their agents and proxies from interfering with the applicant's occupation of the property or dealing with it in such a way as to circumvent or defeat the applicant's rights, title and interest in the property commonly known as Number 3 Cathiness Road, Hillside, Bulawayo pending the finalization of the proceedings under case number HC 1261/16.
- That the third respondent be and is hereby ordered to note a caveat against the property pending the finalization of the proceedings in case number HC 1261/16. At the hearing of the

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application I granted the provisional order and stated that my detailed reasons will follow. Here are the reasons.

The facts of this matter are that both applicant and first respondent are claimants to the title in the property known as subdivision D of Lots 219 and 220 Hillside of Napiers lease under Deed of Transfer number 1656/07 dated 3 November 2017. The parties allegedly bought this property from different individuals and at this juncture it is not clear who had the right to sell the property in question. Applicant claims to have bought it from the previous registered owners namely the Oosthuizens. First respondent claims to have bought same from one Nhamodzenyika Mupindu, who seems to have acquired same *via* section 15 of the Titles Registration Derelict Lands Act [Chapter 20:20].

Applicant challenges the existence of a Nhamodzenyika Mupindu whom she claims is a fictitious person as per her investigations at the Registrar General's office. Whatever happened between these two claimants, the route to their acquisition of rights in this property is not the subject matter of this application. This application is to stop transfer and hold this property pending litigation that seeks to establish who the appropriate claimant is. First respondent has opposed the application on the usual grounds of lack of urgency.

The parties have been to the magistrates court before and their claims are well known to each other dating back to 2016. It is on this basis that first respondent submits that the application lacks urgency as applicant has been aware of first respondent's claims since 2016.

The basis of the application is espoused in paragraphs 6 – 8 wherein applicant states thus:

- “6) The 1st and 2nd respondents have over the period extending from 2014 to 2017 acted in a way that affected my rights, title and interest in the disputed property ---”
- 7) As a result of their actions, I approached this court in various matters, seeking, ultimately, to assert my rights in the disputed property ---.”
- 8) Despite an order having been granted (setting aside the judgment which has been relied upon in effecting transfer) the 1st and 2nd respondents' have proceeded to effect transfer of the disputed property into the 2nd respondent's names. I now

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seek, therefore, an order to restrain the said respondents from further dealing with the property in a way that affects or jeopardises my current interests---.”

It is the formulation of the basis of urgency that is critical in assessing whether a matter is urgent or not. Applicant has sought a court order setting aside an order for transfer affecting her rights. She has not sat back. She has filed five other cases in this court in a bid to secure and protect her rights. Some of the applications being for joinder as she had been clandestinely left out by the respondent who knew however that she had an interest. She has gone to the extent of rescinding a judgment that affected her rights. I find that her circumstances certainly given the background cannot be found to lack urgency. She is dealing with a situation where transfers were effected behind her back adversely affecting her rights and yet she had already obtained any order otherwise. The interests of justice demand that a litigants’ interests are protected and that this court gets to the bottom of all claims before it in order to do justice between man and man. To ride on technical hurdles, after snatching judgments behind the backs of other litigants cannot be accepted by this Honourable court for to do so would be to uphold an injustice. In any event, neither party suffers prejudice by having the provisional order granted and once their legitimate claims are proven, then the provisional order is consequently discharged. The applicant in any event formulates the need to act urgently upon visits by some people who claimed they were from the messenger of court and they intended to carry out an eviction. They went away after she demanded papers.

First respondent also suggested that the application is not in compliance with rule 241. *Mr Shenje* argued that it is in compliance but submitted that however, if the court finds that it is not he seeks an indulgence in that regard.

I granted the indulgence as I am of the view that this court should be concerned more about the substance than the form and, without trivializing the rules of this court, I hold the view that where the non-compliance with the rules does not prejudice the parties and the court in hearing the matter, then surely substance should supercede the form in importance as at the end

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of the day, it is the dispute between the parties that is paramount. I am persuaded in this regard by the case of *Trans African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 AD at 278 wherein the learned judge therein stated thus:

“Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious, and if possible inexpensive decision of cases on the merits.”

I hold the view that this court should only insist on compliance with rules where departure therefrom either causes prejudice or distorts the whole substance of the case, or makes it difficult for the court to fairly deal with the dispute between the parties. In this matter, first respondent has understood applicant’s case it is for this reason that I hold the view that the substance rather than form should prevail in such instances.

In this matter, the first respondent’s counsel did not make any submission on the merits of the application. His opposition was solely based on technicalities with nothing whatsoever to submit on the merits. In other words, the attack on the lack of urgency, and the attack in relation to non-compliance with rule 241, were merely being used to avoid dealing with the merits, which first respondent could not challenge. The merits certainly could not be challenged for, it is in the interests of justice that the transfer of the property in dispute be stayed pending the resolution of the parties’ entitlement to same.

It is for these reasons that I was convinced that applicant has indeed made a case for the relief as sought and I accordingly granted the provisional order.

Shenje and Company, applicant’s legal practitioners
Mashayamombe and Partners’ 1st respondent’s legal practitioners