

BRIAN DUBE

Versus

NELSON MOYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 27 FEBRUARY AND 16 DECEMBER 2004

Ms A Masawi for the applicant
G Nyoni for the respondent

Opposed Application

NDOU J: The applicant entered into a written agreement of sale on 7 September 2001 in terms of which he purchased the right title and interest in stand number 7414 Pumula North, Bulawayo, from the then registered owner, Gilbert Ndiweni. The latter is the respondent's step father. The first agreement reflects the purchase price as \$280 000,00. The parties later amended the purchase price to \$320 000,00 to include the capital gains tax which the parties agreed should be borne by the applicant. The applicant paid the seller the full purchase price of \$320 000,00. The property was transferred into the applicant's name. In the agreement and some of the pleadings the disputed stand is referred to as Pumula South instead of North. The applicant's explanation is that this was occasioned by a typographical error. The respondent later made issue of this aspect. I think the respondent is seeking out red herrings. This was an error that was detected and rectified at the Housing Office at the time the Bulawayo City Council approved the cession to the applicant. There is no doubt the stand in issue is 7414 Pumula North. This is the stand that the Housing Office transferred into the name of the applicant. This is the stand that Gilbert Ndiweni sold to the applicant. Even in his main argument the respondent's case is

that Gilbert Ndiweni sold his (i.e. respondent's) mother's house. The respondent gives details of disputes between his relatives and Gilbert Ndiweni over the stand. So there is no question of the agreement referring to another stand. There is no dispute of fact on this issue. The respondent even wrote to the applicant (Annexure A2) on 25 November 2002 offering to pay back the applicant the purchase price plus interest for the same property. Why would the respondent make such an offer if the dispute related to a different stand?

When the time for Gilbert Ndiweni to give vacant possession of the house, the respondent refused to voluntarily vacate. Gilbert Ndiweni then gave the applicant vacant possession by getting the respondent ejected from the said premises through an order of this court in case number HC 757/02. This order still stands and has not been challenged by the respondent. In fact, the respondent did not bother to challenge the agreement nor apply for its rescission. He did not challenge the eviction order through proper legal channels. The ejectment took place in 2002. It is trite that all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside – *Culverwell v Beira* 1992(4) SA 490(W) and *Macheka v Moyo* HB-78-03. It therefore follows that the order in HC 751/02 still stands. The respondent does not dispute that there was service on him before the order was granted. All that he says is that it was served when he had gone to his communal home. He says “When I came I tried with Lazarus & Sarif Legal Practitioners to oppose but they said it was too late.” He does not explain why he did not apply for rescission of the said order granted in default or seek to rescind the agreement of sale between the applicant and Gilbert Ndiweni from 2002 to date. He was evicted from the stand in 2002 by the deputy Sheriff accompanied by the police. The respondent

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was allowed back into the property by the applicant's agent Petro Mthintwa until the end of the month of the eviction. This was done purely on humanitarian grounds. The respondent kept on asking the applicant's indulgence until after four months he refused to move out and became violent.

According to the applicant, before the agreement of sale was concluded they did check at the Housing Office for any lawful impediment to the sale. There was no caveat registered against the property or any letter challenging Gilbert Ndiweni's title. There was nothing in Gilbert Ndiweni's file to show that there was any dispute. In the circumstances even if what the respondent says is true about the dispute between his family and Gilbert Ndiweni the position is that the applicant is an innocent third party purchaser. The respondent has not challenged that the applicant is an innocent third party purchaser. The applicant was entirely ignorant of the claims of the respondent and took transfer in good faith and for value.

The applicant has shown on the papers that there was agreement of sale which resulted in disputed property being transferred into the applicant's name. The applicant is entitled to occupation but the respondent unlawfully refuses to vacate the said property.

Accordingly, it is ordered that the deputy Sheriff, Bulawayo, be and is hereby authorised and directed to evict the respondent, and all those claiming occupation through him, from stand number 7414 Pumula North, Bulawayo. The respondent will bear the costs of this application on a legal practitioner and client scale.

Masawi & Associates, applicant's legal practitioners
Majoko & Majoko, respondent's legal practitioners