

MICHAEL T CHARAMBA

Versus

MARJORY SHUPIKAYI CHARAMBA

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 16 & 22 MARCH AND 21 APRIL 2005

Nzarayapenga for the applicant

R Moyo-Majwabu for the respondent

Urgent Chamber Application

NDOU J: The parties are married to each other in terms of the Marriage Act [Chapter 5:11]. The marriage still subsists. More importantly, there are no divorce proceedings instituted by either party although their marriage is currently challenged in terms of happiness and other positive aspects of matrimony. The applicant seeks an order in the following terms:

“Terms of the final order sought

1. That you show cause to this honourable court why a final order should not be made in the following terms:
 - (i) That the first respondent be and is hereby interdicted from disposing or selling stand 3777 Bulawayo Township of Bulawayo Township Lands also known as number 6 Byron Road Malindela, Bulawayo to any other third party or alienating same for whatever without the applicant’s written consent;
 - (ii) That the second respondent be and is hereby interdicted from transferring the said stand from 1st respondent to any third party or register any bond on the same property without applicant’s written consent;
 - (iii) That the first respondent be and is hereby ordered to pay costs of this application on an attorney – client scale.

Interim relief granted

Pending the finalisation of this matter, the applicant is granted the following interim relief:

- (iv) That first respondent be and is hereby interdicted, upon service of this provisional order from selling or disposing stand 3777 Bulawayo Township of Bulawayo Township Lands, also known as number 6 Byron Road, Malindela, Bulawayo to any third party or alienating same for whatever until the finalisation of this matter;
- (v) That the second respondent be and is hereby interdicted, upon service of this provisional order from transferring the said stand from first respondent to any other third party or registering any bond on the property until the finalisation of this matter.”

What gives birth to this application are the following facts. According to the 1st respondent the applicant is currently staying with a female friend in Pumula South. Prior this date the applicant had left the home some ten years ago. He left the 1st respondent and the parties' children. He was gone for about three years. He came back and she took him back thinking that he had reformed. In April 2004 the applicant started an affair and started frequently sleeping out. On October 2004 he took away from the home a television set, a radio and a satellite television decoder. Upon receipt of this information from their son, she called the applicant enquiring why he had taken the above mentioned property. The applicant instead went over to the 1st respondent's workplace, a bank, and pulled her outside. He threatened to assault her. She did not report this incident to the police thinking they would talk it over. Up to the date of this application she did not know where the applicant took those items. She replaced them about a month later. The applicant left on Christmas day and returned three days later after taking two DVD discs. On the same day a satellite television decoder and DVD player went missing. First respondent and the children suspected that the applicant had spare keys. The 1st respondent reported the

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matter to Hillside Police Station. On 9 January 2005 at about 2am the applicant came home and slept. He left at 7am and the 1st respondent then discovered that her cellular phone had gone missing. The applicant returned home on 11 January 2005 and 1st respondent confronted him about the cellular phone and the applicant assaulted her. She reported the assault to the police and the applicant was prosecuted at the local Magistrates' Court and on 12 January 2005 he was sentenced to a fine of \$25 000,00 plus an additional custodial sentence wholly suspended on condition of good behaviour. On 24 January 2005 the applicant came home with persons he intended to sell car parts to. When he left he took away some empty mineral and beer bottles. As a result of her fear for her personal safety and the safety of her property the 1st respondent sought and obtained a peace order on 11 February 2005. Unable to enjoy easy access to the home on account of the peace order the applicant launched this application. The basis of the application is that he fears that she will dispose the house without consulting him. This is obviously possible because the house is registered in her name. He however, withheld the fact that there are allegations that he was dissipating household property. He also withheld his acts of violence perpetrated against the 1st respondent. He does not disclose that these are the reasons that resulted in the parties not living together. He tries to paint a picture that he is a victim of the 1st respondent's abuse. He tried to mislead the court on the reasons why he is no longer living at home. The applicant has exhibited dishonesty and concealment of material facts in his application. It is trite that an urgent application is an exception to the *audi alteram partem* rule and, as such, the applicant is expected to disclose fully and fairly all material facts known to her or him. In urgent applications utmost good faith must be shown by the applicant – *Barclays Bank v Giles* 1931 TPD

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9; *In re heysdorp and Pietersburg (Tul) Ltd (in liquidation)* 1903 TS 254; and *Graspeak Investments P/L v Delta Corporation P/L & Anor* 2001 (2) ZLR 551(H). I, however, still have a discretion even in the face of the material non-disclosure. Looking at the facts of this case I am not prepared to exercise the discretion to his favour for a number of reasons. First, the house in question is registered in name of the 1st respondent. Such registration in deeds registry is a matter of substance and not mere form – see *Takapfuma v Takapfuma* 1994 (2) ZLR 103 (5) at 105H – 106A. Second, there is no evidence or indication that 1st respondent intends to dispose of the house. As shown above, the applicant previously deserted the home for as long as three years and if she was bent on selling the house to defeat his rights thereto, if any, she had sufficient opportunity to do so. Third, there are no divorce proceedings between the parties. On a balance of convenience such an interdict will place an onerous burden on the 1st respondent. The order will be highly prejudicial to 1st respondent because her employer cannot be able to bond the property for loans advanced to her. She will require the consent of the applicant and from the papers it may prove very difficult in view of his disappearing acts. The applicant's non-disclosure related to the question of urgency.

Accordingly, I dismiss the application with costs.

Dube & Partners, applicant's legal practitioners
James, Moyo-Majwabu & Nyoni, 1st respondent's legal practitioners