

GLADMORE MUNYORO

versus

ANNAH MANDINYENYA

and

THE REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE

CHIWESHE J

BULAWAYO 23 JANUARY 2004 AND 17 FEBRUARY 2005

Advocate T A Cherry assisted by K Ncube for applicant
E Marondedze for 1st respondent

Opposed Matter

CHIWESHE J: The applicant and the first respondent entered into an agreement of sale in respect of house number 14414 Nkulumane Township, Bulawayo in May 2001. The purchase price was fixed at \$150 000,00 which the applicant (as purchaser) paid in full.

The title deeds however remained with the first respondent who subsequently refused to effect transfer of the property on the grounds that at the time she concluded the sale she lacked the requisite mental capacity due to serious illness and depression triggered by the death of her husband. She alleges she was not therefore in control of her mental faculties at the time of the agreement.

In view of this development the applicant sought to safeguard her interest by means of an application for a provisional order interdicting the first respondent from disposing of the property. The provisional order was granted in the following terms:

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“Terms of the Final Order sought

1. That the 1st respondent be and is hereby ordered to take all necessary steps and sign all the relevant documents to facilitate transfer of house number 9091 Cowdray Park, Bulawayo to the applicant’s name within ten days of service of this order upon her.
2. Failing the first respondent’s compliance with (1) above the Deputy Sheriff be and is hereby authorised and empowered to sign all necessary papers in her stead to effect transfer the transfer of the above mentioned house to the applicant.
3. The 1st respondent be and is hereby ordered to bear the costs of this suit.

Interim Relief granted

Pending confirmation or discharge of this provisional order the applicant is granted the following relief:

- (i) The 1st respondent be and is hereby interdicted from transferring house number 9091 Cowdray Park, Bulawayo to an person save to the applicant.
- (ii) The 2nd respondent be and is hereby interdicted from processing and registering transfer of the above-mentioned house to any person save to the applicant.
- (iii) The 1st respondent be and is hereby ordered to bear the costs of this suit.”

The provisional order was confirmed unopposed. The order confirming the provisional order was at the instance of the 1st respondent and by consent of both parties subsequently rescinded by order of this honourable court.

The applicant now seeks confirmation of the provisional order. The 1st respondent opposes confirmation on the following grounds:

- (a) that Theresa Munyoro who deposed to the founding affidavit has no *locus standi* as she is not party to the agreement of sale and has no legal interest in the subject matter.
- (b) Application procedure is inappropriate as the applicant knew or ought to have known that disputes of facts would arise.

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- (c) The 1st respondent lacked mental capacity at the time the agreement was concluded; and
- (d) Specific performance should not be granted because it will cause undue hardship to the 1st respondent and her minor children.

I agree with the 1st respondent's submissions. Firstly, it has not been shown that Theresa Munyoro has been authorised to represent the applicant in this matter nor has she demonstrated any legal interest in the matter. I would discharge the provisional order on that basis. Secondly, there are disputes of fact which cannot be resolved on the papers. The applicant knew or ought to have known that the 1st respondent would raise the defence of mental disorder. The 1st respondent as admitted in the applicant's affidavit had disclosed this to the applicant prior to the launch of this application. The 1st respondent's mental health at the time the agreement was concluded cannot be determined without hearing evidence *viva voce*. Also the 1st respondent avers that in any event the agreement was subsequently cancelled by mutual consent. This fact is also in dispute. It cannot be resolved on the papers.

I also agree with the 1st respondent's expose on the circumstances under which a court may order specific performance. I would be loathe to make such an order as it would no doubt cause untold hardship on the 1st respondent given the fact she has no other source of income, the purchase price paid would be insufficient to buy a replacement house and that she has minor children to fend for.

For these reasons the application cannot succeed. Accordingly, it is ordered that the provisional order be and is hereby discharged with costs.

Job Sibanda & Associates applicant's legal practitioners
Sibusiso Ndlovu & Partners 1st respondent's legal practitioners