

**INSOLVENT ESTATE HINDIA MBURUMA**

**Versus**

**BARBARA LUNGA N.O.**

**And**

**SENZENI DUBE**

**And**

**THE ASSISTANT MASTER**

IN THE HIGH COURT OF ZIMBABWE  
CHIWESHE J  
BULAWAYO 5 JULY 2002 & 26 APRIL 2007

*Dhlamini*, for applicant  
*N Mazibuko*, for 1<sup>st</sup> respondent

Opposed Matter

**CHIWESHE J:** The applicant sought an order in the following terms:

“It is ordered that:

- (a) The provisional order issued by this honourable court on 24 December 2001 be and is hereby confirmed.
- (b) The first respondent to pay the costs of this application.”

At the hearing of this opposed matter Mr *Mazibuko* (for the first respondent) conceded confirmation of the provisional order but persisted with first respondent’s opposition to the order for costs. Accordingly the main application was granted and the parties proceeded to argue the question of costs only. I reserved judgment on the issue.

The brief facts of the matter are as follows. On 15 August 1995 the applicant successfully applied to this honourable court for the provisional order for the acceptance of his estate and other relief in terms of section 4(1) of the Insolvency Act,

Chapter 6:04. On 29 March 2001 the provisional order was confirmed. The first respondent was appointed as a trustee to the applicant’s insolvent estate.

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At about that time the applicant went to the United Kingdom to seek employment so that he may raise funds to pay his creditors. The first respondent knew of this development and on her own admission was told by the applicant that she should not sell the applicant's house as the applicant was to raise monies to pay off his creditors. According to the applicant he used to communicate regularly with the first respondent to appraise her of his intentions in that regard.

The first respondent called for the first creditor's meeting which was held on 30 May 2001. No creditors turned up at that meeting and the first respondent appraised the applicant of this fact. The first respondent proceeded nonetheless to sell the applicant's house to the second respondent for the sum of \$500 000,00. The purported sale had not been approved by the creditors and the third respondent as required by section 96 of the Insolvency Act. The applicant avers that he had before then advised the first respondent that he had raised enough money to pay off all the creditors. The money was being held in trust by a firm of legal practitioners. Relevant receipts were filed of record.

It is clear that the first respondent acted *ultra vires* the powers granted her in terms of the Insolvent Act. Despite being advised by the applicant's erstwhile legal practitioners of the impropriety of her actions, the first respondent nonetheless proceeded with the sale apparently because she believed the second creditors' meeting would ratify her decision thereby regularising this untenable position.

It was for purposes of reversing that improper sale to the second respondent that the applicant sought and was granted a provisional order setting aside the purported sale. That provisional order was confirmed by consent at the hearing of this application. The first respondent was ill advised to file papers opposing confirmation of that provisional order in the first place.

It is clear that the first respondent acted improperly in this case. But for her impropriety this application would not have arisen. I agree that she pays the costs of this application.

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Accordingly, it is ordered that the first respondent pays the costs of this application.

*Lazarus & Sarif*, applicant's legal practitioners

*Messrs Calderwood, Bryce Hendrie & Partners*, 1<sup>st</sup> respondent's legal practitioners