

Judgment No. HB 59/07
 Case No. HC 2389/06
 X Ref HC 89/05; 160/05; 1778/06; 2475/05

SYDNEY PAPFUMBU
(In his representative capacity for and on behalf
of Andrew Maphosa and Tarisayi Moyo as per Power
of Attorney)

versus

GETRUDE NKALA

And

THE REGISTRAR OF DEEDS N.O.

And

THE DEPUTY SHERIFF N.O.

IN THE HIGH COURT OF ZIMBABWE
 NDOU J
 BULAWAYO 31 MAY 2007

S M Sibanda for the applicant
 No appearance for the respondents

Judgment

NDOU J: On 7 November 2006 the applicant instituted an application under certificate of urgency with draft provisional order framed in the following terms:

“A final order sought

1. That on the facts deposed to in this application, stand number 70343 Lobengula Extension was and is unlawfully owned by Andrew Maphosa and Tarisayi Moyo in terms of the last Title and holding Deeds No. 3082/04.
2. That the purported transfer of the ownership of stand number 70343 Lobengula Extension under Title Deed No 3167/06 to 1st respondent by Frank Phiri in terms of previous Title Deed No 2547/96 at a time when Frank Phiri, in terms of the law was not the owner of stand and at a time when stand was not held under Title Deed No 2547/96 but under Title Deed No 3082/04, be and it is hereby ordered that such a transfer was unlawful and invalid and of no force and effect in law and be and is hereby ordered to be cancelled and set aside.
3. That the Registrar of Deeds be and is hereby ordered to cancel and set aside the transfer, registration and Title Deeds No 3167/06 issued in the name of Getrude Nkala in respect of stand number 70343 New Lobengula Extension.
4. That Andrew Maphosa and Tarisayi Moyo being and are hereby declared the lawful and registered owners in terms of Title Deeds 3082/04 be and are hereby granted leave to defend the legality of their Title Deeds in the event that Getrude Nkala persists in challenging the legality of their Title and ownership of stand number 70343 Lobengula Extension.

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5. That in the event of any further challenge by Getrude Nkala 1st respondent that she is the lawful purchaser and recipient of transfer and Title of stand number 70343 Lobengula Extension from Frank Phiri in terms of an agreement of sale. It is hereby ordered that Frank Phiri be and is hereby granted leave to defend such proceedings in order to determine the rightful owner of the stand.

Interim relief sought

Pending final determination of the matters referred to in this application it is ordered that:-

1. That on the facts deposed to in this application, stand number 70343 Lobengula Extension was and is lawfully owned by Andrew Maphosa and Tarisayi Moyo in terms of the last Title and holding Deeds No 3082/04.
2. That the purported transfer of the ownership of stand No 70343 Lobengula Extension under Title Deed No 3167/06 to 1st respondent by Frank Phiri in terms of previous Title Deed No. 2547/96 at a time when Frank Phiri, in terms of the law was not the owner of stand and at a time when the stand was not held under Title Deed No 2547/96 but under Title Deed No 3082/04, be and it is hereby ordered that such a transfer was unlawful and invalid and of no force and effect in law and be and is hereby ordered to be cancelled and set aside.
3. That the Registrar of Deeds be and is hereby ordered to cancel and set aside the transfer, registration and Title Deeds No 3167/06 issued in the name of Getrude Nkala in respect of stand No 70343 Lobengula Extension.
4. That Andrew Maphosa and Tarisayi Moyo being the lawful and registered owners in terms of Title Deed No 3082/04 be and are hereby granted leave to defend the legality of their Title Deeds in the event that Getrude Nkala persists in challenging the legality of their Title and ownership of stand No 70343 Lobengula Extension.
5. That it is hereby ordered and directed that the Criminal Investigating Department be and are hereby directed to investigate the Registrar of Deeds, how such a transfer was effected in terms of a none existing holding Deed of Transfer when the said property was now being held

under a new holding Deed of Transfer No 3082/04 in the names of Andrew Maphosa and Tarisayi Moyo.

6. That in the event of any further challenge by Getrude Nkala, 1st respondent, that she is the lawful purchaser and recipient of transfer and Title of stand No 70343 Lobengula Extension from Frnak Phiri be and is hereby granted leave to defend such proceedings in order to determine the rightful owner of the stand.
7. That the provisional order granted under case No. 2389/06, be and is hereby discharged. That in the event that the said eviction has already been enforced and the applicant evicted, it is ordered that the applicant and those deriving title through him be reinstated forthwith.
8. That the 1st respondent be and is hereby ordered to pay the costs of this application in the event of her opposing. It is ordered that she should pay the costs at an attorney and client scale.

Service of the provisional order

A copy of this application together with a copy of this provisional draft order shall be served upon respondents by the Deputy Sheriff for Bulawayo.”

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The matter was placed before my brother BERE J, who eventually directed service of the application on the respondents. The application with provisional order framed in the above-mentioned terms was properly served on 1st and 3rd respondents on 9 November 2006 and the 2nd respondent on 10 November 2006. The matter was set down before me on 8 December 2006. None of the respondents appeared nor filed opposing papers.

During the hearing, Mr *Sibanda* sought to amend the draft provisional order and leave was granted. For the record, paragraph 7 of the Interim Relief sought was amended in the first sentence. The amended sentence reads: “That the order in HC 160/06 and the provisional order granted under case No 2389/06, be and are hereby set aside in terms of Rule 449”. The rest of that paragraph remains unaltered. In “service of the provisional order” paragraph after Bulawayo the full stop was removed and the sentence extended by the following words: ... and the Z R Police Mzilikazi are directed to assist the Deputy Sheriff, if called upon by the latter to do so”.

From the above provisional order it is evident that application plus the provisional order must be served on the respondents. The order of this court has not been served but the application [with a draft order] was served. Instead of serving the provisional order, the applicant filed copies of the order which are now different from the provisional order I granted in terms of his amended draft. It is submitted by Mr *Sibanda* that as the application has been served, the order I granted should be final. From the above order, as amended, that is wrong. Presumably, the applicant is approaching me for directions, I, however, granted applicant a provisional order with interim relief by design. He asked for it and I granted it and the fact that the respondents failed to oppose when the application was served is neither here nor there. The bottom line is that they still had, according to application served upon them, some days to do so upon service on them of the order of the court. Whatever applicant’s interpretation is of the effect of the service of the application, he has not yet served the court order on the respondents. The respondent may have decided not to oppose

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the interim relief sought but rather deal with the confirmation. They still, according to the provisional order served on them have an opportunity to do so. The applicant cannot take advantage of their failure to oppose the interim relief sought in order to convert the provisional order into a final one. To allow this conversion would amount to misrepresentation of facts to the respondents to their prejudice.

Accordingly, the applicant is directed to serve the provisional order granted on 8 December 2006 on the respondents.

Advocate S K M Sibanda & Partners, applicant's legal practitioners