

DORIS DEWA

VERSUS

MAGADALENI SIBANDA

AND

REGISTRAR OF DEEDS, BULAWAYO N.O

AND

DEPUTY SHERIFF BULAWAYO N.O

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 20 OCTOBER 2008 AND 13 NOVEMBER 2008

Mr C. Dube for the applicant

Mr M Ncube for the respondent

Opposed Application

CHEDA J: This is an application for the confirmation of a provisional order granted by this Court on the 12th March 2008.

The historical background of this matter is that applicant alleged that on the 24th January 2008 she purchased stand number 4051 Nketa 7, Bulawayo from first respondent who is now refusing to cede her title, interest and right on the said stand to applicant after the full purchase price has been paid. It is further her assertion that the purchase was signed by both parties.

First respondent's argument is that she was not part of the said agreement as she was in the rural areas and as such the signature which appears on the agreement of sale is not hers. She therefore, suggests that it was appended fraudulently. She further stated that some documents being referred to by applicant were stolen from her by some of her late husband's relatives and were in this fraudulent transaction.

Mr Ncube for respondent raised a point in limine in this matter being that this matter can not be finalized on the papers as there are material disputes of facts. Those facts are in his submissions the issue of signature which is hotly disputed by first respondent.

The legal position is that where there is a foreseeable dispute of fact, it is inappropriate to proceed by way of motion proceedings. The proper procedure should be by action as this will allow the parties' evidence to be tested under cross-examination, see *Nyazorwe v Guta and Others HH 234/88 and Masukusa v National Foods Ltd and another* 1983 (1) ZLR 232 (H).

First respondent in her opposing affidavit argued that the signatures on all the agreement of sale were not hers. This should have alerted applicant that the issue of signatures is being dispute and the dispute is therefore a very serious one as it affects the validity of the contract. Applicant ought to have foreseen this eventually.

As it is the authenticity of the disputed signatures can only be verified by a handwriting expert which therefore makes it impossible for the court to conclude this matter at this stage.

Where a dispute of facts arises in motion proceedings the court has a discretion, it do any of the following:-

- 1). refer the matter for oral evidence or
- 2) order the application to stand as summons, or
- 3) order the papers to stand as proceedings depending on the circumstances, See *Smit v Smit* 1980 (3) SA 1010 at 1015 and *Masukusa v National Foods Ltd and another* 1983(1) ZLR 232.

As the dispute of facts is glaringly obvious the matter cannot be resolved on papers.

In Masukusa's case supra MCNALLY J as he then was expressed the view that the court should take a robust approach even where a litigant has adopted a wrong procedure. The learned Judge at 235 A-B stated:-

“Even where the conflicts cannot be resolved without evidence the courts will take the attitude that they must punish the applicant for the following wrong procedure.”

There is, therefore, no need to look into the merits of this matter. Respondent's point in limine succeeds and the following order is made:

It is ordered that:-

- 1) the application is to stand as summons.
- 2) the papers filed of record be and are hereby to stand as pleadings.
- 3) applicant to pay the costs of this application.

Messers Lazarus and Sarif, applicant's legal practitioners
Cheda and partners respondent's legal practitioners