

SIFISO KHUMALO

Versus

SIHLESENKOSI NDLOVU

And

ZANELE NDOWA

And

POLKA EXECUTORS SERVICES (PVT) LTD

And

OFFICER IN CHARGE LUVEVE POLICE STATION

And

ASSISTANT MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 1 & 9 JUNE 2016

Urgent Chamber Application

Miss L. Mumba for applicant

K. Muronda for 1st & 2nd respondents

L. Dube for 4th respondent

MAKONESE J: This matter was placed before me on the 25th of May 2016 as an urgent application. I directed that the application be served on all the respondents. I heard oral argument in chambers on the 1st of June 2016. At the end of the hearing I indicated that the matter was not urgent. I struck off the matter from the roll. I have been asked to provide reasons for my decision. I now proceed to do so.

The parties in this matter are involved in an ugly dispute over the right of inheritance relating to a property known as stand 321 Emakhandeni Township, Bulawayo. The application itself appears to be a simple case for a spoliation order but a perusal of the record revealed that the parties had appeared before the Assistant Master on the 26th April 2016. The Assistant Master had prepared a detailed report which was known by the parties. I shall deal with the Master's report at a later stage.

The relief sought by the applicant is in the following terms:

“Interim Relief granted

Pending the determination of this matter the applicant is granted the following relief.

1. The application for spoliation order be and is hereby granted and the respondents jointly and severally be and are hereby ordered to restore the applicant into the premises at number 3212 Emakhandeni, Bulawayo within 24 hours upon being served with the provisional order.
2. In the event that the respondents fail to restore the applicant's possession of stand 3212 Emakhandeni in terms of paragraph 1 of this interim order, the Deputy Sheriff be and is hereby directed to proceed to 3212 Emakhandeni, Bulawayo with a locksmith to break therein to restore occupation to the applicant.
3. The 4th respondent to do all in its power to ensure peaceful possession by applicant pending a final order in this matter.”

“Terms of final order sought

1. Applicant be and is hereby restored into the premises of stand number 3212 Emakhandeni Bulawayo.
2. The 4th respondent shall do all in their power to ensure that the applicant's peaceful possession of stand number 3212 Emakhandeni is not disturbed pending finalisation of the distribution of the Estate of the Late Rejoice Ncube.
3. The 1st and 2nd respondents be and are hereby ordered to pay costs of this application on an attorney and client scale jointly and severally, the one paying, the other being absolved.”

The applicant avers in her founding affidavit that she was customarily married to the late Rejoice Ncube who died at Bulawayo on 31 March 2016. The marriage was conducted in

accordance with customary rites sometime in April 2015. Applicant states further that she and the deceased had been living together since April 2014 at house number 3212 Emakhandeni until the death of the deceased in March 2016. Applicant provided evidence of the customary marriage in the form of a note which she said was the record of payment of certain monies towards lobola. Applicant indicates that during the deceased's lifetime she was never informed of the existence of another wife by either the deceased himself or any of his relatives. She first learnt that the deceased had another wife, Zanele Ndowa (2nd respondent), at the deceased's funeral. Applicant contends that she continued to reside at house number 3212 Emakhandeni Township before and after the funeral. Applicant further states that unbeknown to her 2nd respondent opened a file at the Assistant Master's office posing as deceased's wife on 4th April 2016. The family members were later invited to the Assistant Master's office on 26th April 2016 where an Edict Meeting was held and Witness Socks Ncube and Sihlesenkosi Ndlovu were chosen as the co-executors of the Estate of the Late Rejoice Ncube. Applicant contends that on 13 May 2016 she was confronted by 2nd respondent and other relatives of the deceased who told her to vacate house number 3212 Emakhandeni Township. Applicant argues that she was unlawfully despoiled of her possession of the property and that she is entitled to an order in terms of the draft order.

The matter is strenuously opposed by 2nd respondent who gave a very different picture of events surrounding this matter. Second respondent avers that applicant was in fact not residing at the disputed property at the time of his death. She stated that prior to the death of the deceased she was living with the deceased in South Africa. The deceased had been unwell since 2008 and 2nd respondent indicates that during all that time she was taking care of the deceased and paying his medical bills. As proof of these assertions, the 2nd respondent attached clinical notes from clinics in Johannesburg, South Africa. This court cannot, therefore discount the fact that 2nd respondent could have assisted the deceased with his medical bills, at the hour of need. 2nd respondent adduced further proof that when house number 3212 Emakhandeni Township was acquired, she was recorded on the "Application for Lease of Dwelling House", form as the deceased's wife.

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2nd respondent argued that the day the deceased died, the applicant was nowhere near the property in dispute. It is sad to note that when the late Rejoice Ncube was brought from South Africa he was terribly ill. When he arrived at 3212 Emakhandeni Township, the place he considered his home, he found the property locked with no one in sight. A neighbour one Doreen Sithole who resides at 3211 Emakhandeni Township, who had seen events unfold, felt touched and agreed to take the late Rejoice into her own home whilst the relatives were searched for. Unfortunately, the deceased died in Doreen Sithole's house before the relatives could arrive. It is now not in dispute that when deceased passed away, the applicant was at her rural home in Lupane. Applicant did not deny that the late Rejoice Ncube died at Doreen Sithole's house.

2nd respondent argued that she worked tirelessly over the years to purchase the property in question and furnished the house. I do not however, propose to dwell on the merits of the matter as it has not been established that the matter is urgent.

I now deal with the Master's Report. The Assistant Master prepared a detailed report regarding this matter. The report is dated 31 May 2016. I reproduce the entire report as it encapsulates the background to this urgent application. It is in the following terms:

“Master's Report

The estate of the late Rejoice Ncube is registered with my office under DRB 357/16. This is an estate where people try to fight for inheritance. On numerous occasions, complaints have been forwarded to my office by the purported potential beneficiaries. There has been a series of fights by the two camps namely the applicant's camp and the 2nd respondent's camp.

On the 26th of April 2016 my office convened a special meeting to address the problems which were affecting this estate.

On the 26th of April 2016 my office convened an edict meeting and dual executors, namely Witness Ncube and Sihlesenkosi Ndlovu were nominated. The nominated two were advised to produce waivers and Bond of Security and AMHC 5. It is after this meeting that the parties became violent to the extent that there were issues as to

- (a) Who must be at the property left by the deceased.
- (b) What must be done to the household goods.
- (c) Who is the surviving spouse.

On the 12th of May 2016 I dealt with the matter and advised my officer that:

- (a) All the parties must vacate from the property.
- (b) That each one to get her household goods.
- (c) The property be rented out until executors are appointed and rentals to be paid into the Guardian's Fund.

My office did take a neutral stance and made a decision based on the information which was supplied by the parties. The office's position is that, when the deceased died no-one was staying at the property. The deceased used to stay in South Africa and the said property cannot be the applicant's matrimonial home. The deceased died in the hands of some other people not the applicant as such the appointed executors will dig deeper into the matter and find the actual position

I hereby attached the minutes of the meeting which was held by my office (*sic*). According to the minutes Mr D Ncube confirmed that the applicant was in her rural homestead at the time the deceased died.

In terms of paragraph 9 of the applicant's founding affidavit the applicant purports to have been staying at house number 3212 Emakhandeni Township with the deceased which is clearly a lie. The deceased used to stay in South Africa with 2nd Respondent and we are advised it is a friend of the deceased who brought him to Zimbabwe when he was ill.

The basis of this application is that it was the applicant's matrimonial home which applicant has failed to prove. I believe my office have the capacity to deal with such an issue especially after the appointment of neutral executors (*sic*).

It is my humble submission that the decision by my office on the 12th of May is the best way to go. Since it gives the parties to prove their cases to the executor and if there are any problem then my office will solve (*sic*). The application before the court therefore must fail since it is without merit and the executor be allowed to do their work without delay.

However, should the Honourable Court decide otherwise, I will abide by its decision.

Additional Master of the High Court – Bulawayo”

This urgent application was filed on the 24th May 2016. This application was filed with full knowledge that the Master had directed that the property should remain vacant owing to the violent disputes between the parties. The issue that I raised with applicant’s legal practitioner is whether given the background of the matter it should be treated as urgent. The applicant conceded that she was aware of the meeting by the Master of the 26th April 2016. She however, did not have the report of the meeting. The minutes of the meeting show that relatives from both camps made their views known at the meeting. From the 26th April 2016 up to the filing of the application the applicant knew of the Master’s position in the matter. No explanation is given as to why the matter was not brought earlier. It is not clear when the perceived urgency arose. The certificate of urgency does not specify when urgency arose save to state that applicant has been dispossessed of possession. Applicant has not been candid with the court. The certificate of urgency refers to the 13th May 2016 as the date the applicant sought assistance from the police and the Assistant Master’s office. That is simply untrue as an edict meeting was held as far back as 26th April 2016. The urgency which the applicant invokes is not urgency contemplated by the Rules. See the case of *Progressive Teachers Union v Zimbabwe Energy Workers Union & Others* HH-173-11.

In *Kuvarega v Registrar General & Another* 1998 (1) ZLR (H) at page 193E to G, CHATIKOBO J stated as follows:

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“In the present case, the applicant was advised by the first respondent on 13 February 1998 that people would be barred from putting on the T-shirts complained of. It was not until 20 February 1998 that this application was launched. The certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about the delay. What constitutes urgency is not the imminent arrival of the day of reckoning: a matter is urgent, it at the time the need to act arises the matter cannot wait. Urgency which stems from ad deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action is there is any delay.” (emphasis mine)

The principle in the *Kuvarega* case (*supra*) has been consistently applied in our courts. The applicant not only failed to act when the need to act arose. The matter was heard by the Master on 26th April 2016 and some interim measures were put in place. It is clear from the Master’s Report that when the meeting was convened the primary consideration was to achieve fairness in this matter and to protect and safeguard the interests of the parties. I am acutely aware that I am not in any way bound by the report by the Master. While the court is generally not bound by a Master’s Report, the court is normally guided by such a report as regards the surrounding circumstances of the case which would have been gathered prior to the court making any determination on applications brought before the court. It cannot escape my notice, however, that the urgency purported in this matter has not been established.

It is my view that applicant failed to establish urgency as contemplated by the rules.

In the result it is ordered as follows:

1. The matter is not urgent
2. The matter is struck off the roll
3. Each party to bear its own costs

Masiye-Moyo & Associates, applicant’s legal practitioners

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Muronda Malinga Legal Practice, 1st and 2nd respondents' legal practitioners