

**SAVIOUS NKALA**

**Versus**

**PT MADIBA N.O**

**AND**

**FADZAI SENGA**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 22 FEBRUARY 2019 AND 6 FEBRUARY 2020

**Opposed Application**

*P Chigariro*, for the applicant  
*L Mudisi*, for the respondent

**TAKUVA J:** This is an application for review in terms of Order 35 of this Court's rules 1971 as amended. The applicant seeks a review of the proceedings held under the 1<sup>st</sup> respondent at Zvishavane Magistrates' Court. Review is sought on the following grounds;

- “1. That 1<sup>st</sup> respondent did not properly apply his mind to the matters before him.
2. That applicant who was a lay person was denied a right to be heard.”

Applicant seeks the following relief;

- “a. An order setting aside proceedings held on the 16<sup>th</sup> of May 2014.
- b. That the applicant's application for eviction be granted.”

## **BACKGROUND**

Some time in 2000, applicant purchased stand number 2014 from Zvishavane Town Council. In 2002 he had his plan for a house on that stand approved by Zvishavane Town Council. In 2004 he was transferred to Chiredzi where from he started developing his stand up to window level. Upon his return in 2006, he was shocked to find respondent at his stand claiming that it was hers. The dispute was referred to Zvishavane Town Council for resolution. On 20 October 2012, Council resolved that the stand belonged to the applicant. Despite this clear position, respondent refused to vacate the stand.

Desirous of enforcing his rights, applicant through his erstwhile Legal Practitioners filed a Court application for the eviction of respondent from his stand. Respondent not only opposed the application but also filed a cross-application for cession of ownership of stand number 2014 into her name. The two applications were consolidated and set down for hearing on 9 May 2014 but was postponed to 14 May 2014. Applicant left everything in the hands of his erstwhile legal representatives Legal Aid Foundation. On 14 May 2014 applicant was advised by the court *a quo* to file a response to the application for cession. The matter was further postponed for that purpose. Applicant approached his erstwhile lawyers who indicated their unwillingness to assist him. Being a lay person, applicant believed it would suffice if he were to attend court and tender oral submissions without filing a written response to the respondent's application.

On the day of the hearing, the applicant was informed that he was required to file a written response. He then engaged Mesdames Chigairo Phiri and Partners to assist him in filing a written response. Applicant's legal practitioner attended court and applied for a postponement in order to get full instructions before filing a Notice of Opposition. This application was thrown out by the court *a quo*. The court also dismissed applicant's application for eviction, while granting the respondent's application for cession as unopposed. Applicant was aggrieved by this decision hence this application. It must be noted that all the above facts are common cause.

Be that as it may, 2<sup>nd</sup> respondent opposed the application on a somewhat confusing narrative that unfortunately mystify an otherwise simple matter. Apart from alleging that she purchased stand No. “2015” from Costain Rugara on 11 December 2011, she alleges strangely that “there was an error where parties exchanged stands and houses were built by parties on wrong stands” (my emphasis). It was further contended that the physical location of the said two stands (2014 and 2015) is the bone of contention. Applicant is being accused of laboring under a misconception that 2014 is in fact Stand 2015. Respondent further submitted that when the ownership dispute arose, parties approached Zvishavane Town Council for advice and were informed that “since applicant is insisting on stand 2015 to be his and yet his is 2014” respondent can have another plan re-drawn and occupy the stand in question.

On the court *a quo*'s decision, respondent initially defended it but during the hearing *Mr Mudisi* conceded that the procedure adopted in arriving at the decision was irregular and flawed. It violated the *audi alterum* principle. Counsel for the respondent strongly opposed the granting of the eviction claim as couched in paragraph (b) of the prayer. *Ms Chigariro* for the applicant had argued that there are no material disputes of fact since Council had confirmed that according to their records, Stand No. 2014 belongs to the applicant. She further argued that this is a matter where this court should adopt a robust approach in order to resolve the dispute on the papers partly because her client has been prejudiced for years.

I will return to this issue after considering the gravity and extent of gross irregularities committed by the court *a quo*. Firstly, the circumstances of this matter demanded that the postponement be granted in the interests of justice. The principles that are relevant to an application for postponement were laid out by SMITH J as;

- “(i) The court should be slow to refuse a postponement where the true reason for a party’s non representation has been fully explained and is not a delaying tactic and where justice demands that the party should have further time for the purpose of preparing his or her case.
- (ii) An application for a postponement must be made as soon as the circumstances justifying same became known to the applicant, then the court may in an appropriate case allow an application that has not been timeously made.
- (iii) An application for postponement must always be *bona fide* and not merely a tactful manoeuvre for the purpose of obtaining an advantage to which applicant is not entitled.

- (iv) Prejudice is the main consideration. Court must weigh the prejudice to the respondent if the applicant is granted the postponement against the prejudice to the applicant if a postponement is refused and must consider whether any prejudice to be caused to the respondent can partly be compensated by an appropriate order of costs or in some other way.
- (v) Where an application for a postponement is not made timeously or the applicant is otherwise to blame but a postponement is nevertheless justified in the circumstances of the case, the court may in its discretion allow a postponement but direct that applicant pays the wasted costs on higher scale.” See also *National Coalition For Gay & Lesbian Equality and Others v Minister Of Home Affairs & Others* 1999 (3) SA 173.

*In casu*, the court *a quo*'s unjustified refusal to grant a postponement to the applicant who clearly required time to instruct his lawyers of the matters in court, amounts to a gross irregularity. The applicant's intention to prosecute his application for eviction and to defend the counter application for cession was apparent to the court *a quo* in that applicant made frantic efforts to engage new legal practitioners to assist him.

Secondly, the court *a quo* erred and grossly misdirected self when it dismissed the application for eviction on a technicality without considering the merits. More significantly, the granting of the application for cession before the rights of the parties to the house were determined amounts to a gross irregularity warranting interference by this court. In my view the justice of this matter demands that the matter be decided on the merits and not on technicalities considering the value of the property in dispute. Quite clearly, the dispute is that of ownership of stand number 2014.

This takes me back to the question of whether or not this court should resolve this dispute on the papers. While I agree with *Ms Chigariro* on her conclusions on the validity of the contract between respondent and one Costain Rugara, the question of unjust enrichment, Council's determination of ownership and the circumstances surrounding the so called swapping of stands, I still find myself hamstrung from conclusively determining the parties' ownership rights without *viva voce* evidence. Each party must be afforded an opportunity to give evidence and call whatever witnesses they may need. It may also be helpful for the court to hear from Council officials on the alleged swapping of stands and the approval of 2<sup>nd</sup> respondent's plan. Finally, it may be necessary for the court to conduct an inspection *in loco* to establish the physical location of the stands and the extent of the developments on each stand. The list is inexhaustive but the bottom line is that a fair hearing must be conducted.

In the circumstances, it is ordered that;

1. The proceedings by the court *a quo* held on 16 May 2014 are hereby quashed.
2. The matter be and is hereby remitted to the court *a quo* for a hearing *de novo* before a different magistrate.
3. The costs shall be in the cause.

*Chigariro Phiri c/o Danziger & Partners*, applicant's legal practitioners  
*Mutendi & Shumba c/o Dube Tachiona & Tsvangirai*, 2<sup>nd</sup> respondent's legal practitioners