

HC 3684/03  
HH 83-03

HAZEL NDLOVU

and

HAZEL NDLOVU in her capacity as guardian of

P M

versus

VUSA MAKARUKE MALANDU

and

THE MASTER OF THE HIGH COURT

and

THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE

SMITH J,

HARARE, 16 and 19 May, 2003

*Mr A M Musunga* for applicant

*Mr A Moyo* for 1st respondent

SMITH J: The first applicant (hereinafter referred to as "Hazel") is the mother of P M (born [day/month] 1991). The father of the child was the late David Evans Malandu (hereinafter referred to as "the Deceased"). Hazel married the Deceased in 1989. At the time he had three children from a former marriage, the eldest of whom was the first respondent (hereinafter referred to as "Vusa"). She stayed with the Deceased and his three children at his house at 35 Harare Drive, Greystone Park, Harare (hereinafter referred to as "the Home"), which he had purchased in 1984. When the Deceased died in 1990 Vusa, who was 11 years old at the time, was appointed heir to the estate. The Home was transferred into his name in September 2002. He filed an application for the eviction of Hazel and her child. She failed to file her notice of opposition timeously and an order for her eviction was granted in default on 22 January 2003. The order was served on her on 24 March and she and her child were evicted on 10 April 2003. They have been living outside the premises since then. All her movable property was removed from the Home and has been left outside. On 3 April Hazel filed an application for rescission of the

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eviction order and a stay of execution.

Hazel also filed an urgent application on 15 April 2003 seeking an order that she be permitted to remain in occupation of the Home. It was set down for hearing on 22 April and, after hearing the parties, the application was dismissed with costs. Subsequently Hazel filed this urgent application on 12 May. The minor child, P, was made a party to the application. Hazel claims that P has a right to stay in her father's house and, if Vusa wishes to evict her, he must provide alternative accommodation. In this application Hazel has also added a claim for the contributions she made towards the purchase of the Home (amounting to \$68 981) and the cost of the improvements she made after the death of the Deceased (amounting to \$176 500). She claims that her union with the Deceased was a universal partnership and, in the light of what she contributed, she is entitled to 75% of the assets of that partnership. As regards P, she was born some months after the death of the Deceased. Hazel claims that P is entitled to maintenance from the estate of the Deceased and to accommodation.

Hazel is seeking an order that she and P be permitted to re-occupy the Home and that Vusa be interdicted from selling the Home pending the determination of the applicants' claims set out in case No HC 3618/03. She is living in the open outside the Home whilst the Home still remains unoccupied. It appears that Vusa intends to sell the Home because several people have come to view it.

Vusa opposes the application. He claims that there is no urgency in the matter. Hazel was lawfully evicted and the eviction order is still in force. He also submits that the matter is *res judicata* as the previous urgent application made by Hazel (case No HC 2594/03) in which she sought substantially the same remedy, was dismissed. The introduction of P as a second applicant is merely an attempt by Hazel to hoodwink the Court into believing that this application differs from the previous one. As regards the merits, Vusa contends that the estate of the Deceased has been wound up and, in terms of the Distribution Account drawn up by the executor, he has obtained title to the Home. The applicants were aware that the estate was being wound up and did not file any claim. The applicant's claims should have been filed in the manner prescribed in the Deceased Persons Family Maintenance Act [Chapter 6:03].

The Master filed a report in which he advised that he had no objection to the

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relief sought. Hazel filed a letter dated 6 May 2003 from the Master, addressed to a firm of legal practitioners, in which he said -

"Thank you for your letter dated 2<sup>nd</sup> May 2003 whose contents have been noted. My difficulty is that the Letters of Administration were issued in 1990. Any claims against the Estate had to be submitted within 3 months of the issuance of Letters of Administration. If a claim is being filed 12 years later its condonation at this level becomes difficult. I think you should apply to Court so that I may be directed to re-open the file.

However this is a classic example of abuse of authority by the heir. Mrs Malandu and the minor child should not have been evicted. Vusa as the heir is duty bound to provide shelter to these dependants of the Estate. May I suggest that you either note an appeal or apply for the rescission of judgment granted by Matika J, on 22<sup>nd</sup> January 2003 to enable Mrs Malandu and the child to get back into the house while we are sorting out the estate".

In the light of the comments of the Master, it seems to me that justice requires that Hazel be granted a provisional order on the lines of the one she has sought. It seems to me that this application differs from the previous one in that P was not a party to the previous one. Clearly she has a right to receive maintenance from the estate of her late father. She should not be prejudiced by the fact that her mother failed to lodge a claim for maintenance timeously.

A provisional order is granted in terms of the draft order as amended. It is also ordered that the Master reopen the file concerning the administration of the estate of the Deceased so as to deal with the question of maintenance for Hazel and P.

*Musunga & Associates*, legal practitioners for applicants

*Coghlan Welsh & Guest* legal practitioners for 1st respondent