

DISTRIBUTABLE (79)

NTOMBIZODWA NHOWE
v
(1) REGISTRAR OF THE SUPREME COURT (2) MONICA
GONDO

**SUPREME COURT OF ZIMBABWE
HARARE: 23 FEBRUARY 2023**

S. T. Mutema, for the applicant

K. Gama, for the respondents

CHAMBER APPLICATION

**Judgment No. SC 79/23
Chamber Application No. SC 539/22**

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CHIWESHE JA: This is a chamber application for reinstatement of appeal and exemption from payment of security for costs made in terms of r 70 (2) and r 55 (3) of the Supreme Court Rules respectively.

After hearing submissions from counsel, I reserved judgment on the several preliminary objections raised by counsel for the second respondent. I subsequently gave an order striking the matter off the roll. The applicant has requested the reasons for that order. These are they.

The facts of the matter as narrated by the applicant are these. The applicant is the appellant under SC 378/22, the main matter. She alleges that her appeal was wrongly

dismissed by the Registrar, the second respondent. For that reason she has filed the present chamber application for reinstatement of the appeal and exemption from payment of security of costs. The applicant avers that the Registrar's misconduct lies in the fact that he or she has deemed the applicant's appeal abandoned for failure to pay security for costs. Such determination, argues the applicant, is wrong for the reason that there is no valid determination of costs to be adhered to and even if there was, the thirty (30) working days within which the applicant had to furnish the security for costs had not lapsed at the date of dismissal of the appeal in the main matter.

The second respondent, Monica Gondo, had entered into an agreement of sale with the applicant's former husband when there was no valid subdivisional permit at the time the sale was concluded. Accordingly, the subsequent transfer to the second respondent was defective, fatally so. The applicant challenged the validity of that sale through an application for cancellation of title made before the High Court. The high Court, according to the applicant, erroneously found that the matter was "*res judicata*" and upheld the second respondent's preliminary objection on that ground. The second respondent, through her legal practitioners, founded part of the basis against which the present application motivated.

The applicant has lodged a hybrid application for the reinstatement of the appeal in the main matter and for exemption from paying security of costs in that matter. She proceeds by way of r 70 (2) and r 55 (3) of the Supreme Court Rules 2018, respectively.

The second respondent opposed the application. Mr *Gama*, her counsel, raised a number of preliminary objections, chief among which was that the cause in the main matter was "*res judicata*". This Court under SC 489/20 judgment No SC 77/22 definitively disposed

of the dispute in the main matter. At p 3 of the ex tempore judgment, CHATUKUTA JA, who read the court's unanimous decision had this to say:

“It is our view that this appeal can be resolved by the determination of the fourth ground of appeal. The ground raises whether the first respondent (applicant herein) had a direct and substantial interest to impeach the agreement of sale between the appellant (second respondent herein) and fifth respondent (applicant's former husband). (My own brackets)

We agree with Mr *Gama* that the first respondent did not have a direct and substantial interest in the subdivision. The main property and the subdivision were subsequently registered in the name of the fifth respondent. As the owner of the properties he could dispose of the properties. Instead the first respondent has an indirect interest in that she has a personal right against the first respondent. That personal right disentitles her from vindicating the subdivision.

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The court *a quo* therefore misdirected itself in making a finding that the first

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respondent had a direct and substantial interest in the main property and subdivision.

It was therefore not necessary for the court *a quo* to inquire into the validity of the certificate of compliance.

In any event, the first respondent was not privy to the contract between the appellant and the fifth respondent. She therefore could not sue for it.

There is no reason why we should depart from the general principle that costs follow the cause.

Accordingly, we make the following order:

1. The appeal be and is hereby allowed with costs.
2. The order of the court *a quo* be and is hereby set aside and substituted with the following:

“The application for a declaratory order filed under Case No. HC3715/19 be and is hereby dismissed with costs.”

Having upheld the respondent’s submission that the matter was *res judicata* on account of that judgment of this court, it is no longer necessary to deal with the rest of the respondent’s preliminary objections. The matter must end here.

It was for these reasons that I ordered that the matter be struck off the roll. I am advised that I should have dismissed the matter.

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Stansilous & Associates, applicant’s legal practitioners

Gama & Partners, respondents’ legal practitioners