

**MAXEGU BEN MPOFU**

**Versus**

**NTOMBIZODWA NYATHI**

**BARNABAS MPOFU**

**BENJAMIN MPOFU**

**SOLOMON MPOFU**

**JOHN (MTHONSI) MPOFU**

**PETER MPOFU**

**ASSISTANT MASTER OF THE HIGH, COURT, N.O**

**BULAWAYO CITY COUNCIL**

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 22 JUNE 2006 AND 23 NOVEMBER 2006

*Mr Mazibisa* for the applicant

*Mr J Sibanda* for 1<sup>st</sup> and 2<sup>nd</sup> respondent

Urgent Chamber Application

**CHEDA J:** This is an application for the confirmation of a provisional order granted by my brother Ndou J on the 17<sup>th</sup> day of September 2006.

The facts which are common cause in this matter are that, applicant and the second, third, fourth, fifth and sixth respondents are brothers. First respondent is said to have purchased stand number 56738/2 Old Lobengula, Bulawayo from second, third, fourth, fifth and sixth respondents.

Seventh respondent is the Assistant Master of the High Court and is cited in his representative capacity as the custodian of all estates in Zimbabwe. He is also the one who registered the estate of Balembazi Jeremiah Mpofo who was the father of applicant and his siblings. He also issued letters of administration to second respondent.

Eighth respondent is the Bulawayo City Council and is responsible for all the property rights and transfers in the Lobengula area.

Applicant and second, third, fourth, fifth and sixth respondents' father is Balembezi Jeremiah Mpofo who died on the 1<sup>st</sup> day of November 1985, leaving behind his wife Nomalanga Ncube (the surviving spouse) who passed away on the 3<sup>rd</sup> day of April 1995.

Stand number 56738/2 Lobengula, Bulawayo ("hereinafter referred as the property"), was registered under the late Balembezi Jeremiah Mpofo. According to applicant, after his father's death, applicant with the approval and consent of his mother Nomalanga Ncube had transferred the property into his name on the 6<sup>th</sup> day of May 1988 after the agreement of sale between his father and eighth respondent had been cancelled. Infact, it was cancelled on the same day that transfer into his name took place. The property was, however, later transferred into second respondent's name who subsequently sold it to first respondent.

It is applicant's assertion that a year after his father's death a family gathering was held as in their traditional family custom to appoint a traditional heir. The said ceremony was attended to by their late mother together with his siblings namely second, third, fourth, fifth and sixth respondents. It was at that meeting that he was appointed heir as per their traditional custom as he is the last born in the family. His major responsibility was to look after his mother which he did until she passed away on the 3<sup>rd</sup> day of April 1995.

HB 128/06

It is his further evidence that after his father's death, he together with his mother proceeded to eighth respondent's offices on the 6<sup>th</sup> day of May 1988, whereupon, the property was transferred into his name as authorised by his late mother in her capacity as the widow and surviving spouse.

First respondent sought to evict applicant following the purported sale of the said stand to her by second respondent.

It is this sale which has resulted in this application. An interim order was granted interdicting first respondent from evicting applicant from the property, at the same time barring them from visiting the said property or using any threats against him.

In the final order, applicant initially sought a declaratory order which he now seeks to amend to the following effect:-

- 1) to annul the appointment of second respondent
- 2) the cancellation of the letters of administration which were issued to him by seventh respondent
- 3) the transfer of the property from first respondent to himself and;
- 4) that first and second respondents pay costs of suit as between attorney and client scale.

First and second respondents opposed this application but third, fourth, fifth, sixth, seventh and eighth respondents did not.

Mr Sibanda for first respondent has argued that it is irregular for applicant to seek an amendment at this stage. The question then is, is the court authorised to entertain an application to effect such amendments at this stage. In order to determine this question, one should look at the High Court Act [Chapter 7:09], in particular section 14 which reads:

- **“14 High Court may determine future or contingent rights**

The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

It is clear therefore that the court has a discretion to determine future or contingent rights and this case, in my view, justice demands that a determination be made. The said discretion, however, is to be exercised judiciously. One of the reasons why it has to be used is where there is a need to do justice between the parties.

Whether or not the court or Judge can allow the amendment found in Order 20 rules 132 and 133, which reads: -

“132. **Court may allow amendment of pleadings**

Subject to rules 134 and 151, failing consent by all parties, the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

133 **Amendment of pleadings: method**

Pleadings may be amended by written alterations in the copy which has been delivered and by additions on paper to be interleaved therewith if necessary, but where the amendments are so numerous or of such a nature that the making of them in writing would render the document difficult or inconvenient to read, copies of the pleadings as amended shall be filed.”

The court can allow amendments to pleadings at any stage of the proceedings as long as such amendments do not result in injustice to the other party, see *Rueben v Meyers* 1957 Rhodesia and Nyasaland 616 at 620; *Angeliqe Enterprises (Pvt) Ltd v Albco (Pvt) Ltd* 1990(1) ZLR 6(H) and *Lamin v Duly and Company Ltd* 1983(2) ZLR 35(H)

In its quest to do justice between man and man the court should use such discretion as long as it will not result in prejudice to the other party. In casu, I see no prejudice to the first and second respondents as the filing of supplementary affidavit’s aim is to clarify an

important point which helps the court to arrive at a just decision.

In addition, the Rules of the court authorise the court to depart from the provisions of its own rules and to give directions as to procedure for justice and expediency purposes.

Order 4 C Rule (a) reads: -

- “4 C Departure from rules and directions as to procedure.  
The court or a Judge may, in relations to any particular case before it or him, as the case may be-
- a) Direct, authorise or condone a departure from any provisions of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice.”

This dispute involves the property of the parties who are both deceased. There are certain allegations about what happened which resulted in both applicant and second respondent having their names registered in this property. It is in the interest of justice therefore that a departure from the rules is necessary in order for the court to delve into the ramifications of this issues. In view of this, I hold the view that applicant is therefore allowed to amend its final draft order as this will ventilate the issues before this court.

It is undisputed that after the death of the parties' father, a customary gathering was held in order to appoint an heir with specific instructions to look after the widow. It is also not disputed that applicant did so until his mother (widow) also died.

Applicant has submitted that the widow donated the property to him and he subsequently registered it in his name.

However, unbeknown to him, second respondent without the knowledge of applicant proceeded to eighth respondent's offices wherein he transferred it into his name and thereafter sold it to first respondent.

The property is a “family” property in a way and for either party to change its ownership it was necessary for him to obtain support from other siblings as its ownership

is essential. Applicant claims that second, third, fourth, fifth and sixth respondents were aware of the arrangement that he was to look after their mother.

However, second respondent's view is that he together with third, fourth, fifth and sixth respondents were not aware of applicant and their mother's actions in relation to the change of ownership status of the property from his father's name to applicant.

However, of interest, is that despite the fact that second, third, fourth, fifth and sixth respondents were served with court process, they did not oppose this application. In addition, thereto, eighth respondent who has been levied with serious allegations of illegal transactions in favour of second respondent also did not oppose. What it means, therefore, is that they are presumed to agree with applicants' averments. In light of this, therefore, I have no alternative but to accept his version of events as a true reflection of what took place in this matter.

Second respondent, therefore, is left groping in the dark in an attempt to manufacture facts which could not be supported by siblings. Surely, if what he is saying is true, I see no reason why his siblings should not be supporting him especially that the property is a family property. It would have been in their best interest to support him in order to prevent applicant from claiming the property against everyone's wishes. The fact that they did not support him leads me into only one irresistible conclusion, being that they silently support applicant thereby acquiescing his acquisition of this property both from their father and eighth respondent.

In my view, eighth respondent is also not supportive of applicant by virtue of the fact that it did not oppose this application.

The next question then is, what is the position of first respondent ? She indeed purchased the property from second respondent on the understanding that he was legally

entitled to sell the said property.

However, second respondent's position requires scrutiny. He obtained the letters of administration from seventh respondent and succeeded in transferring the property to first respondent. Both seventh and eighth respondents have not opposed this application. Again, one can only conclude that they are in complete agreement with applicant that the circumstances surrounding both the acquisition of the said Letters of Administration and the subsequent transfer of title by second respondent to first respondent is tainted with some illegality or at best it was not above board.

Therefore, second respondent had no proper title on this property.

It, therefore, becomes clear that second respondent can not transfer property to which he had no proper title to. He did not have title and therefore was incapable of transferring the said property.

The law regarding the purchase of property by an innocent third party is that he can lawfully enforce it while the guilty party cannot – See *Ganier Ishmail* 1957(2) SA 132 and *Ericson v Germie Motors (Edms) BPK* 1986(4) SA 67(A)

In as much as first respondent was an innocent purchaser, her problem is that she can not enforce her contract with second respondent because second respondent had no lawful right to sell this property. Her only remedy is a delictual one against second respondent.

Even if the question of illegality is not prominent, the facts before me merit the courts intervention mero motu as the illegality appears ex facie the transaction, see *Yannakau v Apollo Club* 1974(1) SA 614(A)

In addition thereto public policy dictates that such a contract should not be enforced as it is tantamount to the courts giving credit to a fraudulent action, in this case by

second respondent.

Applicant has asked for costs as between attorney and client scale. The award of such costs are punitive and these courts are slow to award them unless it is shown that respondents' behaviour on the facts before it deserve such censure. In casu, I am not convinced that this case deserves such an award.

Accordingly, the provisional order is confirmed as amended by applicant with costs.

*Cheda and Partners*, applicant's legal practitioners

*Messrs Job sibanda and Associates*, respondents' legal practitioners