

SICHENGI SIMPAMA

Versus

HAZVINEYI HOVE

HIGH COURT OF ZIMBABWE

WAMAMBO J & ZISENGWE J

MASVINGO, 1 July 2020 & 22 September, 2021

Mr. C. Mhuka for the Appellant
Mr T. Chivasa for the Respondent

Civil Appeal

WAMAMBO J: The two appeals CIV 'A'48/19 and CIV 'A'13/20 were consolidated by consent of the parties. They involve the same parties and involve the same issues around a certain property in Zvishavane namely Stand Number 149/ ST 53 Mandava Township. It was agreed that the parties would file supplementary heads of arguments embracing the two cases.

In CIV 'A'13/20 the respondent in this case made an application for an eviction order against the appellant. The relief sought was granted in the court *a quo* in the following terms:

- "1. That the respondent and all those claiming occupation through her be and are hereby evicted from Stand 149/ ST 53 Mandava Township Zvishavane within fourteen days of this order.
2. That respondent be and is hereby ordered to pay costs of this application on an ordinary scale."

The appellant appealed against this order raising the following grounds of appeal

1. The court *a quo* erred at law when it granted the application when the relief sought was of a declaratory nature.

2. The court *a quo* erred at law when it failed to appreciate that the cession had been obtained in contempt of an extant court order.
3. The court *a quo* erred at law when it held that no improvements in her claim had been substantiated.

The facts upon which the application was based are as follows:

Stand No. 149/ST 53 Mandava Township Zvishavane (*hereinafter called the house*) was sold by Esrom Hove (deceased) to Florah Mpofu although the cession forms were not fully completed by the parties involved.

Florah Mpofu died on 7 June 2004. The purported agreement of sale between appellant and Esrom Hove dated 16 February 2011 is a legal nullity as Esrom Hove lost his rights to the house in 1998 when he sold the house and effected cession in favour of Florah Mpofu.

The late Esrom Hove duped the appellant through a fraudulent misrepresentation.

Respondent was appointed an executor to the estate of Florah Mpofu and was also appointed a beneficiary to the said estate and flowing there from signed annexure "H". Annexure "H" is a cession form reflecting that the late Florah Mpofu represented by respondent signed the form as the original purchaser. Various dates are reflected on the said form. The original purchaser and new purchaser both signed the form on 15 August 2019. The Town council witnesses signed the form on 18 and 22 August 2019 respectively. The Town Secretary signed the form on 26 August 2019. The Zvishavane Town Council stamp reflects the date of 22 August 2019 while another stamp titled "For Official use" is dated 16 August 2019. On the other side the appellant prayed for the dismissal of the application with costs. The basis thereof is as summarised below:

There was an extant court order forbidding respondent to enforce any rights on the house in question. Respondent completed the document dated 15 August 2019 Annexure "H" in contempt of a Court Order.

No rights passed as there was no completed cession giving rights to Flora Hove. The agreement of sale between appellant and Esrom Hove is proper and cannot be set aside as there has been no application made to the effect.

More than a decade after the house was allegedly ceded to Flora Mpofu council bills still came in Esrom Hove's name.

The payments made and adverts that followed have nothing to do with the house.

In consideration of application the Trial Magistrate dealt with the points in *limine* raised and found them unmeritorious. The Trial Magistrate found that the respondent was the owner of the house and thus had the lawful right to evict appellant. She was not convinced that water and electricity bills reflecting the names Hove E do not prove with absolute certainty the owner of the property. She made a finding that appellant received the notice to vacate. She found that the issue of the lien to the property was not substantiated and that there was no demonstration of the value of the improvements on the house.

I do not agree with appellant that the order granted is a declaratory one. It is simply an eviction order. Thus I find that the first ground of appeal has no merit.

Dealing with the second ground of appeal I will carefully consider the documents filed of record and the submissions made. The extant order as referred to actually relates to CIV 'A' 48/19 and reads in part as follows: -

- "1. The Respondent and all those claiming rights through he be and are hereby ordered not to harass, insult, assault or threatening to assault the applicant in any manner whatsoever*
- 2. The Respondent and all those claiming rights through her be and are hereby ordered not to visit the applicant at her place of residence being stand number 53 TMB Mandava, Zvishavane*
- 3. The Respondent be and is hereby ordered not to purport to enforce any rights whatsoever in relation to stand number 53 TMB Mandava, Zvishavane without a Court order."*

In that case the order was granted in favour of the appellant who was then the applicant. The above order is dated 29 July 2019.

The argument as I understand it is that in the face of the order of 29 July 2019, the respondent went ahead and completed a cession form Annexure "H" in her favour. The said order forbade her from enforcing any rights on the house in question. Annexure "H" reflects the respondent as the original purchaser and also as the new purchaser. Annexure "H" is dated 15 August 2019 about 17 days after the Court order dated 29 July 2019. I find the argument by appellant sound for the following reasons. The cession form on the face of it reflects that effectively respondent sold the house herself and signed to that effect. She also signed the apparently faulty cession form after knowledge that she was not supposed to act in that manner in the face of an extant court order forbidding this action.

It would appear that the other Annexures namely "J", "J2", "K1", "K2", flowered directly from Annexure "H".

The court *a quo* found that respondent as the owner of the property had a lawful right to evict the appellant.

Annexure "A" a letter emanating from Zvishavane Town Council reflects the following rather contradictory positions on the file it holds: -

The house was allocated to Esrom Hove who changed ownership to Florah Mpfu in 1998 although the cession forms were signed by the parties but were not fully completed.

On the other hand, the same letter reflects that the file also contains an agreement of sale between Esrom Hove and appellant. The Town Council comes to the following conclusion: -

"It is not clear if Esrom Hove sold the property to both Florah Mpfu and Sichengi Simpama as there is no evidence of proper cession forms which were completed. Given such a scenario Council cannot tell who the real owner of the property is"

The cession forms allegedly signed by both Esrom Hove and Florah Mpfu were not filed by either party. The form is merely referred to in the letter by the City Council. It would have assisted the court to have sight of the said form for it to note how complete or incomplete the form is, the nature of the information endorsed on the form if it emasculates the agreement between the parties or not.

The appellant relies on an agreement of sale between Esrom Hove and him. It was prepared by H. Tafa and Associates and is dated 16 February 2011. Esrom Hove's death certificate reflects that he died on 27 January 2018. The principal documents relied upon by respondent were signed after the death of Esrom Hove and 7 to 8 years after the agreement between Esrom Hove and appellant.

I have already noted the nature of the irregularity of Annexure "H" and the fact that the change of ownership form between Esrom Hove and Florah Mpfu does not form part of the record.

To that end I find that although respondent bears documents purportedly reflecting that she is the owner of the house the documents are irregular and unreliable. He thus does not qualify as having rights to the house enough to evict the appellant. The appellant stands in a better position through an agreement of sale between him and Esrom Hove and the fact that he has been occupying the said house since 2011. It is also noted that the 3rd ground of appeal has no relevance. Appellant never filed a counter claim. The order to evict appellant was thus flawed and must be dislodged.

In CIV 'A' 48/19 the appellant applied for an interim interdict which was granted in the following pertinent terms:

"INTERM RELIEF GRANTED

Pending the finalisation of this matter the applicant is hereby granted the following relief:

- 1. The respondent and all those claiming rights through here be and are hereby ordered not to harass, insult, assault or threatening to assault (sic) the applicant in any manner whatsoever.*
- 2. The respondent and all those claiming rights through her be and are hereby ordered not to visit the applicant at his place of residence being stand number 53 TMB Mandava, Zvishavane.*
- 3. The respondent be and are hereby ordered not to purport the enforce any rights whatsoever in relation to stand number 53 TMB Mandava, Zvishavane without a court order."*

On the return date however the court *a quo* discharged the above order. It is the discharge of the said order that the appellant is appealing against.

The sole ground of appeal is couched as follows: -

"The court a quo erred at law when it discharged the rule nisi on the basis of an admitted typing error when all the requirements for an interdict had been proved on a balance of probabilities."

The appellant in his application before the court *a quo* referred to respondent as female when he is a male. In the founding affidavit appellant refers to respondent as a female adult. In paragraphs 7,8,9,10,12 and 15 respondent is referred to as female.

Respondent asserts that the error goes to the root of the matter and that this therefore must be a case of mistaken identity as respondent has never masqueraded or dressed as a woman. Appellant however avers that the reference to respondent as female is a mere typographical error emanating from the fact that his Legal Practitioners may have mistaken respondent's gender on account of respondent's file name being a name that is commonly used by males and females.

I am inclined to agree with the appellant for the following reasons.

The allegations in their founding affidavit reflect that respondent referred to him having duped her late father. Indeed, respondent's late father was the original owner of the house. Respondent is alleged to have declared that he lawfully bought the house and that rentals should

be paid to him. Indeed as can be gleaned from CIV 'A' 13/20 respondent produced documents suggesting that she lawfully bought the house.

I am convinced in the circumstances that the reference to respondent as female was but an error. The allegations as put by appellant reflects harassment and insults on the part of respondent.

Against this disturbing behaviour by respondent as alleged there was clearly need to confirm the order as sought. The disgusting behaviour are the allegations of insults and threats of unspecified action against appellant.

In a slightly different circumstance but however relevant to this case MATHONSI J (as he then was) in *Sithabise Monga v Nobandle Moyo* HB 282-17 at page 3 said:

"In that regard I am unable to understand why a party who has been ordered to keep the peace by the resort to a preventive order would appeal against such an order. It is a truism that in any civilised society citizens must forever conduct themselves in a peaceful manner towards one another."

On what basis therefore can a citizen be allowed not to be peaceful towards another as to be entitled to overturn a court order merely underscoring what is standard behaviour in a civilised society? If the appellant suggesting that she should be allowed to breach the peace?

I am of to view that the Magistrate's finding that the interim order earlier granted should be discharged was wrong in the circumstances.

The requirements of an interdict were clearly satisfied as earlier alluded to and the interim order should have been confirmed.

Further in the light of the finding I have made in CIV 'A' 13/20 that the appellant's eviction from the house was flawed, it follows that appellant deserves protection from being harassed while staying in the house where she currently has rights to reside at. The issue of who is the owner of the house has still come up for decision and is not the issue in the two consolidated cases dealt with here.

In respect of the two consolidated cases the following orders are made:

In CIV 'A'13/20 I order as follows:

1. The appeal is upheld.
2. The order by the court *a quo* evicting appellant from Stand No 149/ ST 143 Mandava Township, Zvishavane be and is hereby set aside.
3. Respondent to pay costs of the appeal.

In CIV 'A'48/19 I order as follows:

1. The appeal is upheld.
2. The order by the court *a quo* discharging the rule nisi be and is hereby set aside and substituted with the following order: The interim relief issued by the court be and is hereby confirmed. Respondent to pay costs of this appeal.

WAMAMBO J.....

ZISENGWE J agrees.....

H. Tafa & Associates, Appellants Legal Practitioners

Chirara & Associates, Respondents Legal Practitioners