

BATANDI M MPOFU N.O.
[In his capacity as the judicial manager
of second applicant]

and

SIZIBA SPARES AND HARDWARE (PVT) LTD
T/a RECON TRANSPORT & BUILDING CONTRACTORS

Versus

LIKETSO MAFILISTO KOBE SABATA

And

MPILWENHLE MTHUNZI

And

REGISTRAR OF DEEDS N.O.

IN THE HIGH COURT OF ZIMBABWE
 NDOU J
 BULAWAYO 14 JUNE 2007

L Mcijo, for the applicants
S S Mazibisa, for the 2nd respondent

Urgent Chamber Application

NDOU J: The applicants, under a certificate of urgency seek a provisional order
 in the following terms:

“A. Terms of the final order sought

That you should show cause to this honourable court why a final order should not be made on the following terms:

- (1) That second applicant be and is hereby declared the lawful owner of stand number 413 Tayport Road, Killarney, Bulawayo as described under deed of transfer number 1364/82.
- 2) That first and third respondents be and are hereby directed to register transfer to stand number 413, Tayport Road, Killarney, as described under deed of transfer number 1364/82 into the second applicant's name within 14 days of this order.
- 3) That second respondent and all those claiming occupation through him be and are hereby ordered to vacate stand number 413 Tayport Road, Killarney, Bulawayo within seven days of this order.

(4) That first and second respondents shall pay the cost of this suit on an attorney-client scale.

B. Interim relief granted

Pending the finalisation of this matter, the applicant be and is hereby granted the following interim relief:

- (1) That the second and third respondents be and are hereby interdicted from executing the judgment granted in second respondent's favour under case number HC 451/03 until the finalisation of case number HC 155/07 instituted by the applicants.
- (2) All the respondents are interdicted from selling, ceding or dealing with stand number 413 Tayport Road, Killarney, in any manner which may be prejudicial to applicant's interests therein."

The background facts of the case are the following. The second applicant was placed under judicial management on 18 November 2004. The first applicant was appointed the provisional judicial manager. On 30 May 2003, and prior to the second applicant being placed under judicial management, the second applicant and the first respondent entered into a written agreement of sale in respect of stand number 413 Tayport, Killarney, Bulawayo. At the time of contracting, first respondent advised second applicant that the property had been previously sold to the second respondent but that the agreement had been cancelled on account of second respondent's breach. As it turned out, first respondent was wrong because in case number HC 451/03 he was ordered by this court to release title deeds for the disputed property to the second respondent and also to facilitate the transfer of the property into the names of the second respondent. This order was made on 7 May 2003 and still stands. The applicant, in HC 155/07 issued summons against the respondents seeking the same remedy as in the above-mentioned provisional order. The summons were issued on 29 January 2007. Within a week i.e on 6 February 2007 the applicants decided to

proceed under a certificate of urgency. The certificate of urgency does not explain why the matter had suddenly become urgent bearing in mind the facts giving rise to the stay of

execution arise from a 2003 order. There is no explanation when the applicants became aware of the existence of the order. Second respondent is in occupation of the property. Mr *Mazibisa*, for 2nd respondent raised points *in limine*. I propose to deal with these points in turn.

1) Failure to comply with the provisions of section 221(2) of the Companies Act [Chapter 24:03]

It is common cause that the applicants instituted these proceedings without the requisite leave of the court or authorisation in terms of subsection 4 of section 218 of the Act. The court order placing the second applicant under judicial management of first applicant specifies these statutory requirements as well. The applicants have not sought indulgence for error (assuming it can be remedied at this stage). On this point alone, the application should fail. I will consider the alternative points raised.

2) Cause of action against second respondent

From the papers, the applicants have not averred any cause of action against the second respondent. They have not alleged that he is a *mala fide* purchaser. His rights have been vindicated by this court in the order granted in his favour in HC 451/03. This order has not been appealed against or subject to any form of challenge. On this point, the applicants cannot claim any *prima facie* rights against his occupation and ownership of the property. The remedy lies with suing the first respondent for damages. On this point alone the application should fail.

3) Is the application urgent

This is a classical case where there is no urgency at all. As alluded to above, this court ruled

Judgment No. HB 65/07
Case No. HC 211/07
X Ref HC 451/03 & 155/07

in favour of the second respondent in May 2003. The second respondent has been in occupation of the disputed property. The applicants were aware of this all along. For four years they did nothing. Even when they instituted proceedings, they started off by issuing summons. After a few days they decided it was urgent. They do not explain why the matter has suddenly become urgent after four years. This is urgency that stems from a deliberate or careless abstention from action. It is not the type of urgency contemplated by the Rules of this court – *Kuvarega v Registrar General & Anor* 1998(1) ZLR 188(H); *Mushonga & Ors v Min of Local Government & Ors* HH-129-04 and *Moyo v Constituency Election Officer, Tsholotsho & Ors* HB-72-05. From the facts, the time to act arose in May 2003. The applicants did not act on time. And four years later they did so without even explaining the cause of the delay. From the foregoing I would dismiss the application for the reason given (1) above. If I am wrong in the findings the application should still fail in terms of (2). Accordingly, the application is dismissed with costs on the legal practitioner and client scale.

Lazarus & Sarif, applicants' legal practitioners
Cheda & Partners, second respondent's legal practitioners