PHILANGWEZI MUNYARADZI MUDAMBANUKI (In his capacity as
Executor of Estate Late Tapuwa Edson Mudambanuku
and
PATIENCE MUDAMBANUKI
versus
CONSTRUCTION INDUSTRY PENSION FUND
and
REGISTRAR OF DEEDS
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 14 August 2024 & 5 March 2025

Urgent Chamber Application

Ms *P Chimombe* for the applicants
S R Pasvani, with him Ms *R Nemaramba Dodzo*, for the 1st respondent

ZHOU J: This is an urgent chamber application for stay of execution of the judgment in Case No. HCH 6502/19, pending determination of a court application filed under Case No. 3362/24. The latter court application seeks cancellation of Deed of Transfer No. 1467/2019. On the return date the applicants seek cancellation of the Deed of Transfer Number 1467/2019 in favour of the first respondent and revival of the Deed of Transfer Number 7269/2002 registered in favour of the late Tapuwa Edson Mudambanuki, as well as costs against the first respondent on the attorney-client scale.

The application is opposed by the first respondent. Apart from contesting the matter on the merits the first respondent objected *in limine* to the hearing of the matter on an urgent basis and took the further objections *in limine* that the founding affidavit is invalid and that the applicants have no *locus standi* to institute the application.

Urgency

The authorities stress that a matter is urgent if it cannot wait to be dealt with as an ordinary court application. See *Pickering* v *Zimbabwe Newspapers (1980) Ltd 1991 (1) ZLR 71(H) at*

93E; Dilwin Investments (Pvt) Ltd t/a Formscaff v *Jopa Engineering Company (Pvt) Ltd* HH 116-98, p.1.

The dispute between the parties has been ongoing for a considerable period of time and it is in the interests of justice that it be brought to finality. For the purposes of determining the issue of whether this matter should be heard on an urgent basis, I will consider what prompted the applicants to approach the court urgently. The applicants are faced with imminent eviction from the place that they call their home through the process of court. By its very nature an application for stay of execution is urgent unless it fails to satisfy the time and consequence dimensions of the requirements for urgency. The requirement of the law is that the applicants must have acted expeditiously having regard to when the need to act arose. Applicants were served with the notice of ejectment on 24 July 2024. The instant application was filed on 2 August 2024, about nine days from the date of service of the notice of ejectment. That period does not constitute a delay in the making of the application. The time aspect of the requirements for urgency is therefore established in favour of the applicants. As regards the consequences of the failure to obtain the interim relief, I have already pointed out that the application is one that is by its nature urgent. Further, the prejudice that would be occasioned to the applicants if the matter is not dealt with urgently but they succeed in obtaining the relief through an ordinary application is irremediable.

For the foregoing reasons the objection to the urgent hearing of the matter must fail.

The *locus standi* of the applicants

The first respondent challenges the *locus standi* of both applicants to institute the present application. In relation to the first applicant, the point is taken that he is seeking stay of execution of an order in which he is not cited as a party. The only party that is cited, so goes the argument, is the second respondent whose eviction from the property is being sought. As regards the second applicant, the submission is made that she deposes to a supporting affidavit only. The further point made is that the second applicant is not a party to the application for the setting aside of the deed of transfer referred to above yet the instant application is being made pending determination of that application.

The principles upon which a party is entitled to participate in legal proceedings are settled in this jurisdiction. In the case of *Zimbabwe Teachers' Association & Ors v Minister of Education* 1990 (2) ZLR 48(HC) at pp. 52F – 53E, this court held that for the purposes of *locus standi* to participate in legal proceedings what is required is a direct and substantial

interest in the subject-matter and outcome of the case. The interest must be a legal one and not merely some indirect financial interest.

The first applicant as the executor steps into the shoes of the deceased in seeking to protect the deceased estate's interest in the property in dispute. The mere fact that he is not a party in the proceedings pending which the relief is being sought does not take away the legal interest that he has. The final relief and the relief being sought in the main case is reversal of the title in the property to the deceased. He represents the deceased's estate.

As regards the second respondent, the mere fact that her affidavit was titled "supporting affidavit" does not invalidate it. The court must look at the substance of the affidavit and not its title in order to determine what that affidavit is. The affidavit cites the second applicant as one of the applicants, and she confirms this in her affidavit. The affidavit states that the second applicant is deposing to the affidavit in her capacity as second applicant. The suggestion that she has not placed herself before the court as an applicant is thus frivolous.

The point *in limine* taken is therefore devoid of merit and must be dismissed.

Founding affidavit

The respondent's objection to the founding affidavit is that there is no date inscribed where it says "Dated at Harare this . . . of . . . 2024". The objection is without substance, because the date on which the affidavit was commissioned clearly appears from the date stamp of the commissioner of oaths. In any event, there seems to be a misconception that the date is constitutive of an affidavit. That is not so. It is the oath that is administered that makes the statement an affidavit. If a party is challenging the fact that an affidavit has been sworn to before a commissioner of oaths the party making such an allegation must lead evidence to substantiate that claim. Where on the face of the affidavit the deponent thereto has signed and there is a signature attributed to a commissioner of oaths the court must not be quick to say that the affidavit was not duly commissioned in the absence of evidence from the person making the allegation. The absence of the date in an affidavit does not mean that the deponent to the affidavit did not sign it under oath. A date is not part of an oath. Whether or not an affidavit was signed before a commissioner of oaths is a factual issue which must be proved by the person alleging it the fact.

For the foregoing reasons, the objection to the validity of the affidavit must be dismissed.

This Court has on numerous occasions cautioned about raising objections *in limine* as a matter of course. The time has now come for the court to express its disapproval of that approach to litigation by making appropriate orders of costs that discourage litigants and practitioners from conducting litigation in that manner. The order of costs that will be given *in casu* will take into account this factor.

The merits

On the merits, it is common cause that the first respondent obtained ownership in the immovable property in dispute in 2019 in terms of the Deed of Transfer No. 1467/2019. After obtaining the title the first respondent instituted proceedings to recover possession of the property from the second respondent. The order was duly granted. That is the order the execution whereof the applicants seek to stay *in casu*.

The essence of this application is to stop a party who holds title to immovable property from recovering the property from the respondents. The first respondent has in its name the title to the property as owner in terms of Deed of Transfer No. 1467/2019. Its action to obtain possession of the property from the applicants is an *actio rei vindicatio,* because the requirements of that cause are satisfied in that it is the owner of the property and the respondents are in occupation of the property without its consent, see *Chetty v Naidoo* 1974 (3) SA 13(A).

For the applicants to succeed in obtaining the stay of execution they must prove that real and substantial justice demands that the execution be stayed, see *Mupini* v *Makoni* 1993 (1) ZLR 80(S). Other than stating that they are challenging the deed of transfer, the applicants have not really set out any of the recognised defences to an *actio rei vindictio*. Considerations of equity have no place when it comes to the recovery by an owner of the possession of his property from a person who is holding onto it without his consent, see *Alspite investments (Pvt) Ltd* v *Westerhoff* 2009 (2) ZLR 226.

The need for finality in litigation demands that the first respondent enjoys the rights flowing from its ownership of the property. It is offensive to any sense of justice that almost six years after obtaining title to the property the first respondent is not enjoying the benefits of the title. Instead, the applicants continue to enjoy occupation of a property that does not belong to them. Whatever will be the outcome of their application challenging the title, for now while the deed of transfer is extant there is no legal basis for staying the ejectment of the applicants.

Costs

The general rule is that the costs must follow the results. In other words, the successful party must be awarded costs unless there are good reasons for deciding otherwise. In determining who is the successful party the court must look at the substance of the judgment and not merely its form. A party in whose favour the judgment is ultimately given is not necessarily the successful party, for the other party may have succeeded on the issues in dispute or some of the issues raised during the litigation. See *Swanepoel* v *Van Heerden* 1928 AD 15 at 24, *Cole* v *Government of the Union of SA* 1910 AD 263 at 282. Indeed, in cases where a plaintiff has been successful in obtaining judgment but for an amount that is substantially less than the amount claimed the plaintiff may be refused costs, see *Bainbridge* v *Wynberg Municipality* (1889) 7 SC 11; *Rabie* v *Stewart* 1927 OPD 74.

It is important that success be also measured by taking into consideration the outcome in respect of the points *in limine* taken by a party since of late it has become fashionable for litigants and legal practitioners to make these an essential part of the case. This approach will encourage a party to raise an objection *in limine* only when it has substance and not for the mere gratification of his or her ego or for the purposes of vexing the other party. This approach is consistent with the concerns which have been raised in this jurisdiction regarding the raising of points *in limine* in almost every case.

In the instant case the three objections *in limine* raised by the first respondent were dismissed. There is no reason why it should recover costs as if its success was absolute. For these reasons, the first respondent must recover from the applicants only half of the taxed costs incurred.

Disposition

In the result, IT IS ORDERED THAT:

1. The application be and is dismissed.
2. The first respondent is entitled to recover from the applicants jointly and severally the one paying the other to be absolved, half of its taxed costs.

Claude Petronellah & Nomazulu At Law, applicants' legal practitioners
Chihambakwe Mutizwa & Partners, first respondent's legal practitioners