

LEWIS MURIDAZO CHITENGWA v WILSON TATENDA MANASE

SUPREME COURT OF ZIMBABWE  
CHEDA JA, ZIYAMBI JA & MALABA JA  
HARARE, JUNE 2, 2008 & MARCH 16, 2009

*E W Morris*, for the applicant

*R Fitches*, for the respondent

CHEDA JA: On the date set for the hearing of this appeal we found that the respondent had filed an application for leave to file further evidence in connection with the matter.

After hearing submissions on the application we made an order that the appeal be postponed *sine die* pending our decision on the application.

This judgment deals with that application.

The respondent obtained an order at the High Court for the eviction of the appellant from certain premises which the respondent purchased when the property was

sold by the sheriff. The appellant noted an appeal against the High Court's decision on the matter.

Although he had complained earlier about the manner in which the sale and transfer of the property was handled, in his heads of argument for the appeal, the appellant has made allegations of fraud and imputed very dishonest conduct against the respondent.

He said the property was transferred into the name of the purchaser, who is a brother of the respondent before the purchase price was paid. He said the conveyancer appeared before the Registrar of Deeds on 27 November 2001 and the purchase price was only paid on 24 January 2002. He said that fraud was committed and false statements were made to the effect that the price had been paid and secured and the statement was made to mislead and prejudice or potentially prejudice the Sheriff and the creditors of the appellant as well as the appellant himself. He also said that the price was inadequate. He submitted that proper procedures were not followed.

In response to this, the respondent now seeks leave to file an affidavit from a Mr Tanser, a legal practitioner to give the history of the transaction and how it was conducted, in order to counter the allegation of fraud made against the respondent by the appellant.

The allegations made by the appellant against the respondent who is a legal practitioner are very serious. While the respondent may have had this information about the transaction available at the trial, it does not seem to be clear that the appellant, while questioning the transaction, intended to make such serious allegations of fraud against the respondent.

Furthermore, the evidence sought to be led is not intended, as is often the case, to prove or support the case of the respondent concerned, but to rebut the serious allegations made.

The appellant did complain against the Deputy Sheriff's handling of the matter but did not at the time, accuse the respondent of dishonesty and fraud. He has now made very clear accusations as opposed to a general complaint.

In my mind, it would not be appropriate to deprive the respondent of an opportunity to lead the evidence to show if he so wishes, that there was no fraud on his part. It is the appellant who has made the allegations and I do not think the new evidence prejudices his case in any way.

The points made in the case of *Warren-Correington v Forsyth Trust Pvt Ltd*, 2000(2) ZLR 372 are in my view, not exhaustive. The points refer to the appellants diligence in obtaining the evidence, the credibility of the evidence, the influence on the result of the case and whether conditions have since changed after the trial.

They do not deal with a situation where one party makes serious allegations of fraud against the other on appeal.

It is mainly for this reason that I consider it appropriate to grant to the respondent leave to file further evidence on appeal without going into the details of the background as that would entail going into the merits of the main application.

Accordingly leave is granted for the respondent's further evidence to be admitted on appeal.

Costs will be costs in the cause.

ZIYAMBI JA: I agree

MALABA JA: I agree

*Gill, Godlonton & Gerrans*, appellant's legal practitioners

*Manase & Manase*, respondent's legal practitioners