

MARIA SITHOLE  
versus  
MATHIAS SITHOLE  
and  
CECK ENTERPRISES (PRIVATE) LIMITED  
and  
B.R.M HOVE  
and  
PETER DZIMBA  
and  
MANNERS JARAVAZA  
and  
PARDON CHAKANYUKA  
and  
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 16 February 2018 & 14 March 20 8

**Opposed application**

*C Mucheche*, for the applicant,  
*E Jera*, for the respondent,  
No appearance for the 7<sup>th</sup> respondent

DUBE J: This case is concerns a sale and transfer of property carried out contrary to a court order. It is trite law that a thing done contrary to the direct prohibition of a court order is void and is of no legal effect. Such a thing is regarded as never having been done. A disregard of a court order is fatal to the validity of a contract that is concluded in violation of a court order.

This is an application for confirmation of a provisional order. The brief background to the application is as follows. The applicant and first respondent were married to each other and they later separated. The first respondent passed away on 2 February 2013. The applicant obtained a provisional order on 8 October 1997 under HC 8638/97 against the first respondent and the Registrar of Deeds in the following terms,

- "1. That the 1<sup>st</sup> respondent be and is hereby interdicted from selling, ceding, encumbering or otherwise disposing of his right, title and interest in Stand No. 2395 Glen View



Township of Glen View situate in the District of Salisbury pending the finalization of the appeal noted by the applicant in case No. CC 1314/92; DC 1/93.

That the 1st respondent be and is hereby interdicted from removing any of the movable assets in the matrimonial home.

REGISTRAR OF THE HIGH COURT  
OF ZIMBABWE  
CIVIL DIVISION

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2. That the 2<sup>nd</sup> respondent be and is hereby interdicted and restrained from registering or in any way giving effect to any sale, cession, encumbrance or disposal by any means of 1st respondent's right, title and interest in Stand No. 2395 Glen View Township of Glen View situate in the District of Salisbury.

3. That the 1<sup>st</sup> respondent pays the costs of this application."

The first respondent did not oppose the provisional order which was granted during his life time and was barred for the reason of not opposing this application. He remains barred and this matter can proceed without notice to him or his estate. The seventh respondent is cited in his official capacity and did not oppose the application. The claims against the third to sixth respondents who are legal practitioners that represented the respondents at different stages of this dispute were withdrawn. Only the second respondent, who is the buyer of the property in dispute, defends the application.

The applicant followed the provisional order with a letter dated 24 October 1997 requesting that a caveat be registered over the property. Unfortunately, the letter was erroneously directed to the Registrar of the High Court instead of the Registrar of Deeds. Unbeknown to the applicant the first respondent had already sold the property to the second defendant in September 1997, and transferred the property to second respondent on 3 November 1997. Sometime in January 1998, the applicant was visited by people who claimed to be the new owners of the property. She obtained another order against the second respondent under HC 1891/98 interdicting him from evicting her from the property or interfering with her peaceful occupation of the property on 2 March 1998. In the final, she sought an order against all respondents for the setting aside of the sale and transfer of the property and cancellation of the sale.


The applicant remains in occupation of the property. The Magistrates Court gave judgment in the appeal case on 11 November 1998 granted 35 % of the value of the rights, title and interest in the property to applicant. The applicant has appealed against the decision to this court under CIV(C) 27/29 and interestingly that appeal is still pending. The issue regarding the applicant's rights in the property is still pending.

The applicant submitted that the first respondent disregarded the interim order and proceeded to sell and transfer the said property to the second respondent. The sale and



transfer to second respondent was unlawful and illegal and ought to be set aside. The applicant seeks confirmation of the provisional order granted under HC 1891/98 with the effect that the sale of the property to second respondent is set aside and the property transferred into her name.

The second respondent is opposed to confirmation of the provisional order and he submitted as follows. It was not aware of the order interdicting the sale at the time it bought the property. It later learnt of the controversy surrounding the sale and transfers of the property and surrendered the title deed to Hove Dzimba and Associates. The court order granted under HC 8638/97 has been overtaken by events as the issue pertaining to the applicant's interests in the property was resolved by the Magistrates Court. The respondent prays for dismissal of the applicant's application and counter claims for an order compelling the applicant to deliver the title deeds to it and for her to vacate the property.

 The first respondent breached the court order interdicting him from selling or disposing of the property by selling the property to second respondent and went to transfer the property after the interim order had been granted. The issues for determination are whether applicant is entitled to the final interdict sought. Secondly whether the second respondent is entitled to claim the title deeds of the property and eject the applicant from the property.

The applicant applies for a final order. An applicant who seeks a final order must satisfy the following requirements,

- (i) that applicant has a clear right.
- (ii) that actual injury has been committed or is reasonably apprehended.
- (iii) the absence of similar protection of another remedy.

See *Setlogelo v Setlogelo* 1914 AD 221

In *Federation of Governing Bodies of South African Schools(Gauteng) v MEC for Education, Gauteng*, 2002 (1) SA 660 at 673 D E, the court remarked that when an order is disobeyed, the onus is on the party in favour of which the order was granted to establish contempt and persuade the court that a sanction is merited. See also *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) 326 (SCA) where the court remarked that a party who has obtained an order requiring an opponent to do or not to do something, may in the event of non-compliance apply for contempt of court. In *Schierhaut v Minister of Justice* 1926 AD 99 @ 69, per INNES CJ said the court said the following of things done contrary to a court order,



"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated: *Ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro nectis habeantur: licet legislator fieri prohibent tantum, nec speccialiter dixerit inutile esse debere quod factum est*: Code 1.14.5. So that what is done contrary to the prohibition of the law is not only of no effect but must be regarded as never having been done and that whether the lawgiver has expressly so decreed or not: the mere prohibition operates to nullify the act... and the disregard of peremptory provisions in a statute is fatal to the validity of the proceeding affected....".

Similar sentiments were echoed in *Munyikwa v Mapenzauswa & Anor* SC 91/05. In this case, a party sold property contrary to a court order. The court said the following:

"Accordingly, the sale, having been done contrary to the provisions of the High Court order, was certainly not proper. It was therefore not proper to order that the house be transferred to the first respondent, as the sale was a nullity.

Court orders are made so that they are complied with. The order of the High Court made on 16<sup>th</sup> May 2002 had neither been set aside nor appealed against. The High Court cannot be used to enforce a sale that was carried out contrary to the provisions of a lawful order.

In view of the above, the sale of the property to the first respondent cannot be allowed to stand."

In the *Munyikwa* case, the consideration that the purchaser of the property was an innocent purchaser did not carry the day.

A thing that is done in breach of a court order is *void ab initio*. It is of no legal effect. The failure to comply with a court order has the effect of injuring the rights of the other party. When a party is granted a provisional court order, those proceedings are complete notwithstanding that they may well be subject to an appeal or confirmation. The order ensuing is required to be complied with as any other order. A subsequent breach or wilful disobedience of the order entitles the person in whose favour the order was granted to enforce it. A deliberate disregard of a court order constitutes contempt of court. It has the effect of violating the court's dignity, repute and authority. It is the duty of the court to regulate its own orders. Courts cannot sit back and watch whilst its orders are being disobeyed. As a result, the courts regard anything that is done contrary to a court order to be of no force and effect and is regarded as not having been done at all.

The facts of this case are on all fours with the *Munyikwa* case where the court refused to recognise a sale of a property made in defiance of a court order. The order interdicting the sale and transfer of this property was granted on 8 October 1997 under HC 8638/97. The applicant proceeded with the sale and transferred the property into the second respondent's name in November 1997 well after the provisional order had been granted. First respondent



breached the order when he sold the property to second respondent and transferred it to him in the face of the court order. First respondent acted contrary to a prohibition of a court order. The sale entered into between the first and second respondents is unlawful. It is a nullity and ought to be set aside. The non-compliance with the court order was both wilful and *mala fide*. The court order has not been appealed against or discharged and is still extant. The applicant is entitled to enforce the order. The sale and transfer went ahead despite of the fact that the dispute over ownership of the property was still pending. The fact that the Magistrates Court subsequently dealt with the appeal is of no consequence when regard is had to the fact that the first respondent acted contrary to a court order. The judgment does not make lawful the sale and transfer which was made contrary to an extant order of the court and remains unlawful. The fact that the purchase may not have known of the existence of the court order does not clothe the sale with legality. The first respondent disobeyed the authority of the court. This court cannot be used to endorse and enforce a sale and transfer of property that was done contrary to its own order. The court will not be encouraged to be a party to defiance of its own orders. The applicant has established a clear right to redress. She is not at law required to prove that she is likely to suffer any irreparable harm, see *Charisma Blasting and Earthmoving Services (Pvt) Ltd v Njainjai and Ors* 2000 (1) ZLR 85 at p 90.

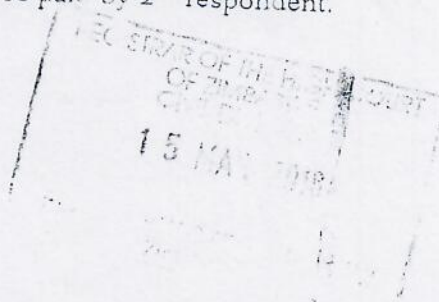
There clearly is no other appropriate remedy available to the applicant to address the harm caused. The sale of the property to the second respondent cannot stand. The applicant has shown an entitlement to the order sought. The main application succeeds. Consequently, the second defendant's counterclaim for eviction of the applicant from the property and surrender of title deeds of the property fails. The provisional order granted under HC 1891/98 is hereby confirmed with amendments. The applicant was initially justified in seeking an order for contempt of court against the first defendant. She has now abandoned that claim following the first respondent's death.

It is accordingly ordered as follows:

1. The respondent's counterclaim fails.
2. The applicant's claim succeeds
3. The sale of Stand No. 2395 Glen View Township of Glen View situate in the District of Salisbury previously held under Deed of Transfer No. D.T No. 4347/90 by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent be and is hereby set aside.



4. The transfer of Stand No. 2395 Glen View Township of Glen View situate in the District of Salisbury from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent registered as DT 9235/97 be and is hereby set aside.
5. The 7<sup>th</sup> respondent be and is hereby ordered and directed to cancel the transfer of Stand No. 2395 Glen View Township of Glen View situate in the District of Salisbury effected on the 3<sup>rd</sup> of November 1997 and registered as D.T 9235/97
6. The costs of this application shall be paid by 2<sup>nd</sup> respondent.



*Matsikidze Mucheche and Partners, applicant's legal practitioners*  
*Moyo and Jera, respondent's legal practitioners*