CLIPSHAM VIEWS HOUSING PROJECT
versus
EMMANUEL VHUDZIJENA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 23 October, 2017 and 29 December, 2017

Opposed Matter

N. Mugandiwa, for the applicant
N Chamisa, for the respondent

MANGOTA J: A purchaser has only personal rights against the seller of a thing he purchased. He has no real rights over the thing. Unless and until he takes transfer of, or title in, the property which he purchased, the remedy of *actio rei vindicatio* remains unavailable to him.

The status of the current applicant fits neatly into the above-described set of circumstances. It purchased Lot 2 of Clipsham Farm ("the property") from the Government of Zimbabwe. It did so on 9 December, 2015. It did not take transfer of the property.

Lot 2 of Clipsham Farm is situated in the District of Masvingo formerly Victoria. It is 205,5200 hectares in extent. It is held under Deed of Transfer number 633/95.

Prior to the acquisition of the property by Government, Shell Zimbabwe (Pvt) Ltd owned the same. The former owner or its co-owner one Alison Jean Diedericks or both leased a portion of the property to the respondent. They did so in or about 1997 or 1998. He erected on the leased portion of the property:

(i) a brick yard;
(ii) a bar;
(iii) a restaurant;
(iv) ablution facilities;
(v) a garage – and
(vi) offices

The applicant instituted a *rei vindicatio* application. It moved the court to evict the respondent from the property.

The respondent opposed the application. He submitted that the applicant has no title in the property and, as such, it could not evict him. He stated, in the alternative, that he has an improvement lien over the portion of the property on which he constructed the abovementioned structures. He moved the court to dismiss the application with costs on a punitive scale.

It is pertinent for me to mention, for the record, that I heard this application on 23 October, 2017 and dismissed it with costs. I remained satisfied at the time, as I am currently, that the application was devoid of merit. I delivered an *ex tempore* judgment to the mentioned effect.

The applicant's legal practitioners wrote to the registrar of this court on 21 November, 2017. They requested for reasons for the *ex tempore* judgment which I delivered at the close of submissions. These are they.

The applicant's heads of argument show, in clear and categorical terms, that the application stood on nothing. It advanced two scenarios in its heads. I will, for the sake of clarity and brevity, refrain from dealing with the preliminary matters which the applicant dwelt upon in response to the respondent's position of the matter. I will, therefore, focus my attention on the substance of the application.

It was misplaced for the applicant to rest its application on such case authorities as *Gregor* v *Saburi & Ors,*2011 (1) ZLR 262 (H) and *Commercial Farmers Union and Ors* v *Minister of Lands and Rural Resettlement & Ors,* SC 31/10. The principle which the court laid in the mentioned cases relates to holders of offer letters, pursuits and land settlement leases. These, it was stated, have the right to evict from the land which Government offers to them any person who settles himself on land which has been allocated to them.

The case authorities which the applicant relied upon to assert what it claimed was its right in the property are distinguishable from the circumstances of the present application. The applicant did not ever say that it held an offer letter, a permit or a land settlement lease in respect of the property which is the subject of this application. It stated that it purchased the property from Government. It, in fact, produced the agreement of sale of land which it concluded with the Government on 9 December, 2015. Its case was, therefore, that of purchase and sale and not that of offer of land to it by the Government. It could not, legally speaking, invoke case authorities the

principles of which were totally divorced from the well-established concept of purchase and sale and use those to support its application for eviction of the respondent from the property.

The applicant was ably legally represented when it filed this application. I, therefore, found its second line of argument not only very odd but also totally flawed. Paragraphs 6-2 and 6-3 of its answering affidavit do, in its view, constitute its argument. They read:

> "6.2 The Applicant's title over the land emanates from the Agreement that was entered into between the Government of Zimbabwe and the Applicant.
>
> 6.3 It is the basis upon which its right to ownership of the property arose from. The Respondent does not dispute that the land was properly acquired by the State and sold to the Applicant." (emphasis added).

The applicant persisted with the position which it adopted in furtherance of its application for *rei vindicatio.* It even went as far as citing case authorities which it said supported its position. It stated that the eviction application aimed at protecting its ownership of the property. It said the application rested on the principle that an owner such as itself shall not be deprived of its property without its consent. It, in the process, placed reliance on such case authorities as that of *Sibanda* v *The Church of Christ*, 1994 ZLR 74 (S) and *Alspite Investments (Pvt) Ltd* v *Westerhoff*, 2009 (2) 226 (H).

The applicant did not ever say that it took transfer of the property after it purchased it from Government. It, in fact, produced no evidence which shows that it has title to the property. All it said was that the agreement of sale which it concluded with the Government was valid. That agreement, on its own, it is needless to mention, does not confer real rights to it over the property. All it does is that it confers personal rights to it as against the seller and nothing more. The application for the eviction of the respondent based on the applicant's agreement of sale, was misplaced.

The respondent, it was observed, was settled on a portion of the property at about 1997 or 1998. He built structures on the portion in question. He insisted, and correctly so, that he be compensated for the structures which he erected. He, in short, claimed an improvement lien over the portion of the property which he developed.

The applicant's response to the respondent's claim was confused. It said the respondent's claim for compensation, if any, lay with the acquiring authority and not itself. That response is confused for two reasons. The first is that the acquiring authority did not offer the land to the

applicant in terms of the Land Acquisition Act. It sold the same to it. The second is that it is not the acquiring authority which seeks to evict the respondent. The applicant seeks his eviction for its own purposes.

That the respondent erected structures on the portion of the property which he held in terms of his lease with the former owner of the property requires little, if any, debate. The applicant admits that fact. It, by implication, also admits that he improved the property to the extent of the structures which he constructed. He expended money when he embarked upon the structures. His right to an improvement lien over the portion of the property on which his structures remain, is therefore, unassailable.

The applicant cannot have its cake and eat it. The principle of unjustified enrichment estops it from evicting the respondent without paying compensation to him for the improvements which he effected on the property. He stated as much in his opposing papers.

The principle of a lien as read with the concept of unjustified enrichment exists in our law. Reference is made in this regard to the remarks of SANDURA JA who, in *Nexbank Invstms (Pvt) Ltd & Anor* v *Global Electrical Mfrs (Pvt) Ltd & Anor*, 2009 (2) ZLR 270 (D) at 273 G- 274 A-B quoted Professor R.H. Christie's *Business Law in Zimbabwe* pp 454-455 and said:

> "A right of retention, or lien, arises by operation of law from the principle that no-one should be unjustly enriched at the expense of another. A person who has incurred expenditure on the property of another, movable or immovable, and who is in possession of that property, is entitled to retain possession until paid sufficient compensation to prevent the owner being unjustly enriched at his expense.
> ……
>
> Useful expenses, i.e. expenses which have enhanced the market value of the property, give rise to an improvement lien, also valid against all the world, for the amount of the enrichment: *Fletcher and Fletcher* v *Bulawayo Waterworks Co. Ltd*, 1915 AD 636."

The respondent's right of lien over the property which he is in possession of cannot be wished away. It is real and properly claimed.

The correspondence which the respondent attached to his opposing papers shows that it was not the intention of Government to disturb the respondent's peaceful and undisturbed possession of the portion of the property which the former owner of the same leased out to him. Annexure C which appears at p 64 of the record is relevant.

The annexure is a letter which Government addressed to the respondent on 9 March, 2017. The letter sought to clarify the position of Government in regard to the respondent's structures which are on the property. It reads, in part, as follows:

> "When you later informed us about your commercial operation late last year, we then realised that the joint venture company (the developer) had not captured some of the existing development such as yours in the overall layout plan which they prepared and submitted to us for approval. As a result, the land on which your restaurant and related uses are located was set aside for low density residential purposes in the layout plan. This office indicated to the developer….. that the setting aside of the land covered by your operations for residential purposes was inappropriate because it is not commercially justifiable to disband operative business activities and demolish existing structures, if such an action can be avoided. This is also part of mainstream sound spatial planning practice which the land developer did not abide by, we therefore requested the developer….. to amend the layout plan and surrender the two most affected stands (excluding the area covered by brick molding an activity which we suggested should start winding down)." [emphasis added]

It is clear, from the forgoing, that Government which still owns the property was prepared to allow the respondent to continue with his operations on the structures which he erected. The applicant which has no title to the property made up its mind to evict the respondent and not to pay him any compensation for the improvements which he made on the property. The attitude of the applicant remains unconscionable.

The applicant failed to prove its case on a balance of probabilities. The application cannot stand. It is, therefore, dismissed with costs.

Kantor & Immerman, applicant's legal practitioners
Muzenda & Partners, respondent's legal practitioners