

NEVER CHAWAREVA

versus

LOVEMORE CHAZA

and

THE MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE

CHIGUMBA J

HARARE, 13, 15 September 2016 & 21 June 2017

Opposed Application

E. Z Mapendere, for the applicant

W. Chishiri, for the 1st respondent

CHIGUMBA J: This is an apposed application in which the court interdicted the first respondent and all those acting through him from interfering in any way with the applicant's occupation of stand 2087 Acorn Township Goromonzi, and ordered the first respondent to pay costs on a higher scale, on 15 September 2016. The court has now been asked to provide detailed reasons for its judgment, for purposes of appeal. These are they;- The applicant filed a court application for an interdict on the 21st of August 2015. In the founding affidavit, he averred that on 23 July 2012, he had entered into a lease agreement with the second respondent, the Minister of Local Government, Public Works and National Housing. In terms of that agreement (Lease number 9376), a sum of five hundred dollars rent was payable every year and the applicant had an option to purchase the stand. The applicant, paid his rental on time, and otherwise fulfilled all the terms of the lease agreement.

The applicant averred that the first respondent has been preventing him from erecting a structure on the stand, and that, instead he himself has erected an illegal structure on the stand, despite not having any right to do so. The applicant was unable to get vacant possession of the stand. The first respondent filed a notice of opposition to the application on 5 October 2015. He deposed to an opposing affidavit in which he averred that;- the applicant had sought to eject him

from the stand through the Goromonzi Magistrates Court under case number 30-13 and his claim had been dismissed. He subsequently withdrew his appeal which he had noted under CIV507-14. The second averment made was that the second respondent had ceded the land in question to Zvakatanga Sekuseka Housing Cooperative (the Cooperative) in terms of the Cooperative Societies Act [*Chapter 25:04*]. The first respondent is a member of the Cooperative whose main objective is to provide land for residential use for its members. He has been faithfully paying his subscriptions to the Cooperative. The first respondent averred that the application was fatally defective for failure to cite the second respondent as a party to the proceedings. He stated that there were material disputes of fact which made this matter incapable of resolution on the papers, and that the applicant lacked *locus standi in judicio* to bring this application because the land in question was now vested in the Cooperative.

The first respondent averred that the applicant had failed to establish the requirements of a final interdict, a clear right, an actual or reasonably apprehended injury, and the absence of any other remedy. The applicant filed an answering affidavit on 16 November 2015 in which he denied that the dispute between the parties is *res judicata*. He stated that the appeal had been on the question of the jurisdiction of the Magistrates Court to deal with matters that fall under the Cooperatives' governing Act. The appeal was not on the validity of the lease agreement, which the lower court had been unable to determine. Applicant challenged the first respondent to show that it had proof that the land in question had been allocated to the cooperative as alleged. He maintained his position that in the absence of such proof, his lease agreement was valid and binding. The applicant filed heads of argument on 19 May 2016 in which he submitted that the applicable law was as follows:-

The requirements of *res judicata* are threefold;-

- (a) There must have been a prior action between the same parties
- (b) The action must have concerned the same subject matter
- (c) The prior action must have been founded on the same cause of action. See *Kawondera v Mandebvu*¹, *Towers v Chitapa*², *Banda & Ors v Zisco*³, *City of Mutare v Mawoyo*⁴, *Becks Theory and Principles of Pleading in Civil Actions 5 ed p165*.

¹ SC 12-06

² 1996 (2) ZLR 261 @ 271A

³ 1999 (1) ZLR 340 (S) @ 341G0342E

⁴ 1995 (1) ZLR 258 (H) @ 263-264

The applicant submitted that the cause of action in this matter was different to the one raised before the magistrates court. The court is inclined to agree with the applicant and to find in his favor on this preliminary point. The issue before the magistrate's court was an action for eviction which was not determined on the merits. Instead the court *a quo* declined jurisdiction and stated that it was not in a position to determine the validity of the applicant's lease. The second preliminary point raised, in the opposing affidavit was one of *locus standi in judicio*. The applicant submitted, correctly in my view, that the law which governs this issue is to be found in the case of *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority*⁵, where the court stated that;-

“The common law on *locus standi in judicio* of a party instituting proceedings in a court of law is that, to justify participation in the action a party must show that he or she has a direct and substantial interest in the right which is the subject matter of the proceedings and the relief sought, and not merely a financial interest which is only an indirect interest in the litigation.”

It is my considered view that it cannot be said that the applicant does not have a direct and substantial interest in the matter of a stand allocated to him in terms of a lease agreement which was not formally terminated and in terms of which he paid his rentals on time, and proof of attachment is attached. Quite clearly the holder of a valid lease agreement has the authority to sue for ejection, because he is entitled to vacant possession of the leased premises. See *Pedziwa v Chikonyora*⁶, *United Watch & Diamond Co Private Limited v Disa Hotels & Anor*⁷, *AAIL (SA) v Muslim Judicial Council*, *SA Optometric Association v Frames Distributors Private Limited*⁸. This preliminary point is dismissed for lack of merit. I also am of the view that there are in material disputes of fact which are incapable of resolution on the papers. See *Muzonda & Ors v Usaiwevhu & Ors*⁹, *Supaplant Investments Private Limited v Edgar Chidavaenzi*¹⁰, *Vimbiso v Dairiboard Employees Ownership Trust*¹¹. None of the preliminary points have merit. The 2nd respondent, despite being served with a copy of the application, did not bother to take the court into its confidence. At the hearing of the matter the 1st respondent was barred for failing to file heads of argument on time.

⁵ SC56-07

⁶ 1992 (2) ZLR 445 (SC)

⁷ 1972 (4) SA 4)(c)

⁸ 1985 (3) SA 100

⁹ HB107-12,

¹⁰ HH 92-09

¹¹ HH235-15

Turning to the merits of the matter, the requirements of a final interdict are settled. They are;-

The requirements for a final interdict are well known and were set out by BARLTLET J in *Umb Zimbabwe Limited v The Zimbabwe Independent & Anor*¹² they are:

- (a) A clear right
- (b) Irreparable injury actually committed or reasonably apprehended; and
- (c) The absence of similar protection by any other remedy.

See *Setlego v Setlego*¹³ which appears to be the primary source relied on by the court in determining the requisites of a right to claim an interdict. See also *Sanchez Private Limited v Farmers Agricore (Pty) Ltd*¹⁴ The court in that case analyzed the difference in the requirements of an interim interdict and a final interdict. In my view the most fundamental difference is in the standard of proof required. Proof on a balance of probabilities as opposed to *prima facie* evidence. It is now trite that the clear right must be established on a balance of probabilities. See *Econet Private Limited v Minister of Information, Posts and Telecommunication*¹⁵, *Zesa Pension Fund v Clifford Mushambadzi*¹⁶.

It is my considered view that the lease agreement and proof of payment of the rent establishes a clear right which vests in the applicant. On a balance of probabilities, the lease agreement is valid. The first respondent did not dispute that the applicant and the second respondent entered into a lease agreement. He simply averred that the cooperative had superior title to the applicant, which title had presumably been passed on to him. This allegation was not proved by the first respondent. The fact that he paid subscriptions to a cooperative, does not establish whether the cooperative had title to the stand in question, whether such title was legal, or capable of being alienated to him, at the material time. Clearly the applicant will be irreparably prejudiced if he is unable to take vacant possession in these circumstances. No other remedy would be suitable or adequate. The requirements of a final interdict have been met.

In the result the applicant is granted an order in terms of the draft, as follows;- it be and is hereby ordered that;-

1. The 1st respondent, and all those deriving authority from him be and are hereby interdicted from interfering in any way, with applicant's occupation of Stand 2087 Acorn Township Goromonzi.
2. 1st respondent shall pay costs of suit on an Attorney-Client scale.

¹² 2000 (1) ZLR 234 (h) @ 239

¹³ 1914 AD 221 @227

¹⁴ 1995 (2) SA 781 (A) @ 789B

¹⁵ 1997 (1) ZLR 342(H)

¹⁶ SC 57-02

Mapendere & Partners, applicant's legal practitioners
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