PEACEY ESTATES (PVT) LTD
versus
GEORGE MAKAWA DAKA

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 24 January 2017 & 8 November 2017

Opposed Matter

A.K Maguchu, for the applicant
R Mutindindi, for the respondent

FOROMA J: In this opposed application the applicant has sued respondent for an order of ejectment of the respondent and all those claiming occupation through respondent occupation from applicant's commercial premises at Chedgelow Farm and holding over damages in the sum of $600.00 per month with effect from the 1st July 2016 to date of vacation or ejectment. The following facts are common cause between the parties.

i. At all material times respondent was employed by applicant.
ii. It is also common cause that the respondent is presently in occupation of commercial premises (the property). However the basis of the occupation is disputed with applicant claiming that respondent occupies the property in terms of a lease agreement entered into on the 6th January 2012 while the respondent claims that he occupies the property as his own the same having been donated to him by applicant about 2009 when Plot 1706 together with the property were donated to him. Respondent thus claims that since then he has been in occupation and used the property without payment of rent i.e. free of charge.

Applicant disputes that the property was donated to respondent and argues that to the extent that it is accepted that the property is a portion of Chedgelow Farm such alleged donation would be unlawful as being in contravention of the Regional Town and Country Planning Act [*Chapter 29:12*] as no donation could have been done without a permit for sub-division.

Whilst applicant claims that it is the owner of Chedgelow Farm in paragraph 4 of the founding affidavit applicant contradicts this assertion in paragraph 8 of the answering affidavit where it says "While applicant operates on the farm the title to the property is held by a land holding company applicant or its management could not have donated a portion of the property to which applicant has no title."

Although applicant claims that respondent entered into a lease agreement in respect of the property respondent disputes this and he claims that he occupied the property free of charge. It is also worth noting that the alleged lease agreement records the parties as follows C. Danckwerts (the lessor) and M Daka (the lessee). There is no suggestion in the entire agreement that C Dackwerts was acting on behalf of the applicant or the owner of the farm. On the other hand respondent claims in its opposing affidavit avers that the property in question was donated to him by applicant through applicant's Managing Director.

Applicant has also premised its ejectment proceedings on the basis that the respondent's contract of employment has since been terminated by retrenchment and that therefore respondent has no legal right to continue occupation of applicant's commercial premises. Respondent on the other hand disputes that his occupation of the commercial premises was linked to any employment. Respondent also disputes the suggestion that the has been retrenched as there is still a dispute on the period of service that he should be credited with for purposes of calculating the terms of the retrenchment package.

The disputed facts appear to be material to the resolution of the dispute. While it is correct that the court should adopt a robust approach in order to resolve the disputed facts on the papers that should not be done if as a consequence an injustice will be done to one or both of the parties – *Room Hire Co (Ptd) Ltd* v *Jeppe Street Mansions Pty Ltd* 1949 (3) SA 1155 (T).

See also *Joosab & Others* v *Shah* 1972 (4) SA 298 R.

It is accepted that when a court is faced with a material dispute of fact it can do any of three things namely (1) dismiss the matter or (ii) refer the matter to trial or (iii) hear oral evidence to resolve the material dispute of fact – see *Miller* v *Reussot* 1975 (1) RlR 324
Smit vs Smit 1980 (3) SA 1010 (0). Lalla v Spafford N O and Others 1973 (2) RLR 241

The applicant does not consider any dispute of fact raised to be material and quotes the case of *Kaystows Ltd* v *LD Ineson P/L* 2006 (1) ZLR 457 (SC) where the court in addressing allegation of material disputes of fact in an eviction matter held – "Care must be taken not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral

evidence, for to do so might well encourage a lessee against whom ejectment is sought to raise fictitious issues of fact thereby delaying the resolution of the matter to the detriment of the lessor."

Bearing in mind the caution in *Kingstons Ltd* v *LD Ineson P/L* supra l consider that not every dispute of fact raised by the respondent is capable of resolution through the adoption of a robust approach to the facts as some are definitely incapable of resolution on the papers and yet so material to the resolution of the dispute. Applicant has for instance averred that applicant entered into a lease agreement with respondent in respect of the property whose occupation is in dispute and yet respondent has not only disputed the existence of such lease agreement but has averred in rebuttal that he never paid any rentals for the period he had been in occupation and applicant had not produced any evidence to discredit respondent's claim disputing the existence of the lease. On the other hand applicant which has confessed that it is not the owner of the Chedgelow Farm has not shown what authority C Danckwerts had to represent the owner of the commercial premises for purposes of entering into the lease agreement and yet applicant's claim for holding over damages is premised on the said lease agreement. It is not clear whether Danckwerts in the alleged lease agreement represented applicant or the owner of Chedgelow Farm.

It is not clear what authority the applicant (who is not the owner of the farm on which is located the commercial premises) has to eject the respondent from the commercial premises. Applicant has argued forcefully against the claim by respondent that the commercial premises were donated to respondent on the basis that not only is there no evidence of such donation but that any such donation would be a nullity as being in contravention of the Provisions of the Regional Town Country Planning Act *supra* as no sub-division permit authorising donation existed. Forciful though this argument sounds the dispute on the existence of a lease agreement between the parties remains sticking out like a sore thump.

I therefore find that the factual dispute that exists in this case are such that they cannot be resolved on the papers filed. I however do not consider the resolution of the factual disputes to be essential for the disposal of the matter at hand. The basis of the applicant's claim has been pleaded as the lease agreement based on ownership by applicant of the property in dispute it being applicant's claim that the lease agreement was terminated on ccount of termination of the respondent's employment contract through retrenchment. Applicant has unreservedly conceded that it is not the owner of the property thus destroying the validity of the lease agreement pleaded.

In the absence of any valid lease agreement no basis for the claim for ejectment or holding over damages can be said to have been established by applicant. The concession by respondent that applicant was owner of the property in dispute is not only misplaced but cannot avail the applicant in light of respondent's denial of the existence of a lease agreement.

In the circumstances the application is hereby dismissed with costs.

Dube, Manikai & Hwacha, applicant's legal practitioners
Messrs Matsikidze & Mucheche, respondent's legal practitioners