INVICTUS (PRIVATE) LIMITED
versus
SCHALK LESSING

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 5 and 11 November 2009

L Uriri, for the applicant
M Mandewere, for the respondent

GOWORA J: The applicant herein is the registered owner of an immovable property commonly known as 425 Dandaro Village. The applicant has owned the property since April 2004. In this matter the applicant is seeking the eviction of the respondent from the premises. The respondent is opposed to the granting of the relief being sought.

The respondent, in seeking to oppose the order being sought has raised a point *in limine*. He avers that there are many disputes of fact on the papers which cannot be disposed of without the hearing of oral evidence. He alleges that he occupies the property with the consent of one Margaret Kathleen Matthew and her husband. He said that these two had sold the property to him in February 2004 and that this alleged sale was an issue before this court in case number HC 1454/05.

This court, on 4 October 2006, did under that case number issue out a judgment in terms of which the respondent was evicted from the premises. This judgment is however the subject of an appeal to the Supreme Court. I will therefore not comment on the findings by the learned judge in that matter. The respondent contends further that even in these proceedings it is the said Margaret Matthews and her husband who are seeking to evict him and his family through the medium of the applicant.

It is correct that the Matthews have been litigating with the respondent under other case numbers for his eviction from the house. On 23 November 2006, Margaret Matthews filed an application for leave to execute pending appeal which was unsuccessful. In his opposing affidavit to that application, the respondent made the following averments under oath:

Para 3(e)(i)

> "In my notice of appeal I raised a number of grounds against the judgment. In essence I contended that I had offered to buy the property from the applicant to which the applicant did not act.
>
> 3(e)(ii)
>
> In any case the applicant had acted prematurely in seeking my eviction when I was expecting a written agreement to be signed by both parties.
>
> 3(e)(iii)
>
> I deny that I appealed in order to frustrate the applicant. I raised the necessary grounds of appeal. I want to protect **the offer** (my emphasis) I made to purchase the house."

It is clear that whereas in the application before me the respondent contends that he purchased the house from Mrs Matthews in the earlier application where he was pitted against her he told the truth that he had in fact offered to purchase the house but Mrs Matthews did not, as he put it "act". I therefore find that there is no dispute of fact on the alleged purchase of the house by the respondent from Mrs Matthews.

As to whether or not it is Mrs Matthews and her husband trying to evict the respondent through the applicant is concerned, this averment has no merit. The applicant is the registered owner of the property as the title deeds would show. The respondent has not, apart from making a bald averment as to their alleged involvement in this application, laid any foundation for his claim about how they are acting and I find no substance in the allegation.

It is correct that the respondent assumed occupation through Mrs Matthews in terms of an agreement of lease. It is not clear in what capacity the said Mrs Matthews assumed control of the premises and leased them to the respondent. At the time that the lease agreement was concluded the property was registered in the name of Wenham Investments (Pvt) Ltd. The capacity of Mrs Matthews to have concluded the agreement in the first place was raised by the applicant in these proceedings. She is not a party before me but the respondent apart from stating that her right to enter into the agreement was recognized by this court, the respondent has not been able to place me any facts which would confirm the legal capacity for Mrs Matthews to have leased the property to him. In my view he has not even been able to defend the legality of the lease agreement that he alleges existed before the incidence of the applicant on the scene. He has also claimed that he is on the premises with the consent of Mrs Matthews,

which claim I find untenable as she has been actively seeking his ejectment from the premises as far back as 2005 as the pleadings will show.

Coming to the present, the applicant is now the registered owner of the premises. It is therefore entitled to recover the same unless the person in occupation is vested with an enforceable right against the owner. See *Chetty v Naidoo*[1] where JANSEN J.A. stated the following

> "… It may be difficult to define dominium comprehensively *(cf. Johannesburg Municipal Council v Rand Townships Registrar and Others*, 1910 T.S. 1314 at 1319) but there can be little doubt (despite some reservations expressed in *Munsamy v Gengemma*, 1954 (4) S.A. 468 (N) at pp 470H-471E) that one of its incidents is the right to exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res*-the onus being on the defendant to allege and establish any right to continue to hold against the owner (*cf. Jeena v Minister of Lands*, 1955 (2) S.A. 380 (A.D.)"

The applicable action is the *rei vindicatio* which applies for both movables and immovables and it is an action *in rem*.[2] An owner who institutes a vindicatory action need allege and prove no more than that he is the owner and that the property is in the possession of the defendant at the time that the recovery action is commenced. If the owner does not go beyond proving ownership in the *res*, then the defendant has the onus to establish any right to retain possession of the thing being sought to be recovered. Thus, in *casu*, the respondent can only remain therein if he can establish a legal basis to do so. He has alleged an agreement of lease with Mrs Matthews. Mrs Matthews is not the registered owner. If his alleged defence is based on an agreement of lease, such *defence* would fail unless it was concluded with the applicant herein or if it had been entered into with the previous registered owner and was at the time that the applicant assumed ownership still in force. His only recourse would be to allege an agreement of lease with the applicant. He has attached an agreement of lease concluded on 10 January 2004 with Mrs Matthews. An examination of the Deed of Transfer reveals that transfer to the applicant was effected on 6 April 2004. He cannot claim therefore to have

[1] 1974 (3) S.A. 13 at p 20C

[2] The Law of Property –Silbeberg 3ed p 274.

concluded a lease agreement with the applicant as it assumed ownership after the lease agreement was concluded. The respondent has never held an agreement of lease with the registered owner of the premises in question at any stage. He did not purchase the property and consequently he has not established a right to remain on the premises.

The respondent further contends that he is a statutory tenant. A statutory tenant can be protected from eviction as long as he shows that he is paying rentals. Apart from alleging that he is a statutory tenant the respondent has not even claimed that he has been paying rentals. In case number HC 7306/06 the respondent claimed that Mrs Matthews had not indicated how much rental was due to her and further that she had made no demands for rentals. That constitutes a clear admission in my view that he had not paid rentals. In this application the respondent has conveniently left the issue of rentals unsaid.

The applicant, as part of the order sought, prays that the order not be suspended in the event that the respondent appeals against this judgment. The respondent has not challenged the prayer for the order to remain operational even in the event of an appeal being noted. At common law the noting of an appeal suspends the operation of the judgment appealed against. It is trite that the court has the discretion to grant an applicant leave to execute a judgment pending appeal.

In *Whata* v *Whata*[3] GUBBAY CJ stated that the principle to be applied by the court considering an application for leave to execute pending appeal is what is just and equitable in the circumstances. The enquiry would involve the assessment of factors such as the potentiality of irreparable harm or prejudice being sustained by either the successful or losing party and if by both, the balance of hardship or convenience,; and the prospects of success on appeal, including whether the appeal, is frivolous vexatious or has been noted for some indirect purpose such as to gain time to harass the other party.

The applicant in para 12 of the founding affidavit alluded to the respondent probably noting an appeal to gain more time in on going occupation of the disputed premises. It also opined that an appeal would have no prospects of success. There was, however, no attempt to deal with the other factors that must be considered in an application for leave to execute. I am of the view therefore that in the event that the respondent notes an appeal against this order, the applicant may at that stage lodge and file an application for leave to execute pending appeal

[3] 1994 (2) ZLR 277 (S)

In this regard I wish to respectfully associate myself with the remarks of the learned Chief Justice in *Whata's* case where he stated at p 281:

> "The need to take account of such factors serves to underscore that it is contrary to the basic tenets of natural justice for a court to order that its judgment be operative and not be suspended, before giving the unsuccessful party the right to be heard as to why execution should be stayed".

In the premises the applicant's claim against the respondent for his ejectment from the Dandaro house and an order will issue in terms of the draft. The application succeeds to that extent. The respondent is ordered to pay the costs of this application.

Atherstone & Cook, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, respondent's legal practitioners.