PLAXEDES MASIYA
versus

WELLINGTON MANGWANYA
and
JOHN MARANGE
and
MINISTER OF LOCAL GOVERNMENT
and
PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE 1 November 2022 & 20 February 2023

Mr *T G Mukwindidza*, for the appellants
Ms *T Kadhau*, for 1st respondent
No appearance for the second respondent

Civil Appeal

MUCHAWA J: This is an appeal against a decision of the Magistrates Court wherein the first respondent was awarded an order to evict the first and second appellants and all those claiming occupation through them, from stand number 7006 Retreat, Waterfalls, Harare.

The appellants are disgruntled by this order and they filed this present appeal on the following grounds;

1. The court *a quo* erred and seriously misdirected itself at law and on the facts in making a finding that there was no proper allocation of stand 7006 Retreat, Waterfalls, Harare in circumstances where the evidence showed that the first appellant had been properly allocated the stand by her cooperative, Zvido Zvevana Housing Cooperative and not the Apex Board.
2. The court *a quo* seriously erred and misdirected itself at law and on the facts in finding that first appellant had no rights and interests in stand 7006 Retreat, Waterfalls, Harare

notwithstanding that first appellant had provided evidence showing that she had rights flowing from the partnership agreement between the Apex Board and the second respondent herein.

3. The court *a quo* grossly erred and misdirected itself at law in finding that the first respondent had *locus standi* to evict the appellants in circumstances where the appellant failed to prove the *locus standi* given that lease agreement was not issued in respect of a vacant stand.
4. The court *a quo* grossly erred and seriously misdirected itself at law and on the facts in upholding an irregular lease agreement which was founded on a defective allocation done by Harare South Housing Union Cooperative and was issued in violation of an extant partnership agreement between the Apex Board and the second respondent herein.

I deal with these grounds of appeal in turn, below.

Whether the allocation of stand 7006 Retreat, Waterfalls, Harare, to the appellants was improper.

Mr *Mukwindidza* submitted that the court *a quo* erred on the facts and evidence when it found that the allocation in favour of the first appellant was improper. Such finding is alleged to have been based on a misdirection on the facts which was so outrageous and in defiance of logic given the totality of the evidence presented by the appellants. The court *a quo* is alleged not to have taken into account, the first appellant's defence that she had been allocated the stands by her cooperative Zvido Zvevana Housing Cooperative on 8 August 2012. The allocation which was tendered in evidence appears on p 120 of the record. Such allocation was also confirmed by first appellant's witness, Steven Chisenga as appears on p 35 of the record. Even the first respondent's lawyer confirmed this allocation on 21 of the record. Further to this the first appellant explained that Zvido Zvevana Housing Cooperative's allocation was based on an allocation done by the Apex Board on 3 August 2012 as appears on p 118 of record. This fact is confirmed on page 36 of record by first appellant's witness, Steven Chisenga.

Mr *Mukwindidza* contended that despite the clear evidence from the first appellant of the allocation by Zvido Zvevana Housing Cooperative, the court *a quo* misdirected itself by making the following finding on p 6 of the record;

"The defendants on the other hand avers that the third defendant Plaxedes Masiya is the rightful owner of the stand in terms of which she was allocated the stand by the Apex Board which was given authority by the Ministry of Local Government to distribute land."

The court *a quo* is said to have continued in this route of reasoning by concluding as follows;

"It therefore follows that if ever the Apex Board allocated land to the defendants or any other party, such allocation is null and void in the eyes of the court since section 9 clearly states that Apex Board does not have such mandate of allocating land to people."

The total disregard of the evidence about the allocation by Zvido Zvevana Housing Cooperative is argued to be a misdirection as relevant evidence was disregarded leading to a wrong conclusion at law which was that it was the Apex Board which had done the allocation. It was argued that the court *a quo* should have placed due weight on the allocation by Zvido Zvevana Housing Cooperative as read together with the Partnership Agreement between the Apex Board and the Ministry of Local Government dated 2 August 2012. In the circumstances, it was argued that the allocation to first appellant was therefore regular.

Ms *Kadhau* submitted that the appellants had indeed submitted that the first appellant had been allocated the stand by Zvido Zvevana Housing Cooperative. She went on to make submissions on the first respondent's allocation. She averred that though the appellants had claimed that the first respondent was in possession of a fraudulent lease agreement, they failed to show that the lease agreement had been cancelled and no one appeared on behalf of the second respondent to testify to that. Instead, it is alleged that the second respondent provided a confirmation letter that first respondent is the owner of the stand in issue.

Furthermore, Ms *Kadhau* submitted that the first respondent was given a letter from Chenjerai Hunzvi confirming that the first respondent is the legal owner of the stand. Reference is also made to a resolution letter signed by the second respondent ministry as confirmation that second respondent is the beneficiary of the land in dispute. It is argued that the first respondent has personal rights over the stand.

The rest of Ms *Kadhau*'s submissions go to justify the first respondent's claim and the legal basis for it. She does not venture into considering whether the court *a quo* excluded considering some of the appellants' evidence resulting in a gross error.

In *National Foods Limited* v *Mugadza, SC 105/95*, the Supreme Court held, as indeed it has in a number of other cases[1] that a serious misdirection on the facts amounts to a misdirection in law. In *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (SC) at 670 D KORSAH JA elaborated on this point as follows:

> "… an appeal Court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at such a conclusion. *Bitcon* v *Rosenberg* 1936 AD 380 at 395 – 7; *Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 ALLER 665 (CA) AT 671* E – H; *CCSU* v *Minister for the Civil Service supra at 951* A – B; *PF Zapu* v *Minister of Justice* (2) 1985 (1) ZLR 305 (5) at 326 E – G."

In *casu*, the appellants have clearly shown, as conceded by the first respondent's legal practitioner, that the court *a quo* failed to consider the appellant's evidence that she had been allocated the stand by Zvido Zvevana Housing Cooperative. The ruling is completely silent on this fact. Instead it latched onto a fact that the appellants had said that the land was allocated by the Apex Board. Needless to say, this led to an erroneous legal conclusion as the court a quo was saying the Apex Board had no authority to allocate land.

It is my finding that having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at such a conclusion. This ground of appeal therefore succeeds as there was no proper factual and legal basis to find that the allocation to the first appellant was improper.

Whether the first appellant had any rights and interests in stand 7006 Retreat, Waterfalls, Harare flowing from her allocation by Zvido Zvevana Housing Cooperative and the Partnership Agreement dated 2 August 2012

Would it have made a difference if the court a quo had considered the allocation by Zvido Zvevana Housing Cooperative to the first appellant? This is what this second ground of appeal addresses.

[1] See also Reserve Bank of Zimbabwe V Granger & Anor 1996 (1) ZLR 664 (SC), Muzuwa v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (SC) and Chinyange V Jaggers Wholesalers SC 24/04

Mr *Mukwindidza* submitted that the allocation by Zvido Zvevana Housing Cooperative dated 8 August 2012 gives the first appellant rights to occupy the stand in question. This allocation is alleged not to be based on nothing but that it was based on an allocation that was done on 3 August 2012 in favour of Zvido Zvevana Housing Cooperative by Harare South Housing Apex Cooperative Society Limited being the Apex Board. The Apex Board is alleged to have been appointed as a developer of Retreat Farm by the Ministry of Local Government, Public Works and National Housing as confirmed by the first appellant on p 31 of the record. The court was referred to the Partnership Agreement which is between the Ministry of Local Government and the Apex Board. This agreement appears on pp 236 to 241 of the record and clauses 3.5 and 3.6 are relied on to argue that the Apex Board had a responsibility to advertise the project and submit a list of paid up beneficiaries to the Ministry of Local Government for processing of lease agreements. The first appellant is said to have confirmed this process on p 32 of record and it was argued that following the allocation by Zvido Zvevana Housing Cooperative to first appellant she is awaiting the process of submission of her name to the Ministry of Local Government for processing of the lease agreement and this would be done once the stand was fully developed and serviced. It was argued that she is not disqualified from this and she therefore had rights and interests in the stand particularly as she has been in occupation of the stand since the allocation in 2012. Furthermore, Mr *Mukwindidza* argued that the appellants had proved a right of retention against the owner of the property, the Ministry of Local Government and should be allowed to remain on the property. This right was said not to have been disputed.

It was contended that, on the contrary, the first respondent had produced a lease agreement which does not pass the test set in clause 3.6 of Partnership Agreement and the lease was therefore irregular. The first respondent is alleged not to have produced any allocation made in favour of his cooperative, Chenjerai Hunzvi by the Ministry of Local Government or any lawful entity at law before the lease agreement was processed. The first respondent's claim, it was argued, could not have defeated first appellant's rights and interest in the property which rights and interests accrued before the first appellant's alleged allocation and the lease agreement issued in his favour.

Ms *Kadhau* submitted that the appellants did not produce anything entitling them to occupy the stand either in the form of deeds, cession or a lease agreement. It was argued that the land in question is State land and the Minister of Local Government and National Housing is mandated to

alienate it exclusively and the Apex Board was never given authority to distribute land and its role was limited to ensuring proper administration of cooperatives as it is an affiliation of cooperative societies. It was argued that as the appellant was in possession of a lease agreement from the Ministry, it is clear that he had personal rights over the stand. Reference is made to section 9 of the Cooperatives Act [*Chapter 24:05*] to argue that the Apex Board's administrative duties do not include the distribution of land. Furthermore, it was contended that the appellants had the onus to prove that the allocation done by Zvido Zvevana Housing Cooperative was indeed valid.

Section 9 of the Cooperatives Societies Act provides as follows,

"**Objects and functions of apex organizations**
Every apex organization shall have any or all of the following objects and functions—
(*a*) providing information, education, training and advice to its member societies;
(*b*) assisting formation committees and emerging societies through the process of registration in terms of this Act;
(*c*) auditing the books and accounts of its member societies through persons competent and authorized to carry out such audit in terms of section *thirty-five*;
(*d*) providing services to its member societies, including—
(i) the joint supply of inputs and the pooling of raw materials; and
(ii) the joint marketing of products; and
(iii) loan facilities for the use of its member societies;
(*e*) carrying out any other activities"

Indeed there is no clear role of land distribution in the Act. One cannot however lose sight of the provision in s9 (e) which says that the Apex Board can carry out any other activities. In my opinion, this was the basis on which the Partnership Agreement was signed and the Ministry allocated responsibilities to the Apex Board as appears in clauses 3(5) and 3 (6) as read with clause 2 (1). Clause 2(1) makes clear that the role of the Ministry was to contribute to the project the land owned by the State at intrinsic value. The Apex Board's role was to design, engineer, procure, finance and develop the requisite infrastructure. In doing this, this role is explained in clause 3 (5) as being responsible for advertising the project or being its agent and in clause 3 (6), it would submit the list of paid up beneficiaries to the Ministry for processing of leases. In terms of clause 4 (1) beneficiaries had to pay the cost of constructing the requisite infrastructure to the Apex Board. Clause 4 (2) provides that no beneficiary shall obtain title to the land until he pays the Apex Board the full cost of development.

On p32 of the record the first appellant confirmed that she got the land through her cooperative which was allocated the land by the Apex Board and awaiting recommendation for processing of the lease once the requirements in clause 4 (1) and 4 (2).

On p 242 is a letter from the Ministry of Local Government, Public Works and National Housing dated 21 December 2016 which confirms the role played by the Apex Board. It is stated as follows;

> "It is known by the Ministry that before the Harare South Housing Association: Apex Board was dissolved in July 2012, it had subdivided and allocated stand 315 Retreat measuring 67,2 hectares into 620 residential stands which were then allocated to 23 housing cooperatives in Retreat"

On record p 119 is a letter from the Apex board which allocated several stands to Zvido Zvevana Housing Cooperative including stand 7006. The proof of the subsequent allocation of the stand to the first appellant on 8 August 2012 whose proof is on page 120 by Zvido Zvevana Housing Cooperative Society flowed from the above. The first appellant's name appears as beneficiary number 93 on page 122 of record.

There appears to be a clear irregularity in the process followed by the first respondent. There is no clarity as to who recommended that the first respondent should get a lease agreement particularly as the land was already occupied by the appellants. The Ministry's letters on pages 242 and 243 confirm the "rampant double allocations and numerous court cases that resulted from the double allocations." As at June 2021 the Ministry was verifying the double allocations and stopped issuing any new leases. As early as 21 December 2016, the Ministry was aware of the problem of double allocations and already working to resolve it. It is striking that the letter confirming allocation of this stand to the first respondent is dated 30 June 2017 (see p 87) yet the lease agreement on pp 91 to 96 was already issued on 19 December 2016. There is clear inconsonance if one has regard to the process set out in clauses 3 (6) and 4(2) of the Partnership Agreement. The first respondent's evidence is also not consistent. He first says that he bought the stand from the Ministry then again says it was allocated by Chenjerai Hunzvi Housing Cooperative.

Though the land in issue is State land, by entering into the Partnership agreement, the Ministry abrogated its powers both expressly and impliedly, to the Apex Board, and in turn, housing cooperatives, to allocate land to beneficiaries and recommend beneficiaries for lease

processing after they had met the requirements set out. It is my finding, in the circumstances, that the first appellant had rights and interests in stand 7006 Retreat, Waterfalls, Harare. This second ground of appeal therefore succeeds.

Whether the first respondent had *locus standi* to evict the appellants

Mr *Mukwindidza* submitted that the first respondent should not have been found to be the holder of personal rights entitling him to evict the appellants for several reasons. The first reason is that the first respondent was not allocated a vacant stand by the Ministry which is the owner of the land. This is confirmed by the first respondent's witness on page 12 of record who said that upon allocation of the stand when the first respondent went to the stand, he could not build on the property as he realized that someone had already started construction on the property that is second appellant. Secondly, the lease agreement of the first respondent is criticized as not being a lease to buy agreement as it did not refer to the purchase price on pages 46 to 56 and no such purchase price was ever paid. It is evident from a perusal of the lease agreement paragraphs 14 and 18 that the first respondent could only exercise the right to purchase upon fulfilment of certain conditions.

The third reason advanced as working against the first respondent is that the Ministry could not have leased a stand which was already occupied and therefore could not have given the first respondent any rights to the stand. It was argued that as the action brought by the applicant was that of a *rei vindicatio*, it is only available to owners of the property in issue, which at the time of commencement of proceedings, is in possession of a defendant and the defendant fails to prove a right to retain the property. In *casu*, it was contended that the appellants had proved a right to retain the property based on an agreement signed by the Apex Board and the Ministry of Local Government and that the first appellant has a defence against the same Ministry which later on proceeded to enter into a lease agreement resulting in a double allocation. On the strength of the cases of *Sanudi Masudi* v *David Jera* HH 67/2007, *Pedzisa* v *Chikonyora* 1992 (2) ZLR 445 (S), it was argued that before being given vacant possession of the land, the first respondent did not have a real right entitling him to evict anyone from the land in issue. But just a personal right enforceable against the owner entitling to delivery of the land.

Ms *Kadhau* submitted that the first respondent's lease agreement was not defective and he had paid US $ 3 000.00 for the land purchase and receipts had been provided. She supported the court a quo's finding that the first respondent had superior rights over the land as he held a lease

agreement whereas appellants did not have a lease, title deed or cession in respect of the stand. On the strength of the cases of *Claudius Chenga* v *Virginia Chikadaya & Ors SC* 7/13, inter alia, it was argued that once ownership has been proved, the onus is on the defendant to prove a right of retention. See also *Mashave v Standard Bank of South Africa* 1998 (1) ZLR 436 (S).

Interestingly, Ms *Kadhau* relies on the case of *Pedzisa* v *Chikonyora supra* which establishes that a lessee to buy who has been given vacant possession of the property has *locus standi in judicio* to sue to evict an occupant who does not have better title to him or a trespasser. Given the common cause fact that the first respondent was never given vacant possession and confirmation that upon visiting the stand, they found second appellant in possession, it means that the first respondent had no *locus standi*. His personal rights were only limited and were against the second respondent.

The *actio rei vindicatio* was also not available to the first respondent as he was not the owner of the property. This was clearly elucidated by MAKARAU JP, (as she then) was, in the case of *Sanudi Masudi v David Jera supra* where it was held as follows;

> "In my view, the trial court fell into a grave error by finding that the respondent is the owner of the property and is thus entitled to vindicate it from the appellant. It is this error on the part of the trial court that in my view, led to a muddling of the legal principles applicable to resolve an otherwise simple dispute between the parties.
> Based on the authorities, it appears to me settled at law that the *rei vindicatio*, being an action in *rem*, is only available to owners of the property in issue, which at the time of the commencement of the action, is in the possession of the defendant and the defendant fails to prove a right to retain the property as against the owner."

In *casu*, the first respondent had not proved ownership, he simply relied on a lease agreement in circumstances where he had not been given vacant possession. His action had no leg to stand on as he had no *locus standi*. This third ground of appeal therefore succeeds.

Given the findings and issues canvassed under all the grounds above, there is really no legal basis to detain myself by considering whether the first respondent's allocation was defective at law as advanced in ground four of appeal.

Accordingly, this appeal succeeds and it is ordered as follows;

1. This appeal succeeds with costs.
2. The decision of the court a quo be and is hereby set aside and is substituted as follows;

"The plaintiff's claim is dismissed with costs of suit on an ordinary scale."

MUCHAWA J----------

WAMAMBO J agrees----------

Messrs Bere Brothers, appellants' Legal Practitioners
T Kadhau Law Chambers, first Respondent's Legal Practitioners