M.BHIKA BROTHERS (PVT) LTD

Versus

PHILEMON SAMBO

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 10,16 June 2022 & 22 March 2023

Civil trial

B. Ngwenya -for plaintiff
C.Chipere -for defendant

CHILIMBE J

BACKGROUND

[1] Plaintiff seeks the eviction of defendant from premises cited as 26 Craster Road, Southerton, Harare ("26 Craster Road"). Plaintiff also prays for an order directing defendant to settle arrear and holding over rentals.

[2] Defendant, who is operating (a business commonly known as) a "sports bar" at 26 Craster, opposed the relief sought. He disputed plaintiff`s contention that he was but a lessee who had violated occupancy terms. He argued instead, that he had in fact purchased the property concerned.

[3] In his plea, defendant adverted to the following; -the property was put up for sale by an entity known as Tote Zimbabwe. Defendant approached a Mr. Mohammed Ismael Bhika (herein referred to as "Mr. Bhika"), who agreed to advance defendant a loan to purchase the property. Mr. Bhika, who is a director (presumably shareholder) and founder of plaintiff, subsequently altered this arrangement; -he proceeded to pay Tote Zimbabwe the US$280,000 purchase price for the property himself.

[4] Defendant averred that Mr. Bhika then permitted him to take occupation of the premises, renovate it and operate a business thereon. This on the understanding that defendant would make periodic payments toward the purchase price. He effected renovations to the value of US$80,000 and paid a total of US$30,000 toward purchase of the immovable property.

THE ISSUES FOR TRIAL

[5] The matter was referred to trial on the following issues; -

i. What is the legal relationship between the parties? Is it; -
ii. That of landlord and tenant? Or; -
iii. Is it that of seller and purchaser?

[6] The above issues can be viewed against the advice carried in the below dictum of this court. The purpose being to establish where the onus principally lies since ownership of the premises was not in contention. It was held as follows[1]; -

> "I am unaware of any law that entitles a prospective purchaser to have possession of the *merx* against the wishes of the seller, prior to delivery of the *merx* in terms of the sale agreement. I was not referred to any such law during the hearing of the matter."

[7] It was incumbent upon the defendant to offset that onus. Nonetheless, the ancillary claim was largely resolved at commencement of trial. The parties agreed on the following matters; -

i. That should it be held that defendant is indeed a tenant rather than purchaser, then the arrear rentals due as at 1 June 2022 be fixed at $64,171-84.
ii. That the figure of $32,072-44 in the claim for arrear rates due as at 31 December 2018 be substituted an amount of $88,937-90.
iii. That the amount for holding over damages be set at US$400-00 per month with effect of 1 August 2019.

[8] Midpoint in plaintiff`s evidence, the above was further narrowed down as follows; -

i. In the event of the court making a finding that a tenancy relationship existed, it was agreed that defendant could be ordered to vacate the premises and pay a sum of US$30,000-00 or its equivalent at the ruling interbank rate.
ii. That defendant to be ordered to the sum of ZWL $88,937-50 being the equivalent of municipal rates due and payable by him on the property.
iii. That holding-over damages to remain fixed at US$400-00 per month from July 2022.

[1] *Medical Investments Limited v Rumbidzai Pedzisayi* HH 26-10 at page 5.

iv. That the issue of costs be left for the determination of the court.

[9] Whilst I found this convergence of matters by the parties encouraging, I was somewhat puzzled by it. I will outline the cause of my curiosity in the disposition paragraph.

PLAINTIFF`S CAE

[10] Plaintiff called one witness, Mrs Gertrude Nomsa Mutsinze ("Mrs Mutsinze), its Administration and Properties Manager. Her role within plaintiff company might be better appreciated as that of an operations officer. Although the nature and extent of plaintiff`s property portfolio was not disclosed, it may be accepted that it is sizeable. Mrs Mutsinze was responsible for managing these properties.

[11] In that capacity, she engaged tenants, followed up on arrear rentals, attended to correspondence and generally addressed various queries associated with the properties of plaintiff. This overarching administrative role was not challenged. She maintained the accounts, ledgers and correspondence which were admitted, also through her, as evidence during the trial.

[12] The witness testified that upon joining plaintiff company in 2016, she was introduced to all tenants including defendant. The gave the following account of her dealings with defendant. She was introduced to, and dealt with defendant at all times as one of plaintiff`s tenants. Mrs Mutsinze` s testimony was that upon taking charge, she addressed a circular on 9 May 2016, to all tenants (exhibit 1) including defendant.

[13] Exhibit 1 was a circular introducing the witness and stipulating changes to the management of the tenancy relationships going forth. Plaintiff was overhauling its property portfolio administration which appeared to be in shambles. It required all tenants to update their particulars or "KYC" details. Defendant, like a number of other tenants did not comply.

[14] The witness submitted the following correspondence, all except one issued by her; -

i. 09/05/2016- introductory circular requiring KYC details -exhibit 1

ii. 16/03/2017 – reminder notifying defendant of rent arrears-exhibit 2

iii. 27/09/2017 -another remainder on outstanding arrears-exhibit 3

iv. 19/12/2018-notification of rent review and addendum to lease agreement-exhibit 4

v. 21/05/2019-rent reviews effective July 2019-exhibit 5

vi. 02/07/2019-further rent reviews effective 1 July 2019 following "SI 42"-exhibit 6

vii. 22/08/2019-letter from defendant setting out a rental offer of US$400-00 per month among other proposals to acquit the arrears-exhibit 7.

viii. 04/06/2020-rent review July 2020-exhibit 8

[15] It was put to her that whilst she addressed a total of 6 letters between the period March 2016 up to the point of issuance of summons, defendant respondent in writing only once- by exhibit 7 dated 22 August 2019.Mrs Mutsinze stated that although defendant did not respond in writing to her correspondence, he communicated with her by telephone, WhatsApp messaging and email.

[16] In all their consultations, defendant insisted that he would engage Mr. Bhika directly in order to resolve the issues which the witness was raising with him. This explains firstly, why defendant continued to run on the basis of a verbal lease. Secondly, according to the witness, other tenants also insisted that they were dealing with Mr. Bhika to address the same issues. The witness was quizzed at length by Mr. *Chipere,* counsel for defendant, on the lack of consistency in the rental statements. Her response was that (a) the payments were impacted by currency changes, (b) reflected the erratic payments by defendant and (c) factored in the interventions of Mr. Bhika who accommodated requests from defendant and prescribed a rental lesser than that which the witness had fixed.

[17] The witness stated that she drew the attention of Mr. Mouse Bhika to defendant`s offer to purchase the property as set out in paragraph 3 of defendant`s letter to plaintiff (exhibit 7). Mr. Mouse Bhika`s guidance was that defendant`s offer would be considered once received.

THE DEFENDANT`S CASE

[18] Defendant invited the testimony of Mr. Mohammed Ismail Bhika, on subpoena, aged 93 who stated thus; he was the founder and director of plaintiff. He organised the purchase, on behalf of plaintiff, of 26 Craster Road "from the horse racing people" for US$240,000. He

was well known to defendant whose father had been a close friend for a period of over 40 years. Having invited and showed defendant the property, he inquired if defendant was interested in leasing it. Defendant took up the invitation. Mr. Bhika told the court that he in fact proffered the business ideas which defendant gladly adopted in establishing his sports bar. According to Mr. Bhika, the defendant`s venture at the premises was hugely successful. The witness did not stipulate the exact terms of the occupancy.

[19] Mr. Bhika admitted that at some point, defendant made an offer to purchase the property. It was his further testimony that defendant in fact proposed to make a down payment of US$50,000 for the property. That offer was never followed up. In closing, the witness denied that he had concluded an agreement to sell 26 Craster Road to defendant at all. The testimony of Mr. Bhika was not materially challenged.

[20] Defendant took to the witness stand and related the following account; -he considered Mr. Bhika "a father" owing to the longstanding friendship between Mr. Bhika and defendant`s father. Sometime in 2013, Mr. Bhika, who had chanced upon the property being offered for sale invited defendant to a meeting to negotiate purchase of the property. A representative of the seller by the name Julio attended that meeting. Mr. Bhika indicated during that meeting that he would not pay for the property on behalf of defendant. He stated that he would pay the seller Tote Zimbabwe then resell the property to defendant at a subsequent stage.

[21] Mr. Bhika then excused the defendant from the meeting but later invited him and handed over the keys to the premises. In fact, according to defendant`s testimony, Mr. Bhika intended to hand the title deeds to the property to him but same could not be located. Mr. Bhika "gave him the freedom to use the property as he deemed fit". He duly took occupation toward the end of 2013.

[22] With respect to the actual sale, the defendant testified that the agreement was verbal. The purchase price was a markup of US$30,000 or US$50,000 over the US$180,000 that Mr. Bhika had paid in cash to Tote Zimbabwe for the property. Defendant offered to liquidate the purchase price in instalments. There were no timeframes set for the payment. The witness said he considered the property "a bequeathment from my father".

[23] When plaintiff started issuing various written demands for rentals through Mrs Mutsinze, defendant said he reported this effrontery to Mr. Bhika. According to defendant, Mr. Bhika

indicated to Mrs Mutsinze that "the matter had been settled" and ordered her to leave defendant alone. Finally, defendant informed the court that having taken occupation of the premises, he effected extensive renovations and paid a total of US$25,000 to US$28,000 toward the purchase price. These periodic payments commenced about a year after he occupied the premises.

ANALYSIS OF THE EVIDENCE

[24] Mrs Mutsinze related her story well, and remained faithful to it under cross examination. She referred to her records, part of which were admitted as evidence, whose contents were self-explanatory. Her evidence was a coherent account of an administrator trying to instil good order in her tenant book. The pattern of defendant`s dealings with her reflect a disdainful tenant who was erratic in rental payments, and unwilling to recognise her authority in plaintiff company. Her evidence was that defendant was not the only recalcitrant tenant who sought to hide behind previous relationships with Mr. Bhika in order to evade the new arrangements. Apart from one letter (exhibit 7 dated 22 August 2019), the witness received no written protest from defendant.

[25] I turn to the testimony of Mr. Bhika. Mr. Bhika gave the impression of a fine old gentleman with a benign disposition. His testimony was quite lucid, apart from a few lapses possibly owing to his advanced age. Mr. Bhika testified that being the founder of plaintiff, he had handed over the running of the company to his nephew Mr Mohammed "Mouse" Bhika.It is hardly surprising. Mr. Bhika was advanced in age. His very dealings with defendant suggest a magnanimous person unfettered by the stricter demands of standard business requirements. But he had relinquished the control of plaintiff`s affairs to Mr. Mouse Bhika who in turn appointed Mrs Mutsinze as administrator in charge of the plaintiff`s property portfolio. Mrs Mutsinze proceeded to "read the riot act" to plaintiff`s various tenants by introducing a series of measures to streamline the lease relationships. That aside, Mr. Bhika maintained that his discussion with defendant over possible sale of 26 Craster Road progressed no further than indicative contemplations of such a sdisposal.

[26] This piece of evidence was pivotal. He was definite that no sale was ever concluded. Promises to pay for the building were made by both defendant and his (natural) father but none came to fruition. The defendant neither challenged this witness nor did he offer an explanation as to why Mr. Bhika would so directly contradict the defendant`s story. The very

Mr. Bhika who had practically bequeathed the property to him? Why would he then abandon a person whom he considered his own son in court? The question of an informal trust agreement[2] (where one-party acts as a nominal party to a contract on behalf of an absent beneficial owner) raised by Mr. *Ngwenya* for the plaintiff in his closing submissions does not in fact arise in the present circumstances.

[27] The defendant himself was a terrible witness. His testimony was a colander of contradictions. In his plea he referred to Mr. Bhika having promised to grant him a loan to purchase the property. This story change in evidence in chief and no mention of the loan was made. On one hand, defendant denied that of all the letters written to him by Mrs Mutsinze, he received only one. At one point, he sought to raise issue with the fact that some letters were addressed to him as Mr. Philemon Sambo, whilst others were directed to F&G Bar. This protestation was without regard to the fact that defendant himself wrote exhibit 7 on 22 August 2019 on a letter that went; *Franklin & Goosen P/L ("A Cool Bar For Cool Guys")* and signed it as *"P.D. Sambo, F&G Sports Bar"*. At the same time, defendant made reference to irksome communication from plaintiff which caused him to constantly report to Mr. Bhika.

[28] In his evidence in chief, defendant stated that he approached Mr. Bhika following Mrs Mutsinze`s persistence, and that Mr. Bhika informed her that the matter had been settled. Which matter exactly? Mrs Mutsinze said Mr. Bhika intervened or in fact interceded to only for purposes of reducing the rentals due from defendant. Under cross examination, defendant testified that Mr. Bhika informed him that he would order his staff to leave him alone.

[29] Then there was the issue of title deeds; -firstly, defendant testified that shortly after Mr. Bhika purchased the property, he actually wanted to surrender the title deeds to the property to him, but same could not be found. Secondly, he indicated in exhibit 7, the letter of 22 August 2019 to Mrs Mutsinze, (see [31] below) that the title deeds were awaited from the sellers. Mr. Bhika made reference to no such arrangement.

[30] Defendant further stated under cross examination that he was both a landlord and tenant a matter that he had again, specifically pleaded. Finally, on the actual payments made, the defendant was unclear. He tendered no schedule splitting payments toward capital, municipal

[2] See the Namibian decision of *Oberholzer v Loots & Anor* HC-MD-CIV-ACT-OTH-2017/04333 per UEITELE J,

rates and rentals. For a party meticulously effecting part payment toward acquision of a property, the lack of precision regarding (a) the exact purchase price and (b) the payments remitted, did not prop up defendant`s cause. The defendant did not raise a counter-claim for the improvements he claimed he had effected to the premises.[3]

[31] Defendant authored exhibit 7 dated 22 August 2019. The body of letter is reproduced in full; -

> "Re: F& G Sports Bar: Rentals Offer.
>
> Your attention is drawn to the above-named event.
>
> 1. Having considered the following
> 2. The current economic environment:
> 3. The improvements and developments we have undertaken at the above property.
>
> The improvements stated in No.2 were based on the verbal agreement with Mr. Bhika (Snr) for a Rent-To-Buy arrangement whilst awaiting Title Deeds from Tote Holdings.
>
> We write to kindly make a rental offer of USD 400 (four hundred United States dollars) every month.
>
> We look forward to your kind consideration as we thank you in advance."

[32] Defendant sought to rely rather heavily on paragraph 3 thereof, as the expression and assertion of his rights as purchaser of the property. This letter is unconvincing. It does not carry the tenor of a communication issued by an owner of a building. Instead, it is quite consistent with that typically written by one who fully recognises his status as a tenant. And its paragraph 3 cannot be seriously taken as a bold endeavour to communicate such rights. It was bereft of the details of the alleged transaction. It was certainly not the positive declaration setting out clear conditions, proposals or demands one would expect from a purchaser who was now being mistaken as a tenant at 26 Craster Road.

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[3] See the Supreme Court`s discourse on pleading unjust enrichment in *rei vindicatio* proceedings in *Silonda v Nkomo* SC 6-22 per KUDYA AJA (as he then was).

THE LAW

[33] It is a settled position in *actio rei vindicatio* proceedings that the proprietary rights of an owner generally reign superior to those of claimants. In *Nyahora v CFI Holdings* SC 81-14 the Supreme Court per ZIYAMBI JA held as follows [at 7]; -

> "The action *rei vindicatio* is available to an owner of property who seeks to recover it from a person in possession of it without his consent. It is based on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely to allege that he is the owner of the property and that it was in the possession of the defendant/respondent at the time of commencement of the action or application. If he alleges any lawful possession at some earlier date by the defendant then he must also allege that the contract has come to an end. The claim can be defeated by a defendant who pleads a right of retention or some contractual right to retain the property."[4]

[34] In seeking to evaluate any right of retention the court is enjoined to fully recognise the owners' position. This status was ably demonstrated through a colourful analogy by MAKARAU JP (as she was then) in the famous "lollipop judgment" of *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 266 (H), where it was held at 237 C-F that; -

> "There are no equities in the application of the rei vindicatio. Thus, in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership. The application of the principle conjures up in my mind the most uncomfortable image of a stern mother standing over two children fighting over a lollipop. If the child holding and licking the

[4] See also the long line of cases starting with *Chetty* v *Naidoo* 1974 (3) SA 13; *Jolly v Shannon and Anor* 1998 (1) ZLR 78 (H); *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (H); *Zavazava & Anor* v *Tendere* 2015 (2) ZLR 394 (H); *Savanhu v Hwange Colliery* SC 8-15; *Lafarge v Chatizembwa* 418- 18.

> lollipop is not the rightful owner of the prized possession and the rightful owner cries to the mother for intervention, the mother must pluck the lollipop from the holder and restore it forthwith to the other child notwithstanding the age and size of the owner-child or the number of lollipops that the owner child may be clutching at the time. It matters not that the possessor child may not have had a lollipop in a long time or is unlikely to have one in the foreseeable future. If the lollipop is not his or hers, he or she cannot have it."

[35] Finally MAKARAU JP in *Medical Investments v Pedzisayi* (supra), considered the possible scenarios that could, entitle a party to retain occupation or possession of another`s property pending conclusion of a sale; -

> "I am aware that in some instances, where there is an amicable relationship between the parties, for instance where the employer-employee relationship still subsists or was amicably terminated, the seller may allow the prospective purchaser who is already in possession of the *merx* to retain possession pending finalization of the sale. Another instance that immediately suggests itself is where a tenant purchases the leased property from the landlord. Such a tenant may remain in occupation pending finalization of the agreement of sale and transfer. An analysis of the two examples I have given above will reveal that they are borne out of consent. They cannot thus be cited as precedent for creating any right or entitlement on the part of similarly circumstanced prospective purchasers to enforce possession against the wishes of the seller. Where the arrangement obtains in my view, it is simply an incidence of an owner willingly parting with possession of his property pending transfer of ownership in favour of the possessor. Such willingness on the part of the seller cannot be compelled by an order of court."

DISPOSITION

[36] From the evidence received, it is not in dispute that defendant is in occupation of plaintiff`s property. It is also common cause that the defendant is not in possession of a valid lease agreement. In fact, the owner of the property has exhausted its benevolence and now wants him out. The purported sale agreement has not been proven. In any event, that contract

would, from the evidence received, still remain unperfected. That so even on defendant`s own version.

[37] This I say for the following reasons; - firstly, the defendant has not been able to clearly set out the specific terms of that sale. What exactly was the purchase price? What were the payment terms? How much did he specifically pay? Where is the detailed record showing the amounts paid? And what was the arrangement regarding rentals? What is the split between payments to liquidate the capital amount and the payments toward rentals and municipal charges? The essentials of a valid sale[5] were not proven and defendant carried the onus to do so.

[38] Secondly, the sale on 26 Craster Road was in effect an instalment sale of land[6] as defined in section 2 of the Contractual Penalties Act [Chapter 8:04] whose definition goes; -

> "instalment sale of land" means a contract for the sale of land whereby payment is required to be made—
>
> (*a*) in three or more instalments; or
>
> (*b*) by way of a deposit and two or more instalments;
>
> and ownership of the land is not transferred until payment is completed;

[39] The same Act by section 7 thereof, sets a condition which defendant failed to prove; -

> **7 Instalment sales of land to be in writing**
>
> Every instalment sale of land shall be reduced to writing:
>
> Provided that, where any such contract or any term or condition thereof has not been reduced to writing, the onus of proving the existence of that contract, term or condition, as the case may be, shall rest on the person alleging its existence.

[40] In addition, defendant sought not to rely on his rights as a purchaser under an instalment contract of sale of land set out in section 8 of the same Act. There is therefore no basis upon which defendant validly insist on retaining occupation of 26 Craster Road. Plaintiff succeeds

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[5] *Chikoma v Mukweza 1998 (1) ZLR 541 (S); Warren Park Trust v Pahwaringira &* 4 Ors HH 39-09.

[6] See also *Zimbabwe Reinsurance Company v Musarurwa* HH 141-01; *Mangureni & Anor v Registrar of Deeds & Anor* HH 489-20;

in its claim. I also recognise the consent reached by the parties and will incorporate same into the order.

[41] I may state that my perception, at the time the concession was made and subsequently amended, was that defendant was impliedly acquiescing to the claim. The position adopted appeared inconsistent with a spirited defence of one who claims to have purchased the property. This, view did not escalate to an adverse finding against the defendant. In conclusion, there is a finding in favour of plaintiff and; -

It is hereby ordered that; -

1. Defendant and all those who may claim occupation through him to forthwith vacate the premises known as 26 Craster Road, Southerton, Harare.
2. Defendant pays plaintiff the sum of US$30,000 or its equivalent at the ruling interbank rate on the date of payment as arrear rentals for the premises.
3. Defendant pays plaintiff the sum of ZWL $88,937.50 being the equivalent of municipal rates due and payable by him on the property.
4. Defendant pays holding over damages calculated at the rate of US$400-00 per month from July 2022 to date of termination of occupation, payable in the local currency equivalent at the ruling interbank rate on the date of payment.
5. Defendant pays costs of suit.

B. Ngwenya Legal Practice-plaintiff`s legal practitioners
Charamba and Partners-Defendant`s legal practitioners

CHILIMBE J____ [22/03/23]