DORCAS MUTAPUTA
versus
OLIVER CHITAMBA
and
ABIGAIL CHIRONGOMA
and
VIMBISO TAMIREPI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 23 July, 2019 and 20 February, 2020

Opposed Court Application

CHITAPI J: The applicant seeks the following relief as set out in the draft order to her application.

1. The application for eviction be and is hereby granted; and
2. The 1st respondent and all those claiming occupation through him, be and are hereby ordered to vacate stand no. 2321 Marlborough Township, of stand no. 2550 Marlborough Township, Harare within 7 days of the service of this order; and
3. If the 1st respondent or any person occupying the property through him remains on the property after that date, the Deputy Sheriff be and is hereby authorized to remove him / them and his / their possessions from the property; and
4. Respondent to costs (*sic*) of this application on a legal practitioner-client scale."

At the commencement of hearing of the application, the first respondent who appeared in person stated that he had engaged five different legal practitioners who had to use his words "all deserted him" and he did not have legal representation. He however elected to proceed and argue his case as a self actor.

The applicant is the registered title holder of stand 2321 Marlborough Township of stand 2550 Marlborough Township held under deed of transfer no. 2258/2018 registered on 20 April, 2018. The transferors of the property were the second and third respondents. The second and third

respondents did not oppose this application. The first respondent is in occupation of the property and opposes the application and his eviction therefrom.

The applicant's case is as set out in her founding affidavit as follows: She is employed by National Social Security Authority (NSSA). She purchased the property in dispute on 6 January, 2018 from the second and third respondents as joint sellers as evidenced by a written agreement of sale executed on the same date. The applicant attached a copy of the agreement of sale as annexure "A1" to the founding affidavit. The purchase price for the property was US$80 000.00. The purchase price was to be deposited into NSSA's main account. NSSA held a mortgage bond over the property. The agreement also provided that the purchaser could only obtain transfer upon NSSA cancelling the existing mortgage bond registered in its favour.

The applicant attached documents showing that NSSA advanced her a loan to purchase the property. In the answering affidavit, the applicant clarified the paper trail in regard to the sale of the property. She averred that the second respondent had mortgaged the property in favour of NSSA. On failing to service the mortgage, they gave up the property to NSSA as mortgagee. NSSA in turn was happy to have the first respondent sell the property and further granted a loan to the applicant to purchase the property. By reason of the sale and transfer of the property to the applicant, the second respondent was absolved of liability on the mortgage loan and equally divested of ownership of the property. The applicant is servicing the mortgage loan repayments through deductions made monthly against her salary by NSSA. NSSA has registered a mortgage bond no. 1086/2018 for the sum of $87 216.68 over the property as security for the loan granted to the applicant for its purchase. Despite being the registered holder of title over the property in dispute, the applicant has failed to obtain vacant possession and occupation of the same owing to the refusal by the first respondent to vacate the property. The agreement of sale provided that risk and profit on the property was to accrue or vest in the purchaser on transfer which means that the applicant became entitled to take occupation and possession of the property on 20 April 2018 upon registration of title into her name. The applicant averred that despite being in occupation of the property and receiving notice to vacate the property by 9 August 2018, the first respondent has refused to vacate the property nor even offered to pay rentals for his use of the same.

The first respondent in his opposition to the application raised a preliminary point that there were other matters *lis pendens* in this court involving the same parties and that therefore the court

should not entertain the applicant's suit. It is at this stage convenient to briefly discuss the requirements for a plea of *lis pendens* to be sustainable. The first point to note is that *lis pendens* is not an absolute bar to the exercise by the court of its inherent discussion to determine a dispute before it. The court will exercise a discretion whether or not to determine the dispute where *lis pendens* is raised. In other words, the court can, whilst recognizing that the same dispute is pending in another suit nonetheless exercise a discretion to determine the matter despite the existence of the other pending case. Since the decision to determine a dispute which is already pending is a matter of discretion, such discretion as in practice should be exercised judiciously. A judicious exercise of a discretion can only be properly exercised taking into account the circumstances of each case and determining on a balance, what the courts convenience and that of the parties dictate as well the fairness to the parties of not upholding *lis pendens.* See *Metallon Gold Zimbabwe (Pvt) Ltd & Metallon Corporation PLC* v *Collin Gur*a HH 263/16.

In my view however, the court must keep in mind the mischief or rationale for the *lis pendens* plea. The discretion whether or not to uphold the defence of *lis pendens* must be informed by an understanding of why the defence is provided for. It is an undesirable practice for litigants to flood courts with litigation regarding the same dispute and parties being pursued under different case records and at times in different courts. The fact that such practice should not be favoured is easily understood when one considers that rules of court provide for the filing of counter claims and counter-applications. There is even provision in the rules for third party procedure in terms of which a defendant can seek relief of a contribution or indemnity against another defendant. The idea here is that once a party commences litigation in the court and the same is defended, parties ought to deal with all disputes between them at one time. The procedures for counter claims and third party procedure as I have averted to present a window for realization of these ends. It is certainly is undesirable that parties file a multiplicity of cases on the same matter as no meaningful purpose is to be achieved by commencing a fresh matter where one is already pending and have the two running parallel to each other. Common sense and logic as well as orderly case management favour an approach whereby the pending case is managed and heard rather than allow a later filed case to be determined ahead of the one which remains lodged and pending in the court's registry.

There is one other issue that needs mention. The expansion and decentralization of the High Court by opening additional stations namely Mutare and Masvingo stations was intended to bring the High Court closer to the people in line with the constitutional imperative to promote access to justice. The establishment of the courts have unfortunately seen gold digger minded legal practitioners who are based say in Harare and the parties they represent being based in Harare and cause of action having occurred in Harare, preparing court papers and filing cases in these newly established courts. The result is that the parties will have to travel from say Harare to Mutare or Masvingo High Court at great expense. The legal practitioner makes a killing in fees charged because of the time spent on the road to and from that court. The party who is saddled with costs will have to pay costs which include costs unnecessarily incurred because the Plaintiff or applicant has chosen to engage in forum shopping for selfish reasons. Whilst it is accepted that there are no divisional delimitations in regard to the jurisdictions of the High Court, it means that an unscrupulous litigant who has been sued at say Mutare High Court, may bring a counter action in any of the other High Court stations and if the Plaintiff or applicant pleads *lis pendens*, the submission is then made that the court should exercise a discretion and hear the latter case filed at another station ahead of the first matter already filed and pending at another station. In such a case, there should in my view be exceptional or compelling reasons which the plaintiff or applicant in the second case must advance for court shopping before the court exercises its discretion to disregard the *lis pendens* plea and hear the second matter. It therefore appears to me that where it is shown that the second matter is clearly l*is pendens*, the court should be more inclined to stay the second matter and direct the parties to prosecute the first matter for good and orderly case management unless irrepairable prejudice will result if *lis pendens* is upheld.

Having dealt with the rationale for *lis pendens* and expressed my view on the undesirability of allowing a party to institute a fresh suit dealing with the same subject matter in an already pending suit and the parties are the same, I deal briefly with the requirements for a plea of *lis pendens*. The requisites for the plea of *lis pendens* are the same as for a plea of *res judicata* in that the first filed *pending lis* when juxtaposed against the second one in which objection is taken must be the same in regard to the parties and the *causa sine qua non* or *causa* of action. The celebrated authors Herbstein & Van Winsen in their works; The Civil Practice of the High Courts and

Supreme Court of Appeal of South Africa, Juta, 5th Edition, Volume 1, after considering Roman Dutch Law Authorities state as follows on p 311:

> "The requisites of a plea of *lis pendens* are the same with regard to the person, cause of action and subject matter as those of res judicata which in turn are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint … In order to decide what matter is in issue, one should consult the pleadings not the evidence led" See *Marks & Kantor* v *Van Diggenlen* 1935 TPD 29.

That said, it should also be stated that the effect of a successful plea of *lis pendens* is not the dismissal of the second suit but the court will order a stay of the current suit before it pending the determination of the first filed and pending suit.

Reverting to the case *in casu*, the first respondent's point *in limine* on *lis pendens* cannot succeed. He did not show in his opposing affidavit that the requirements of the *lis pendens* plea are satisfied in relation to the cases which he has cited as pending. The property which is in dispute has already been transferred to the applicant which means that the first respondent has no legal right to hold on to the property unless the title deed in the applicant's name has been cancelled or set aside by the court. The first respondent has indicated that under case No. HC 7156/18 he applied for an interdict from being evicted from the property. In the absence of the court having granted the interdict, the first respondent cannot derive entitlement to remain in occupation of a property in which he has no title to the prejudice of the applicant as the title holder.

Real rights in property should be given effect to and jealously protected. The right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of property, other than agricultural land is a guaranteed right under s 71 (2) of the Constitution. The court is required by the provisions of s 44 of the Constitution to 'respect, protect, promote and fulfil rights given under the Constitution. In *Oakland Nominees Limited* v *Gelria Mining & Investments Ltd* 1976 (1) SA 441 (A) a case cited in the applicant's heads of argument, HOLMES JA stated as follows at p 452:

> "Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property .. if the law did not jealously guard and protected the right of ownership and the correlative right of the owner to his/her property, then, ownership would be meaningless and the jungle law would prevail to the detriment of legality and good order."

The concept of a real right is also discussed by the respected authors on property law, namely; Silberberg and Schoeman in the book, *The Law of Property*, 4th Ed at p 32 wherein it is stated:-

> "A real right is just in rem. It established a direct connection between a person and a thing in the sense that the holder of a real right is entitled to control the use of a thing within the limits of his right. In other words, areal right is enforceable against the world at large, that is against any person who seeks to deal with the thing to which a real right relates in ant matter which is inconsistent with the exercise of the holders right to control its use (and in so far as a person may have a real right in another person's property, areal right is also enforceable against the owner of that property).

The above trite principles of the law on real rights in immovable property was also embraced in this jurisdiction by the Supreme Court in the case *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) 105H, 106 A where it is stated:

> "The registration of rights in immovable property in terms of the Deeds Registries Act (*Chapter 139*) is not a were matter of form, nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of 'real right' in s 2 of the Act. The real right of ownership, or *jus in re propria*, is
>
> > "the sum total of all the possible rights in a thing' –see Willie's *Principles of South African Law* 8ed p 255."

In casu, the first respondent does not deny that the applicant is the registered title holder of the property. Whatever challenge which the first respondent may wish to bring before the court or to have determined by the court does not in the absence of a court order alter the position that the title in the property vests in the applicant. In terms of section 8 of the Deeds Registries Act, Chapter 202:05, a registered deed of transfer holds good against the whole world unless cancelled by order of court. The applicant's title therefore holds good and is enforceable against the first respondent and the world at large. Until the title is cancelled or has been lawfully encumbered, the applicant's rights to hold and occupy the property has to be given effect.

Upon a consideration of the whole of the first respondents' opposition to the eviction, he failed to establish any legal entitlement as would defeat the applicant's right to take occupation of the property. The first respondent appears not to appreciate that neither him nor the second respondent, his estranged wife, still enjoy any rights in the property unless or until the existing deed of transfer is cancelled. The first respondent's argument that the property is matrimonial property which was sold behind his back or without his consent is not a defence to the eviction for as long as the title in the property remains registered in the name of the applicant. Until such time that the deed of transfer in the applicant's name has been cancelled by order of court, the applicant has no leg to stand on and should vacate the property. If there are any challenges to the applicant's

title which he is pursuing, the first respondent can do so from anywhere but the property from which his presence is not required by the applicant. The applicant does not enjoy any legal entitlement to remain in occupation of the property as matters stand and the applicant's claim must succeed.

In respect to costs which have been sought on the punitive scale of legal practitioner and client, I have considered that whilst the first respondent's defence does not stand scrutiny, he is a self actor who inadvisedly seeks to fight a losing battle. He however believes that he should not leave the property which he considered to be home. He appears not to appreciate the ramifications of the bond holder having recalled the security for nonpayment. There is no bad faith on his part but a misapprehension of the law by a self-actor. I do not believe that a punitive costs order is merited and costs will be ordered on the normal scale.

The following order is made:

1. The application be and it is hereby granted.
2. The 1st respondent and any other person claiming rights of occupation through him shall vacate the property called stand 2321 Marlborough Township of Stand 2550 Marlborough Township Harare, otherwise called 2321 Musasa Marlborough within 7 days of service of this order, failing which
3. The Sheriff of the court is authorized to eject the first respondent and every other person who remains on the property and give vacant possession thereof to the applicant
4. The first respondent to pay the costs of the application

Nyawo Ruzive Legal Practice, applicant's legal practitioners