ZIMPAPERS PENSION FUND
versus
FORTUNATE CHAGWEDERA
and
GLADYS KHUPE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 21 & 24 October & 9 November 2016

Civil Trial

J.C Muzangaza, for the plaintiff
Defendants in persons

MUREMBA J: This was a joint trial of 2 separate cases, *Zimpapers Pension Fund* v *Fortunate Chagwedera* HC 2809/2009 and *Zimpapers Pension Fund* v *Gladys Khupe* HC 2810/2009 which were consolidated. They were consolidated because the plaintiff is the same in both matters and it is suing the two defendants for the same reliefs. The reliefs it wants are as follows. Firstly, it wants the eviction of the defendants from flat numbers 27 and 29 Jorosa Court Corner 8th Street/Selous Avenue, Harare, respectively. Secondly, it wants the first defendant to pay damages in the sum of US$8.33 per day and the second defendant to pay damages in the sum of US$10.00 per day reckoned from 1 February 2009 to date of vacation.

At the conclusion of the trial it emerged that the following evidence was common cause. The plaintiff is the owner of a block of flats called Jorosa Court at corner 8th Street/Selous Avenue, Harare. The defendants who are former employees of Zimbabwe Newspapers (1980) Limited are in occupation of Units 27 and 29 of Jorosa Court being a one bedroomed and a two bedroomed flat respectively. They have been in occupation since 1994 and 1980 respectively.

The defendants took occupation of the flats by virtue of being employees of Zimbabwe Newspapers (1980) Limited which is a contributor to the plaintiff. It pays pension funds of its employees to the plaintiff. In 2004 the defendants together with other employees engaged in an industrial action which resulted in the termination of their employment by

Zimbabwe Newspapers (1980) Limited in August 2004. That is the same month they last paid their rentals to the plaintiff.

Prior to the termination of their employment, the arrangement was such that the rental money would be deducted from the defendants' by their employer. The employer would remit the rentals to the plaintiff. Due to termination of employment this arrangement of Zimbabwe Newspapers (1980) Limited paying rentals to the plaintiff on behalf of the defendants ceased. From that time to date, the defendants have remained in occupation of the flats, but they have not been paying any rentals to the plaintiff which is the owner of the flats. It is for this reason that the plaintiff, on the basis of *rei vindicatio,* wants the defendants evicted from its premises and be ordered to pay damages for the period they have remained in occupation of the flats. However, although the defendants have not been paying rent since September 2004, the plaintiff has decided to claim damages starting from 1 February 2009, for the reason that, that is when as a country we adopted the multi-currency system. It has decided to abandon damages in respect of the period September 2004 to 31 January 2009 because rentals then were payable in the now defunct Zimbabwean currency.

In their pleas that are identical, the defendants had put into issue the propriety of the proceedings on the grounds that there was a labour dispute which was still pending between them and their former employer Zimbabwe Newspapers (1980) Limited wherein they were challenging their dismissal which they averred to be unlawful. The pleas were filed on 14 August 2009. The defendants averred that since Zimbabwe Newspapers (1980) Ltd had always remitted their rentals to the plaintiff, the plaintiff should have continued demanding rent from Zimbabwe Newspapers (1980) Limited regardless of termination of their employment. The defendants also challenged the level of rentals as claimed by the plaintiff.

It is common cause that the matters were previously called for trial on 20 May 2013, on which day the defendants, through their then counsel, successfully applied to this court for the trial to be postponed indefinitely to allow the labour dispute which was on appeal to run its course. See judgment HH 190/13 delivered on 6 June 2013. On 7 October 2013, the defendants' appeal was struck off the roll under Civil Appeal SC 105/12. The defendants later filed with the Supreme Court a chamber application for condonation for late filing of appeal and reinstatement of appeal. On 16 April 2014, the then defendants' counsel withdrew that application. As of 21 October 2016 when this trial commenced, there was no challenge

pending anywhere in the courts regarding the lawfulness or otherwise of the defendants' termination of employment with Zimbabwe Newspapers (1980) Ltd.

Let me hasten to point out that the labour dispute defence that the defendants sought to rely on was not a competent defence to start with. It could not stand in the way of the plaintiff's claim for the recovery of its property and for compensation for non-payment of rent by the defendants. I say this for the reason that the labour dispute involved the defendants and their former employer Zimbabwe Newspapers (1980) Limited. It did not involve the plaintiff at all. The defendants' former employer and the plaintiff which owns the property that the defendants are occupying are 2 distinct legal entities. That there was an arrangement between the plaintiff and the defendants' former employer for the plaintiff to let its flats to the employees and the employer deducting money for rent from the employees' salaries and remitting the same to the plaintiff did not and does not entitle the plaintiff to be dragged into the labour disputes between the defendants and their former employer. With all due respect, it is my considered view that it was not even necessary for this court to give judgment in HH 190/13 postponing the present trial indefinitely to allow the labour dispute between the defendants and their former employer to run its course. This matter should have proceeded to trial right away in 2013.

Be that as it may, during trial in answer to the plaintiff's claim the defendants grudgingly accepted that they know that they have to pay rent for their lodgings. They said that at some point they remitted small amounts of rent to the plaintiff, but failed to show proof of this despite having been aware that they would be required, at trial, to prove any such payments. They also continued to challenge the levels of rentals or damages being claimed by the plaintiff for the period they have remained in occupation of the flats.

The defendants maintained that they should not be evicted and ordered to pay damages because they still want to pursue their labour matter with their former employer because their termination was unlawful. They said that their then legal practitioner had acted without their mandate when he withdrew their chamber application for the reinstatement of their appeal in the Supreme Court.

There is nothing to stop the defendants from pursuing their labour matter with their former employer Zimbabwe Newspapers (1980) Ltd. However, as I have already said above, that matter has no bearing in the determination of the present matter. These are two distinct matters involving two separate or distinct legal entities.

From the evidence led it is clear that as of August 2004 the lease agreements that were there in favour of the defendants terminated by virtue of termination of their employment with Zimbabwe Newspapers (1980) Ltd. The letters of 11 January 2005 addressed to each of the two defendants written by the Corporate Services Legal Services Manager Mrs C.A. Chigumira, of Zimbabwe Newspapers (1980) Ltd, gave notice to them to vacate 27 and 29 Jorosa Court. They each read:

> "It is agreed that you are no longer an employee of Zimpapers. Pursuant to the Pension Fund Manager's minute of the 24 September 2004 addressed to yourself, please be advised that you should vacate the premises forthwith."

The letters were produced as exh(s) 3 and 4 respectively. The letters serve to show that the defendants' lease agreements to occupy the flats were dependent on them being employees of Zimbabwe Newspapers (1980) Ltd. The letters also show that after termination of their employment, the defendants were given notices to vacate the premises as far back as January 2005. Despite that, the defendants have not vacated and they have not paid any rent.

Under the principle of *rei vindicatio* an owner of a property can institute legal action for the recovery of his property from the possessor of the property on the grounds that he is the owner and that the possessor is holding on to the property without his consent. In *Chetty* v *Naidoo* 1974 (3) SA 13 (A) JANSEN JA, at 20 B-D had this to say:

> "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 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 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."

The right of ownership embraces the right to possess a thing; the right to use and enjoy a thing and its fruits; the right to destroy a thing; and the right to alienate a thing. See Harry Silberberg *The Law of Property (Butterworths* 1975) p 37. In other words, the owner of a thing has the right to deal with it as he pleases within the limits allowed by law.

In *casu*, the plaintiff being the owner of the property, there being no lease agreement in favour of the defendants, the defendants not paying any rentals for their occupation from September 2004 to date, the plaintiff having given notice to the defendants to vacate the property and the defendants having refused to comply, the plaintiff is entitled to the remedy of *rei vindicatio.* The defendants have not proffered a recognised defence at law to the claim of *rei vindicatio.* They have not shown some right of retention or a contractual right as is

required by the law. See *Chetty* v *Naidoo supra*. The explanation by the defendants that they have not been able to pay rent because of termination of their employment by Zimbabwe Newspapers (1980) Ltd and that as such they cannot make ends meet is not a recognised defence at law. Even the explanation that they still want to pursue the labour matter between them and their former employer is not a recognised defence. MAKARAU JP (as she then was) in *Alspite Investments (Pvt) Ltd* v *Westerhoff* 2009 (2) ZLR 226 (H) gave an illustration which quite fits the circumstances of the present matters. At p 237 D-F she said,

> "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 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 same 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."

Likewise in the present matters the defendants cannot ask that they be allowed to continue in occupation of the plaintiff's property without the consent of the plaintiff and when they have not been paying rentals since September 2004. This deprives the plaintiff as the owner of the property, possession of its property and its right to use and enjoy the property and its fruits which are rentals. I will thus grant the order for the eviction of the defendants.

On the claim for damages the defendants disputed that they were ever notified that they should pay rentals in United States currency since the inception of the multi-currency system. They went on to challenge the levels of rentals as claimed by the plaintiff. They thus submitted that they should not be ordered to pay damages as claimed by the plaintiff.

To begin with, it is a fact that Jorosa Court which is a block of flats is leased out to tenants for purposes of investment by the plaintiff which is a pension fund. Tenants occupying the flats do not stay there free of charge, but pay rentals for their stay. The defendants do not dispute that. It is a fact that at the time they were still employed by Zimbabwe Newspapers (1980) Ltd they were paying rentals monthly to the plaintiff. The termination of their employment did not and does not change anything as far as their obligation to pay rentals was and is concerned. Even the introduction or adoption of the multi-currency system did not exonerate them from paying rentals.

The defendants having refused to vacate the flats as far back as 2005 had new letters written to them by the plaintiff's manager, Mrs E. Mahomva on 2 April 2009 after the adoption of the multi-currency system. Those letters were produced as exh 5 and 6 respectively. Their contents are the same. They were notifying each one of them that it had been resolved that rentals for Jorosa Court should be levied in foreign currency. The first plaintiff was advised that her rentals with effect from 1 February 2009 would be US$250.00. The second defendant was advised that hers would be US$300.00. The defendants were advised that the rentals should be paid not later than the 7th of each month with effect from 1 February 2009. They were told that the administration of the flats had been handed over to an estate agent called Gabriel Real Estate. The defendants were told that they were required to attend the offices of Gabriel Real Estate by not later than 7 April 2009 so that they regularise their occupation and sign the relevant lease agreements.

It is common cause that despite these letters, the defendants did not go to Gabriel Real Estate to regularise their occupation by signing lease agreements. They never paid a cent towards rentals. In their evidence they claimed not to have seen these letters, but I do not believe that. They are just trying to hide behind a finger. I say this because assuming for a moment that they did not receive the letters as they are saying, it is a fact that on 26 June 2009 the plaintiff issued summonses for their eviction and payment of damages with effect from 1 February 2009. The defendants received the summonses. Having received the summonses, why did they not seek to regularise their stay and settle the arrear rentals when the amounts were still little and reasonable? Instead they continued in occupation up until now without paying a cent towards rentals. If the defendants were acting in good faith they would have sought to settle their matters with the plaintiff by signing lease agreements to regularise their stay and by paying arrear rentals from the time they received the summonses. Their refusal to settle the matter with the plaintiff is a clear indication that they knew about the new rentals charged in United States currency as per the letters written to them in April 2009. They have continued to refuse to vacate the premises and to pay rentals banking on their labour dispute with their former employer, Zimbabwe Newspapers (1980) Ltd.

Hebert Chakanyuka Simemeza who is the Group Human Resources Manager of Zimbabwe Newspapers (1980) Ltd and also the Employer Trustee on the Board of the plaintiff gave evidence on behalf of the plaintiff. He said that at the inception of the multi-currency system the plaintiff pegged all rentals in respect of its properties in the United States

currency using the prevailing market rentals. He also said that historically, the plaintiff would lease out its properties to the employees of its contributing entities which included the defendants' former employer. He said that the plaintiff has since changed from that position. The leasing of its properties is now open to the public at ongoing market rental trends. This explains why the defendants, in 2009, were then given an option to regularise their occupation by signing lease agreements with the plaintiff.

This witness explained that with effect from 1 February 2009 all one bedroomed flats were pegged at US$250.00 per month whilst 2 bedroomed flats were pegged at US$300.00 per month. He explained that for the plaintiff to claim US$8.33 per day and US$10.00 per day for damages from the defendants respectively, the plaintiff simply divided US$250 and US$300 per month by 30 days. The witness further said that with effect from 1 March 2012 these rentals were reviewed upwards. Now a one bedroomed flat is going for US$350/month while a 2 bedroomed flat is going for $450.00/month. He said that despite these increases the plaintiff was sticking to the claims it made in the summonses for US$250.00 and US$300.00/month in respect of the defendants respectively.

Both defendants failed to meaningfully challenge the levels of the rentals given by the plaintiff. They have no excuse for having not paid these rentals from 1 February 2009 to date. The averment that their employment was unlawfully terminated by their employer which is a separate legal entity from the plaintiff is without merit. It does not suffice as a defence. That the defendants, because of not being employed and not being on a salary, cannot afford to pay the rentals is again without merit. Realising the predicament they were in, the defendants ought to have come to their senses long back and vacated the plaintiff's premises before accumulating huge amounts of arrear rentals. I will thus order the defendants to pay to the plaintiff recompense as prayed for by the plaintiff for their continued occupation of the flats from 1 February 2009 to date of vacation.

Disposition

I order as follows:

1. As against the first defendant, it be and is hereby ordered that:
   1.1 She, together with all persons claiming occupation through her of flat 27 Jorosa Court, corner 8th Street/Selous Avenue, Harare are evicted.

1.2 She pays damages to the plaintiff in the sum US$8.33 per day reckoned from 1 February 2009 to the date of vacation.

1.3 She pays costs of suit to the plaintiff.

2. As against the second defendant, it be and is hereby ordered that:

2.1 She, together with all persons claiming occupation through her of flat 29 Jorosa Court, corner 8th Street/Selous Avenue, Harare are evicted.

2.2 She pays damages to the plaintiff in the sum of US$10.00 per day reckoned from 1 February 2009 to date of vacation.

2.3 She pays costs of suit to the plaintiff.

Muzangaza Mandaza & Tomana, plaintiff's legal practitioners