HAZEL MAGUMISE
versus
SOLOMON MUZENDA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 29 May 2019 & 6 June 2019

Opposed Application

Mrs *B Mtetwa*, for the applicant
L.C Ndoro, for the respondent

MANGOTA J: The applicant applied through the urgent chamber book. She sought relief which was of a final nature. The stated matter persuaded me to postpone the application to 29 May 2019 as well as to direct that:

i) the applicant file and serve her answering affidavit, if any, upon the respondent on 21 May 2019;
ii) the applicant file and serve her heads of argument upon the respondent on 23 May 2019;
iii) the respondent file and serve his heads upon the applicant on 26 May 2019.

Because the respondent challenged the applicant's *locus standi* to sue him on the basis that she was not the owner of the flat which was the subject of the proceedings which had been placed before me, the applicant did, on 17 May 2019, file HC 4146/19 through the chamber book. Her aim and object were to join Roshumba Family Trust ["The Trust"] to HC 3857/19 as the second applicant.

The applicant served HC 4146/19 upon the respondent who filed his notice of opposition to the same. She filed her answering affidavit.

At the hearing of HC 3857/19, the applicant withdrew HC 4146/19. She proceeded to prosecute HC 3857/19.

The applicant moved the court to evict the respondent from Flat number 14 which is at 109 Baines Avenue, Harare. The respondent, she alleged, was her tenant at the flat from 2014. He had been so in terms of a written lease which she and him signed in 2014, according to her. She said she misplaced the lease the terms of which she spelt out in her founding affidavit. She averred that, on 29 January 2019, she served a written notice upon the respondent whom she asked to vacate the flat on 30 April 2019 because she required the same for her own use. She alleged that he did not respond to the three months written notice which she gave to him. She said he only did so on the last day of the period of notice when he wrote, through his legal practitioners, seeking extension of the lease on the basis that he had nowhere else to go as, according to him, his house was occupied by a company on a long lease. She stated that the respondent's silence for the period of the written notice conveyed to her the impression that he would leave her flat on 30 April 2019. She said it was on the strength of the created impression that she, during the period of the notice, concluded a lease with a tenant who took occupation of her Mount Pleasant home wherein she was then staying. The tenant, she alleged, took occupation of the Mount Pleasant home on 1 May 2019. She indicated that the respondent's letter of 29 April 2019 rendered her homeless. She stated that his self-created predicament should not be allowed to inconvenience and/or prejudice her. She couched her draft order in the following terms:

"IT IS ORDERED THAT:

1. The Respondent and all those who claim title through him vacate the property known as Flat No. 14, 109 Baines Avenue, Harare within 48 hours of service of this order on him.
2. In the event that the Respondent and all those who claim title through him do not vacate the premises within 48 hours of the service of the order, that the Sheriff be and is hereby authorised to immediately evict the Respondent and all those who claim title through him from the said premises.
3. The Respondent pay the costs of this application on an attorney and own client scale."

The Respondent opposed the applicant. He raised four (4) *in limine* matters after which

he dealt with the substance of the application. His preliminary matters were that:

a) the application was not urgent;
b) the applicant did not have *locus standi* to sue him;
c) the applicant introduced inadmissible new evidence into her case – and
d) the application contained material disputes of fact which could not be resolved on the papers which were before the court.

He denied, on the merits, having ever received the applicant's letter of 29 January 2019. He alleged that his lease agreement with the applicant was oral and terminable on 31 July 2019. He said the applicant and him agreed between them that the lease could be negotiated three (3) months before its date of expiry. He said it was for the stated reason that he instructed his legal practitioners to write to the applicant on 29 April 2019 seeking an extension of the lease to the end of the year. He stated that he was only advised that she intended to increase rentals or terminate the lease by 31 July 2019 so as to secure another tenant who could pay more rentals than what he was paying to her. He said she told her of that matter is January. He moved the court to dismiss the application with costs which were on a higher scale.

During submissions, the respondent withdrew *in limine* matters (a) and (b) *supra*. His withdrawal of the preliminary matter which related the applicant's *locus standi* to sue him was, however, not without a fight. He only abandoned that argument when it dawned to him that his persistence on the same rendered his stay at the flat illegal and, therefore, unenforceable.

In so far as the respondent's third preliminary matter was concerned, the applicant denied that she introduced new evidence into the application. She stated, in my view correctly so, that the annexures which she attached to her answering affidavit aimed at nothing but rebutting what the respondent raised in his opposing papers.

The respondent stated in para (10) of his opposing affidavit that the applicant did not show that she leased her Mount Pleasant home to a tenant with effect from 1 May 2019. He challenged her to produce such evidence as well as a supporting affidavit from the tenant who tool occupation of her Mount Pleasant home where she was staying prior to 30 April 2019.

It was in response to the challenge of the respondent that the applicant attached Annexures F and G to her answering affidavit.

Annexure F is the lease which she concluded with one Mumtuz Mia of UNAIDS offices. The lease relates to the Mount Pleasant house in which she stayed prior to 30 April, 2019. Clause 4 of the same shows that the tenant took occupation of the Mount Pleasant house on 1 May 2019. Annexure G is the affidavit of the tenant who took occupation of applicant's Mount Pleasant house. The tenant stated that she moved into the applicant's Mount Pleasant house on 1 May 2019.

Annexure H which the applicant attached to her answering affidavit relates to a matter which is now a dead one. It addressed the issues of the resolution which the trustees of Roshumba Family Trust passed conferring authority upon the applicant to manage the assets of the trust on its behalf. She attached it to rebut the respondent's contention which was to the effect that she did not have the *locus standi* to sue him.

Annexures I and J are related to Annexure H in many respects. They show that, on the basis of the authority which was conferred upon her, the applicant had been the agent of the trust and had, in the mentioned regard, concluded with lessees all lease agreements in respect of the flat in her name. The two annexures are previous lease agreements which she signed with tenants who occupied the flat prior to the respondent's occupation of the same. Annexure K stressed the point that the respondent always dealt with her and paid rent into her personal account.

The annexures which the applicant attached to her answering affidavit are not new evidence at all. They rebut what the respondent raised in his notice of opposition. They are, therefore, not improperly before the court as the respondent suggested. The applicant was within her rights to attach them to her answering affidavit as she did. Her aim and object were to correct the distorted picture which the respondent had created in the mind of the court.

The applicant stated the terms of the lease which she said she signed with the respondent in 2014. She alleged that the lease was renewable annually and terminable on two months written notice. She stated further that the lease had been renewed orally every year on the same terms and conditions except for the issue of the rental amount which had been negotiated annually to take into account the circumstances which obtained at the time of the renewal.

The respondent's contrary statement was that there was never a written lease agreement terminable on two months (*sic*) written notice. He said the agreement from the onset was oral and terminable on 31 July, 2019. He stated that the parties agreed between them that the lease could be negotiated three (3) months prior to its expiry date. He alleged that it was precisely for the stated

reason that he instructed his legal practitioners to write requesting the applicant to extend the lease which he held with her to the end of 2019.

It is on the basis of the assertions of the applicant as read with his own assertions that the respondent clings to the view that there are material disputes of facts which cannot be resolved on the papers. The question which begs the answer is are there such material disputes of facts in the application which is before me.

Neither the applicant nor the respondent made any meaningful submissions on this aspect of the case. The respondent touched on the same in brief and wondered away from the subject. He proceeded to address the court on such matters as related to HC 4146/19 which was totally divorced from what he had raised.

It is trite that where material disputes of facts exist in a case, the application cannot succeed. Case authorities, however, offer good guidance to a court which deals with the subject of material disputes of facts. One such case is *Room Hire Co (Pvt) Ltd* v *Jeppe Street Mansirus (Pvt) Ltd,* 1949 (3) SA 1155 (T) in which it was remarked as follows:

> "In the preliminary inquiry i.e. as to the question whether or not a real dispute of fact has arisen, it is important to bear in mind that, if a respondent intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of the applicant's material averments, as if it were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavits must at least disclose that there are material issues in which there is a *bona fide* dispute of fact capable of being properly decided after *viva voce* evidence has been heard." [emphasis added]

GUBBAY JA (as he then was) made further elucidation on the subject of material disputes of facts. He remarked in *Zimbabwe Branded Firegalsss (Pvt) Ltd* v *Peech*, 1987 (2) ZLR 338 (5) at 339 C-D that:

> "It is … well established that in motion proceedings, a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an overfastidious one, always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact." [emphasis added]

The above case authorities, it is evident, enjoin the respondent who places reliance on material disputes of facts not to make bare denials on the applicant's material averments. His affidavits, they stress, must disclose the existence of material disputes of facts. The authorities

encourage the court which is seized with the subject of material disputes of facts to take a robust and common sense approach and not to dismiss the application on the mere say so of the respondent. They exhort the court to distinguish real, from illusory, disputes of facts. They also encourage the court which is dealing with such a matter as the present one to ensure that its decision does not unnecessarily prejudice the respondent. They, in short, urge the court to make a balanced assessment of the matter which relates to the subject of material disputes of facts.

The respondent made bare denials. He denied that he entered into a written lease with the applicant. He insisted that the parties' lease was, at all material times, a verbal one. He, for reasons known to himself, did not state the terms of the alleged oral lease. He was challenged to state such. All he said was that the lease was renewable or terminable on three months' notice. He did not make mention of the duration of the lease. Nor did he state the length of the period for the lease's renewal. He did not mention the issue of how rent was to be factored into the renewed lease, if it was, or what would constitute breach of the lease entitling the innocent party to resile from the same.

The respondent is not having the court believe that his alleged oral lease with the applicant had only one term which he stated in his notice of opposition. No lease – oral or written – of the nature which he sought to portray qualifies to be regarded as such. *A fortiori* when it leaves out of itself such basic requirements of the lease as have been stated in the foregoing paragraphs.

The applicant's uncontroverted statement was that the respondent took occupation of her flat in 2014. She said he has been at the flat from the mentioned year todate. She stated that the lease was renewable orally every year on its same written terms except for the issue of rent which the respondent and her would negotiate during each renewal of the lease to take into account the country's economic realities.

The respondent's assertion on the same matter was that the lease was for the period which commenced in January, 2019 and expired in July, 2019. It was for a period of seven (7) months, according to him. He said, when he realised that its date of expiry was 31 July 2019, he instructed his legal practitioners to address a letter to the applicant on 29 April, 2019. The letter, he said, requested the applicant to extend the period of the lease to December, 2019.

It is trite that what has not been denied in affidavits is taken as having been admitted [See *Fawcett Security Operations* v *Director of Customs and Excise*, 1993 (2) ZLR 121 (SC), D D

Transport (Pvt) Ltd v *Abbot* 1988 (2) ZLR 92. In *Remo Investments Brokers (Pvt) Ltd* v *Securities Communication of Zimbabwe*, SC 13/13]

The respondent admits that he took occupation of the flat in 2014. He also admits that the applicant and him would negotiate the renewal of the lease orally every year as well as that it was at each renewal of the lease that they would discuss and agree on the new rentals for the flat.

The statement which is to the effect that the respondent took occupation of the flat in 2014 renders his assertion which is to the effect that the lease was for the period of January to July, 2019 nugatory. The lease which commenced to run in 2014 could not commence to run in January, 2019 as he suggested.

It is on the strength of the principle which the court enunciated in *Fawcett Security* and *D D Transport* (*supra*) that the respondent is taken to have admitted that he negotiated with the applicant to renew the lease on an annual basis. He, therefore, renewed the lease for the years 2015, 2016, 2017 and 2018. He did so by himself on each of the mentioned four previous occasions.

The question which begs the answer is what prompted the respondent to seek the assistance of counsel when he sought the renewal of the lease in 2019. He did not indicate that he feared some challenge standing in his way in his fifth negotiation for the renewal or extension of the lease. He had, after all, conducted his negotiations in the past without any hitches coming his way.

The respondent, in my considered view, received the applicant's letter of 29 January, 2019. He kept it to himself for the period of the notice. He then sought the assistance of counsel to resist his eviction from the flat. He fed counsel with a lie about his lease with the applicant and requested counsel to put up a sound argument on his behalf so that he remained in the flat. All the issues which he raised about the application being not urgent or the applicant's lack of *locus* to sue and evict him point in one and the same direction – his resistance from imminent eviction from the flat. He told a lie when he alleged that he did not receive the applicant's letter of
29 January, 2019 which notified him to vacate the flat on 30 April 2019. The correct position of the matter is that he received the letter which notified him to vacate the flat but he made up his mind to resist the eviction as he did.

My views in the abovementioned regard find fortification from the effort and the extent to which the respondent went to resist his eviction. He, as it were, threw all hurdles in the way of the applicant. He almost succeeded to realize his desired end- in- view. His narration of events,

however, betrayed his dishonesty. The story which he told was totally incoherent and difficult to comprehend. It became too true to be believed. It was more in line with a made up account of the events than it was real.

On a robust and common cause approach which the court enunciated in *Zimbabwe Branded Fibreglass (Pvt) Ltd* v *Peech*, there is no doubt that what the respondent referred to as material disputes or facts were not such at all. These were a result of a well calculated move which he hatched with a view to confusing issues which were clear in themselves. He created them in the vein hope of resisting his eviction from the flat.

The respondent conceded that the applicant has the authority of *Roshumba Family Trust* to manage its affairs as well as its assets on its behalf. One such asset is the flat from where she sought to evict him. It is within the applicant's right to evict him from the flat. She is, after all, the person who authorized him to be in the flat. She is, therefore, competent to move for his eviction from the same.

The strenuous effort which the respondent made to resist eviction put the applicant on her guard. She became convinced of the fact that she could not continue to repose her trust in him. She realized that, as a person who intends to remain in her flat, the respondent will likely file an appeal if the application goes against him. It was for the mentioned reason that she moved to amend the draft order so that she has a final as well as definitive order granted to her.

I remain satisfied that, given the extent to which the respondent went to resist his eviction from the flat, the spanner works which he threw into an otherwise straight forward case, the inconvenience to which he put the applicant whom he rendered homeless for his own advantage and the actual prejudice which he caused her to endure from I May, 2019 todate, the amended draft order is warranted in the circumstances of this case.

The applicant proved her case on a balance of probabilities. The application is, accordingly, granted as prayed in the amended draft order.

Mtetwa & Nyambirai, applicant's legal practitioners
Thondlanga & Associates, respondent's legal practitioners