

COSWELL TRUST
versus
RACHEL CHIRIMUMARARA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 22 July & 31 October 2023

Opposed Application

Mr *E Mubaiwa*, for the applicant
Mr *R G Zhuwarara*, for the respondent

MUSITHU J: The applicant seeks an order for the eviction of the respondent and all those occupying through her from a certain piece of land situate in Harare known as Stand 17788 of Harare Township of Salisbury, otherwise known as number 17788 Watermeyer Road, Belvedere, Harare (the property).

The applicant is the registered owner of the property as more fully attested to by the Deed of Transfer registered in its name under DT 2882/17. The applicant claims that the respondent is in occupation of the property unlawfully, without its permission. The applicant wants her out of the property. The respondent has not heeded the applicant's call to vacate. The applicant was thus being denied its right to enjoy the fruits of ownership.

In response, the respondent raised as the first point in *limine* the absence of *locus standi* by the deponent to the applicant's founding affidavit. The applicant's founding affidavit was deposed to by *Tofireyi Craig Meda*, he being duly authorized to do so by a resolution of the applicant. According to the respondent, the applicant's resolution attached to the founding affidavit gave authority to one *Brian Tamburai Meda* to represent the applicant instead of the deponent. The deponent and *Brian Tamburai Meda* were two different people. There was therefore no proper application before the court.

The second preliminary point was simply that the matter was afflicted by material disputes of fact. It could not be resolved through the application procedure.

On the merits, the respondent argued that the deed of donation was procured fraudulently and behind her back by one *Costain Meda* who happened to be her husband. She considered the property to be her residence. She acquired the right of occupation through her husband. She denied occupying the property unlawfully. For that reason, the matter was riddled with material disputes of fact. She urged the court to dismiss the application with costs on an attorney and client scale.

In its brief reply, the applicant attached the correct resolution that authorized the deponent to depose to the founding affidavit on behalf of the applicant. The applicant denied the alleged material disputes of fact as no attempt was made to point these out. The deponent to the applicant's affidavit also denied that the property was donated to the applicant behind the respondent's back. Even assuming that it was, the respondent had not challenged the donation in the matter or through a separate process. The applicant's title deed remained extant and ought to be given effect to.

The submissions and the analysis

Validity of the resolution

The resolution that was attached to the founding affidavit in the court record referred to *Tofireyi Craig Meda* as the person duly authorized to represent the applicant in the eviction case against the respondent. *Tofireyi Craig Meda* deposed to the founding affidavit. It appears that whoever prepared the applicant's papers for filing attached a wrong copy of the resolution that referred to *Brian Tamburai Meda* in the papers that were served on the respondent. The correct resolution citing *Tofireyi Craig Meda* was attached to the applicant's answering affidavit.

Mr *Zhuwarara* for the respondent did not argue the issue further, save to restate the submission made in the opposing affidavit. It is trite that where the authority of a deponent who purports to represent a legal *persona*, such as the applicant is challenged, proof of that authority can always be availed through the answering affidavit. I have no reason to believe that the deponent to the applicant's founding affidavit was acting on a frolic of his own in the absence of evidence showing that he indeed had no authority to depose to the founding affidavit on behalf of the applicant.

The second leg of the respondent's argument was that the deponent to the applicant's founding affidavit did not aver the capacity in which he was deposing to that affidavit on behalf of the applicant. The respondent's contention is that the deponent ought to have clearly stated whether he was deposing to that affidavit as a trustee or in some other capacity. In its heads of argument, the applicant argued that a deponent to an affidavit is a witness. He is not a

representative of the applicant. The applicant cited the *dictum* in *Ganes v Telecom Namibia Ltd*¹, where the court held that the deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized. I agree with this *dictum*. The person instituting the proceedings is the applicant. Paragraph 3 of the resolution authorized the deponent “to do all things, and execute all such documents and represent the Trust in the Court.”

Rule 58 (4) (a) of the High Court rules states that an affidavit filed with a written application—

“(a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein”

It is not necessary that the deponent states the capacity in which he or she is deposing to that affidavit. All that is necessary is that they are able to swear positively to the facts or averments set out in the affidavit. I found the preliminary objection devoid of merit and dismissed it.

Material disputes of fact

The alleged disputes of fact were set out as follows. The applicant averred in its founding affidavit that the respondent did not have permission to occupy the property. It also averred that it asked the respondent to vacate the property but she refused. Respondent however denied those averments. The applicant did not attach any evidence to substantiate its claims. It was the applicant’s word against the respondent. The court could not resolve such a dispute on the papers.

In response, the applicant averred that in determining whether or not there were material disputes of fact, the court had to consider whether the alleged dispute was material and if so, whether it was incapable of resolution on the papers. A dispute of fact related to an issue raised in the founding affidavit, that could not be resolved based on the answer given in the opposing affidavit.

In *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F – G, MAKARAU JP (as she then was), made the following pertinent observations:

“A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

¹ 2004 (3) SA 615 (SCA)

What comes out of the above *dictum* is that the respondent's case must clearly point to *bona fide* material disputes of fact which are incapable of resolution on the papers. The court must be left with no ready answer to the averments made by both the applicant and respondent in their respective cases as pleaded. A bare denial to the applicant's averments is not enough. In her opposing affidavit, the respondent denied occupying the property unlawfully and that she ever refused to vacate. According to her, that constituted the material disputes of fact which could not be resolved on the papers. The applicant's claim is based on the *rei vindicatio*. It holds title to the property. The disputes of fact alleged herein are averments that the respondent must make in response to the claim on the merits.

If the respondent asserts some lawful right to occupy the property, then she must clearly set out that right in her response to the merits of the application. This is what she did in p 3 of her opposing affidavit. The respondent averred in pp 1 (c) of her opposing affidavit, (which is the part where she raised the preliminary point) that the matter was afflicted by material disputes of fact. She did not particularise those disputable facts that were incapable of resolution on the papers. It was only in p 3 of the opposing affidavit that an attempt was made to relate to some disputed facts. But those averments were made in response to the applicant's averments on the merits.

Points in *limine* are by their nature legal objections that are intended to make short work of an applicant's case without delving into the merits of the case. In raising them, the respondent is urging the court not to waste its time by considering the merits of the matter, since those preliminaries are dispositive of the matter. Be that as it may, preliminary points should not just be raised as a matter of routine as the respondent did on this particular point with respect to disputes of fact. The court determines that the respondent failed to particularize in detail the material disputes of fact that are incapable of resolution on the merits. The preliminary objection therefore fails.

As regards the merits, Mr *Mubaiwa* for the applicant submitted that the applicant was asserting a *rei vindicatio* on the basis of holding title to the property. It was entitled to the possession of the occupied property. Once the applicant proved its right of ownership of the property, the onus shifted on to the respondent to justify possession. Possession of someone's property was *prima facie* unlawful. No such defence had been pleaded by the respondent save to assert that she was married to one *Costain Meda* and that the deed of donation was made behind her back.

Mr *Mubaiwa* further argued on the strength of *Muzanenhamo and Another v Katanga and Others* 1991 ZLR 182 (S), that for as long as the title of the property was in the name of the husband, the wife could not stop the transfer of the property to a third party unless she challenged the validity of the transfer. That was not the case herein.

In response Mr *Zhuwarara* submitted that the respondent had a right to remain in occupation as the wife to one *Costain Meda*. The purported transfer of the property to the applicant had been done behind her back. A husband could not hide behind a corporate personality to divest his wife of a right of occupation. In arguing this point, Mr *Zhuwarara* cited the case of *Cattle Breeders Farm (Pvt) Ltd v Veldman* 1974 (1) SA 169. He further argued that the right to possess the property was a full defence to a claim for eviction. The title to the property was alienated behind the respondent's back. The respondent's husband had abused his position in the applicant to pass a resolution authorizing the eviction of the respondent from the property.

It is necessary to briefly analyse the two cases cited by counsel to evaluate their relevance to this matter. In the *Cattle Breeders Farm (Pvt) Ltd v Veldman* case, the brief facts were that Veldman was the owner of Cattle Breeders Farm Ltd. He and his wife lived in a company house which they considered their matrimonial home. A matrimonial dispute arose and *Veldman* decided to evict his wife from the company house. The wife objected arguing that the property was her matrimonial home and the husband at common law had a duty to provide her with suitable accommodation as his wife. *Veldman*, in the alternative used the company to try and evict his wife from the property on the grounds that the company had a right to evict her since it owned the house.

The court held that the company was nothing more than a façade behind which the husband had control and possessed no greater rights to eject the wife than the husband had. The court reckoned that the husband had a duty to provide his wife with accommodation. It was for that reason that the court lifted the corporate veil and determined that it was actually the husband who was seeking the eviction of the wife and not the company.

In the *Muzanenhamo and Another v Katanga and Others* case, the parties were estranged. Before the wife filed for divorce, the husband sold the matrimonial home that was registered in his name to the appellants. The appellants sought to enforce the agreement but their claim was dismissed by the High Court. The decision of the High Court was set aside on appeal to the Supreme Court. In upholding the appeal MCNALLY JA had this to say at p 185-188 of the judgment:

“Perhaps one can begin by reminding oneself that ownership and possession are two different things. A landlord owns, a tenant possesses. Possession by the tenant does not prevent the landlord from selling. The purchaser may take ownership subject to the lease. Ownership and possession may reside in two different people simultaneously. I appreciate that the wife is not a tenant. But her position is closer to that of tenant than to that of owner.”

Further down in the same judgment, the court held as follows:

“I turn secondly to consider whether she may have a right of occupation arising from her status as a wife. This is always a difficult problem for the courts to solve. See for example *Jackson v Jackson* [1971] 3 All ER 774 (CA); *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) 1973 (2) RLR 261 (A) and *Owen v Owen* 1968 (1) SA 480 (E). It is essentially a matter of equity. The courts will intervene where, for instance, the husband sells the house as part of a policy of harassment arising out of divorce proceedings.”

The *Cattle Breeders Farm (Pvt) Ltd v Veldman* case was decided on the basis that the husband was the alter ego of the company. He and the company were inseparable. The decision to evict the wife from the house was his and not the company. The *Muzanenhamo and Another v Katanga and Others* case was decided long after the *Cattle Breeders* case. The court did not make a finding that as a matter of law, a wife could resist her eviction from the matrimonial house on the basis that she had a right of possession by virtue of her marriage. The *Cattle Breeders* case, was determined on the basis of a balance of equities, which approach the court was not so keen to follow in the *Muzanenhamo* case. In the *Muzanenhamo* case, the court determined that the position of the wife was actually closer to that of a tenant. Just like a tenant could not stop the owner from selling their property, the wife could also not stop the husband who held title in the property from selling the property.

I find the approach in the *Muzanenhamo and Another v Katanga and Others* case more persuasive. The wife cannot use her right of possession as a shield to a claim for the *rei vindicatio*, without asserting her own rights through a counter claim of her own. She must take the necessary steps to challenge the disposal and the transfer of title to a third party, the moment she becomes aware of those processes. She cannot simply fold her hands, sit back and wait for the new title holder to strike, before waiving the marriage card as a defence to a claim for eviction. The owner of the property as the holder of real right must also be accorded some protection by the law. This is why it is important that there be a challenge to the disposal and transfer of title by any interested party before the *rei vindicatio* proceedings are placed before the court for determination.

The respondent herein merely claimed a right of occupation based on her being the wife to one *Costain Meda*. She also claimed that the property was transferred behind her back. It is not

clear whether the parties are in the midst of a divorce or are on separation. While she claimed that the property was transferred behind her back, the respondent did not state whether she had taken any steps to challenge the transfer of the property to the applicant. She was simply content with her occupation of the property. That alone is not enough to resist the claim for her eviction. It is for the foregoing reasons that I find the applicant's claim to be unassailable.

Costs

The applicant's counsel urged the court to make an adverse order of costs on the punitive scale. This was because the respondent made her case on her feet and outside her own pleaded case. In the exercise of my discretion, I do not consider the respondent's case to be so frivolous as to warrant an order of costs on the punitive scale.

Accordingly it is ordered as follows:

1. The application is granted with costs.
2. The respondent and all those occupying through her are ordered to vacate Stand 17788 Watermeyer Road, Belvedere, Harare within fourteen (14) days from the service of this order.
3. Should the respondent not comply with p (2) above, the Sheriff is directed and empowered, with the assistance of the Zimbabwe Republic Police, to cause the eviction of the respondent and all those occupying through her from the said property.

Chiminya & Associates, applicant's legal practitioners

Hamunakwadi and Nyandoro, respondent's legal practitioners