

MASSTOW INVESTMENTS (PVT) LTD
and
THOMAS MASANGO
and
THE SHERIFF OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 19 November 2021 & 23 March 2022

Opposed Application- *Rei Vindicatio*

K Siyeba, for the applicant
M Mavhiringidze, for the respondent

KATIYO J: The applicant approached this court on application of *Rei Vindicatio*.
The terms of the order sought are as follow:-

IT IS ORDERED THAT

1. The first respondent and all those claiming occupation through him be and are hereby ordered to vacate a property commonly known as number 159 Domboshawa Road, Harare within five days of this order.
2. Should the respondent and all those claiming occupation through him fail to vacate the property in paragraph one (1) within five (5) days, the second respondent be and is hereby authorized to evict the first respondent from the property.
3. The first respondent to pay costs of suit.

Brief background of the Application

The applicant is the owner of a disputed immovable property, being a certain piece of land situated in the district of Salisbury called, the remaining extent of Subdivision “A” of Philadelphia, measuring 1, 8842 hectares and commonly known as stand number 159 Domboshawa Road. The applicant received transfer of number 159 Domboshawa on the 20th of January 2010 and copy of the title deeds are attached to this application

as annexure **A2**. The respondent was appointed one of the directors of the applicant on the 7th of January 2009 as per annexure **A3** which is the **CR14**.

The applicant avers that the first respondent continued to be a director until he was relieved of that position on allegations of not serving the interest of the applicant. Further that the applicant is leasing the property to Philadelphia Mission in Africa Trust, which is a Trust running a school on the premises and has been leasing same since 2010. The applicant avers that Philadelphia Mission in Africa Trust initially could not use all the land thereby allowing the 1st respondent to use portion of the property in which he was occupying. The school has now grown and wants to make use of the whole property but despite demand, the first respondent has refused to give vacant possession of the property prejudicing the applicant's interest. Applicant as the title holder has the right to vindicate anyone who is unlawfully occupying its property without authority. Further averred that the first respondent has no right of occupation as he doesn't have the authority of the lessee thus unlawfully continuing in occupation through his agents.

The respondent in his affidavit denies being a lessee but a lawful owner of the four (4) stands he is occupying as per Memorandum of Agreement between him and one Tendai Jemwa as well as the Arbitral Award between the same parties. Further avers that they have a cluster housing permit which leaves them *defecto* shareholders sharing the stands as per annexure **G** attached to the opposition papers.

The respondent has raised points *in limine* which after addressing the court, judgement was reserved without getting into the merits of the application.

Material dispute of facts

The respondent argues that the applicant adopted a wrong procedure as it knew that there are material dispute of facts in that the respondent and one Tendai Jemwa bought a shelf company Masstow Investments (PVT) LTD in 2009 and accordingly changed CR14 after appointing themselves as directors. They added other directors who were all their employees save for one Patric Jemwa who was thought would be useful owing to the business which was to be undertaken then.

Further that there was no amending of the Memorandum and Articles of

Association and to date the Memo and the Articles of Association indicate Enoch Charangwa and Noreen Pepa as Shareholders. These are the persons from whom the shelf company was bought.

Further that the appointment of one Oswald Zhakata in 2018 without notice and without involvement of the shareholders is a material dispute

Further the purported forced resignation which the respondent was not notified of or participate by writing a resignation letter cannot be resolved on papers.

Further that the eviction of the respondent from the (4) four stands where there is a Memorandum Agreement signed between the respondent and Tendai Jemwa as well as the Arbitral Award show that the matter cannot be resolved on papers.

Further that the filing of this application a few days after an aborted Extra- Ordinary General meeting called by the respondent and attended to by the respondent and one Tendai Jemwa under the watchful eye of the legal practitioner who filed this application is an indication that the applicant knew that there will be disputes of facts which cannot be resolved on papers.

The applicant knows that there is no application because the resolution is defective as in one way it purports that it was a board resolution of the Board of directors, purporting to be an extract from the meeting of an Extra-Ordinary General Meeting. This is so because it speaks of directors and shareholders. The appointment of Oswald Zhakata without the involvement of respondent, Enoch Charangwa and Noreen Pepa the former shareholders also makes the application defective as the deponent of the founding affidavit lacks authority to represent the applicant.

The applicant in his answering affidavit insists there are no material dispute of facts in this matter and sticks to his averments as in the founding affidavit.

Arguments

Counsels for both parties argued in support of their papers. On the points *in limine* the respondent's counsel insisted that it is alleged that the respondent was allowed to occupy the land he is occupying as a director of the applicant and according to the applicant he was relieved of the directorship in 2018, and yet the respondent has placed

before the court, that the respondent and one Tendai Jemwa had a partnership resulting in them buying a shelf company which is the applicant. Further that in 2009 they formed a company and bought this property in 2010. That they created eight (8) clusters through a Memorandum of Agreement of share placed before the court.

There is also among other issues the issue to do with the Arbitral award which is clear as to the background of this matter.

The applicant insists that he is the owner of the property and that there are no material dispute of facts for this matter to be referred to trial. Insists that this matter can be resolved on papers without the need to hear oral evidence.

Analysis of the points *in limine*

Material dispute of fact has been articulated in many authorities in various jurisdictions ours included. It arises when a party to the proceedings makes a material allegation which is disputed by the respondent in such a way that the court will not be in a position to make a decision based on the answers and allegations made by the parties without the benefit of hearing further evidence. In case of *Supa Plant Investments (Pvt) Ltd v Chidavaenzi 2009 (2) ZLR 132(H) JP MAKARAU* remarked as follows:-

“.....a material dispute of fact arises when material facts alleged by the applicant are disputed and transversed 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”

In *Muzanenhamo v Officer in Charge CID Law and Order & Ors CCZ 3/13* the learned judge PATEL JA as then was had to say:

“As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party”

It is trite law in appropriate circumstances a point *in limine* can dispose the matter before the court. Points *in limine* should not be raised as a fashion but on genuine understanding of the law and facts to be deliberated on. Many times legal practitioners have raised this as a matter of routine without confidence of their acceptance. In most

instances this has had the effect of delaying proceedings where if not the matter could have been easily disposed of. MATHONSI J as he then was had this to say in the case of

Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors HC:

“Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly if it is likely to dispose of the matter”

When PATEL JA as he then was stated as alluded to above was not in any way suggesting that the court should do it blindly but to carefully applying its mind in order to do justice (my own emphasis). There is always a danger of rushing to dispose a matter on papers which otherwise would have been appropriately referred for trial. There is no harm if a matter which could have otherwise been dealt with is referred for trial to exhaust the disputed issues. This case is full of disputed facts as stated above and have no doubt that the circumstances of this matter are such that they need full interrogation. The issue to do with directors is hotly disputed. The parties are not at all in agreement on any of the material issues as discussed above. There are quite number of disputed issues which cannot be resolved on papers. This was not supposed to be launched as an application as doing so will not resolve the dispute between the parties. In conclusion I am persuaded by the 1st Respondent that this matter cannot be resolved on papers without the need to hear oral evidence. The points *in limine* as raised are in order and ought to succeed. This matter cannot go further than the points *in limine*. The applicant has taken a wrong route. He was supposed to proceed by way of action. In the result it is ordered as follows:-

1. That the application for ***REI VINDICATIO*** be and is hereby referred for trial.
2. Papers filed to act as pleadings of the parties.
3. Applicant to pay the costs of suit at ordinary scale.

Bherebende Law Chambers, applicant’s legal practitioners

Mavhiringidze & Mashanyare Law Chambers, respondent’s legal practitioners