DISTRIBUTABLE (33)

WONDER MUSHURE
v
(1) THOMAS PASI (2) LINDA MADZIVAIDZE N.O. (3) LINDA MADZIVAIDZE (4) REGISTRAR OF DEEDS N.O. (5) MASTER OF THE HIGH COURT N.O.

SUPREME COURT OF ZIMBABWE
GOWORA JA, HLATSHWAYO JA & MAVANGIRA JA
HARARE 11 JULY 2017

T. Sibanda, for the appellant

G.R.J. Sithole, for the first respondent

No appearance for the second, third, fourth and fifth respondents

MAVANGIRA JA: After hearing the parties on 11 July 2017 the following pronouncement was made by the Court:

> "The unanimous view of this court is that there is no merit in this appeal. The appeal be and is hereby dismissed with costs. Full reasons for judgment will be availed in due course"

The full reasons follow hereunder.

This is an appeal against the whole judgment of the High Court granted in favour of the first respondent. The judgment ordered the revival of Deed of Transfer No. 6132/1987 dated 2 September 1987 in terms of which a certain immovable property was registered in the first respondent's name. It ordered the cancellation and setting aside of two subsequent Deeds of Transfer registered, respectively, in favour of the appellant (No. 2451/2008 dated 21 August

2008) and the second and third respondents (No. 3241/2009 dated 5 August 2009), in respect of the same immovable property.

The appellant raised the following grounds of appeal:

"1. The court erred at law in not finding that the first respondent's claim had prescribed.
2. The court *a quo* erred at law in not finding that the first respondent had used the wrong procedure by instituting application proceedings in a matter that had material disputes of fact which ought to have been referred to trial.
3. The court *a quo* erred at law in reviving the Deed of Transfer 6132/87 in favour of the first respondent and cancelling and setting aside the Deed of Transfer No. 2451/08 in favour of the appellant and subsequent transfers without a trial cause and:
   (a) without a proper investigation on the triable issues surrounding the circumstances of the sale and transfer of the property to the appellant;
   (b) without the joinder of the estate agents (Highrise Real Estate) and the conveyancers (Mutsahuni Chikore & Partners to whom first respondent had given the power of attorney to pass transfer) to the proceedings *a quo* who were the main parties responsible for the sale and transfer of the property from the first respondent to the appellant.
4. The court *a quo* erred at law in proceeding to grant the application in favour of the first respondent with costs.

The prayer (as amended) in his notice of appeal reads:

"WHEREFORE the appellant prays that the appeal succeeds with costs and the order of the court *a quo* be and is hereby set aside and substituted in its place with the following:
"(a) The points *in limine* be and are hereby upheld.
(b) The application be and is hereby dismissed.
(c) The applicant pays costs of suit."

SUBMISSIONS BEFORE THIS COURT

Mr *Sibanda* for the appellant was unable to carry his argument on prescription far as he readily conceded early in his address to the Court that the issue of prescription was never raised in the appellant's pleadings *a quo*. The purported raising of the issue in heads of argument was of no consequence as heads of argument are not pleadings. Prescription ought to have been specifically pleaded as the court would need a factual background in order to relate

to the issue. He submitted that he would no longer persist with the point. That disposed of the first ground of appeal. He had no further meaningful submissions to make before the court.

In his written heads of argument Mr *Sibanda* submitted that the application before the court *a quo* was heavily laden with disputes of fact and that by not referring the matter to trial the discretion of the court was not exercised judiciously. Notably, while the nature of the dispute of fact was not stated, it seemed to relate to the issue of prescription. This would understandably explain the difficulty that he had in making any further useful submissions before us.

A novel submission is also made in the heads of argument relating to the first respondent "having been misjoined in the proceedings *a quo.*" This submission does not relate to or emanate from any of the grounds of appeal raised by the appellant. There was no amendment of the grounds of appeal. It therefore need not detain us.

Mr *Sithole,* for the first respondent submitted that the appellant's opposing affidavit in the court *a quo* (where he was the first respondent), did not answer the averments made by the first respondent (as applicant) in his founding affidavit. There could therefore not be said to be a dispute of facts that arose. He also submitted that on the issue of prescription the appellant had not shown how the court *a quo* had misdirected itself. It was his further submission that the appellant ought to have realised the futility or baselessness of its appeal which he prayed that it be dismissed with costs.

In reply, Mr *Sibanda* conceded that if the appeal was to be dismissed there would be no justification for departing from the trite position that costs ought to follow the cause.

ISSUES FOR DETERMINATION

The issue that calls for determination is whether or not the court *a quo* erred in failing to refer the matter to trial.

The appellant's contention is that the court *a quo* ought to have referred the matter to trial because there were genuine material disputes of fact. The test for whether there is a material dispute of fact was laid down in *da Mata v Otto N.O.* 1972 (3) SA 858 (A) where WESSELS JA stated:

> "in the preliminary, ie, 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 the respondent to resort to bare denials of the applicant's material averments, as if he 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 only after *viva voce* evidence has been heard."

This was buttressed in *Wightman t/a JW Construction v Headfour (Pty) Ltd & Anor* 2008 (3) SA 372 (SCA) in which it was held:

> "A real, genuine and *bona fide* dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. … When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or counterveiling evidence) if they be not true or accurate, but instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

A reading of the authorities including the above cited shows that a real *bona fide* dispute can only be found to exist where the respondent's affidavits show that there are material issues in which there is a *bona fide* dispute of fact. A bare denial or allegation does not suffice. *In casu* the appellant claims that the dispute of fact arises out of the issue of prescription in that the second and third respondents averred in the court *a quo* that the first respondent became aware of the facts necessary to sustain his claim in 2009 when there was a telephone

conversation that was held with him. However, the cited averment is of no assistance to the appellant's case as the second and third respondents did not disclose the subject of the alleged discussion.

It was the appellant's second contention that the professional property agents who were involved in the transfer of the property as well as the conveyancers and legal practitioners ought to have been subjected to a trial. This argument is also of no avail to the appellant's case. This becomes apparent when it is taken into consideration that what was before the court *a quo* was an *actio rei vindicatio.* The nature of such an application was discussed in *Jolly v A Shannon & Anor* 1998 (1) ZLR 78 (HC) where MALABA J (as he then was) had this to say:

> "The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The *onus* is on the defendant to prove a right of retention: *Chetty v Naidoo* 1974 (3) S 13 (A) at 20A –C; *makumborenga v Marini* S – 130-95 p2 …"

The requirements are thus that the applicant must allege and prove that it is the owner of the property and that the respondent is in possession of such property. *In casu* the first respondent satisfied the requirements in that he proved his ownership of the property and that the second and third respondents had illegally acquired title from the appellant and were in possession of the property. The estate agents and conveyancers were of no relevance to the application that was before the court. There was thus no need for them to be subjected to trial. It is also significant that the appellant did not state what evidence would be adduced by the estate agents and conveyancers that would pertain to the alleged dispute of fact.

In view of the above observations, it is my view that the alleged dispute of fact is not *bona fide* and consequently the ground of appeal ought to be dismissed. The appellant has not shown how the court *a quo* misdirected itself. The court clearly disposed of the issue in the following words:

> "A party wanting to illustrate and rely on a dispute of fact must put forward cogent facts of his own version of events that must contrast with that of the other party. *In casu,* against all what the applicant had said to prove that he had never sold away his rights, the respondents just casually alleged that they had spoken to him on the telephone in 2009. About what? Why would they have been speaking to him? They were not taking transfer from him, but from the first respondent. It was all implausible. This was not the kind of factual basis to found a genuine dispute of fact or the defence of prescription."

On the papers that were placed before it the court *a quo's* decision cannot be faulted. The appellant has not stated the nature of the dispute of fact. He has failed to establish to this Court any basis for setting aside the decision of the court *a quo*.

It was for these reasons that we found the appeal to be without merit and dismissed it with costs as stated in the order reflected earlier at the beginning of this judgment.

GOWORA JA I agree

HLATSHWAYO JA I agree

Chinawa Law Chambers, appellant's legal practitioners

Atherstone & Cook, first respondent's legal practitioners