(1) POTENTIAL INVESTMENTS (PVT) LTD **HC 1583/07**
X REF HC 1676/03; 665/08; 1465/08
And **SC 140/05**

RALEMA INVESTMENTS (PVT) LTD

Versus

JOSEPH TAYALI (in his personal capacity)

And

TAYALI AND SONS

And

NERGER PROPERTIES (PVT) LTD

(2) NERGER PROPERTIES (PVT) LTD **HC 2747/07**
X REF HC 18/08 & HC 5061/07

Versus

POTENTIAL INVESTMENTS (PVT) LTD

And

RALEMA INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 31 JULY 2009 AND 4 NOVEMBER 2010

Ms H M Moyo for the applicants under HC 1583/07 and 1st respondents under HC 2747/07
S S Mazibisa for the respondents under HC 1583/07 and the applicant under HC 2747/07

Opposed Application

NDOU J: These two matters have a chequered history and are characterized by voluminous papers and emotive language. Because the matters essentially involve the same main parties and centre around the same issue, this court granted an order consolidating these

matters under case HC 18/08. The matters were argued at the same time. I propose to focus on the main legal issues involved here and ignore all the emotive and unnecessary papers filed.

First Application – HC 1583/07

In the first application, the applicants seek the eviction of Nerger Properties, 3rd respondent. The salient facts of the first application are the following. The applicants are registered companies of limited liability. The 2nd applicant owns all the issued shares of the 1st applicant in its entirety. The deponent of applicant's founding affidavit, one Raphael Howard Chitrin avers that he is a director and manager of both applicant companies. He is a holder of all the shares in the 2nd applicant together with his wife. The principal assets of the 1st applicant are various properties two of which consist of the building and open area situate at 70 Jason Moyo Street, also known as Jameson Buildings stand 188 Bulawayo Township which will be referred to as "Jameson Buildings".

The ownership of the Jameson Building has been the subject of protracted litigation. In the litigation the applicant was R Chitrin and Company. By act of cession, all rights held by R. Chitrin and Company against shareholders of the 1st applicant were, in terms of the judgment under HC 1676/03 (and Supreme Court case under SC 140/05), ceded to the 2nd applicant. The 2nd applicant has acquired all the shares in the 1st applicant and 2nd applicant's control, ownership and rights over Jameson Buildings is beyond dispute post the Supreme Court determination under case number SC 140.05. The 2nd applicant became the effective owner by purchasing the entire shareholding of the 1st applicant. The title deeds of the Jameson Building are registered in the name of the 1st applicant. The above-mentioned High Court and Supreme Court judgments were between R. Chitrin and Company and a number of respondents, one of which was the 3rd respondent, being the party who claimed to have purchased the shares in the 1st applicant. The 3rd respondent, despite having lost its appeal at the Supreme Court has nonetheless purported to act as owners and landlord and has taken rentals from the 1st and 2nd respondents. The 1st and 2nd respondents have occupied Jameson Buildings without any form of lease agreement from the 1st applicant. R. Chitrin and Company occupied a portion of Jameson Buildings by virtue of a lease with 1st applicant prior to its exercising its rights of first refusal to purchase shares in the 1st applicant. Other tenants were a Mr Chiponda trading as Olgas Centre, Hybate Trading, V M Elkinton and Two Shillings Boutique. Whilst the abovementioned litigation was pending the 3rd respondent arranged that each tenant would pay a *pro rata* contribution towards rates and water and the electricity was metred individually. The collection of these monies by 3rd respondent was without the authority of the applicants. However, after the Supreme Court dismissed 3rd respondent's appeal, this practice ceased in 2007 and since then these monies have been paid by 2nd applicant and no monies have been paid by the respondents. The 1st and 2nd respondents still continue to enjoy the use of the

property and the 3rd respondent continues to exercise assumed rights of administration. No occupational consideration has been paid to the applicants by the respondents. Even though the Supreme Court ruled against them, the 3rd respondent refused to move out when asked to do so by the applicants. However, at a later date, 3rd respondent appeared to have agreed to move out pursuant to the Supreme Court judgment. The 3rd respondent's legal practitioners even negotiated that they be given time to move out on their own. On 23 February 2007, the respondent's erstwhile legal practitioners wrote a letter to the applicants' legal practitioners couched in the following terms:

> "Your letter of the 14th instant to Mr and Mrs Tayali has been referred to us for our attention and further action.
>
> First of all, we must emphasize that our clients are not in unlawful possession of the premises they occupy. After the Supreme Court judgment, there was communication between the parties, and your clients were fully aware of, and consented to, the occupation of the premises by our clients.
>
> …
>
> Finally, it is unfair to ask our clients to vacate the premises on seven days notice: it is not possible to find suitable business premises within seven days. <u>The notice to our client should be reasonable, and we believe that three months is adequate."</u> (emphasis added)

The respondents did not put into issue applicant's right to evict them. They sought the applicant's indulgence to wind up their operations. On 12 may 2007 the 1st respondent, acting on behalf of 3rd respondent wrote a letter to the 1st applicant's agent in the following terms:

> "…
>
> Regarding the notice period served on January 31, 2007, <u>we request that the notice</u> be extended to May 31, 2007 because as you are aware, we are a business and we need to secure new premises as well as wind up our business. …"
>
> Once more, all that the respondents were seeking was 1st applicant's indulgence. The 1st applicant's agent did not accept the respondent's request for indulgence and by letter dated 20 March 2007 declined in the following terms:
>
> "(1) …
>
> (2) …

(3) Regarding the adjustments of the notice period we regret to advise that this will not be possible in view of the extent to which the landlord's redevelopment plans have been developed. As such we expect to have vacant possession of the premises you occupy on 1 May 2007 at the latest …"

1st and 2nd respondents agreed to vacate Jameson Buildings by the end of May 2007. Thereafter, the respondents resisted eviction and their conduct has prevented the applicants from having any sort of access to any portion of the property including such areas over which the respondents have never had any purported rights upon any grounds whatsoever. The respondents have also removed the applicants' lock and chain and violence has been used to deny the applicants' the exercise of their rights. Mr Chitrin was assaulted by an employee of 3rd respondent when he tried to assert the applicants' rights. The respondents then embarked on a media campaign, presumably to seek public sympathy on the matter. They also sought to politicize a legal issue as they sought assistance of the Vice President. The 3rd respondent is subletting the premises and receiving rentals. In their opposing papers the respondent's case is that the above-mentioned negotiations and the letters written in pursuance of such negotiations were on a without prejudice basis. They state in 5.3 of their opposing affidavit:-

"As indicated by the plaintiff [*sic*] the negotiations concerning our eviction was [*sic*] on a without prejudice basis to our right and we are enforcing such rights anywhere. So the without prejudice basis papers must be expunged from the record and we claim our rights to statutory tenant in this case."

On the question of statutory tenancy, the respondents did not make any submissions in this regard in their heads of argument. Be that as it may, nowhere in the opposing affidavit do any of the respondents claim to have a lease or paid rentals. This fatal lack of this material averment puts at rest any claim to a right of occupation by virtue of being a statutory tenant. Section 22(2) of the Commercial rent regulations Statutory Instrument 1676/1983 presupposes a prior lease and continuing payment of rentals before a claim of statutory tenancy is made. Further, the respondents averred that a certificate is required from the Rent Board. These are commercial premises and no such certificate is required. In the opposing affidavit the respondents suggest that the application is based on falsehoods but they have not articulated such falsehoods. In fact, this application is premised on the above-mentioned order of this court which was upheld by the Supreme Court. Another issue raised by the respondents is that the balance of convenience favours their occupation until the Supreme Court finalises the appeal by Mrs Humpage i.e. 3rd respondent in the second application. The said appeal is however non-existent. This is so because her application for condonation for late filing of the appeal was dismissed by the Supreme Court.

Another issue raised by respondents is that they have a lien over Jameson Buildings. This issue was raised for the first time in the heads of argument. The averments on the existence of the lien should have been made in the opposing affidavit. It seems this is a mere after thought. It is not clear what type of lien is being claimed. In any event, the respondents are not in lawful possession of the premises so they cannot claim a lien. There are no averments of the nature and extent of improvements upon which the claim for a lien is premised. The respondents have not established any defence at law at all except the clutching at straws. They had their matter determined by this court. The applicants have set out clear grounds showing that they have all rights over the disputed property and that the respondents occupy the property without any right whatsoever and without paying rent or contributing to other expenses such as rates. The opposing papers carefully analysed in fact simply do not disclose any defence at law. The deponent, somewhat emotively, points out that the property was purchased by R. Chitrin and Company for what is now a paltry sum. The fact is however, at the time of the transaction the purchase price was a reasonable sum. Hyper-inflation has eroded that sum but that is not the fault of applicant. In any event, a perusal of the papers in the very first High Court case will show that the respondents themselves offered very much less for the property than was offered by R. Chitrin and Company.

The effect of the High Court and Supreme Court orders, supra, is that R. Chitrin and Company have a right of first refusal which right resulted in a ruling in their favour. The applicants have made out a case for the eviction. The respondents have blown hot and cold. On the one hand, they sought indulgence of the applicants to seek alternative premises to move to. On the other hand, they arrogantly refused to comply with the order of this court as confirmed by the Supreme Court. This kind of behavior calls for costs at an enhanced scale – *Fuyana* v *Moyo & Ors* HB-39-05. Further, the respondents used strong language in their pleadings. This is not desirable and calls for censure by the court by way of an appropriate award for costs on a higher scale – *Shoprite Checkers (Pty) Ltd* v *Bumpers Schwarmas CC & Ors* 2003(5) SA 354 (SA); *Dr Ferguson & Partners* v *Zimbabwe Federation of Trade Unions & 33 Others* HB-57-04 and *Mkwananzi & Anor* v *Mkwananzi & Anor* HB-125-06.

Accordingly the provisional order granted by this court on 20 July 2007 be and is hereby confirmed. The applicants have applied for this order to be carried into execution and have placed reliance on Rule 240 of the High Court Rules 1971. It is in exceptional cases that the court will order execution notwithstanding the filing of any notice of appeal - *Masukume* v *Mboma* HB-46-03 and *Jere* v *Chitsunge* HB-10-03. There are major problems in the latter application for execution pending appeal. First, the founding affidavit does not contain averments in this regard. The issue was raised in the heads of argument and oral submissions by Ms *Moyo.* Second, procedurally I do not think I can make such an order outside a special application. In *Zimbabwe Mineral Development Corp & Anor* v *African Consol Resources PLC &*

Ors SC-1-10 CHIDYAUSIKU CJ dealt with this issue in detail. He noted that at common law the noting of appeal against a judgment suspends the operation of that judgment. At common law the court granting the judgment enjoys inherent jurisdiction to order execution of that judgment despite the noting of an appeal, the successful party has to make a special application for such relief. For the court to be able to exercise this discretion properly, the special application must set out in some detail the basis for seeking such relief. The respondent is entitled to an opportunity to respond to the application. In this case, the applicants did not make a special application, they simply applied at some stage in the course of the proceedings to have a relief of that kind. This approach renders the fundamental right of appeal nugatory or abrogated without due process. Once a judgment is given, the losing party is entitled to appeal. The noting of appeal has the effect of suspending the judgment. It is only then that the successful party can make a special application for leave to execute the judgment despite the noting of an appeal.

Second application – HC 2747/07

This claim by Nerger Properties for an order that the right of first refusal granted to R. Chitrin and Company be declared void for non-compliance with section 183 of the Companies Act. Mr *Mazibisa*, for the applicants, concedes that the proceedings are between more or less the same parties and concern more or less the same subject matter i.e. R. Chitrin and Company's right of first refusal. As alluded to in the first application above, this High Court and Supreme Court ruled that R. Chitrin and Company has such right of first refusal. Mr *Mazibisa*, however, submits that the two matters are not founded on the same cause of action. Nerger Properties' claim in this second application is based on alleged non-compliance with section 183 of the Companies Act [Chapter 24:03] ("the Act"). It is applicants' contention that in light of the provisions of section 183(1) (b) and 183(2) of the Act there ought to have been a general meeting of Potential investments shareholders to empower and authorize the director Mr Louw (who granted R. Chitrin the right of first refusal) in specific terms. It is alleged that there was never such a general meeting of Potential Investments shareholders to authorize the disposal of Jameson Buildings via the sale of the entire issued shares and loan account of Potential Investments. In the circumstances, it is averred that the resultant right of first refusal agreed upon by one of the directors of Potential Investments and R. Chitrin is null and void for non-compliance with section 183(1)(b) and 183(2) of the Act. Authority for this averment is submitted to be *Mason* v *Timore Trading services (Pvt) Ltd* 2004(2) ZLR 347(H) and *Ngatibataneyi (Pvt) Ltd* v *Moyo & Anor* SC 13/07.

It is beyond dispute that question of Mr Louw's authority to dispose of Jameson Buildings was contested issue at the High Court and Supreme Court in the previous proceedings. Admittedly no specific reference was made to section 183, supra. But the issue

was indeed determined by the High Court and Supreme Court. In his cyclostyled judgment under HB-30-05 CHEDA J at pages 7-8, stated:

> "The truth of the matter is that Mr Louw had the mandate and authority to deal with both Mr Chitrin for and on behalf of applicant and 7th respondent. There, therefore existed a special relationship between the two in the form of principal and agent and as such 1st respondent [Rebecca Elizabeth Humpage] can no doubt escape the conduct of Mr Louw. The question is whether or not the applicant had a right of first refusal on this property. Mr Louw negotiated the lease agreement. He remembers that Mr Chitrin kept on referring to the right of first refusal …" (emphasis added)

What can be discerned from this passage is that Mr Louw's mandate to grant the right of refusal to R. Chitrin was a crucial issue determined by the High Court in the previous proceedings. The applicant does not at all proffer an explanation why he did not raise the additional issue of assailing the right of refusal on the basis of section 183, supra. Why is it challenging this right of refusal in a piecemeal fashion? Nerger Properties was in any event represented by a legal practitioner. Be that as it may the Supreme Court under SC 476-06 in the former proceedings also dealt with Mr Louw's authority or mandate to grant the right of refusal to R. Chitrin. At page 6-7 of the cyclostyled judgment this is what appears:

> "Mrs Zurnamer's contention that Louw did not have authority to grant it [right of first refusal] does not assist. Potential had long authorized Louw to deal with the property on its behalf. Indeed when Louw granted this right to the respondent he genuinely believed he was entitled to do so and similarly Chitrin was entitled to believe that a right granted by Louw was proper as he always dealt with matter regarding the property. It does not assist Potential to attempt to place any limitations on Louw's mandate at this state. Louw was at all material times an agent of Potential concerning the property …" (Emphasis added)

The respondent's case in this matter is that the applicant is merely trying to obtain the same relief that it failed to establish in the previous proceedings and relies on a wholly inappropriate section of the Companies Act to do so. The respondent's case is alternatively, that, in any event, section 183, *supra*, does not apply in this case. It is respondent's argument that what happened here is that the shareholders in the company (3rd to 7th respondents) sold their shares. Mr Louw did not sell the company assets. It is argued that when shares are sold and transferred no meeting defined in section 183, *supra,* is required.

It is clear from the foregoing that this special plea of *res judicata* raised by the respondent is a declaratory plea which seeks to quash the matter altogether. It seeks to destroy to operation of the cause of action – *Brown* v *Vlok* 1925 AD 56 at 58; *Sibeko and Anor* v

Minister of Police & Ors 1985 (1) 151 (W) and *Chimpondah & Anor* v *Muvami* HH-81-07. In the latter judgment MAKARAU JP (as she then was) had this to say at page 4 of her cyclostyled judgment:

> "The requirements for the plea of *res judicata* are settled. Our law recognizes that once a dispute between some parties has been exhausted by a competent court, it cannot be brought up for adjudication again as there is need for finality in litigation. To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute.
>
> For the plea [*of res judicata*] to be upheld, the matter must have been finally and definitely dealt with in the prior proceedings. In other words, the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties by making a finding of in law and/or in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment."

The requisites of *res judicata*, put differently, are that-

(a) The two proceedings must have been between the same parties or their successors in title;
(b) Concerning the same subject matter; and
(c) Founded upon the same cause of action or cause or complaint – *Mitford's Executor* v *Ebden's Executor & Ors* 1917 AD 682; *Le Roux* v *Le Roux* 1967(1) SA 446 (A);

The Civil Practice of the Supreme Court of South Africa (4th Edition) Herbstein and Van Winsen at 250 – 1 and *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (SC). For a plea of *res judicata* to succeed, however, it is not necessary that the cause of action in the narrow sense in which term is sometimes used should be the same in the latter case as in the earlier case. If the earlier necessarily involved a judicial determination of some question of law or fact in the sense that the decision could not have been legitimately or rationally pronounced without at the same time determining that question or issue, then that determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be *res judicata* in any subsequent action between the same properties in respect of the same subject matter – *Williams* v *Shub* 1976(4) SA 567 (C); *Boshoff* v *Union Government* 1932 TPD 345; *Cook & Ors* v *Muller* 1973(2) SA 240 (N); *Owen Smith* v *Owen Smith* 1981 ZLR 514 (S); *Munemo* v *Muswerwa* 1987(1) ZLR 20 (SC); *Mvaami (Pvt) Ltd* v *Standard Finance Ltd* 1977(1) SA 861(R) and *Wolfenden* v *Jackson, supra.* In this case the issue of Mr Louw's authority to grant the right of

first refusal was hotly contested in the previous proceedings. As alluded to above, the High Court and Supreme Court made a determination that Mr Louw had authority to represent Potential in its dealings with R. Chitrin. The applicant seeks to plough the same ground of challenging Mr Louw's authority based on section 183, *supra.* With the benefit of experienced counsel in the previous proceedings applicant does not proffer any explanation why the challenge of Mr Louw's authority was not based on section 183, *ab initio*.

To allow this kind of application will result in uncertainty in court decisions and will bring the administration of justice into disrepute. The Supreme Court has confirmed the High Court decision that Mr Louw had the authority to represent Potential in the granting of the right of first refusal. The Supreme Court's judgment is final in terms of section 26 of the Supreme Court Act [Chapter 7:13]. The issue of *res judicata* is fatal to the applicant's claim. This court has inherent jurisdiction to prevent abuse of its process in certain circumstances. This power has to be exercised sparingly and only in exceptional cases and in clear cases – *Hudson* v *Hudson & Anor* 1927 AD 259 at 267 and *Fisheries Development Corp of SA Ltd* v *Jorgensen & Anor*; *Fisheries Development Corp of SA Ltd* v *AWJ Investments (Pty) Ltd & Ors* 1979 (3) SA 1331 (W) at 1338. This is one such case where the proceedings are vexatious and frivolous. The applicant had ample forum and opportunity to challenge Mr Louw's authority. The applicant did so in the High Court and in the Supreme Court unsuccessfully. Thereafter, the applicant went back and studied the law once more and discovered section 183 and decided to use it to assail Mr Louw's authority.

Without going into other issues raised, I accordingly dismiss this application with costs on the legal practitioner and client scale.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners under HC 1583/07 and respondent's legal practitioners under HC 2747/07
Cheda & Partners, respondent's legal practitioners under HC 1583/07 and applicant's legal practitioners under HC 2747/07