

A.V. ZEEDERBURG (PVT) LTD

And

MATURIN INVESTMENTS (PVT) LTD

Versus

TERRY TEVERA MAPFUWA

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 28 FEBRUARY & 22 MARCH 2018

Opposed Application – Summary Judgment

S. Huni, for the applicants
P. Madzivire, for the respondent

BERE J: On 10 September 2015 the two applicants in this case issued out summons in this court seeking to cancel the lease agreement allegedly entered between the 1st applicant and the respondent, and also seeking an order for the eviction of the respondent from Lot 104 A Essexvale Estate and all those claiming title or occupation through him, together with costs of suit on attorney – client scale.

The basis of the two applicants' action were that the 1st applicant being the registered owner of the property in question as evidenced by the title deed attached to the summons had entered into a lease agreement whereby it had leased to the respondent the bottle store, kiosk and vegetable market stall for an indefinite period.

The 1st applicant alleged that it had subsequently sold the property in issue to the 2nd applicant on 1st March 2015, which sale necessitated the 1st applicant to give vacant possession of the property to the 2nd applicant.

It was averred in the summons that respondent had been notified of the sale of the property and given 3 months notice period to vacate the property in order to pave way for the second applicant's possession.

It was finally contended that the respondent had failed and or neglected to vacate the premises.

In response to the summons filed by the applicants, the respondent, after requesting for further particulars and having been furnished with same filed its plea on 9 November 2015 opposing the relief sought by the two applicants in their summons.

The respondent pleaded that it had no legal relationship with the 2nd applicant and that it also owned the property in issue.

Respondent further alleged that the 1st applicant could not possibly have sold the property in question without the respondent's approval and knowledge and that if such sale had been concluded such sale was null and void, if not fraudulent.

Faced with this plea the two applicants filed the instant application for summary judgment alleging that the respondent had no valid defence to their action and that the appearance to defend and the subsequent plea were only filed for purposes of buying time.

The respondent opposed the application for summary judgment by alleging *inter alia* that he owned the property in question and therefore he could not be evicted from same. In support of his position the respondent attached a document speaking to his partnership agreement with Walter Rodney Taylor (in his capacity as director of Zeederburg (Pvt) Ltd).

The respondent also contended in his notice of opposition that there were material disputes of fact which could not be resolved on the papers and that because of this this case was not suitable for summary judgment.

Both counsels are agreed on the legal principles involved in an application for summary judgment but their point of divergence stems from the application of facts of their respective client's factual averments to the law.

For clarity's sake it is trite that in an application for summary judgment, a defendant will succeed in his defence if he demonstrates that he has a *bona fide* defence. In this regard, the Supreme Court outlined what is expected in an application for summary judgment in the case of *Kingstone Ltd v L D Ineson (Pvt) Ltd* as follows:

“In summary judgment proceedings, not every defence raised by a defendant will succeed in defeating the plaintiff's claim. What the defendant must do is to raise a *bona fide* defence, or a plausible case, with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. The defence must allege facts which, if established would enable him to succeed... The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts... Care must be taken, in suit for ejection, not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejection is sought to raise fictitious issues of fact, thereby delaying the resolution of the matter to the detriment of the lessor.”¹

From the 1st applicant's founding papers, it is clear that the respondent has always accepted his position as a tenant. In this regard, on 29 July 2015 the respondent deposed to an affidavit where he stated *inter alia* as follows:

“I, the undersigned TERRY TEVERA MAPFUWA, do hereby make oath and say that:-

...

- (3) I have been a business partner with the respondent in the Petroleum Industry for more than three (3) years trading as Zeederburg Garage in Esigodini.
- (4) ...
- (5) ...
- (6) I am aware that me and my business partner the 1st respondent are not shareholders of the company, hence we have no capacity to sale (*sic*) and or invite the public to inspect the building in pursuance of selling the property.
- (7) Besides being the sitting tenant, I have the right of first refusal when the immovable is being disposed.”² (my emphasis)

¹ 2008 (1) ZLR 451 (S) at pp 451F-H & 452E

² Affidavit deposed to in this same court under another High Court matter

The above-referred affidavit was deposed to by the respondent for another case in this same court and the deposition was on 29 July 2015. The argument then is, if the respondent understood himself to be a tenant in July 2015, how then could he have changed his status by becoming the owner of the disputed property in August 2003? The respondent's argument is not inspiring at all but loaded with deceit.

The 1st applicant has attached to its founding affidavit a title deed confirming that indeed it owns the property under dispute. In contrast, the respondent has attached no document confirming its alleged ownership of the property.

It is trite that when property is registered, *prima facie*, the person in whose name the property is registered has a real right in the property, and no one may claim a greater right over that property than him.

It is this court's view, as correctly submitted by the applicant's counsel that the unsolicited admission made by the respondent confirming his tenancy should not be taken lightly by this court. In this regard, the Supreme Court had occasion to consider the effect of such an admission as looked at in view of section 36 of the Civil Evidence Act³ in the case of *Mining Industry Pension Fund v DAB Marketing (Pvt) Ltd* by stating as follows:

“A formal admission made in pleadings cannot be ignored by the court before which it is made. Unless withdrawn it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted.”⁴

The respondent was given three (3) months notice to vacate the property. Surely, his alleged partnership agreement (even if accepted) cannot possibly confer upon him rights on the leased property greater than those of the title holder.

³ Chapter 8:01

⁴ 2012 (2) ZLR 132 (S) at p 133D-F

It is doubtful in my view (although I prefer to leave the issue open for future consideration) whether a right for first refusal can be successfully relied upon where the property in issue has already been sold and transferred to an innocent party.

From the evidence on papers, it seems that the respondent's claim of ownership to the property is not sustainable as he holds no title to it. The respondent can argue about his having been overlooked as a person with the right of first refusal after vacating the leased property and outside the gate.

I also note with concern that the respondent claims that there is a material dispute of fact in this matter. With respect, I do not see traces of any such disputes. The respondent's wish to own the property in issue cannot be afforded greater weight to the applicants whose ownership is confirmed by title. The respondent's claim for the existence of a material dispute of fact sounds no more than an illusory assertion. In this regard, I can do no better than borrow the words of my brother MATHONSI J, in the case of *The Railways Enterprises t/a Paroun Trucking v Dowood and David Bruno Luwo* where the learned judge put it as follows:

“a party does not create a real dispute of facts by merely denying the allegations made by the applicant in its founding affidavit. That party must present a story in its defence which would lead the court to the conclusion that indeed a dispute of facts exists that cannot be resolved on the papers. ...”⁵

In conclusion, I am more than satisfied that the applicants have made a good case for summary judgment.

It is ordered:

- 1) That summary judgment be and is hereby granted in favour of the applicants against respondent more specifically in that;

⁵ HB-53-16

- (a) The lease agreement between the 1st applicant and the respondent be and is hereby cancelled;
- (b) The respondent and all those claiming title or occupation through him be and are hereby evicted from Lot 104A Essexvale Estate within 30 days from the date of this order.
- (c) The respondent be and is hereby ordered to pay costs of suit.

Coglan & Welsh, applicants' legal practitioners

Joel Pincus, Konson & Wolhuter, respondent's legal practitioners