DAVID DZEKA
Versus
ENIA NYABANGO

HIGH COURT OF ZIMBABWE
HUNGWE & GUVAVA JJ
HARARE, 27 March 2003 and 25 February, 2004

Civil Appeal

Mr F.M. Katsande, for the appellant
Mr M Hungwe, for the respondent

HUNGWE J. Appellant appeals against two judgments of the court of the Magistrate. In the first judgment, the court a quo granted an order of ejectment in favour of the respondent against the appellant with costs on the higher scale. In the second judgment, the court a quo granted leave to the respondent to execute the writ of ejectment notwithstanding the notice of appeal filed by the appellant.

Appellant raised six grounds of appeal viz,

1. That the magistrate "erred in law by failing to dispose justice impartially leaving no doubt that he had preconceived his judgment."
2. That.. "due to the antipathy and bias, the learned magistrate perfunctorily evaluated the defence's version crediting the plaintiff's case even in the face of allegations of fraud/corruption when she failed to produce a key witness to refute the defence case.
3. That the learned magistrate had no jurisdiction to determine a dispute whose monetary value of $420 000 far exceeded the court's jurisdiction.
4. That the learned magistrate erred by refusing to allow an application to amend the defendant's plea.
5. That the learned magistrate erred in law by failing to

appreciate that respondent enjoying only a personal right, lacked competence to eject appellant.

6. That he misdirected himself at law by making an award of costs on a higher scale where there was no justification for such an award.

In the second appeal appellant relies on two grounds, viz

a) that the learned magistrate erred in law in granting the respondent leave to execute on a judgment pending appeal as there was overwhelming prospects of success on appeal.

b) That the learned magistrate erred in ordering the enforcement of a writ which was issued prematurely.

Dealing with the first two ground of appeal, appellant did not persist

with the same in his main heads of argument as well as his supplementary heads. These grounds allege serious misconduct on the part of the trial magistrate. To make such allegations against a judicial officer is a serious matter. It is unethical for an officer of the court such as a legal practitioner of Mr Katsande's standing to make such allegations without foundation. A perusal of the record does not support the allegations of prejudicial bias and antipathy that appellant alleges in his grounds. The reasons of judgment of the court does not in any way reflect any bias on the part of the magistrate. No wonder Mr Katsande could not advance any submission in his heads or in court to support these two grounds.

As to the question of jurisdiction the magistrate dealt with this point when it was raised *in limine*. The magistrate decided against the appellant.

Appellant persists with the point that the court *a quo* had no jurisdiction in terms of Section 11(1)(b)(iii) of the Magistrate's Court Act [*Chapte*r 7:10].

The section provides;

"Every court shall have in all civil cases, whether determinable by general law of Zimbabwe or by customary law, the following jurisdiction;

((a) .....
.....

b) with regard to causes of action –
(i) .....
(ii) .....
(iii) In actions of ejectment against the occupier of any house, land or premises situated with the province;
Provided that, where the right of occupation of any such house, land or premises in dispute before the parties, such right does not exceed such amount as may be prescribed in rules in clear value to the occupier."

At the time the prescribed amount in terms of the rules was $200 000 00.

It is necessary, for the better understanding of this appeal, to recite briefly the undisputed fact, which gave rise to this suit.

In 2001 Graham and Douglas Real Estate (Pvt) Ltd advertised stand no. 6029 Tafara Township Mabvuku, for sale.

Respondent, who lived in the same suburb with the registered owner one Finhai Frederick Dzeka, offered to buy the property. On 21 October 2001 she entered into an agreement of sale with the said Finhai Dzeka and duly paid the full purchase price $420 000,00. On 30 October the Municipality of Harare approved the assignment of the cession by the seller to the respondent. A memorandum of Agreement of assignment was duly executed on that date.

During this period the appellant, a son of the seller was in occupation. In the court a quo the court accepted the evidence that appellant's father advised him of the sale and that he could come out to the rural areas where he had secured him a plot. Further it was accepted by the trial court that respondent had discussed the sale with appellant who agreed to vacate and make way for her. The agreed date came and went without any sign that appellant will vacate. Respondent then sued for eviction. She got an order for ejectment. Against that

order appellant appeals.

Appellant's position initially was that he would vacate the premises. He then changed his mind. When the summons were issued he claimed in his plea that he had a right of perpetual occupation granted to him by his father as consideration of years of financial support he had given to his father, and for improvements he had effected on the property. Despite these claimed rights respondent and his father had proceeded with the sale to his prejudice.

In order to decide whether or not the magistrate court has jurisdiction in the matter, it is important to determine whether the right of occupation is in dispute, before the clear value to the occupier yardstick is considered.

For the jurisdiction of the magistrate's court to be ousted under section 11 of the Act, the defendant must show;

i) that there is a *bona fide* dispute as to the right of occupation; and

ii) that the right of occupation is worth more than $200 000 in clear value to the occupier.

See *Van der Westhuizen v Petersen* 1922 TPD 412

Malherbe v Britstown Municipality 1949 (1) S.A 281

Munsamy v Gorender 1950(2) S.A. 622

Jordaan v De Beer Scheepers 1975 (3) S.A. 845

That being the legal position the first step, it seems to me, is to enquire what right of occupation if any, is in dispute and whether such a dispute is *bona fide*.

The pleadings in this case show this. Plaintiff's case is that she bought, by way of cession, the right, title and interest in this premises from the legal holder of those rights, who is the defendant's father. There is proof to that. The cession was approved by the relevant authorities, the City of Harare and a certificate in proof of that is on the papers. Both the City of Harare and the seller recognised the plaintiff as the new "owner". There is evidence that this new situation was

explained to appellant by virtue of his being in occupation, by his father, the estate agents and the City of Harare. At that time there was no allegation that he occupied the premised under the guise of any right whatsoever besides being in gratuitous occupation. He was indebted to his father for that.

The Agreement of Sale executed by Finhai Dzeka and respondent by operation of law terminated whatever arrangement gave appellant the gratuitous occupation of the house subject of the sale. As holder of those rights Finhai Dzeka was entitled to alienate such rights without recourse to or consultation with defendant. The act of cession extinguished any rights that defendant may have had, if such right existed at all, in occupying the house.

Defendant states in his pleadings that he had a right of perpetual occupation of the property arising from and as consideration of the may years of financial support he gave to this father, Finhai.

As to whether there was a bona fide dispute about the defendant's right of occupation that issues was not addressed in the ground of appeal. The magistrate dealt with it and found that the defendant's point in limine lacked good faith. He dismissed the point in limine on that basis.

As observed by WESSELLS JP in *Van der Westhuizen v Petersen* 1922 TPD 412; at page 414

> " Now where the law says 'in actions of ejectment against the occupier of any premises or land within the district .....' the magistrate has jurisdiction 'provided that where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed R1 000, clear value to the occupier' it must mean that there must be an actual bona fide dispute. It is not sufficient for a person to go to court and say
> "I dispute your right." There must be some proof that the dispute rests upon some grounds that are not more or less frivolous."

I respectfully agree with his lordship's remarks. It seems to me that this approach commends itself in that it obviates the vexatious defence's that may be put up by tenants for the purpose of postponing the day of reckoning. Where an occupier has no bona fide defence to

an ejectment action, it is difficult to see how any dispute could be said to be *bona fide*.

In the present case the defendant does not say that he occupies the premises as owner. He lays claim to a right arising from possible heirship or inheritance. He does not join his father in the action although he promises to do so in his pleadings. He does not even call his father to the witness stand to buttress his claims.

In my assessment defendant failed in the first hurdle to show that the dispute was *bona fide*.

Even if I were wrong to so hold it seems to me that he was still bound to fail on different grounds.

Defendant raised a special plea in bar excluding jurisdiction of the magistrate court. As such the onus was on him to establish that defence. The onus is on the defendant to establish the defence pleaded - per BROOM J in *Mumsamy v Govender* 1950 (2) S.A. 622 (N).

Defendant claimed lack of jurisdiction citing the sum of $420 000,00 as the value to him of the premises in dispute. That is the value of the premises at the time it was sold. It cannot in my view be the same as clear value to the occupier. What must be shown is the clear value of the right of occupation. The expression "clear right to the occupier" in section 11 (1)(b)(iii) of the Magistrate Court Act imports value over and above the rent payable. See *Jordaan v De Beer Scheepers supra.* It is not the same as value to the defendant as pleaded by defendant. *Langham Court (Pvt) Ltd v Mavromaty* 1954 (3) S.A. 742 at page 746.

In order to determine what value to attach to a disputed right of occupation, a conspectus of the whole transaction should be taken. *Van der Westhuizen v Petersen supra*. *In casu* had there been any transaction between plaintiff and defendant, the defendant's value of $420 000,00 would have been arguably justified. In the absence of any such transaction there could be no basis at all for the appellant's argument. In any event defendant failed to discharge the onus upon

him to establish that defence.

In the premises the learned trial magistrate, correctly in my view, dismissed the special plea in bar taken by the defendant.

As to the ground that the court erred in refusing to grant an application to amend the defendant's plea, counsel for defendant sought to make a comparison of section 66 of the Magistrates Court Act [*Chapter* 7:10] with Rule 132 of the High Court Rules. He urged the court to find that on the basis of the similarly worded provisions of the High Court Rules, that court cannot act otherwise than in terms of the Magistrates Court Act. It cannot do what the Act does not specifically empower it to do.

It therefore cannot apply the provisions of order 132 to vest itself with the wider powers to amend pleadings at any stage before judgment is rendered.

Section 66 of the Magistrates Court Act is worded along Section 111 of the old South African Magistrates Court Act No. 34 of 1994 as amended.

The South African Act allows parties to amend pleadings at any stage but before judgment. Our Act specifically limits amendments to pleadings to "before or at the hearing." In other words one cannot seek to amend pleadings during trial. This is what defendant sought to do. The magistrate quite rightly refused to grant the application.

The fifth ground attacks the lack of capacity on the part of the plaintiff to eject defendant arising on the basis that plaintiff ought to have joined the City of Harare as it is the owner of the premises in question.

The argument as I understood it was that plaintiff only enjoyed a personal right in the property owned by the City of Harare. That being so she could not on her own seek to eject another person.

A cession is effected by an agreement between the cedent and the cessionary. Thus the contractual rights in question are transferred or ceded by the former to the latter.

See *Hiddingh v C.I.R* 1941 A.D. 119.

The word cession simply mean a transfer or making over, and just as the word delivery is used to denote the transfer of a corporeal thing, so cession is employed to denote the transfer of an incorporeal thing, whether it be a real right or a personal right.

See *Smith v Farelly' Trustee* 1904 T.S. 955 at page 956.

Thus by approving the cession between Finha Dzeka and the plaintiff, the Harare City Council similarly ceded all its rights including the right to sue for ejectment to the plaintiff. The magistrate therefore correctly held that plaintiff was properly suited.

As for the grant of leave to execute a judgement under appeal taking a conspectus of the whole matter before that court, I am unable to say that that court failed to exercise its discretion judiciously.

Similarly I find nothing to criticize in the order of costs in a higher scale granted by the court *a quo*.

In the result the appeal is dismissed in its entirety.

GUVAVA J, agrees.

Katsande & Partners, legal practitioners for applicant
Hungwe & Partners, legal practitioners for respondent