

AMON MURWIRA  
and  
KARIN SIGRID MURWIRA  
and  
ALEXANDER TONDERAI MURWIRA  
versus  
NOXON INVESTMENTS  
and  
DAVID GOVERE

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 14 November 2016 & 18 January 2017

**Opposed Matter**

*E Jera*, for the applicants  
*A Bvekwa*, for the respondents

MATANDA-MOYO J: The applicants applied to this court for the following remedy;

- “1. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents and all those claiming occupation through them be and are hereby ordered to vacate from the premises at stand 13975 Salisbury Township of Salisbury Township Lands Community known as stand 13 975 Plover Avenue Mt Pleasant Harare within seven days of the service of this order on them.
2. That in the event that the respondents do not vacate the property within the period stated, the Sheriff of the High Court be and is hereby ordered, directed or authorised to eject the respondents and all those claiming occupation through them from the premises; and
3. That the respondents shall meet the costs of this application on an attorney and client scale if opposed to this application.”

The brief facts of this matter are that the applicants are the registered owners of stand 13975 Salisbury Township of Salisbury Township Lands having successfully bought the property at a Sheriff’s auction sale. The respondents are the former registered owners of the above property. The respondents are in the process of seeking condonation for late noting of an

application to set aside the Sheriff's sale. The basis for wanting to challenge the sale is that the property was sold at an unreasonably low price.

The respondents in their opposing papers reiterated that the sale is under challenge and once the sale is set aside then the transfer would also fall away.

There is no doubt that the applicants are the registered owners of the property in question (- Deed of Transfer number 00001889/2016 refers), having bought the property at a Sheriff sale. It is also a fact that there is no challenge pending before this court. The respondent has only registered an intention to challenge the confirmation of the sale by the Sheriff. At the moment no condonation for late noting of application has been granted by this court.

The applicants have approached this court in terms of the law relating to *rei vindicatio*. The applicants' claim is grounded on their right to ownership. In order to succeed in a *rei vindication* action it is incumbent upon the applicants to prove the following;

- 1) That ownership of the res vests in them. See *Goadini Chrome (Pvt) Ltd v McC Contracts (Pvt) Ltd* 1993 (1) SA 77 (AD) and *Concor Construction Cape (Pvt) Ltd v Santan Bank Ltd* 1993 (3) SA 930 (AD) *Savanhu v Hwange Colliery Co. SC 08/15, Air Port Game Park (Pvt) Ltd & Ors v Minister of Agriculture & Rural Settlement SC 18/04.*
- 2) That the res in dispute still exists and is clearly identifiable; *Sorvaag v Pettersen & Others* 1954 (5) SA 636 and
- 3) That the respondents were in possession of the res at the time of coming to court *Graham v Ridley* 1931 TPD 476; *Chetty v Naidoo* 1974 (3) SA 13(H).

Ejection of an occupier of land can be obtained by the registered owner of the property. See Pretoria *Standraad v Ebrahim* 1979 (4) SA 193 (T). In terms of the title registered in the Deeds Registry's Office the applicants are the owners of the property in question. The first requirement has been proved by the applicants providing the title deeds which are in the names of the applicants. The second requirement has also been satisfied as the property in question is in existence and is clearly identifiable. Equally the last requirement has also been proved that the respondents were and are still occupying the premises.

The remedy of *rie vindicatio* entitles the owner to 'exclusive possession'. It is founded on the *nemo plus iuns* rule.

Once the owner has proven the above the onus shifts on the respondent to prove a right. There are four main defences to a claim of *rei vindicatio*;

- (1) That the applicant is not the owner of the property. The defendant must show documentary evidence to prove this.
- (2) That the property in question is no longer identifiable or does not exist;
- (3) That the respondent's possession or physical control of the property is not unlawful or
- (4) That the respondent is no longer in physical control of the property.

Herein the respondents acknowledge that transfer of the property has already been done and the property is registered in the applicants' names. They admit the property exists and is identifiable and that they are in possession of the property. They however rely on reversionary rights, that they intend to apply to court for the setting aside of the sale. Such applications have not been done. Besides once a Sheriff's sale has been confirmed and transfer effected there are limited grounds upon which such sale can be reversed.

In the case of *Twin Wire Agencies (Pvt) Ltd v CABS SC 46/05* the Supreme Court made it clear that:

"A challenge to a sale in execution does not constitute a defence to a claim for eviction by the registered owner of the property....."

The court proceeded to comment on a passage in *Mapedzamombe v CBZ 1996 (1) ZLR 257 at 240 D-261A* as follows:

"It is quite clear from the remarks of the learned Chief Justice that the remedy to set aside a sale in execution in terms of r 359 of the High Court Rules is only open to a litigant in circumstances where transfer has not taken place. After transfer any application to set aside such transfer should conform strictly with the principles of common law and falls outside the ambit of r 359 of the High Court Rule."

I am of the view that the applicants have discharged the onus on them entitling them to the remedy of *rei vindicatio*. The respondents dismally failed to provide any recognisable defence to the action. The eviction application must therefore succeed.

On the issue of costs, this is a matter where the respondents clearly opposed the order when they knew they had no defence to offer. I agree with the applicant's submissions that their

defences were frivolous and vexatious designed to gain time on the property. This is a case deserving costs on a higher scale.

Accordingly judgment is entered in favour of the applicant as prayed for in the application with costs on a client-attorney scale.

*Moyo & Jera*, applicant's legal practitioners  
*Bvekwa Legal Practice*, respondents' legal practitioners