

SAMUEL MAKUMBE  
versus  
M.V. MOOLJEE & SONS (PVT) LTD  
and  
LOVEMORE NYAUSARU  
and  
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
CHIWESHE JP  
HARARE, 09 November 2017 and 20 March 2018

**Opposed Matter**

Mrs *L. Chiperesa*, for the applicant  
*O. Mushuma*, for the first respondent

CHIWESHE JP: The first respondent obtained an order under case number HC 10809/13 to eject the second respondent and all those claiming occupation of stand 1092 Umtali Township, through him. The first respondent avers that the applicant occupies the stand through the second respondent and is therefore liable to be ejected in terms of the eviction order obtained by the first respondent against the second respondent. The applicant concedes that he is in occupation of the said stand but that he occupies the stand in his own right and not through the second respondent. He states he is in occupation of the stand pursuant to an agreement of sale he entered into with the first respondent who was represented by the second respondent. He was given vacant possession in June 2012. He awaits transfer of title as he has paid the full purchase price. Despite knowledge of the fact of this sale and occupation, the first respondent obtained the eviction order against the second respondent without citing the applicant who is in occupation. It is for these reasons that the applicant sought and was granted a provisional order staying execution of the order granted in

favour of the first respondent under HC 10809/13. The applicant now seeks confirmation of that provisional order.

The first respondent's opposing affidavit is sworn to by Arun Mooljee, its director. It is to the following effect. In November 2008 the second respondent sought to have the first respondent's property stand 1092 Umtali Township leased to him. A lease agreement was drawn up and signed for that purpose. In March 2009 the second respondent offered to purchase the property. It was agreed that the property be sold to the second respondent for the sum of US\$140 000.00 to be paid in instalments within one year. It was also agreed that until the purchase price was fully paid, the lease agreement would remain in force with the rental of \$1000.00 being payable every month. The first respondent instructed its legal practitioners to get the second respondent to sign the agreement of sale. He did not sign the document but started paying the purchase price as had been verbally agreed.

In March 2010 the second respondent approached the first respondent seeking authority to mortgage the property in favour of NMB Bank so he could obtain a loan to service the full purchase price of the property. The first respondent agreed to this arrangement. NMB Bank then registered a bond over the property and in addition the bank also required the first respondent to sign a surety deed in its favour. The first respondent did so sign the surety deed and surrendered the title deed.

However, second respondent failed to service the bank loan nor did he pay the purchase price of the property in full. As a result, the Bank threatened foreclosure, and to save its property the first respondent decided to pay off the balance due to the Bank. It paid the sum of \$31 668.80 being the balance due to the bank after which the bank released title deeds to the first respondent. This was on 10 February 2013.

Meanwhile, around end of 2012, the applicant, who was unknown to the first respondent, approached its director in Harare claiming he had bought the property from the second respondent. The applicant was informed that the first respondent owned the property and it had not sold the property. The applicant was directed to sort out his problems with the second respondent. Realizing that the second respondent may have "sold" its property to the applicant, the first respondent sought legal advice. At a meeting held in Harare on 14 May 2013 the first respondent invited the second respondent to pay the balance of the purchase price and arrear rentals. The total

owing stood at \$70 000.00 which the second respondent was unable to pay at once or through a payment plan. The first respondent made it clear to the second respondent that it would not recognize the applicant's interests as the arrangement pertaining to him had been done behind its back and without its authority. The first respondent then gave the second respondent thirty days' notice to pay the balance of the purchase price and arrear rentals failing which both the agreement of sale and lease would be cancelled. The letter of demand is dated 22 October 2013. No such payments were made during the notice period and even after expiry of that period. On 9 December 2013 the first respondent duly cancelled the agreement of sale and issued eviction summons against the second respondent and all persons claiming occupation through him, holding over damages, arrear rentals and other reliefs. The summons were issued under case 10809/13. A default judgment was granted as prayed on 28 May 2014. The order was not immediately enforced as the second respondent had subsequently signed an acknowledgment of debt and asked for more time to pay. That arrangement, entered on a without prejudice basis, did not succeed and as a result on 31 January 2017 the first responded decided to enforce the eviction order.

The first respondent's legal practitioners then phoned the applicant regarding the impending eviction. The applicant referred them to his legal practitioners. It was then that the first respondent learnt that the applicant had obtained a default judgment against it under case number HC 2518/15.

The first respondent nonetheless proceeded to issue a writ of ejectment against the second respondent and all persons claiming occupation through him (including the applicant). The notice of eviction was served on the applicant's wife on 22 February 2017. The applicant reacted by filing the present application seeking an order to stay execution of the writ of ejectment. On its part the first respondent filed under HC 1682/17, an application for the rescission of the default judgment granted against it at the instance of the applicant. The judgment has since been rescinded by order of MAKONI J dated 5 October 2017 given under case HC 1682/17 (HH 752-17).

The first respondent denies that it ever sold the property to the applicant and that it never authorized or mandated the second respondent as its agent in the purported sale to the applicant. It states that there was no company resolution to so mandate the first respondent and indeed none has been produced by either the second respondent or the applicant. It avers that both the

agreement of sale and the default judgment granted against it under case HC 2518/15 are fraudulent documents.

The first respondent denies ever receiving the purchase price from the applicant as alleged. Its own investigations show that the monies were paid into the second respondent's company bank account (Perchant Enterprises (Pvt) Ltd) while the deposit was paid to Future Real Estate, also owned by the second respondent. The applicant has not furnished the first respondent with proof of payments made to it including receipts issued by it in acknowledgment of such payments. The first respondent also denies giving the applicant vacant possession as averred. It could not have done so because there was no contractual relationship between the applicant and the first respondent. It reiterates that the second respondent does not own the property and specifically that he would not have had any title to transfer to the applicant. The first respondent further denies receiving any communication from the applicant demanding transfer of right, title and interest in the property. It denies virtually every averment in the founding affidavit insisting that it told the applicant that he was unknown to them and that he should pursue his remedies against the second respondent whom he had dealt with behind their backs.

The applicant's case is clearly deficient. The basis of his case is that he purchased the property from the first respondent who was duly represented by the second respondent its agent. The first respondent has categorically denied ever authorising the second respondent to sell its property on its behalf. Neither the applicant, the second respondent nor the legal practitioners acting on their behalf are able to furnish this court with the resolution by the first respondent authorizing the second respondent to dispose of its property. In the absence of proof of such resolution from the first respondent, it is folly of the applicant and its legal practitioners to persist with the present claim against the first respondent. Clearly the absence of such resolution by the first respondent lends credence to the first respondent's assertions that the deal was concluded without its authority and that the second respondent and the applicant acted fraudulently. Further the purported payment of the purchase price was made not to the first respondent but to accounts belonging to companies owned by the second respondent. Thus the monies were not paid to the first respondent but to the second respondent. No subsequent transfers were made from the second respondent to the first respondent. Indeed, the applicant is unable to produce any receipts to prove that payment was indeed received by the first respondent. Clearly the applicant has no leg to stand

on having failed to show that the second respondent was indeed authorized to dispose of the property to him or for that matter any other person. He has also failed to show that he paid the purchase to the rightful owners of the property. I would discharge the provisional order on that basis alone.

The applicant has pursued a hopeless case knowing fully well that the first respondent had not authorized the sale of the property to him. His legal practitioners filed a totally defective draft provisional order which was granted in error. In spite of these obvious weaknesses in the case, the applicant has persisted with its case and has put the first respondent out of pocket unnecessarily. I agree with the first respondent's submissions that an order of costs on the higher scale would be appropriate. It is to the second respondent that the applicant should look for redress, not the first respondent.

Accordingly, it is ordered that the provisional order be and is hereby discharged with costs on the legal practitioner and client scale.

*Mkuhlani Chiperesa Legal Practitioners*, applicant's legal practitioners  
*Mushuma Law Chambers*, first respondent's legal practitioners