

IVY RUPANDE
versus
C M GROBELLAR
and
PROTEA VALLEY (PVT) LTD
and
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 8 October 2018 & 17 October 2018

Exception

Plaintiff in person
N Mugiya, for the 1st & 2nd defendants
T Shumba with *Mukucha*, for the 3rd defendant

CHIKOWERO J: On 14 November 2017 plaintiff issued summons for the eviction of the first and second defendants and all those claiming occupation through them from a piece of land known as subdivision 4 of Lot 1 of Buena Vista located in Goromonzi.

Paragraph 5 of the plaintiff's declaration alleges that on 13 November 2003 the third defendant issued plaintiff with an offer letter for subdivision 4 of Lot 1 of Buena Vista farm measuring 161.11 hectares. The offer letter was attached to the declaration as Annexure "A".

Third defendant filed a plea wherein he confirmed issuing the offer letter to the plaintiff, avers that the offer letter is valid, and does not oppose the granting of the remedy sought against first and second defendants.

First and second defendants excepted and pleaded over to the plaintiff's claim.

The exception was not set down for hearing before the trial. Accordingly, the grounds on which the exception was founded were raised as preliminary points at the beginning of the trial.

After hearing argument on these points on 8 October 2018 I reserved judgment.

This judgment is therefore my decision thereon and the reasons therefor.

I will traverse each point in turn.

Res judicata

This point *in limine* is properly raised by way of special plea rather than as an exception.¹

The essential elements of *res judicata* are settled. They are:

- (a) the two actions must be between the same parties or their privies
- (b) the two actions must concern the same subject matter; and
- (c) the two actions must be founded upon the same cause of action.

See *Kawondera v Mandebvu* 2006 (1) ZLR 110 (S); *Flowerdale Investments (Pvt) Ltd & Anor v Bernard Construction (Pvt) Ltd & Others* 2009 (1) ZLR 110 (S); *Chawasarira Transport (Pvt) Ltd v Reserve Bank of Zimbabwe* 2009 (2) ZLR 112 (H).

What Mr *Mugiya* relied on was this. On 25 October 2013 the Harare Magistrates Court convicted defendants one and two together with one Joshua Marumise for contravening s 3 (2) (9) as read with s 3 (3) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] (Occupation of Gazetted Land without lawful authority).

As part of the sentence, the magistrates court made the following order;

“the accused are also ordered to vacate and give vacant possession of subdivision 4 of Lot 1 of Buena Vista in Goromonzi by 6 November 2013.”

All three requirements were not met.

Res judicata is a special plea available in civil proceedings. Its criminal law cousins are *autrefois convict* and *autrefois acquit*. See John Reid Rowland, *Criminal Law in Zimbabwe* 1999 *Chapter 16* p 19.

Accordingly, it matters not that the subject matter and the cause of action in respect of the criminal matter and the present suit are the same.

I find the words of BHUNU J (as he then was) in *Chawasarira Transport (supra)* at 116 E to be apposite in this regard:

“The applicant’s plea of *res judicata* falters at the very first hurdle in that the respondent in this case was not a party to the criminal proceedings in the magistrate court. It is common cause that the parties to that case were the state and the applicant.”

¹ Herbstein and van Winsen, *The Civil Practice of the High Court of South Africa* 5 ed vol 1 pp 609-610

Parties to a criminal case are the accused therein and the state. Plaintiff was neither.

With that, the preliminary point of *res judicata*, being without merit, is dismissed.

I turn to analyse the second point.

Plaintiff did not exhaust internal remedies

The submission was that plaintiff ought not to have instituted the instant proceedings. Instead, she ought to have registered the order of eviction granted by the magistrates court, sitting as a criminal court, with the same court sitting as a civil court, issued a warrant of eviction and caused the eviction of first and second defendants.

This argument is without substance. In *Commercial Farmers Union and others v Minister of Lands and others* 2010 (1) ZLR 576 (S) CHIDYAUSIKU CJ, in delivering the unanimous decision of the Supreme Court, said at 596 D:

“While section 3 (5) of the Act confers on a criminal court the power to issue an eviction order against a convicted person, it does not take away the...right of a holder of an offer letter... to commence eviction proceedings against a former owner or occupier who refuses to vacate the acquired land.”

In my view, it does not matter that the state successfully prosecuted and obtained an eviction order *a quo*. The Superior Court authority referred to above is clear. Plaintiff has a right to institute civil proceedings for eviction. This is what she has done.

The exhaustion of domestic remedies argument, being without merit, is likewise dismissed.

Material non-disclosure

I was referred to an order made by the Magistrates Court on 30 June 2017. The applicant was the Prosecutor General. The respondents were the present first and second defendants. The third respondent was Joshua Marumise.

In that order, the magistrates court dismissed the Prosecutor General’s application for condonation for late filing of the eviction order with the clerk of the magistrates court for purposes of registration.

Nothing turns on that order. It does not take away plaintiff’s right to file the present proceedings. She also was not a party to the proceedings which gave rise to that order.

It necessarily follows that I dismiss, as I do, this preliminary point.

It leaves me to examine the last preliminary point. I pause to record it was not raised on the papers, but it is one that Mr *Mugiya* clearly stated, during the case management meeting held before me on 2 October 2018, would be raised at the commencement of the trial.

I directed at that meeting that the relevant papers, in the form of a bundle, be delivered to the Plaintiff and copy availed for the record.

The point is as follows:

The plea of abatement of *lis pendens*

The requisites of this plea are:

- (a) the litigation is pending;
- (b) the other proceedings are between the same parties or their privies
- (c) the pending proceedings are based on the same cause of action; and
- (d) the pending proceedings are in respect of the same subject matter

It is the law that even where a party satisfies all these requirements, the court has a discretion to grant or refuse a stay of proceedings on the ground of *lis alibi pendens*, In exercising the discretion the court has regard to the equities and the balance of convenience. Ultimately, the question is whether justice will not be done without the double remedy. I refer to a few only of the decisions confirming that the defence of *lis pendens* is not a complete bar to further proceedings concerning the same, but is a discretionary tool in the hands of the court. See *Khan v Provincial Magistrate, Harare and others* 2006 (1) ZLR 298 (H); *Diocesan Trustees, Diocese of Harare v Church of the Province of Central Africa* 2009 (2) ZLR 57 (H); *Mhungu v Mtindi* 1986 (2) ZLR 171 (S).

On 28 November 2017, under case number HC 3126/17 the present first defendant, as applicant, sued the Chief Lands Officer N O (Mashonaland East Province) and the Minister of Lands and Land Resettlement N.O.

That suit, a court application for a declaratur, was issued out of the High Court Bulawayo.

The order sought is as follows:

- “1. The applicant is declared to be the lawful occupier of Lot 1 of Buena Vista Farm measuring 404.68 hectares in Marondera, Mashonaland East.
2. The respondent’s issuance of offer letters against the 404.68 hectares of Lot 1 of Buena Vista Farm, in Marondera Mashonaland East be and is hereby held to be unlawful and wrongful and accordingly all such offer letters are set aside.
3. The subdivisions of the 404.68 hectares of Lot 1 of Buena Vista Farm Marondera by the respondents be and is hereby declared unlawful and wrongful.

4. The first and second respondents are ordered to replace the applicant's offer letter for Lot 1 of Buena Vista Farm, Marondera Mashonaland measuring 404, 68 hectares within 30 days of the date of this order.
5. The respondents are ordered to pay costs of suit on client attorney scale."

The Bulawayo High Court matter is not before me. I observe, however, that the matter is opposed and Heads of Argument have been filed. I was told by Mr *Mugiya* from the bar that the matter is now set down for hearing before MAKONESE J. I was not shown anything to that effect.

More fundamentally, however, the equities are clearly not in favour of the first and second defendants.

I say so for the following reasons.

Well aware of the plaintiff's direct and substantial interest in the land in question the first defendant deliberately avoided citing the plaintiff in case number HC3126/17. A judgment may not be made affecting a person who is not a party to the proceedings.²

Further, well aware of the instant action instituted out of this court (to which the first and second defendants entered an appearance to defend on 21 November 2017) the first defendant went on, seven days later, to institute the court application for a declaratur not out of the Registry of this court at Harare but at Bulawayo.

That conduct has all the hallmarks of forum shopping on the part of the first defendant. I have already pointed out that plaintiff, an interested party, was not even cited in the court application despite the first defendant stating in para 12 of his founding affidavit:

"A lot (*sic*) people have been coming to my farm claiming to be owners of the farm including Ivy Rupande, and S K Muchemwa and I have never known peace since then."

As a further factor worth considering in the exercise of my jurisdiction whether to stay the present proceedings or not I have considered that the respondents in the Bulawayo matter categorically deny that first defendant was ever issued with an offer letter in respect of the land to which the application for a declaratur relates.

In the course of preparing this judgment I came across the judgment in *Shorai Kudzai Muchemwa v CM Grobber* SC 32/17. It paved the way for *Muchemwa* to evict the first defendant.

The matter turned on this court's judgment upholding, on appeal, the magistrates court's judgment and sentence already referred to. In the circumstances I do not see how the High Court

² *Mashingaidze v Chipunza & Others* HH 688/15

at Bulawayo can effectively overturn the Supreme Court decision by granting the declaratur sought. I considered that in determining where the equities and balance of convenience lie.

I observe also that in the Bulawayo matter first defendant did not attach any offer letter to his application.

He did not file any answering affidavit in response to what I perceive to be specific averments from the respondents that no offer letter was ever issued to him. He contends himself with stating in para 9 of the founding affidavit:

“I collected my offer letter from the second respondent’s offices but I can’t remember where the offer letter went and how I misplaced it because at one time my place was forcibly entered into by the beneficiaries who claim that they had been offered the same piece of land and I lost a number of thugs (*sic*)...”

For the purposes of this judgment I have considered that the first defendant has neither attached to his papers filed, either before me or at the High Court in Bulawayo an offer letter issued to him to compete with or contradict the offer letter attached by the plaintiff to her summons.

I have also borne in mind that defendants one and two, and one other, were convicted by the magistrates court for occupying the land which is the subject of this suit without lawful authority.

I have also taken judicial notice of this court’s own records. In this regard, attached to the plaintiff’s bundle of discovered documents is a judgment of this court under case number HH 462/16 wherein defendants one and two, and Joshua Marumise, lost their appeal against their conviction and sentence in the criminal proceedings.

Nothing was put before me to suggest that the judgment in case number HH 462/16 is not extant.

In all the circumstances, therefore, it seems to me that the raising of the preliminary points was designed to stall the trial proper.

The plaintiff did not pray for costs relating to my decision on the preliminary points.

But she prayed for costs in the main. The costs hereof are held over for determination at the trial.

In the result, the following order will issue:

- (1) All the preliminary points raised are dismissed.
- (2) The question of costs is held over for determination at the trial.

Mugiya & Macharaga, 1st & 2nd defendants' legal practitioners
Civil Division of the Attorney General's Office, 3rd defendant's legal practitioners