

CHEDELLOW TOBACCO COMPANY (PVT) LTD
and
PEACEY ESTATES (PVT) LTD
versus
GEORGE MAKAWA DAKA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 7 November 2018 & 11 June 2020

Opposed Matter

A K Maguchu, for the 1st & 2nd applicants
R R Mutindindi, for the respondent

NDEWERE J: The first applicant is Chedgelow Tobacco Company (Pvt) Ltd a private company duly incorporated in terms of the laws of Zimbabwe. The second applicant is Pearcey Estates (Pvt) Ltd, a private company incorporated in terms of the laws of Zimbabwe. The respondent is George Makawa Daka, a male adult formerly employed by the second applicant.

On 29 March 2018 the first and second applicants filed a court application for the eviction of the respondent from the first applicant's commercial premises known as Shasha Complex. The applicants said the respondent took occupation of The Commercial premises in terms of a lease agreement dated 6 January 2012. The duration of the lease agreement was from 1 January, 2012 to 31 December 2014. The agreement was subject to review every December. The rental payable was US\$600 per month. The last clause, clause 8, said the agreement will only be valid whilst the respondent was employed by the lessor, unless agreed in writing.

The applicants said on 3 March, 2016 the respondent was given notice of termination of his contract of employment in terms of section 12c of the Labour Act, chapter 28:01 as amended. The notice period lapsed on 30 June 2016 and the respondent ought to have vacated Shasha Complex upon the lapse of the notice period since the lease agreement provided that the lease of

Shasha Complex would only be valid during his employment by the second applicant. The respondent did not vacate the premises, hence the present application to evict him.

The applicants said continued occupation was prejudicing the applicants of US\$600 *per* month. They therefore prayed for the eviction of the respondent and all those claiming through him and for holding over damages of US\$600 *per* month from 1 July, 2016 to the date of vacation of Shasha Complex by the respondent.

The respondent opposed the application and filed opposing papers on 16 April, 2018. In his opposing affidavit, the respondent refused to vacate Shasha Complex. He said the termination of his employment had not yet been finalized and there were issues which the second applicant as his employer needed to attend to. He also said Shasha Complex was donated to him by Craig Danckwerts who was the managing director of both applicants. He denied entering into any lease agreement with the second applicant. He disputed the authenticity of the lease agreement and the authenticity of his purported signature.

The respondent further said that the applicants had successfully evicted him from the farm house after his employment was terminated and if the applicants had been entitled to Shasha Complex, they would have sought his eviction from the commercial premises at the same time that they applied for his eviction from the farm house.

The respondent denied that he was supposed to pay rent since the property was donated to him by Craig Danckwerts who he said was the real owner of the property. He prayed for the dismissal of the application with costs.

The applicants filed Heads of Argument on 29 May, 2018. They maintained that the respondent's contract of employment was terminated, therefore he had to vacate the commercial premises referred to as Shasha Complex. The applicants denied donating the property and challenged the respondent to produce the alleged deed of donation. They said Mr Craig Danckwerts had no capacity to donate a property belonging to the first applicants. They said a Board Resolution authorizing Mr Craig Danckwerts to donate the complex had to be issued before such a donation could be made validly. Furthermore, the applicants said that any donation which was not in line with s 39 of the Regional Town and Country Planning Act [*Chapter 29:12*] was null and void. They further said any alleged ownership of immovable property which was not in terms of section 14 of the Deeds Registration Act [*Chapter 20:05*] was invalid.

The respondent filed heads of argument on 18 June 2018. He started by raising the point *in limine* that there were disputes of facts which could not be resolved without leading oral evidence and on that basis, the application should be dismissed because the applicants had utilized a wrong procedure when they knew that there were disputes of facts. He maintained that his retrenchment had not been finalized, therefore he was still an employee. He conceded that the donation was not reduced to writing; but was verbal.

The following factors were not disputed:

- a) that respondent was employed by the second applicant
- b) That the immovable property in question is owned by the first applicant
- c) That Craig Danckwerts was the Managing Director of both first and second applicants
- d) That there was no written deed of donation.
- e) That what started was respondent's employment by second applicant, followed by use of the commercial premises (Shasha Complex) by the respondent during his employment.
- f) That during his employment, the respondent enjoyed use of the commercial premises (Shasha Complex) as well as a farm house, all on first applicant's property.
- g) That respondent was served with a retrenchment notice of 3 months and he responded to it, asking for more money according to the breakdown he gave in the letter by his legal practitioners dated 14 April 2016.
- h) That the second applicant tendered payment of the retrenchment package to the respondent and awaited respondent's bank details.
- i) That respondent was evicted from the farmhouse he occupied during his employment at the termination of the employment.

The only issues in dispute were whether the commercial premises, Shasha Complex were donated to the respondent or leased to him and whether his retrenchment was finalized or not.

On the issues in dispute the applicants provided a written lease agreement for Shasha Complex. The respondent disputed signing the lease agreement in his opposing affidavit and alleged a donation. However, he conceded that the donation was just verbal. So the court already has the evidence of the lease agreement, and the evidence concerning the alleged donation from the affidavits of both the applicants and the respondent. Nothing further will be achieved by asking

for oral evidence on the issue of whether the complex was availed to the respondent through a lease agreement or a donation. The applicants and the respondent who are the key witnesses on that matter have already testified under oath in affidavit form. So there is no need for the court to refer the matter to trial for *viva voce* evidence. The point *in limine* alleging adoption of a wrong procedure has no merit and is therefore dismissed.

On the merits, the court considered all the submissions by both applicants and the respondent. The respondent's claim to the property on the basis of a donation cannot succeed. The applicants denied the existence of a donation and the respondent was unable to produce tangible proof of that donation. In addition, the law forbids verbal agreements where immovable property is concerned. That is why sales of immovable property require written agreements of sale. Similarly, a donation of immovable property has to be in writing. The term 'deed' of donation means a written document entitled "Deed" is required. There can be no valid verbal donation. So even if Mr Danckwerts had admitted uttering the words "donated" there would still be no valid donation without a written Deed.

Furthermore, s 39 of the Regional, Town and Country Planning Act, [*Chapter 29:12*] provides as follows:

"39

- 1) Subject to subsection (2) no person shall-
 - a) subdivide any property; or
 - b) enter into any agreement
 - i) for the change of ownership of any portion of a property;
 - ii) for the lease of any portion of a property for a period of 10 years or more or for the lifetime of the lessee; or
 - iii) conferring on any person a right to occupy any portion of a property for a period of 10 years or more or for his life time
 - iv) for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is 10 years or more;
 - or
 - c) Consolidate 2 or more properties into one property;
except in accordance with a permit granted in terms of s 40."

The above section means that even if the applicants had donated the commercial premises, which they deny, that donation would still have been null and void because of the failure to obtain a permit in terms of s 39 of the Regional Town and Country Planning Act, (*supra*)

So if ever there was a donation to the respondent; it was null and void because of the failure to get the permit mentioned above.

In addition, s 14 of Deeds Registries Act, [*Chapter 20:05*] provides as follows:

“Section 14

Subject to this Act or any other law-

- a) the ownership of land may be conveyed from 1 person to another only by means of a deed of transfer executed or attested by a registrar;
- b) other real rights in land may be conveyed from 1 person to another only by means of a deed of cession attested by a notary public and registered by a registrar.”

This means that after obtaining a permit in terms of s 39 of the Regional Town and Country Planning Act, the applicants still needed to do a deed of cession of the commercial premises to the respondent. None of the above technical requirements were done so it is not possible for the respondent’s claim of a donation to succeed in a court of law because the courts can only enforce what was done lawfully.

Furthermore, Craig Danckwerts had no capacity to donate first applicant’s property to the respondent. Being a Managing Director of both applicants did not give him that power. Before he could donate the property, he had to obtain a Board Resolution from the applicants, authorizing him to donate the property to the respondent. No resolution was provided to him so even if he had told respondent verbally that he was donating Shasha Complex, in the absence of a Board resolution from first applicant authorizing him to do so, such a donation would have been null and void from the outset. As correctly pointed out in the *Benjamin Leonard Macfoy v United Africa Co. Ltd* [1962] AC 152 at 160. you cannot put something on nothing and expect it to stand. So a person without capacity to donate cannot make a valid donation.

Regarding the issue of continued employment, the court noted that the respondent contradicted himself in his opposing affidavit. On para 2 he says the termination of his employment was not finalized, but in paragraph 7, he says,

“In any event, the second applicant herein successfully obtained an order of my eviction from the farm house I was living in during my employment after my employment was terminated...”

That paragraph contains a concession that respondent’s employment was terminated and that is why he was successfully evicted from the farm house. How can his employment be terminated in respect of his occupation of the farmhouse; and not be “finalized” in respect of occupation of the commercial premises? That shows that the respondent knows that his contract of employment was terminated and payment tendered.

In para 8 of his opposing affidavit, the respondent said he raised certain issues with the retrenchment board. He referred to the letter by his legal practitioners to the Retrenchment Board dated 14 April 2016, appearing on pp 21 and 22 of the record. That letter does not challenge the date of termination at all. It simply revises the figures. So his employment was terminated in accordance with the notice to retrench. What remained were financial claims only; otherwise the respondent is no longer an employee of the second applicant. On p 22, he gave a computation of the figures he alleged made up his salary. Interestingly; there is a computation figure of \$1000 against Shasha Complex, the commercial premises. This shows that there was a direct link between his employment and the utilization of Shasha Complex; contrary to what he is saying now.

The other aspect of the case which the respondent failed to appreciate is the fact that whilst his employment claims are against the second applicant as his employer; the owner of the commercial premises in issue is the first applicant, as evidenced by the title Deeds in its name. So he cannot refuse to vacate property owned by the first applicant on the basis of his alleged dispute with the second applicant, his employer. He has to vacate from the property and pursue whatever financial claims he has against the second applicant. The first applicant, as owner, has the right to claim back its property from whoever is holding onto it without its authority.

A related issue was that of the lease agreement. The respondent denied entering into any lease agreement. He denied signing it. The applicants said the signature on the lease agreement are similar to respondent's. The applicants could have gone further to have the handwriting checked by an expert. It could have provided company minutes to show who the lessor was as it is not clear if it was the first applicant or the second applicant or both who leased the property to the respondent. Mr Danckwerts who represented both parties in the hearing did not clarify who he was acting for when he concluded the lease. A resolution authorising the lease should also have been attached.

As a result, in respect of the holding over damages claim; the court has no choice but to dismiss that claim; because the applicants did not place sufficient evidence to prove the validity of the lease agreement which was the basis of the holding over damages claim.

Consequently, it is ordered that;

1. The respondent and all those claiming occupation through him be and are hereby ordered to vacate 1st applicant's commercial premises at Chedgelow farm within 48 hours of this order.
2. In the event that respondent fails to comply with the order in para (1) above, the Deputy Sheriff shall be and is hereby empowered to evict the respondent and all those claiming occupation through him from 1st applicant's commercial premises with immediate effect.
3. The applicants' claim for holding over damages of US\$600.00 *per* month from 1 July, 2016 be and is hereby dismissed.
4. The respondent shall pay the applicant's costs of suit relating to the eviction claim only; with each party meeting its own costs on the holding over damages claim.

Dube, Manikai & Hwacha, applicants' legal practitioners
Messrs Matsikidze & Mucheche, respondent's legal practitioners