

Judgment No. SC 31/05
Civil Appeal No. 189/04

ENOCK CHITSA v I M MOTSI

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, MARCH 24 & SEPTEMBER 12, 2005

R M Fitches, for the appellant

T Chiparo, for the respondent

ZIYAMBI JA: This is an appeal against a judgment of the High Court which upheld an order of eviction granted against the appellant by the Magistrates Court.

The facts forming the background of this appeal are as follows:

Prior to 17 May 1996 (the date of the agreement is not legible) the respondent and three others whom I shall refer to as ‘the Manzunzu brothers’ agreed to form a joint venture (“the partnership”) to run a bakery at Murambinda growth point in the Buhera district. In terms of that agreement each party was to contribute the sum of 10 000 dollars as working capital for the partnership and the respondent was to lease, to the partnership, the immovable property being Stand 168 Murambinda Growth Point (hereinafter referred to as “the Stand”) for a period of 12 months renewable subject to negotiation with the respondent.

It is common cause that the respondent was the lessee of the Stand having taken cession of it on 6 October, 1992.

On 17 May 1996 the respondent resigned from the partnership and requested a dissolution thereof. The notice of withdrawal provided that the property would remain leased to the Manzunzu brothers who were trading as 'Murambinda bakery', at an agreed rental.

Thereafter the following events took place:

On 30 March 1998, National Foods Limited obtained judgment in the High Court in case number HC 1655/1997, against all the partners (the respondent included notwithstanding his resignation) in the sum of \$266 207,61 and caused a writ of execution to be issued out of the High Court against the movable goods of the partners. In pursuance of the writ, which was issued on 13 June 1998, certain movable goods located at Murambinda bakery ("the goods"), were attached and removed on 23 October 1998. Thereafter, on 9 November 1998, the goods were advertised in the newspaper for sale by public auction which was to be held on 13 November 1998.

It was the appellant's claim that he had purchased the Stand at the auction sale notwithstanding that it was not advertised for sale. In support of this allegation he produced a Notice of Attachment in Execution dated 13 October 1998 and issued out of the Magistrates Court for the province of Mashonaland. This notice showed that Stand number 168 was attached together with the movables at the bakery. The notice stated that the Messenger of Court had attached the articles mentioned therein "in pursuance of a warrant to me directed under the hand of the Clerk of Court". It bore the reference

number of the High Court case namely 1655/97.

It will be immediately apparent that the notice of attachment in execution was false as it was issued out of the wrong court. While notices of attachment in execution are issued by the Clerk of the Magistrates Court in respect of judgments obtained in the Magistrates Court, the same is not true of judgments obtained in the High Court in respect of which only writs of execution are issued and these are done at the instance of the Registrar of the High Court.

The appellant also attached to his affidavit, two receipts from the Deputy Sheriff and Messenger of Court, Chivhu, for the purchases allegedly made by him at the auction. The first one dated 26 January 1999 was for \$100 000.00. At the bottom of the receipt the words “Cheque Murambinda Bakery Stand 168” were written. The second, dated 26 March 1999, was for \$17 000.00. The case number appeared at the bottom of this receipt as HC 1655/97. The appellant claimed that the first receipt was for the purchase of the Stand while the second was for the goods bought at the auction.

Accordingly, so the appellant argued, he was in lawful occupation of the Stand and the application for eviction should fail.

Attached to the respondent’s papers however was a return of service of the writ by the Deputy Sheriff showing that only movable property at Murambinda bakery

had been attached. The newspaper advertisement of the sale produced by the respondent also showed that only movables attached had been advertised for sale.

The success of the application for eviction depended on proof that the appellant was in unlawful occupation of the Stand. The High Court upheld the ruling of the Magistrates Court upholding the application.

Before us, it was conceded by Mr *Fitches* that the appellant had been in unlawful occupation of the Stand in that the respondent held a valid lease of the Stand in his name from the Buhera District Council and had not relinquished his title to it but had merely leased it to the partnership of which he was a member. In any event, he had resigned from the partnership in 1996 and the default judgment obtained against him had been improperly obtained. (That judgment was in fact rescinded on 24 February, 1999). It was conceded further, that the writ of execution issued by the High Court, did not authorise the Deputy Sheriff to attach or sell immovable property and the Stand had not been advertised for sale.

How, in the above circumstances, the Stand came to be 'sold' can only be surmised. The Deputy Sheriff is not a party to these proceedings and the answer to this question must remain with the appellant and the Deputy Sheriff. Suffice it to say that the evidence filed of record proves conclusively that the respondent is the registered lessee of the Stand and the appellant was in unlawful occupation thereof.

For the above reasons we were satisfied that there was no merit in the appeal and dismissed it with costs at the end of the hearing.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Legal Aid Directorate, respondent's legal practitioners