DISTRIBUTABLE ZLR (9)

Judgment No. SC 58/06
Civil Appeal No. 137/04

THOKOZANI KHUMALO v DAVIS SUNGANAI MAFURIRANO

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & BERE AJA
BULAWAYO, APRIL 3, 2006

No appearance for the appellant

C P Moyo, for the respondent

MALABA JA: On 3 April 2006 we dismissed the appeal in this case with costs and indicated that reasons for the decision would follow in due course. These are they –

The facts show clearly that the appeal from the judgment of the High Court dated 8 April 2004 was devoid of any merit. The appellant and the respondent entered into a lease agreement on 22 May 2001 in terms of which the appellant leased a house belonging to the respondent, at a monthly rental of $14 500. On 30 September 2001 the respondent's wife, with whom he jointly owned the house, entered into an agreement with one Dinesh Naran in terms of which she purported to sell the house to him. The agreement fell through.

The appellant in the meantime stopped paying any rent for the occupation of the house as from October 2001 claiming that he was now occupying the house on the authority of Dinesh Naran. On 7 June 2002 the respondent issued summons claiming from the appellant payment of arrear rentals amounting to $121 500, holding over damages and ejectment. The appellant did not enter appearance to defend, resulting in an application for default judgment being made by the respondent. It was granted on 17 June 2002.

On 15 July 2002 an application for rescission of judgment was made

without denial of the fact that the monthly rental was not being paid for the continued occupation of the house.

The appellant sought to suggest that the respondent no longer had title to the property. Title deeds were produced at the magistrate's court showing that the house was still jointly owned by the respondent and his wife. The learned magistrate found that the agreement of sale between the respondent's wife and Dinesh Naran had fallen through and that in any case it could not justify the appellant as a lessee in disputing the title of the respondent over the property.

The application for rescission of judgment was refused.

The appellant appealed to the High Court on 6 September 2002. In a well reasoned judgment the High Court dismissed the appeal on 8 April 2004. On 16 April 2004 the appeal to this Court was noted. On the matter being called on 3 April 2006 there was no appearance for the appellant and the respondent applied for the dismissal of the appeal.

It is clear from the admitted facts that the appellant had breached the lease agreement when he stopped paying rent whilst continuing to occupy the house. The respondent was in the circumstances entitled to the order of ejectment granted by the magistrates court. It was futile for the appellant to attempt to question the validity of the respondent's title to the house. As long as the respondent gave to him vacant possession of the house and continued to ensure that he enjoyed such occupation, the appellant was obliged to discharge his obligations under the lease agreement.

The learned judge correctly stated the law when he said at pp 10–11 of the judgment:

> "The appellant, as a tenant, was not in a position to dispute the title of the person from whom he derives his right of occupation, the respondent. *The Law of Contract in South Africa* (1983) R H Christie at 405–6; *Salisbury Gold Mining Company* v *Klipriviersbertg Estate and Gold Mining Co.* 1893 H 186, *Loxton v Le Hurve* 1905 (22) SC 577. All that the respondent was obliged to do once the parties had concluded the lease was to give the appellant the use and enjoyment which he had promised to give. The respondent fulfilled this obligation and therefore the appellant as lessee was not entitled to question the lessor's (respondent's) lack of title and is bound to perform his own obligations. In the *Salisbury Gold Mining Co.* case *supra* at 190 KOTZE CJ stated:

'Any person can let to another something which belongs to a third party, and it is not open to the lessee to raise the defence that he has discovered that the property leased belongs to another person, where, for instance, he is during the currency of the lease sued for the payment of the stipulated rent.'

In *Clark v Nourse Mines Ltd.* 1910 TS 512 at 520–1 SOLOMON J stated:

> 'It seems to me that the rule (that a lessee cannot dispute the lessor's title) may be based upon one or other of two very simple grounds. The first is that the lessor, having performed his part of the contract and having placed the lessee in undisturbed possession of the property, is entitled to claim that the lessee should also perform his part of the contract and should pay him the rent which he agreed to pay for the use and enjoyment of the premises. The second ground is that the lessee, having had the undisturbed enjoyment of the premises under the lease and having thus had all for which he contracted, it would be against good faith for him to set up the case that the lessor had no right to let him the property.'

See also *Hillock & Anor v Hiloage Investments (Pvt) Ltd* 1975 (1) SA 508(E) at 516 and *Ebrahim v Pretoria Stadsraad* 1980(4) SA 10 (T) at 14 B–C."

The appeal was accordingly dismissed with costs.

CHEDA JA: I agree.

BERE AJA: I agree.

Majoko & Majoko, respondent's legal practitioners