

CENTRAL AFRICA BUILDING SOCIETY

Versus

TWIN WIRE AGENCIES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 21 MARCH 2003 AND 29 JANUARY 2004

Ms M Matshiya for applicant

T C Masawi for respondent

Judgment

NDOU J: The applicant is the registered owner of stand 2796 Kwekwe of stand 2999 Kwekwe Township situate in the district of Que Que (hereinafter called “the property”). The property is held by the applicant under Deed of Transfer number 4525/01 dated 27 November 2001. The applicant purchased this property on 27 April 2001 following a Sheriff’s sale in execution in a matter the applicant herein was the plaintiff and the respondent was the defendant. The applicant had foreclosed on a mortgage bond registered by the respondent on the security of stand 2796 for a failure by the respondent to maintain its mortgage repayment in terms of the bond.

The present claim arises from the respondent’s failure and/or refusal to vacate the property notwithstanding its purchase and subsequent transfer to the applicant. The respondent has opposed the application on three grounds. First, the respondent’s case is that the sale was not properly made and done above board. Second, that the purchase price fetched at the auction was unreasonably low. Third, that it has capacity to pay off what is due to the applicant and retain its property and therefore should be given an opportunity to sell the property by way of private treaty.

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The sale by the Sheriff was held on 29 October 1999 and confirmed by him on 27 April 2001. For the record, on 3 December 2001 in HC 3750/01 the respondent filed a court application seeking to set aside the said Sheriff's sale. On 20 May 2002 the respondent withdrew the application in HC 3750/01 tendering costs. The said notice of withdrawal was filed on 12 June 2002. The respondent has not indicated the details of any other existing matter besides HC 3750/01. I have referred to papers in HC 3750/01. I agree with Mrs *Matshiya*, for the applicant, that I can do so competently. In *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) at 173A-B McNally JA said-

“It seems clear from the judgment in which the learned judge a quo granted summary judgment that he made reference to the papers in case number HC 3406/84. In so doing he was undoubtedly right. In general the court is always entitled to make reference to its own records and proceedings and to take note of their contents-

Halsbury 4 ed Vol 17 paragraph 102; *Boyce NO v Bloem & Ors* 1960 (3) SA 855 (T); *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 ZLR 498 (HS) at 503-4 (this case was upset on appeal but not on this point). The position is a *fortiori* when the defence involves a reference to the previous proceedings, as this one does.”

In *casu*, the respondent has made vague allegations about a pending matter. Mr *Masawi*, has also avoided the issue of the details of the case. From the opposing affidavit I can only discern that the respondent seems to challenge the authority of his erstwhile legal practitioners who filed a notice of withdrawal on his behalf.

I find that at the time of the hearing of this application the other dispute in HC 3750/01 no longer existed. The respondent, to date, has not taken any step to challenge the notice of withdrawal besides alluding thereto in the opposing affidavit. Even if one assumed that there was such challenge, I think this is a typical case where

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this court would be justified to ignore the existence of such other dispute “for the sake of equity and convenience” – *Geldenhuys v Kotze* 1964 (2) SA 167 and *Mhungu v Mtindi supra* at 175G-H. It would be quite unconscionable to allow the respondent to remain in occupation of the property in view of its withdrawal of the matter in HC 3650/01. There is no triable issue in this matter. There is no reasonable possibility that an injustice may be done if summary judgment is granted for ejectment from the property. The property was purchased by the applicant in 1999 and sale was confirmed by Sheriff in April 2001. Since then the respondent has enjoyed occupation after making negligible and incoherent attempts to have the sale set aside. Admittedly summary judgment is an unusual and drastic remedy accorded only where a plaintiff could establish his case clearly. However, the legal process should not be abused simply in order to delay just claims. *Jena v Nechipota* SC-15-86; *Mbayiwa v Eastern Highlands Motel (Pty) Ltd* SC-139-86; *Tanhira v Makoni* SC-18-88; *In Vogue (Pvt) Ltd v E L Bulle* HH-82-93; *Faust Products (Pvt) Ltd v Continental Fashions (Pvt) Ltd* 1987 (1) ZLR 45 (HC) and *Omarshah v Karasa* 1996 (1) ZLR 584 (H). Even in the withdrawn proceedings the respondent was only seeking the setting aside of the Sheriff’s confirmation of sale and not the setting aside of the transfer. The overall picture that emerges is that the respondent has not raised any valid triable issues and has simply filed the opposition to delay the applicant’s occupation of the property. Coming to damages for arrears and damages for holding over it is common cause that the respondent has not paid rentals to the applicant. At the time of the institution of these proceedings that were arrears in the sum of \$384 000,00 and with damages for holding over accruing at the rate of \$48 000,00 per months. I accept that \$48 000,00 per month is reasonable monthly rental for the property. The respondent’s

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actions in this matter were *mala fide* and consistent with abuse of the court process. I must show my disdain for such behaviour by awarding costs against the respondent on an enhanced scale.

The application succeeds and it be and is hereby ordered that there will be summary judgment for the applicant in these terms:

1. That judgment is hereby granted in favour of the applicant for ejectment of the respondent from stand 2796 Kwekwe Township of stand 2999 Kwekwe situate in the district of Que Que.
2. That the respondent pays the applicant arrear rentals in the sum of \$384 000,00 as at 1 July 2002.
3. That the respondent pays the applicant damages for holding over at the rate of \$48 000,00 per month with effect from 1 June 2002 to date of ejectment.
4. Costs of suit on legal practitioner and client scale.

Wilmont & Bennett applicant's legal practitioners
Makonese and Partners respondent's legal practitioners