

Judgment No. HB 64/11
Case No. HC 379/11
Xref No. HC 891/11

ARJUN INVESTMENETS (PVT) LTD

AND

THOMAS MUTAMBIRWA

AND

FLORENCE VENTER

AND

SARAH NDLOVU

AND

TENDAI CHIEZA

AND

NOMALANGA SIBANDA

AND

SIBUSISIWE NCUBE

AND

SHIRLEY MANDINDO

AND

WEBSTER AND VINCENT

AND

BENNY NCUBE

AND

SOFT-TOUCH ELECTRONICS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 14 MARCH 2011 AND 16 JUNE 2011

Ms P. Dube with Mr Sibanda for applicant

Mr G. Nyoni for respondents

Urgent Chamber Application

CHEDA J: This is an urgent chamber application whose relief is as follows:

“Terms of final Order

That you show cause to this Honourable Court why a final Order should not be made in the following terms:

IT AND IS HEREBY ORDERED THAT:

- 1) The Deputy Sheriff is hereby directed and authorised to remove such of the respondents and any persons claiming through any of the respondents, together with their goods and properties as may remain on the premises by or after the 1st April 2011, from the property known as VICTORIA HOUSE, OR VICTORIA FLATS, 103 HEBERT CHITEPO STREET, BULAWAYO.
- 2) The Deputy Sheriff be and is hereby authorised and directed to; thereafter; lock and secure the property against re-entry or re-occupation by taking such measures as she deems necessary.
- 3) The Respondents shall, jointly and severally, the one paying, the others to be absolved, pay the costs of this Application.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the Applicant be and is hereby granted the following relief:

- a. IT IS DECLARED that the Applicant has the right to remove the Respondents and all persons claiming through them from the property known as VICTORIA HOUSE, OR VICTORIA FLATS, 103 HEBERT CHITEPO STREET, BULAWAYO at the expiry of the notice to vacate.
- b. IT IS ORDERED THAT the respondents and all persons claiming through them, together with their goods and properties, shall vacate Victoria House by 31 March 2011.”

Applicant was represented by Dipti Jateen Madhoo. It is a duly registered company which owns an immovable property known as stand number 1053 Bulawayo Township otherwise known as Victoria House or Victoria Flats, 103 Hebert Chitepo Street, Bulawayo [hereinafter referred to as “the property”].

Applicant purchased the property from Guelder Rose Investments (Pvt) Ltd [hereinafter to as “Guelder – Rose”]. Upon transfer to itself there were tenants in occupation of the property of which either all or some of them are still tenants to date. However, from the list provided by CB Richard Ellis, who are the Estate Agents and has always been managing the property, it is clear that there are some tenants who are not recognised tenants. It therefore

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appears that this property does not have clearly recognised tenants, in other words tenants or occupants do as they please.

It is applicant's argument that although there is no written lease agreement it was an implied term that tenants should pay rentals, operational costs comprising of rates , garbage removal and other levies which they have not been paying and as such they owe a total of \$25165.69 in operational costs. In addition thereto, they are in arrear rentals and as such they are in breach of their terms and conditions of their lease agreements.

It was applicant's further argument that the property is in a dilapidated stated which resulted in its condemnation by the Bulawayo City Council. To that end the Bulawayo City Council wrote a letter in the following manner:

"City Of Bulawayo

Ref: BC/44

29 September 2008

Victoria House

No. 101 Hebert Chitepo Street.

Stand No. 1052 BT

BULAWAYO

Dear Sir/Madam

RE: UNSIGHTLY/DILAPIDATED AND DANGEROUS BUILDINGS

A recent inspection on the above-mentioned stand revealed a contravention of the Model Building By-Laws of 1977, Chapter 2, Section 48a and 49.

The above-mentioned premises are now a danger to the health of persons occupying or using the building, source of unpleasant odours, disfigurement to the neighbourhood and offensive or embarrassing to the people living or working on the premises or in the neighbourhood.

You are therefore advised to make a major facelift to the property, or demolish the structure within 21 days of the date of this letter.

Failure to comply will result in Council entering upon the premises and taking the necessary action and charge you the costs thereof. This is in terms of Chapter 21 Section 56 of the Model Building By-Laws.

Yours faithfully

(Signed)

DIRECTOR OF HOUSING
AND COMMUNITY SERVICE

c.c Acting Town Clerk

Chamber Secretary

A/Director of Health Services

A/Principal Building officer”

(My emphasis)

Applicant notified respondents of its desire to repossess the property in order to effect repairs, but, respondents ignored, neglected or refused which resulted in a meeting between the parties aimed at resolving this impasse. It is further their argument that some of the respondents including one Roy Sibanda was very abusive and threatening. The court has taken judicial notice that Roy Sibanda is a member of Affirmative Action Group, an organisation that purports to protect the interests of black businessman. He is however, not a tenant of applicant but seems to have surrogated himself the power of representing respondents which unfortunately has resulted in his abuse of the applicant. He has not responded to these allegations which therefore mean that they are true. In view of that, he is strongly warned to conduct himself within the confines of the law otherwise applicant and all others whose rights have been violated by him should take appropriate legal action against him in order to safeguard their proprietary rights.

The law regarding lease agreements is that, in return for the right to use and enjoy the property let to him/her, a leasee is under an obligation to pay rent. Rent is an essential element of a lease agreement, see *Estate Ismail v Sayed* 1965(1) SA 393(C) at 397 A-B. A tenant who occupies premises without paying rent can not be properly defined as a leasee.

Respondents on the other hand have argued that the matter is;

- 1) not properly before the courts because the deponent to the founding affidavit is not authorised to do so as the names are different,
- 2) that they were not given proper notice to vacate,

- 3) there is no urgency in the matter as the Bulawayo City Council 's letter dates back to 2008,
- 4) they have been paying rent not through CB Richard Ellis but to Khoza consultants,
- 5) that they had the right of first refusal, and
- 6) applicant sought their eviction by application instead of an action

I propose to examine these issues *in seriatim*

(1) **MATTER NOT BEING PROPERLY BEFORE THE COURT**

On the 3rd day of February 2011 applicant resolved to evict respondents from the property and duly appointed Jateen Madhoo to represent it in that issue. For respondents to argue that they should have appointed someone else without justifying their argument is not tenable at law. It is clear to me, that the applicant's representative uses three names. For that reason the company resolution is indeed properly placed before the court. In my, view, the company resolution is legal.

(2) **REASONABLE NOTICE TO VACATE**

On the 30 November 2010 applicant through its legal practitioners of record notified all the respondents to vacate the property at the end of February 2011 as developmental work was due to commence on the 1st of March 2010. On the 17th December 2010 respondents advised applicant by letter that they were not going to vacate the premises on the basis that they had a right of first refusal on the property. Despite the fact that they did not agree with applicant's attempt to repossess the property, that on its own is not a reason enough to nullify the said notice. Infact respondents responded to the notice in time, thereby attending to a meeting where one Roy Sibanda attended and turned out to be abusive of the applicants' legal practitioners. Suffice, to say that his abusive behaviour did not help respondents, but, if anything further alienated then from applicant's attempt to conduct a civilized meeting.

It is further respondents' argument that the notices to vacate were defective as they did not disclose the particulars of the landlord. This argument lacks merit as respondents have always known that there is a landlord hence their reference to a lease agreement, which

agreement cannot exist in the absence of another party, in this instance a landlord. This argument therefore falls on its face and is not worth pursuing.

(3) **URGENCY**

Respondents argued that this is a 2008. They, therefore query why it was now being brought up as an urgent matter. The property was condemned not to be suitable for human habitation as was back as September 2008. The defect remains to date. In my opinion, the fact that it remains in that state, on its own renders it urgent. The urgency increases by each day as long as the defect remains unattended to. Attempts to correct the defects were frustrated by respondents, this also makes the matter urgent.

Logically, the matter becomes urgent when irreparable harm or no other alternative exists which is the position in casu. The matter is for all intents and purposes extremely urgent. The building poses a health hazard and is delilapidated as observed by the Bulawayo City Council. Therefore, there would be no reason to further postpone the renovations. Urgency may either be time or economic related see *Silver's Trucks (Pvt) Ltd and another v Director of Customs and excise* 1999 (1) ZLR 532 (HC).

(4) **RENTALS**

It is applicant's assertions that respondents have not been paying rentals to CB Richard Ellis, who are the appointed estate agents. But respondents have argued that they have been paying rent to Khoza Consulatants.

Applicant has submitted proof from CB Richard Ellis which shows that respondents have not been paying rent and other operational costs. Payment of rent is an essential element of a lease, see *Estate Ismail v Sayed* 1965 (1) SA 393 (c) at 397 A-B. Our law is very clear on that point, namely that in return for the right to the use and enjoyment of the property let, the leasee has an obligation to pay rent timeously, failing which they will be in breach of the contract. Indeed it is clear that respondents have been occupying this property without paying rent , this, without more is a breach of the lease agreement. Respondents have no right to continue occupying the property without paying rent.

(5) **RIGHT OF FIRST REFUSAL**

Respondents have also argued that the property should not have been sold to applicant as they have a right of first refusal. They, however did not furnish the court with any proof thereof.

It is now settled law, if my understanding of our current legal position is correct, that the right of first refusal arises out of a contract between the landlord and tenant, see *Nerger Properties (Pvt) Ltd SC 47/06* and *Makshori v Nyamushamba and another SC 9/06* where the Court defined it as follows;

“The essence of the right of first refusal or the right of pre-emption is that the grantor of such a right not to sale the object of the right to a third party unless the right has been given an opportunity to purchase the object of the right and has not offered to do so. See *madam v Macedo Heirs and another 1991 (1) ZLR 295 SC at 302 A-B*; and *Owsianick v African Candidate Theatres (Pty) Ltd 1967 (3) SA 310(AD) at 316 C-D.*”

It must be clearly expressed, it, therefore, cannot be implied. In addition, it cannot be enforced on a third party who purchases the property without prior knowledge of the right of first refusal, see *Central African Processed Exports (Pvt) Ltd and others v Mcdonald and others SC 40/02* and *Sommer Properties v Wilding 1984(3) SA 647 (A)*.

It therefore, stands to reason that a party seeking to enforce this right must prove its existence on a balance of probabilities.

(6) **THE RIGHT OF APPLICANT TO EVICT RESPONDENTS.**

Respondents have always been aware of applicant’s intention to repossess its property. This is not only confirmed by the notices to vacate but also by *Mr L. Sibanda*, applicant’s legal practitioners at a meeting held on the 17th January 2011 wherein he informed those respondents present that his client was repossessing its property. This meeting unfortunately turned out to be rowdy as a result of the inclusion of one Roy Sibanda who has no *locus standi* in this matter, but, whose involvement seems to have polarised the parties, the result of which is detrimental to the respondents.

Respondents argue that the method used by applicant to evict them was improper as they claim that they are statutory tenants. In our law in order for one to successfully claim

his/her as a statutory tenant they must comply with the requirement to pay rent arising from the lease agreement entered into which is one of the essential requirements of a Lease Agreement. It is through that compliance that, as they have been paying rent they may seek and obtain protection from the courts, see *Moffat Outfitters (Pvt) Ltd v Hoosein and others* 1986 (2) ZLR 148 (S) and *Metro International (Pvt) Ltd v Old Mutual Properties Investment Corporation (Pvt) Ltd* SC 244/08.

On the other hand applicant is obliged to show good and sufficient cause for requesting an order for the eviction of the tenant, see *Marsh v Intermarket Building Society* SC 59/05 and *Movement for Democratic Change v President of the Republic of Zimbabwe* HH 28/07. The question then is, has applicant done so?

Applicant as the landlord has shown that it required the property for repairs and renovations as directed by the Bulawayo City Council. This, therefore, is in my view a good and sufficient cause which is legally acceptable, see *Dyneley Investments (Pvt) Ltd v Stevens* 1968(2) PH A215. Further, if the repairs are urgent and carried out while the tenant remains in occupation, the landlord may require him to vacate the premises see *Mackay v Theron* 1947(1) SA 42. It will be physically impossible for such repairs and/or renovations to be effected while respondents or any other person is in occupation of the rented property.

The repairs or renovations were both urgent and necessary. In view of respondents' refusal of applicants' desire to carry out renovations, the applicant is left with no alternative, but, to approach the courts.

Respondents' refusal must of course be examined. They refused to give vacant possession even when there is proof of the danger the property poses to them which is not prudent with all due respect. This, in my considered opinion is being unreasonable. Where a tenant becomes unreasonable in its refusal to vacate, the landlord has a right to evict him/her from the property as such stance is tantamount to a breach of the terms and conditions of the lease under which he/she enjoys, see *Anderson v Byron* 1953 (4) SA 395.

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Having taken into account all the circumstances surrounding this case it is clear in my mind that applicant has made a good case for itself. Respondents have no defence at all against applicant.

The following order is made:-

INTERIM ORDER

Pending the determination of this matter, the Applicant be and is hereby granted the following relief:

- (a) IT IS DECLARED that the Applicant has the right to remove the Respondents and all persons claiming through them from the property known as VICTORIA HOUSE, OR VICTORIA FLATS, 103 HEBERT CHITEPO STREET, BULAWAYO at the expiry of the notice to vacate.
- (b) IT IS ORDERED THAT the respondents and all persons claiming through them, together with their goods and properties, shall vacate Victoria House by the 31 March 2011.

Webb, Low and Barry, applicant's legal practitioners

Messrs, Moyo and Nyoni, respondent's legal practitioners