TENDAI MIDZI
versus
ESTATE LATE BRIAN HARRY

HIGH COURT OF ZIMBABWE
MAKARAU JP and PATEL J
HARARE, 18 July and 15 November 2006

Civil Appeal

Mrs D. Mandaza, for the appellant
Mr W. T. Pasipanodya, for the respondent

MAKARAU J: On 1 February 2006, the respondent, represented by one Mary-Ann Kathleen Harry, ("Mary-Ann Cathleen), acting under a Certificate of Authority granted to her by the Master of this court on 23 January 2006, filed a court application in the magistrates' court sitting at Harare, seeking an order evicting the appellant from certain property called stand No. 11941 Salisbury Township. In the application, Mary-Ann Cathleen Harry alleged that she had been granted authority by the Master to administer the Estate of the late Brian Harry, ("Brian"), and that the late Brian was a one –half share owner of the property, together with one Michael Vincent Harry, ("Michael Vincent"), his brother, also now late. She further alleged that the appellant was in unlawful occupation of the property as she had been given 2 months notice to vacate before the application was filed.

The appellant opposed the application on two main grounds. In *limine*, she contended that the respondent had used the wrong procedure in approaching the court by way of a court application instead of issuing summons as there were many disputes of facts arising from the application. Regarding the merits of the matter, she contended that her occupation of the property was lawful as she had a lease agreement with an agent of the late Michael Vincent which lease was renewed each year.

To her opposing affidavit the appellant attached a supporting affidavit from one Beatrice Noach who had a power of attorney granted her by the late Michael Vincent during his lifetime. Beatrice Noach averred that after the demise of Michael Vincent, she continued to lease the property to the appellant with the consent and knowledge of the heir to the estate of Michael Vincent.

After hearing the parties, the trial court granted the application, ordering that the appellant be evicted. Unhappy with that decision, the appellant noted an appeal to this court. In the notice of appeal the appellant raised three broad grounds. Firstly, she maintained that the procedure adopted by the respondent in the lower court was improper. Secondly, she argued that Mary-Ann Kathleen had no authority to represent the respondent, as she was not issued with letters of administration for that purpose. Along with this issue was also raised Mary Ann Cathleen's status as the widow of Brian Harry. Finally, the appellant argued that the lower court had erred in finding that the lease agreement she had with the agent of Michael Vincent was invalid.

I will consider each of the three broad grounds of appeal in turn.

The general rule is that application or motion proceedings should not be used where there is likely to be a material conflict in the evidence deposed to in the affidavits attached to the application. It is however not every dispute that is material to the resolution of the legal issues arising in each application. A court deciding on the application has to assess the materiality of each alleged dispute of fact and, where it believes that it will not work an injustice on any of the parties, will take a robust stance and determine the application notwithstanding the dispute of facts. In appropriate cases, the court may call for oral evidence on the disputed fact and proceed to determine the issue between the parties. (See *Masukusa v National Foods Ltd and Another* 1982 (1) ZLR 232).

In casu, it was contended on behalf of the appellant that there were numerous disputes of facts before the trial court. In her heads of

argument, the appellant listed six alleged disputes of facts. While not agreeing with the appellant that all six disputes of facts were indeed material disputes of facts, I agree with the appellant that the trial court, with respect, erred in its approach to determining the application before it. In proceeding to determine the application, the trial court, on the first page of its judgment observed as follows:

> "Respondent contends in limine that the procedure used of proceeding by way of notice and not summons in an eviction is wrong. Cognisance having been had on the fact that the applicant is the executrix who is facing homelessness when she could benefit from the estate persuades this court to allow this application on notice because the applicant's case has established some urgency."

In my view, the trial court allowed improper considerations to persuade it to proceed with the application in the face of disputed facts. Had the court indicated that it was taking a robust stance in the face of the disputes and was proceeding to determine the matter fully aware of the disputes, I may have been inclined to uphold its stance.

On the basis of the foregoing alone, I would set aside the decision of the lower court on the ground that oral evidence ought to have been led on the material disputes of fact such as to whether the appellant was paying rentals or not for her occupation of the property, and again as to whether the respondent was entitled to sole benefit over the entire property.

The second broad ground of appeal by the appellant exercised our minds to some extent. This is in relation to whether the trial court erred in accepting the certificate of authority issued to the respondent's representative in light of the clear provisions of the law that such certificates can only be issued in respect of estates of a value less than $60 000-00 (old currency). Clearly, the estate in this matter exceeds the modest amount stipulated in the Administration of Estates Act [*Chapter 6:01*] and the Certificate of Authority issued to Mary-Ann Cathleen was issued in contravention of the law and thus cannot stand.

The issue that then arises is whether in exercising its appellate jurisdiction, this court can also exercise its review jurisdiction when faced with a patent irregularity or illegality in the proceedings of the lower court.

Section 26 of the High Court Act [*Chapter 7:06*] provides for the review powers of this court over all inferior courts of law, tribunals and administrative authorities in Zimbabwe. In my view, this section does not confer any new powers on this court that it does not ordinarily have but simply acts to confirm the inherent jurisdiction that the court already has. The review powers of this court are without limit. (See *Mutukwa v National Dairy Cooperative Ltd* 1996(1) ZLR 348 (S)).

In my view, while it is not necessary for us to make a definitive finding on this issue for the purposes of determining this appeal, this court has jurisdiction and power to review the proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe at any time including when it is determining an appeal. The exercise of this power is in my further view subject only to the rules of the court as to the need to afford all interested parties a right to be heard before relief is granted following the review. To hold otherwise and restrict this court to the record of proceedings and the sole grounds of appeal raised by the appellant would be to rob the court of its inherent jurisdiction as the sole superior court of first instance to correct injustices wherever it sees them.

The decision by the Master is highly susceptible to being set aside for the reasons I have given above. The issue having come to our attention during the hearing of the appeal, it will be remiss of us to turn a blind eye to it and hold as did the trial magistrate that unless and until set aside, we are bound to respect it on its face value.

However as indicated above, it is not necessary that we review the decision of the Master in issuing a certificate of authority to Mary-Ann Cathleen or that we give directions, in exercising the powers granted us

by s 31(1)(viii) of the High Court Act, that the Master be brought before us for the purposes of reviewing his decision as separate proceedings in that regard have already been commenced in this court.

Finally, I turn to the third broad ground of appeal.

It is common cause that the property in dispute was jointly owned by Harry and his brother Michael Vincent. During his lifetime, Michael Vincent brother granted power of attorney to Noach to lease the property. It does not appear that Brian demurred at this arrangement. This was a valid lease. On the death of Michael Vincent, while it is correct that the power of attorney in favour of Noach lapsed by operation of law, the appellant in our view became a statutory tenant and remains so if it is proved that she is paying the rentals agreed to and is observing all the other terms of the lease as agreed to prior to the death of Michael Vincent. The leading of oral evidence on whether the appellant paid rentals and is still paying such rentals becomes unavoidable in the circumstances.

Further, it is common cause that the property in dispute is jointly owned. It is doubtful in our view whether the respondent is entitled to occupation of the entire property as the order by the trial court implies.

On the basis of the foregoing, we make the following order:

1. The appeal is allowed.
2. The decision of the magistrates' court is set aside.
3. The matter is remitted to the trial court for the leading of oral evidence on all the facts in dispute.
4. Costs of this appeal shall be in the cause.

Patel J agrees.....

Muzangaza Mandaza & Tomana, appellant's legal practitioners.
Manase & Manase, respondents' legal practitioners.