SANANGURAI GWARADA
versus
KEVIN JOHNSON
and
MR WILLIAMSON
and
BERNARD CHOTO

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 18 June and 16 September 2009

Urgent opposed application

G N Mlotshwa with him *F Mutamangira,* for the applicant
I E G Msimbe with him *F Piki*, for the respondents

GOWORA J: This matter came before me by way of an urgent chamber application. At the initial set down date the legal practitioners indicated that they wished to file written submissions and the matter was accordingly postponed for that purpose. In view of the legal issues that were apparent from the affidavits and that had not been canvassed I required the legal practitioners to file supplementary heads of argument, which counsel did and I am indebted to counsel for the same. I had also requested a copy of a translation of a South African judgment referred to by applicant's counsel but unhappily that was not been given to me expeditiously with the result that this judgment was then delayed.

The facts relevant to this dispute are as follows. The dispute centers around Dana Farm. This farm is now owned by the State after it was gazetted for resettlement under the land reform program. The first and second respondents are referred to on the papers as former owners of the farm, although the exact nature of that ownership has not been stated nor is it relevant for present purposes. What is relevant is that they were in occupation at the time the farm was acquired. The third respondent is a beneficiary of the land reform program but he occupies a neighbouring farm. He is however a majority shareholder in a company, in which first and second respondents also own shares and which is undertaking certain farming operations on Dana, A Farm. According to the papers the first and second respondents occupy subdivisions 2 and 3 of the farm. The applicant was issued with an offer letter for subdivision 1 which he occupies.

The applicant seeks an interdict both in interim and final terms against the respondents from use and occupation of subdivision 1 of Dana Farm. In addition he seeks their eviction from the same. After he and counsel for the respondents had made submissions on the application, Mr *Mlosthwa* moved for an amendment to the draft order. Mr *Musimbe* did not object to its amendment. The new draft order merely sought an interim interdict against the three respondents with the eviction being reserved for the final relief. I find it difficult to comprehend the logic of seeking an amendment of that nature at that stage as counsel for both sides had argued the matter fully on the merits as related to the interdict and the eviction. In my view no prejudice will occur to any of the litigants if I dispose of the matter on the merits as if it were an opposed application rather than for relief in interim terms. Although the applicant sought to file an amendment to the draft order, the application to amend the same was only introduced after both parties had addressed the court in argument on the basis of the original draft order. It seems to me therefore that the dispute between the parties has been ventilated in full and it does not assist either of the parties for this court to ignore that fact. I also agree with the submission in the respondents' heads of argument that the nature of relief sought is in final terms. Even if I considered the matter on the basis of the amended draft order it would not change much as the relief being sought is not materially different in the two draft orders.

I proceed now to consider the other point *in limine* raised by the respondents. The respondents had contended that the failure to join the Provincial Lands Inspectorate was fatal to the applicant's case. I disagree. The farm was acquired and now vests in the State, which is the owner of the land. I have to consider whether there is any effect to the application consequent to the non citation of the responsible minister. It becomes necessary therefore that I consider the nature of the relief being sought by the applicant. The sum total of the relief sought by the applicant is an interdict against the respondents from utilizing the permanent structures and improvements on the subdivision that he has been offered by government.

It is common cause that although the entire farm was gazetted and has since been acquired the former owners, in the guise of the second and third respondents, are still in occupation. It also seems that the third respondent is the majority shareholder in a company that is running farming operations on the farm. Although the third respondent made this averment there was challenge from him that the wrong person had been brought to court, he

has deposed to an affidavit opposing the application on the merits and did not persist with the challenge when the matter was called. All the respondents have been in occupation since the farm was acquired and, my view from an assessment of the facts is that the respondents have been in possession of the homestead, the barns and the borehole same for the entire period that the applicant has been in occupation of the subdivision. The simple fact is that when he moved in they were in occupation and have not been evicted from the same.

In terms of s 3 (1) of the Gazetted Lands (Consequential Provisions) Act [*Cap 20:28*] no person may hold, use or occupy Gazetted land without lawful authority. In the Act lawful authority is defined as an offer letter, a permit or a land settlement lease. The applicant is in possession of an offer letter and therefore he has lawful authority to occupy the part of the farm allocated to him. The respondents have contended that the offer letter is irregular. The lawfulness of the offer letter is not before me and I cannot comment on its validity. That is for the authorities to resolve. What is at issue however is whether or not the applicant has the *locus standi* or right to claim the relief that he is claiming against the respondents.

In seeking redress from this honourable court the applicant asserts a right predicated on the offer letter in terms of which he occupies the piece of land in question. The applicant concedes that he has not been granted cession of rights by the owner of the land, the Government of Zimbabwe. The applicant contends that even though he is not the holder of a lease agreement in respect of the piece of land in question, nevertheless, the offer letter that he is in possession of accords him the entitlement to sue the respondents for possessory rights over the land. There is a plethora of cases in South Africa where the courts have considered the rights of a lessee to a lease agreement in relation to a trespasser or any person occupying the premises to which the lessee is entitled to occupy by virtue of the lease agreement. In *Jadwat and Moola v Seedat*[1], CANEY J dealt with the issue as follows:

> "An action for ejectment on the grounds of a defendant being in wrongful and unlawful occupation is in essence based upon his being a trespasser and trespass is an infringement of possession, which is one of the rights of ownership. If the owner has parted with possession, he cannot maintain an action for trespass against a third party and sue him for ejectment on that ground, since possession is not in him but in the one to whom he has parted with it; the owner has a cause of action only if his reversionary right to possession is injured by the trespass. *Thomas v Guirguis, supra.* If, however, the owner has not parted with possession, he retains the right to sue for trespass and to claim ejectment. He has the right to eject the trespasser in order that he may perform his contractual obligation to the person to whom he has parted

[1] 1956 (4) SA 273 at 276C-D

> with the right to possession, as in *Jeena v Minister* of Lands, supra. This, in my opinion is clearly so whether he has parted with the right to possession by selling the property or in some other manner conferring on another the right to possession. Clearly, the buyer of a property who has not obtained transfer (nor cession of the owner's right of action) is not entitled to sue for ejectment. *Nicholas v Wigglesworth*, 1937 N.P.D. 376. Nor, in my opinion, can a lessee who has obtained the right to possession but not obtained possession itself, sue a trespasser for ejectment."

This case was followed in a long line of cases by the courts in South Africa. As the applicant is not relying on a lease for the enforcement of his alleged right it is not necessary that I embark on a discussion of those cases. The clear principle from those cases is to the effect that a lessee acquires a personal right to possession of the leased premises and until and unless granted vacant possession of the said premises by the lessor such lessee has no *locus standi* in *judicio* to claim the ejectment from the same of a trespasser. As stated by VAN DIJKHORST J in *Nkadia v Mahlazi and Ors*[2]:

> "In respect of the claim for ejectment, the applicant's objection to the first respondent's *locus standi* is, in my view, sound. The rights acquired by the first respondent in terms of the certificate of occupation were, in the absence of possession on her part, merely personal rights. Her rights to *vacua possessio* are to be enforced against the person or body from whom they were acquired. I need not here decide which of the respondents this is to be done; cf *Chiloane v Maduenyane* 1980 (4) SA 19 (T); *Tshandu v City Council* 1947 (1) SA 494 (W); *Bodasingh's Estate v Suleman* 1960 (1) SA 288 (N); *Padayache v Veerapan and Another* 1979 (1) SA 992 (W)."

The applicant has referred me to two South African authorities on which he relies for his right to claim the relief that he seeks, *viz Buchholtz v Buchholtz*[3] and *Steenkamp v Mienies and Ors*[4]. In the case of *Buchholtz (supra)* the applicant therein who had purchased an immovable property but had not yet obtained transfer, sought to evict her husband from the premises. The respondent had raised a point *in limine* to the effect that as the applicant was not the registered owner of the premises she could not evict him therefrom. In dismissing the point *in limine* the court therein opined that the principle that a purchaser who had not obtained transfer or cession of rights from the seller had never been intended in the literal and wide sense to relate to all conceivable situations. Per BOTHA J at p 425A-D"

[2] 1982 (2) SA 441 (T.P.D.) at 447G-H
[3] 1980 (3) S A 424 (W)
[4] 1987 (4) SA 186 (NCD)

> "……Taking *Nicholas'* case (*supra*) as the origin of all what was said in the Natal cases, it is clear beyond doubt, in my opinion, that the Courts were dealing with the situation where a purchaser of property had not yet received either transfer or-and this is important-possession of the property purchased. In such circumstances it is indeed clear that the purchaser would have no right to sue for the ejectment of the person in possession of the property because the purchaser had not acquired a *jus in rem* in relation to the property. By virtue of his purchase of the property he acquires no more than a *jus in personam* against the seller, and, if someone is in possession of the property, then the purchaser must look to the seller, the owner, to obtain *vacua possessio* of the property. The distinction between a situation where the purchaser has not acquired a right *in rem* and the situation where he has acquired such a right by virtue of actually obtaining possession, appears to me to be implicit in all the cases. See e.g. the discussion regarding the position of a lessee in *Jadwat and Moola v Seedat (supra at 276C-F*)."

When the matter was argued before me, reference was placed on the decision in *Steenkamp v Mienies and Ors (supra*). However as the actual judgment is in Afrikaans a full discussion on the judgment was not possible as the legal practitioners did not at that stage have a copy of the translation. That was subsequently availed to me and a perusal of the same does not lead me to conclude that the principle on the rights of a lessee to evict a trespasser has been altered. The applicant contends, based on the *Steenkamp* case, that by virtue of his occupation of Lot 7 of Dana A Farm he has the *locus standi* to obtain the nature of relief he seeks from the respondents. It is the contention of the applicant that by virtue of being in partial occupation of Lot 7 he has *locus standi* to obtain this relief and that there is no need to obtain vacant possession in order to acquire *locus standi*. The applicant has in his heads of argument quoted from the head note of the judgment and not a passage representing dicta from the Court. A passage that could accord with what the applicant is submitting is to the following effect:

> "Apparently they are using the farm together. However, the applicant has at least partial occupation of the said farm and as far as I could ascertain, by law there is nothing to prevent him under these circumstances from enforcing his rights derived from the contract of lease, including against first respondent. Even if his occupation is in some respects incomplete, it cannot be said for one moment that he received no occupation of farm 10 and therefore has no real rights. For purposes of *locus standi* I view this occupation as sufficient to enforce his rights derived from the lease contract against the first respondent. The fact that the lessor would also have l*ocus standi* to obtain an eviction order against the first respondent, does not take away the right of the applicant to claim the same relief against the first respondent."

I turn then to consider the legal position within this jurisdiction. In Zimbabwe the leading authority on this principle of law is *Pedzisa v Chikonyora*[5], where at p 451 GUBBAY CJ made the following remarks:

> "Where a lessee's rights are personal, as in *casu*, he is entitled to claim delivery of the property from the lessor. His rights are effective against the lessor's gratitous successors and against purchaser's who knew of the existence of the lease when they purchased or took transfer; they are not effective against creditors of the lessor or against the lessor's singular successor in good faith. In the case of a short lease, the lessee has a real right only when he is given occupation of the property; in the case of a long lease, he has it after registration, or if he is in occupation for the first ten years. Consequently, upon being given occupation, or the lease being registered, the lessee would be entitled to evict anyone who wrongfully assumes occupation of the property, for example a trespasser. See *Morkel's Transport (Pty) Ltd v Melrose Foods (Pty) Ltd & Anor* 1972 (2) SA 464 (W) at 482E-F. But not before that occurrence. This principle is clearly set out by FANNIN J in *Bodasingh's Estate v Suleman* 1960 (1) SA 288 (N) at 289A, as follows;
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> *"In the case of an ordinary lease, the lessee to whom possession has not yet been given cannot sue a trespasser for ejectment from the leased property, save under a cession of action form the lessor."*

I turn now to discuss the authorities that the applicant seeks reliance on in his claim against the respondents. The applicant does not state that he obtained vacant possession from the respondents. Indeed it is accepted on the papers that he had moved onto the farm as a requirement to comply with the terms of the offer letter. He goes further and suggests that by virtue of his occupation he has acquired a right which is indistinguishable from a lessee who obtained vacant possession and that he now has a real right to evict the former owners whom he says are in illegal occupation. In *Buchholtz's (supra)* case the purchaser had obtained *vacua possessio* from the seller before transfer and was thus invested with a right to occupy by the title holder. The facts in *Steenkamp (supra)* are somewhat more complex. The applicant had a written agreement of lease with the second respondent which had been entered into on 16 June 1986 in respect portion 10 of Mier no 585. It was formerly known as portion 115. The applicant had also alleged that he had rented the same property from the second respondent in terms of a written lease agreement from 1 January 1981 to 31 December 1985, and that as a result of the lease contract he was in partial occupation of the property. The first respondent on the other hand had contended that he was in rightful occupation of portion 10 in terms of a written agreement between himself and the Department of Internal Affairs (Coloured Affairs).

[5] 1992 (2) ZLR 445 (S)

A copy of the agreement was attached to his papers and confirmed the agreement which was to expire on 31 December 1985. The farm was referred to in the agreement as 139, Kooi Hoop. The new number was portion 7 of Mier, no 585. A plan attached to the applicant's papers shows that the farms are indeed different. At the hearing the first respondent's counsel accepted the accuracy of the plans and maps. The Court then was required to determine the point *in limine* raised on behalf of the first respondent as to the *locus standi* of the applicant to bring proceedings for the eviction of the first respondent from portion 10 on the basis that the applicant had never had *vacua possessio*.

The finding of the court was that the applicant therein had leased the portion in contention prior to 1981 in respect of an oral agreement and that the applicant had at least partial occupation of the same. It also found that the first respondent had never leased portion 10 and thus had never acquired any rights in respect thereof. The court found that the applicant had at least partially occupied the farm from 1 January 1981 and further that the first respondent had made use of the grazing on the said farm from the same date or even earlier. The court also stated that the applicant could claim *vacua possessio* from the lessor since the first respondent had been trespassing on the farm for a considerable period but that this did not detract from the fact that the applicant had acquired a real right through the partial occupation. There is no indication that in obtaining partial occupation the applicant therein had been given vacant occupation by the lessor. The court however went on to state that even if the occupation of the farm by the applicant was somewhat incomplete, it could not be said that he had received no occupation of farm 10 and therefore had no real rights. I assume therefore from the passage that the court found that in obtaining the partial occupation the applicant had received *vacua possessio*.

I note with interest that the applicant did not find it necessary to discuss the Zimbabwean case of *Pedzisa v Chikonyora* (*supra*) even though the respondents had placed heavy reliance on the same. It is a judgment of the Supreme Court of this country and is therefore binding. The judgments from South Africa where they are distinguishable from our own can only be persuasive. I venture to suggest that where the judgment in *Steenkamp* differs from that in *Pedzisa* such dicta is not binding.

The applicant herein does not have an agreement to lease the property. He has instead an offer letter which courts in this jurisdiction have found not to constitute a lease. See *Airport Game Park P/L & Anor v Karidza & Anor*[6], where ZIYAMBI J.A. stated;

> "Not only is this basic requirement of a lease lacking in the offer letter, but the contents of the letter do not admit of the interpretation sought to be placed thereon by the appellants, namely, that the first respondent was constituted a lessee by the letter."

And later in the same judgment at p 396C-E in discussing the judgment in *Mgwaco Farm (Pvt) Ltd v Pasi & Ors*[7], the learned judge of appeal stated:

> "I respectfully disagree with the conclusion of the learned judge. The letter clearly indicates that it is only if the Minister was satisfied that the conditions stated therein had been met that he would enter into a lease agreement with the first respondent. The duration of the lease and the rent payable were not set out in the letter. Although the duration of the lease need not be specified for a lease to be constituted, the same cannot be said of the quantum of the rental and when it should be paid. In the absence of any provision setting out the rental the offer letter cannot be said to constitute a lease."

Clearly therefore an offer letter is not a lease agreement. The applicant has premised his right to claim relief on the basis of such rights as would ensue on the conclusion of an agreement for lease. If an offer does not constitute a lease, it seems to me that it offers a right to occupy at the pleasure of the owner of the land, that is, the Government of Zimbabwe. The parameters attendant on such occupation are not before me for discussion, but on the other hand it cannot be said that the applicant can claim the same rights as a lessee occupying under an agreement of lease.

In a somewhat tongue in cheek fashion the applicant contended that even if he had no *locus standi* to sue for the ejectment of the respondents from the portion of farm that is in contention, he had *locus standi* to sue for an interdict. In my view *locus standi* is predicated on the existence of a right, whether clear or prima facie. Generally, a right either exists or does not. There are situations where one can have a right in respect of certain relief, for instance in spoliation proceedings, but no right for obtaining other relief. This is not so in this case. Since the right is being sought by virtue of an entitlement to occupy the piece of land, I do not believe that such right is capable of qualification. If the applicant has the right to evict the

[6] 2004 (1) ZLR 391 (S) at 390C
[7] 2003 (2) ZLR 478

respondent then he would have a right to an interdict against any perceived infringement of his rights to occupy the land. He has failed to establish the right to evict or for an interdict. In *casu,* the applicant never obtained vacant possession having moved onto the farm under his own steam, so to speak. He has thus not acquired the necessary *locus standi* to sue the respondents for the enforcement of rights that may accrue from his possession of the portion of land he occupies. I find that he has no *locus standi* even to obtain an interdict against the respondents. His application must therefore fail on that ground.

I turn next to the issue of urgency which I left until a discussion of the facts of the matter. It was contended on behalf of the respondents that the applicant's papers did not exhibit urgency. The leading case within this jurisdiction in relation to urgency is *Kuvarega v Registrar General & Anor*[8], a judgment by CHATIKOBO J. The learned judge had the following to state at p 193F-G.

> "What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay".

When an applicant files an urgent application, the Rules require, where such an applicant is legally represented, that a certificate of urgency be filed setting out why, in the opinion of the legal practitioner, the matter should be treated as urgent and not await set down in normal course. The certificate of urgency filed on behalf of the applicant suggested an infringement on the part of the respondents and an interference with his occupation of the piece of land that he was in occupation of. There was also a statement that the applicant was being denied access to a borehole.

On the face of it therefore the matter appeared to be urgent and an impression was created that the applicant should be allowed through this court unhindered access to the borehole and the homestead. It is not stated in the certificate when precisely the alleged interference commenced. It is only when the respondents' papers are examined that it becomes clear that there is no urgency in the application. The applicant has been on the farm since 2008. He has not given a precise date but going by the averment that he moved onto the farm

[8] 1998 (1) ZLR 188 (H)

in order to comply with the requirements on the offer letter that obliged him to take occupation within 30 days of the acceptance of the offer it is safe to assume that he had moved onto the farm soon after the month of April 2008 when the farm was offered to him. He alleges that soon after he moved onto the farm the respondents started interfering with his activities in that they began to construct permanent structures on the farm, guarded the borehole (*sic*), refused to surrender the farmhouse and occupied the pigsty that is located on his portion of the farm.

Since this application was launched in June 2009, the applicant had waited a full year before approaching this court on an urgent basis for relief over happenings that had taken place on the subdivision. Given that the situation that the applicant seeks this court to reverse has been in existence for the better part of a year it is mischievous in the extreme for a legal practitioner to issue a certificate that a matter is urgent in circumstances such as the above. A matter does not assume urgency because a litigant has plans, the fulfillment of which require an immediate solution. Urgency, in my view arises when an event occurs which requires contemporaneous resolution the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may in their very nature be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threat whatever it may be. In the matter before me there is no urgency established.

I wish to respectfully associate myself with the comments by GILLESPIE J in the case of *General Transport & Engineering P/L v Zimbank Corp P/L*[9] wherein the learned judge stated:

> "It is therefore an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, the good faith can be tested by the reasonableness or otherwise of the purported view. Thus, where a lawyer could not reasonably entertain the belief that he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency".

There is a duty incumbent upon a legal practitioner before he files a certificate that a matter is urgent to carefully examine the case that his client puts to him and to satisfy himself that indeed the matter is urgent. As was stated by BERE J in *Dodhill P/L and Anor v Minister of Lands and Anor*[10] there is no formula which determines what constitutes urgency,

[9] 1998 (2) ZLR 301 at 303A-B
[10] HH 40/09

nevertheless a legal practitioner should be diligent in certifying the urgency of a matter. Sufficient thought ought to be given to the instructions from the client as regards the issue of urgency and an opinion expressed clearly to the applicant as regards the lack of cogent grounds to justify urgency. An applicant who has his matter dealt with on an urgent basis steals a march on other litigants and it is a facility which should be accorded only to a few deserving cases. On the facts presented, this case did not merit such an accommodation.

In the premises I find that the application was not well founded and the application is therefore dismissed with costs.

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IEG Musimbe, legal practitioners for the respondents