EFROLOU (PVT) LTD
versus
MRS MURINGANI

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 18 March 2013; 8, 9, 10 & 24 April 2013

**Absolution from the instance**

Mrs *M Matshiya* for the Plaintiff
Mr *G C Manyurureni* for the Defendant

MAFUSIRE J: After the preliminaries on 18 March 2013, the trial in this matter began in earnest on 8 April 2013. The defendant had the duty to begin. That had been the agreement at the pre-trial conference.

At the close of the defendant's case the plaintiff applied for absolution from the instance. I reserved judgment. This is the judgment.

The facts of this case are virtually common cause. The plaintiff, a duly registered private company, seeks an order for the eviction of the defendant from premises known as Lot 4 of Lot 9 of Chicago situate in the district of Kwe Kwe ["**the property**"]. The Plaintiff is the registered owner of the property. Through one of its directors at the time, one Emmanuel Papayianis, now deceased, the plaintiff had bought the property at an auction sale in June 1996. The owner of the property had been one Anesu Anthony Muringani, now deceased [hereafter referred to as "***the late Muringani***"]. The defendant is his surviving widow.

The property had been auctioned at the instance of the City of Kwe Kwe as the judgment creditor. The late Muringani had been the judgment debtor. The plaintiff's bid, at $120 000-00, had been the highest. The plaintiff had paid a deposit of $30 000-00 on the date of the sale. The provincial magistrate at Kwe Kwe had subsequently confirmed the sale to the plaintiff. However, the late Muringani had successfully challenged the purchase price on the

basis that it was too low. The magistrate had increased the purchase price from $120 000 to $160 000 and had directed a sale by private treaty. The late Muringani had further challenged the new price in this court. That had been in 1997. He had lost. The sale by private treaty to the plaintiff had been confirmed by the magistrate in September 1997.

The plaintiff had paid the balance of the purchase price in the sum of $130 000. Transfer of the property to the plaintiff had been registered in the deeds office on 14 May 1999 under deed of transfer no 2421/99.

Plaintiff's summons for eviction was issued on 24 March 2010. That was more than ten years after the registration of transfer. In its pleadings plaintiff's explanation for the delay was that its director at the time, the said Mr Papayianis, had subsequently died. His surviving widow had subsequently fallen ill. No one had had any knowledge of the existence of the property and its registration in plaintiff's name and in its books until in late 2009.

It transpired through defendant's case that the defendant and her husband, the late Muringani, had at one time been estranged. He had wanted to take on another wife. The late Muringani had died in 2004. In September 2008 the defendant had obtained from the Master's office a certificate of authority authorising her to take transfer of the property. However she did not succeed. In proceedings in this court, in 2010, under HC 355/10, the plaintiff, represented by one of its directors at the time, one Daniel Mackenzie Ncube, sought an order not only to stop the defendant's bid to take transfer of the property, but also to have the certificate of authority set aside. The defendant consented to those orders. She only sought to be excused from the order of costs.

In the current proceedings the defendant's defence to plaintiff's claim for eviction was that the plaintiff was not the lawful owner of the property; that the plaintiff had obtained the title to the property fraudulently; that as the lawful beneficiary to the estate of the late Muringani she had the right, title and interest in the property; that she had issued her own summons against the plaintiff and its directors to have the property transferred back to her late husband's estate and that she was entitled to occupation of the property until the dispute was resolved.

The defendant's summons was issued on 17 May 2010 under the name Emily Ntombizodwa Luwaca in HC3285/10. She sought an order setting aside the transfer of the property from the late Muringani to the plaintiff that had occurred in May 1999. She also sought an order directing the Messenger of Court, Kwe Kwe, to sign all the necessary transfer papers.

The defendant gave evidence. She called one witness, Majorie Quinisela Tshuma [hereafter referred to as "***Ms Tshuma***"]. Ms Tshuma is the defendant's daughter and the late Muringani's step-daughter. The defendant testified that the property had been illegally transferred by the messenger of court to the plaintiff; that neither she nor her husband, the late Muringani, had been aware of the purported sale and transfer; that the transfer bordered on fraud; that the messenger of court was not supposed to have made the transfer and that she had contributed directly to the purchase of the property through mortgage finance.

Plaintiff's plea on the merits of the defendant's claim was filed on 15 June 2010. It stated that it had bought the property from an auction sale and had subsequently obtained title on 14 May 1999. It further stated that there had been nothing illegal or improper about the sale; that the late Muringani would have known about the sale in execution and the subsequent transfer and that the defendant had not laid out any basis upon which the transfer of the property should be set aside.

The parties had subsequently filed further pleadings in the two matters. On 1 February 2011 the two matters had been consolidated at a pre-trial conference and had been referred to trial on three issues.

The three issues on which the matters had been referred to trial were (a) whether the purchase of the property by the plaintiff and the subsequent transfer was tainted by fraud; (b) whether the transfer should be set aside, and (c) whether the plaintiff was entitled to eviction.

The plaintiff subsequently filed an amendment to its plea to include the special plea of prescription. It argued that the defendant's claim had become prescribed; that the sale in execution had taken place in 1996; that transfer had been effected as far back as 1999; that it had been more than three years since that transfer and that in terms of the Prescription Act the claim had become prescribed.

Following argument on the question of both the propriety of the application for amendment and the merits of the defence of prescription I handed down my judgment on 10 April 2013. It was judgment no HH112/2013. I allowed plaintiff's application for amendment and its special plea of prescription. I dismissed the defendant's claim in HC 3285/10. The full reasons are in my judgment.

At the close of the defendant's case there was no shred of evidence relating to any fraudulent dealings or illegal conduct by anyone associated with the sale and transfer of the property to the plaintiff. The sale and transfer had been open, public and plainly above board.

The defendant was at first adamant that the transactions had not been clear to her and that the plaintiff had not paid the full purchase price. She said she had not been privy to the goings-on. However, she eventually conceded the absence of fraud after she was shown the documentary proof. The crucial exhibits produced in court included, among others, the letter to the messenger of court from the provincial magistrate dated 16 September 1997, exh 5, confirming the auction sale and authorising the transfer; the proof of payment of the full purchase price by the plaintiff in the form of a receipt of $30 000 on 31 October 1997, exh 8 (a); a statement by the conveyancers, Danziger & Partners dated 3 December 1997, exh 8 (c), showing receipt of the full purchase price; and a schedule of distribution by the messenger of court on 18 September 1997, exh 8 (d) showing that all the creditors of the late Muringani had been paid out and, crucially, that 82% of the balance of the proceeds amounting to $167 378.16 had been remitted to him.

After defendant's evidence, particularly her concession aforesaid, one would have thought that that would have been the end of the matter. However, the defendant insisted on calling her daughter. But none of Ms Tshuma's evidence was relevant. Her evidence was largely hearsay and therefore inadmissible. It was surprising that Mrs *Matshiya*, despite my raising of a concern on what was manifestly a red herring, went the full distance in her cross-examination.

Ms Tshuma had in fact sat in court as defendant was giving her evidence. Mr *Manyurureni* had been candid enough to bring this to my attention and to highlight the caution with which I would have to approach her evidence.

Ms Tshuma's evidence was that after the trial had begun she had conducted some kind of investigation of her own. She had been to Stanbic Bank in Harare and had been told that the late Muringani had had no account with them. Stanbic Bank had been one of the late Muringani's creditors whose name had appeared on the schedule of payments prepared by the messenger of court as having received an amount in the sum of $4 277.21 through lawyers Wilmot & Bennett, Kwe Kwe.

Ms Tshuma also said that she had been to the deeds office in Harare where she had asked someone there whether it was usual to make alterations on title deeds without proper "endorsements". She claimed that she had worked in some "records office'' and that therefore she knew "the procedure". She said the deeds office at Harare had referred her to

the deeds office at Bulawayo. That had been the office that had handled the transfer of the property way back in May 1999.

Ms Tshuma went on to say that she had telephoned the deeds office at Bulawayo but that she had been asked to bring the original title deed in question as no one could pass judgment in the absence of the document.

Ms Tshuma further said that she had asked her brother in Kwke Kwe to check on the messenger of court's office about the sale in execution. The messenger of court's offices had allegedly professed no knowledge of the sale in execution in 1999.

Ms Tshuma conceded that she was living in Harare when the events in relation to the sale and transfer of the property were unfolding in Kwe Kwe. She however maintained that from time to time she would visit Kwe Kwe. She was adamant that the property could not have been sold because the late Muringani, whom she said was very close, would have told her. She said the late Muringani had not told her anything and that therefore no such sale or transfer could have taken place as claimed by the plaintiff. Ms Tshuma conceded that in her enquiries she had spoken to people in the front office who had no records of the transaction and whose names she did not get. However, she said she had obtained their telephone numbers in case anyone wanted to verify her information.

In the light of the documentary evidence produced in court and the concessions made by the defendant herself, Ms Tshuma's "evidence" was of no value. She was merely being argumentative. She conceded that she was pained by the fact that her mother, the defendant, stood to lose out if she was evicted.

In applying for absolution from the instance at the close of the defendant's case Mrs *Matshiya* submitted that given that the defendant's defence had been predicated on the question of fraud; that since none of the elements of fraud had been raised, let alone proved at the close of the defendant's case; that in fact the evidence having established that the sale and transfer of the property had been above board; the defendant's own claim for a reversal of the transfer having been dismissed and that the defendant having had the duty to begin, there was no need to put the plaintiff on its case and that it was proper to absolve it from the instance. She suggested that if the plaintiff was absolved from the defendant's case the plaintiff could then open its own case for eviction.

After I queried the propriety of her application and her intended course of action plaintiff's counsel clarified her position and said that if plaintiff was absolved from the instance there would be no longer any issue for determination in the plaintiff's case because

the plaintiff's case for eviction was predicted on the fact of its ownership of the property and that the only issue standing in the way was the defendant's defence of fraud but that this defence had no substance.

In terms of Order 49 Rule 437 (1) if the burden of proof is on the plaintiff, he shall adduce his evidence first. If absolution from the instance is not decreed the defendant will then adduce his evidence. However, Rule 441 provides that when the right or obligation to begin lies on the defendant, the order of procedure should be read as if the defendant was the plaintiff and the plaintiff was the defendant. Therefore the plaintiff in this case could properly apply for absolution from the instance at the close of the defendant's case since the duty or obligation to begin had lain on the defendant.

Where absolution from the instance is refused at the close of the plaintiff's case the defendant can go to his own case, can simply close it and still apply for absolution on the same evidence. But the considerations at that stage are different.

The test for absolution from the instance at the close of the plaintiff's case was laid down in the case of *Gascoyne* v *Paul and Hunter* 1917 TPD 170 which BEADLE CJ accepted as the *locus classicus* on the point. This was in the case of *Supreme Service Station [1969] [Pvt] Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1.

In the *Gascoyne's* case the test was formulated as follows[1]:

> "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is: Is there evidence upon which a reasonable man might find for the plaintiff? …. The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant …: in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against (the defendant)?"

In the *Gascoyne's* case the court noted the difference in the tests where the defendant closes his case without calling any evidence. The court formulated the test for absolution where the defendant closes his case without calling any evidence as follows[2]:

> "Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?"

[1] Per De Villiers JP at p 173
[2] Still at p 173

The difference is in the expressions "*might*" and "*ought to*". This difference was then amplified and explained by BEADLE CJ in the *Supreme Service Station [1969]* case aforesaid. At p 4A – 5D the then learned Chief Justice said:

> "I think it is unfortunate that the magistrate's attention was not specifically directed to the manner in which he should have approached this case. It was never stressed that the test to be applied was **might** a reasonable court give judgment for the plaintiff? No attempt was made to elaborate what the word 'might' meant in this context, and it is as well that I should do so now. The *locus classicus* of the cases dealing with the procedure of absolution from the instance is the old Transvaal case of *Gascoyne* v. *Paul and Hunter*, 1917 T. P. D. 170 … **Gascoyne's** case stresses that it is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the close of the plaintiff's case but to grant it if the defendant then promptly closes his case and renews the application without calling any evidence at all. There is no inconsistency in two such diametrically opposed orders, though the evidence before the court in each application is identical.
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> "The reason why there is no inconsistency is because the test to be applied when application is made before the defendant closes his case is 'what **might** a reasonable court do?'; whereas the test to be applied when the application is made after the defendant has closed its case is 'what **ought** a reasonable court do?'.
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> "The distinction here between 'might' and 'ought' in this context is an important one. It must be assumed that any judgment which a court 'ought' to give must be the correct judgment, as no court 'ought' to give a judgment which is incorrect. Once it is accepted that a judgment which a court 'might' give may differ from that which it 'ought' to give, it is clear that the judgment which it 'might' give and which differs from the judgment which it 'ought' to give must be an incorrect judgment. As a matter of logic, therefore, in considering what a reasonable court 'might' do, allowance must be made for its making a reasonable mistake and giving an incorrect judgment. …. The test, therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff?"

BEADLE CJ further pointed out that the practice in the South African courts and ours was always that in the case of doubt as to what a reasonable court "might" do, a judicial officer should always lean on the side of allowing the case to proceed. He also pointed out that a defendant who closes his case without giving evidence risks having an inference being drawn against him from his failure to give evidence contradicting that of the plaintiff.

The test on absolution from the instance as formulated in *Gascoyne's* case has been followed in numerous other cases. HERBSTEIN AND VAN WINSEN *The Civil Practice of the Superior Courts in South Africa*, 3rd ed, at p 464 state that in view of the principles on absolution from the instance, a trial court should be very chary of granting absolution at the close of the plaintiff's case. JUTA J's remarks in *Theron* v *Behr* 1918 CPD 443[3] which were quoted with approval by SUTTON J in *Erasmus* v *Boss* 1939 CPD 204[4], by BEADLE CJ in the *Supreme Service Station* (1969) case above[5], SMITH J in *Standard Chartered Finance Zimbabwe Ltd* v *Georgias & Anor* 1998 (2) ZLR 547 (H)[6] and MATIKA J in *Bailey NO* v *Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H)[7]were to the effect that the practice is that judges are very loath to decide upon questions of fact without hearing all the evidence.

As was stated in the *Supreme Service Station* (*1969*) case aforesaid and followed in the case of *Standard Chartered Finance* and that of *Bailey NO* above a defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance. I should say the same applies to a defendant, or in this case, the plaintiff, who might be *unwilling* to take the witness' stand.  It should not shelter behind the procedure of absolution from the instance.

In this case the plaintiff took a calculated risk to seek absolution at the close of the defendant's case. Despite the query that I raised with its counsel regarding her intended course of action should I grant absolution the plaintiff did not seek to close its case even though she made submissions to the effect that absolution at that stage would effectively mean the end of the case as there would be nothing else for plaintiff to say in support of its case for eviction.

I say the plaintiff was taking a risk because it is the principle of absolution from the instance that the onus is higher where the application is made at the close of the plaintiff's case than where it is made after all the evidence has been led. At p 5F – G BEADLE CJ in the *Supreme Service Station* (1969) case above said:

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[3] At p 451
[4] At p 207
[5] At p 5 - 6
[6] At p 553B - C
[7] At p 487

> "… the onus on a defendant who applies for absolution from the instance before closing his case is greater than the onus placed upon him when he applies for absolution from the instance after closing his case …"

Furthermore, it is the practice in our courts to lean more in favour of deciding questions of fact after all the evidence has been led. However every case depends on its own special set of facts. In the present case I am satisfied that the risk that the plaintiff took in applying for absolution from the instance at the close of the defendant's case and without closing its own case was well taken. Even if I were to apply the more stringent test of what "*ought*" a reasonable court do as opposed to what "*might*" a reasonable court do, and even bearing in mind that the practice in our courts is to lean more in favour of hearing all the evidence before deciding on questions of fact I still come to the conclusion that the plaintiff is entitled to be absolved from the instance.

The special circumstances of this case are that plaintiff's cause of action against the defendant was predicated purely on its ownership of the property. An owner of a property is entitled to the full enjoyment of the property unless by agreement or operation of the law there has been a diminution of that right. In the judgment on prescription aforesaid I highlighted that the registration of a real right in the deeds office protects the holder and the public alike. Once a real right has been registered it becomes enforceable against the world at large: see HARRY SILBERBERG *The Law of Property*, Durban Butterworths, 1975, at p 67. Therefore, in this case, unless there is established a superior right to deprive it of its right to the full enjoyment of the property, the plaintiff is plainly entitled to recover possession of the property.

The defendant's sole ground for resisting plaintiff's claim for eviction was predicated on the question of fraud. It was her defence that the transfer of ownership in 1999 had been fraudulent. But that defence completely evaporated once she took the witness' stand. Even her counsel implored her to pin point the time and place at which the fraud might have taken place, from the time that the magistrate had given judgment in favour of the City of Kwe Kwe against the late Muringani way back in 1995; the time when the messenger of court had sold the property by public auction; the time when the magistrate had confirmed the sale; the time when the late Muringani had challenged the auction price; the time when the magistrate had directed a sale by private treaty; the time when the late Muringani had unsuccessfully challenged the new price; the time when the magistrate had confirmed the new price and had directed the registration of transfer; the time when the messenger of court had signed the

transfer papers; the time when the conveyancers Danziger & Partners had caused the registration of transfer, and finally, to the time when the registrar of deeds had registered the transfer in the deeds office. She could not say where or when or by whom the fraud could have been committed.

In some of her papers the defendant had claimed rights of occupation until the "dispute" had been resolved. She said she was the surviving spouse of the late Muringani and the *executrix dative* to his estate. This was not the bulwark of her defence. But again this other ground also evaporated once she took the witness' stand. The certificate of authority from the Master's office that had given her the limited authority to take transfer of the property was set aside with her consent. The transfer to herself was stopped with her consent. She had been fully represented in those proceedings. The property had been registered in the sole name of the late Muringani.

In terms of the Deeds Registries Act, [*Cap 20: 05*] an owner of an immovable property is the registered owner. Registration of real rights in the deeds office is not a mere matter of form. In the case of *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) the Supreme Court[8] stated as follows:

> "The registration of rights in immovable property in terms of the Deeds Registries Act [*Cap 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of 'real right' in s2 of the Act. The real right of ownership, or *jus in re propria*, is 'the sum total of all the possible rights in a thing' – see Wille's **Principles of South African Law** 8 ed p 255".

In the circumstances of this case the defendant has no right to remain in occupation of the property without the plaintiff's authority. The plaintiff is entitled to immediate vacant possession of the property. There is nothing further for the plaintiff to say that should require its witness to take the stand.

In the final result the plaintiff's application for absolution from the instance at the close of the defendant's case is hereby granted with costs. The defendant is hereby ordered to vacate the plaintiff's property known as Lot 4 of Lot 9 of Chicago, held under deed of transfer no 2421/99 situate in the district of Kwe Kwe.

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[8] Per McNally JA at p105 - 106

*Mtetwa & Nyambirai*, plaintiff's legal practitioners
*Manyurureni &Company*, defendant's legal practitioners