

1.ABIGAIL MUTIZE  
versus  
FMC FINANCIAL SERVICES (PVT) LTD  
and  
REVESAI TABETH NYAHASHA  
and  
SHERIFF OF THE HIGH COURT  
and  
REGISTRAR OF THE HIGH COURT  
and  
REGISTRAR OF DEEDS  
and  
POWER BREEZE ENGINEERING (PVT) LTD

HC 10930/18

2.REWESAI TABETH NYAHASHA  
versus  
ABIGAIL MUTIZE

HC 505/19

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 24 July 2019 & 8 January 2020

### **Consolidated opposed applications**

*N Musuba*, for applicant (HC 10930/18)  
*E Mubaiwa*, for respondents

*F Moyo*, for applicant (HC 505/19)  
*N Musviba*, for respondent

TAGU J: There is an order of this Court consolidating the two matters in HC -10930/18 and HC- 505/19 for hearing. The matters speak to each other particularly because the title sought to be enforced in HC- 505/19 is also being impugned in HC-10930/18. It is necessary to set out the facts in each case.

In Case No. HC 10930/18 the applicant ABIGAIL MUTIZE is applying for setting aside a sale in execution by public Auction in terms of the common law of Zimbabwe. The applicant as the one of the directors of, and on behalf of the 5<sup>th</sup> respondent pledged her house, which is a

certain piece of land situate in the district of Salisbury, being Stand 659 Mabelreign Township, measuring 1163 square meters (the property) as collateral for the money borrowed from the 1<sup>st</sup> respondent, by the 5<sup>th</sup> respondent. The 5<sup>th</sup> respondent defaulted in its payments and the 1<sup>st</sup> respondent obtained a judgment against the applicant under Case Number HC 7340/11. The property was attached and sold in execution by public auction by the 3<sup>rd</sup> respondent. The 2<sup>nd</sup> respondent was duly declared the highest bidder and purchaser of the said property for \$115 500.00 on the 19<sup>th</sup> of March 2018 and the sale was confirmed on the 31<sup>st</sup> May 2018. Efforts by the applicant to challenge the confirmation were unsuccessful. The terms of the sale set by the 3<sup>rd</sup> respondent were that the purchase price was to be paid in full within 7 days after confirmation and failure to do so would result in the sale cancelled. The applicant alleges that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents breached the terms of the sale in that payment was made after seven days. The 3<sup>rd</sup> respondent is accused of having passed transfer to the 2<sup>nd</sup> respondent before full purchase price was paid. She therefore submitted that the manner in which the Sheriff handled this sale is opaque and suggestive of bad faith or mischief on the part of the purchaser or the Sheriff or both of them. The relief being sought by the applicant is as follows-

- “1. The Deed of transfer registered in favor of the second respondent in respect of the property in dispute be and is hereby cancelled.
2. The Deed of transfer No. 8554/89 registered in the name of the applicant on the 12<sup>th</sup> day of September 1989 be and is hereby revived.
3. The third respondent be and is hereby directed, in respect of the relevant documents, to make the endorsements and entries necessary to give effect to paragraph 2 of this order.
4. The sale by public auction concluded between the second and third respondents on the 19<sup>th</sup> of March 2018, in respect of Stand 659 Mabelreign Township, Harare, measuring 1163 square meters, be and is hereby set aside.
5. The second respondent shall pay the costs of this application.”

The applicant (Rewesai Tabeth Nyahasha) in Case No. HC-505/19 is that she is applying for the eviction of the respondent, (Abigail Mutize) her invites, occupants, employees and any other person claiming occupation at her behest from a certain piece of land situate in the district of Salisbury called Stand 659 Mabelreign Township measuring 1163 square meters held under deed of transfer 5886/2018 also known as No. 9, 27<sup>th</sup> Avenue Haig Park, Mabelreign, Harare. (the stand). Facts in respect of Case No. HC 505/19 are that the applicant in or around the 28<sup>th</sup> September 2018 became the legal owner of the said stand. Transfer from the respondent arose following a Sheriff's sale by way of public auction held under SS16/18 to which she successfully tendered the highest bid and was consequently confirmed by the Sheriff of Zimbabwe as the

purchaser in and around the 31<sup>st</sup> of May 2018. She claims to have title to the property and is being deprived of possession and all the rights which flow from ownership by the respondent's conduct of refusing to vacate the property despite demand. She now prays for an order in the following terms-

- “1. The eviction of the Respondent and all those claiming through her from the premises known as No. 9, 27<sup>th</sup> Avenue, Haig Park, Mabelreign, Harare within 7 days of being served with this Order failing which the Sheriff of the High Court of Zimbabwe is hereby authorized to evict the Respondent and all those claiming occupation through her.
2. Costs of the suit on a legal practitioner and client scale.”

**CASE HC -10930/18**

Several preliminary objections were raised by the second respondent. These have to be dealt with first. The first point *in limine* is that there are material disputes of facts. The contention by the second respondent is that at the time of issuing this application the immovable property had already been transferred to the 2<sup>nd</sup> respondent as evinced by Annexure “D”. She said not only does the applicant need to prove that the conduct of the 3<sup>rd</sup> respondent fell below the standard expected of him but she must also address the issue of ownership which facts form triable issues that cannot be dispensed solely on the papers filed of record. Counsel for the applicant submitted that there are no disputes of facts because there is a balance of \$500.00 that needs to be paid. In response the counsel for the second respondent produced receipt number 0984015 which proved that the amount of \$ 500.00 was paid on the 13<sup>th</sup> of November 2018. A perusal of the papers indeed shows that this court application was filed on the 27<sup>th</sup> of November 2018 well after the balance had been paid. Therefore it is not correct that an amount of \$500.00 is outstanding. Therefore this point *in limine* has merit.

The other point *in limine* is that the application is *lis pendens* under Case No HC 5402/18. The court indeed had sight of the file referred to by the second respondent. I agree with the counsel for the applicant that the case referred to does not apply in that while some parties are mentioned the case involves some totally different parties. This point *in limine* is therefore dismissed.

The other point *in limine* is that of *res judicata*. This submission is based on a letter of compromise made at the time the applicant was not aware of the bad faith she referred to.

Besides in my view this letter is not a court order. I cannot uphold this point *in limine*. See *Wolfenden v Jackson* 1985 ZLR (2) 313 (S).

One point *in limine* was that the applicant failed to comply with Rule 257 of the Rules of this Honourable Court in that the Form No. 29 which the applicant used neither specifies the grounds upon which application is brought nor states the relief sought. She said these infractions render the application fatally defective. See *Moyo v Forestry Commission* 1997 (2) ZLR 254 (S). The counsel for the applicant argued that since the application is one made under common law there was no need to comply with the Rules. The Form used by the applicant reads as follows-

“TAKE NOTICE that the applicant intends to apply to the High Court at HARARE for an Order in terms of the Draft Order annexed to this notice and that the accompanying affidavit and documents will be used in support of the application”

Rule 257 reads as follows-

**“257. Contents of notice of motion**

The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for.”

A reading of the Form used by the applicant in this case does not contain the particulars referred to in by the Rule. It is therefore fatally defective. This point *in limine* is upheld.

The other point *in limine* was failure to apply for condonation. The second respondent submitted that the applicant was out of time and should have applied for condonation or at least explain why this application was brought out of time. Again the counsel for the applicant submitted that since this is an application under common law there was no need to apply for condonation. This was disputed by the counsel for the second respondent.

I tend to agree with the counsel for the second respondent who submitted that a perusal of the applicant’s papers suggest that the motion before this court is actually an application in terms of Rule 359 of this Honourable Court. In particular Rule 359(8) provides that a person aggrieved by the Sheriff’s decision may within 1 month after notification apply to the Court by way of Court application to have the decision set aside. The applicant in her papers at paragraph 23 admits to filling her papers out of time all the while being economical about the truth as to why she filed her application out of time. She merely said-

“further, she did not file this application sooner in terms of rule 359 of the High Court Rules, because she was not informed despite all her numerous requests from the Sheriff if the full purchase price had been paid. She was only advised that the full purchase price

had not been paid through Annexure B supra, on the 6<sup>th</sup> of November 2018, hence bringing this application in terms of the common Law.”

Realizing that she was out of time this is what the applicant should have said in an application for condonation. The applicant should have first sought condonation from this Honourable Court highlighting the reasons for late filing and seeking the court’s pardon to file the present application. I therefore uphold this point *in limine*.

Finally, the last point *in limine* is that the applicant lacks *locus standi* to found a cause on the decision by the Sheriff to not cancel the agreement of sale. The second respondent submitted that the authorities are clear that the effect of the confirmation of a sale in execution is to bring about a contract between the Sheriff as the seller and the purchaser. Applicant is therefore not privy to the contract and has no relationship to the Sheriff’s right to elect to abide the contract. She has no *locus standi* to seek to enforce sanctions on the exercise of contractual rights of other persons. The counsel for the applicant conceded that the Sheriff had discretion but argued that it was exercised in bad faith.

In the case of *Allied Bank Limited v Dengu & Anor* SC- 12-2016 it was held that-

“It is quite clear that the question of locus standi does not arise in the present case for the following reason. The principle of locus standi is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he/she is entitled to the relief sought, he or she has locus standi. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject –matter of the cause of action.”

In the present case if the purchaser of the property in question had not complied with the terms of sale set by the Sheriff it was the Sheriff himself/herself who had a direct interest/ cause and not the judgment debtor and he had the right to extent the time within which the purchaser could make good the payment and not for the judgment debtor to bring an application for cancellation of the sale. I therefore agree with the second respondent that the applicant does not have *locus standi*. I uphold the point *in limine*.

On the basis of the points *in limine* that I upheld the applicant’s application is dismissed without dealing with the merit of the application with costs.

#### **CASE HC- 505/19**

This an application for eviction of the respondent, her invites, occupants, employees and any other persons claiming occupation at her behest from a certain piece of land situate in the district of Salisbury called Stand 659 Mabelreign Township measuring 1163 square metres held

under deed of transfer 5886/2018. (also commonly known as No. 9, 27<sup>th</sup> Avenue, Haig Park, Malbereign, Harare). It is common cause that the applicant has title to the said property. The respondent lost title to the property when it was sold in execution by the Sheriff. The applicant temporarily allowed the respondent to stay in the property. Now the applicant wants to take possession of her property she lawfully bought at a public auction. The sale has since been confirmed by the Sheriff. All attempts to set aside the sale made by the respondent for one reason or another have hit a brick wall.

This application is premised on the law of *rei vindicatio* and right to uninterrupted ownership. It is trite that in order for the applicant to succeed in a motion for *rei vindicatio*, it is incumbent upon the applicant to prove the following-

- a) That the immovable property vests in her;- *Savanhu v Hwange Colliery Co.* SC -15-08;
- b) That the immovable property in dispute exists and is clearly identifiable;- *Sorvaag v Prettersen & Ors* 1954 (5) SA 636;
- c) That at the time of issuing these motion proceedings, the respondent and those claiming occupation through her were in continued occupation at the premises.- *Chetty v Naidoo* 1974 (3) SA 13 (H)

In the authority of *Pretoria Standard v Ebrahim* 1979 (4) SA 193 (T) cited by the applicant it is put forward that ejectment of an occupier of land can be obtained by the registered owner of the immovable property. This applies *mutandis mutatis* to this case.

The first requirement in my view has been satisfied by the applicant who provided the title deed to the immovable property despite the challenge by the respondent. The second requirement has also been satisfied as the property in question is in existence and is clearly identifiable. Equally the final requirement has been met as can be manifested from the respondent's opposing papers filed of record wherein she admitted to having been in continuous occupation of the premises at the time proceedings were instituted.

On the premise of the *nemo plus iuris* rule the remedy of *rei vindicatio* entitles the owner to exclusive possession and the applicant having met the requirements at law, the onus shifts to the respondent to prove that a right exists to her continued occupation at the premises. See *Muriwa & Others v Noxon Investments & Ors* HH-17-27.

In deciding whether the respondent discharged the onus on her the court has to have regard to the following-

- a) Documentary evidence that the applicant is not the owner of the immovable property;
- b) That the immovable property is no longer identifiable or does not exist;
- c) That the respondent's continued occupation of the immovable property is not unlawful;  
or
- d) That the respondent is no longer in physical control of the premise.

Having considered the submission made before the court and the documentary evidence the court is of the view that the respondent, despite the spirited challenges she made failed to discharge the onus on her and her defence is dismissed with costs. The applicant managed to prove her case.

IT IS ORDERD THAT

1. The application in HC 10930/18 be and is hereby dismissed with cost on a legal practitioner and client scale.
2. The application in HC 505/19 be and is hereby granted.
  - (i) The eviction of the Respondent and all those claiming through her from the premises known as No. 9, 27<sup>th</sup> Avenue, Haig Park, Mabelreign, Harare within 7 days of being served with this Order failing which the Sheriff of the High Court of Zimbabwe be and is hereby authorized to evict the Respondent and all those claiming occupation through her.
  - (ii) Costs of suit on a legal practitioner and client scale.

*Donsa Nkomo & Mutangi*, applicant's legal practitioners (HC- 10930-18)  
*Scanlen and Holderness*, 2<sup>nd</sup> respondent's legal practitioners

*Scanlen & Holderness*, applicant's legal practitioner (HC-505-19)  
*DNM Attorneys*, respondent's legal practitioners