

MARY MADZIMA

and

MICAH SIYAPI MADZIMA

versus

MILIVIC HOUSING TRUST AND ALL THOSE OCCUPYING THE REMAINDER OF
STAND 219 STRATHAVEN TOWNSHIP, HARARE THROUGH IT

and

MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS N.O.

HIGH COURT OF ZIMBABWE

MUSITHU J

HARARE: 11 January 2023 & 13 February 2023

Civil Trial – Absolution from the Instance

Mr *P. Matsanura*, for the plaintiff

Mr *G Madzoka*, for the 1st defendant

Ms *A Magunde*, for the 2nd defendant

MUSITHU J: The plaintiffs herein are husband and wife. In March 2010, they entered into a lease agreement with the then Minister of Local Government, Rural and Urban Development (now known as the Minister of Local Government and Public Works) in respect of a property called the Remainder of Stand 219 situate in the township of Strathaven in the district of Harare (the property). The Minister was joined to the proceedings as the second defendant by an order of this court dated 22 November 2022. The first defendant claims to be in occupation of the property since 2017, on the strength of an allocation letter issued by the second defendant on 21 August 2017. The plaintiffs instituted the current proceedings against the first defendant on 6 July 2020, claiming the following relief:

- “a. Eviction of the Defendant and all those claiming occupation of the premises through them or with them from the premises known as Remainder of Stand 219, situate in the township of Strathaven in the District of Harare;
- b. Payment of damages in the sum of ZWL 500 000.00;
- c. Interest on the above sum calculated at the prescribed rate from the date of issue of summons to date of full and final payment;
- d. Costs of suit on a legal practitioner and client scale.”

On the day the trial was set to commence, the first defendant’s erstwhile legal practitioners, J. Mambara & Partners renounced agency. The first defendant’s representatives applied for a postponement of the matter to enable them to engage another legal practitioner

to take over the matter. During that engagement with the parties I pointed out the difficulties attendant upon an attempt to resolve the matter without the second defendant in whom ownership of the property is vested. This was so in view of the fact that both the plaintiff and first defendant claimed rights in the same property based on documentation issued by the same authority.

In addition, neither party had intimated in their summaries of evidence that they intended to call the second defendant as a witness to clarify his position on the property. It was at that stage that the court, acting in terms of r 32(12)(b), joined the second defendant to these proceedings. The court directed that the second defendant or his proxy appear before the court on the next date in order to give evidence *inter alia*, on the status of: the lease agreement issued to the plaintiffs and the allocation letter issued to the first defendant in respect of the same property.

The plaintiff's legal practitioners were also directed to prepare and serve on the second defendant through the Sheriff of the High Court, all pleadings in the matter and all documents in issue. The second defendant was ordered to prepare and file a summary of evidence and any other relevant documentation relating to the property in question. The second defendant prepared and filed a summary of evidence on 2 December 2022, through the Attorney General's Office.

Background to the Plaintiffs Claim

The plaintiffs claim is based on a lease agreement that they signed with the second defendant on 9 March 2010 in respect of the property. They claimed that the lease still subsisted. The lease granted them an option to purchase the property upon payment of agreed lease fees and the construction of a primary school amongst other conditions. The plaintiffs claimed to have fully discharged their financial obligations and were set to commence the construction of the school. They discovered that the first defendant had taken occupation of the property and had since subdivided it for residential purposes. They claimed that the first defendant's presence at the property was hampering their efforts to commence construction works in line with the terms of their lease with the second defendant. The delay in the construction of the school in turn meant a delay in the realisation of income from the school. The estimated loss of income was in the region of ZWL\$500,000.00.

In its defence, the first defendant denied that the lease agreement between the plaintiff and second defendant still subsisted. The lease was for a period of four years from the date of

inception. It had since expired in March 2014. The first defendant denied that it was in unlawful occupation of the property. It claimed to have been allocated the same property by the second defendant in August 2017 for the purpose of developing same into medium density residential stands. The stands had since been developed and allocated to its members. There was no space for the construction of a school as alleged by the plaintiffs. It further alleged that the plaintiffs were aware of its occupancy from as far back as 2017.

The Issues

The agreed trial issues were as follows:

- whether or not the plaintiffs have a right at law to seek the eviction of the defendants from the remainder of stand 219 Strathaven Township, Harare;
- whether or not the defendant and all those claiming occupation through the defendant must be evicted from stand 219 Strathaven Township, Harare;
- Whether or not there are any damages to be paid in the circumstances and if any, by who and how much?

The Trial

The first plaintiff gave evidence for the plaintiffs. She told the court the plaintiffs applied to lease the property from the second defendant in 2010. The agreement had an option to purchase, meaning the monthly rentals were contributing towards the purchase price. They paid the agreed rentals fees from 2010 to 2018. The receipts issued from the second respondent's offices confirming the payments were tendered as exhibits by consent. The balance of the purchase price was paid as a lump sum in the sum of ZW\$72, 435.00 on 20 November 2018. They tried to erect a fence around the property on two occasions. On one occasion the fence was razed down to the ground and on another occasion their contractors were chased away by people who had illegally occupied the property. They lodged a criminal complaint at Avondale Police Station. They also lodged another criminal complaint with the Zimbabwe Anti-Corruption Commission (ZACC).

Following the intervention of Avondale Police, they tried to erect a billboard and to put up a fence, without success. In short, nothing came out of the complaints to the Police and to ZACC. They approached the offices of the second respondent. They were told to approach ZACC again or take up the issue with the courts. The second respondent's officials however wrote a letter confirming the plaintiffs as the legitimate lease bearers. It was at that point that the plaintiffs engaged their legal practitioners, who then instituted the current proceedings.

Under cross examination the witness confirmed that the lease agreement was for a period of four years, but renewable at the expiration of the four years. When challenged to

produce the evidence of the renewal, the witness insisted that although there was no documentary proof, she had indeed renewed the lease. The witness's attention was drawn to a letter dated 10 May 2010 from the second respondent. Attached to that letter was a copy of the signed lease agreement. The letter drew the plaintiffs' attention to three key clauses. Clause 3 stated that the rental should be remitted to the second respondent's offices on or before 1 March of each year during the lease period. Clause 4 required that buildings to the value of US\$100,000.00 be erected on the property on or before 28 February 2014. Clause 5 required that plans be approved and construction was to commence on the stand on or before 1 November 2010. The witness stated that clause 4 was not complied with because she was blocked by the first defendant.

Clause 11 stated that the lessee was not to occupy or permit any person or persons to occupy the property leased until the buildings were completed to the satisfaction of the lessor. The witness admitted that the plaintiff could only take occupation after the buildings were completed to the satisfaction of the lessor. She also admitted that no construction was completed by the 24th February 2014 as directed by clause 4 of the agreement. Clause 20 provided that the lessee could exercise the option to purchase the property for the sum of US\$75, 435.00 in writing if it complied with the conditions pertaining to the construction of structures.

When asked to confirm if the plaintiffs exercised their option to purchase the property in writing and to produce confirmation of such communication, the witness could only state that she thought she had given the notice. She went further to state that when the plaintiffs made payment in full, they genuinely thought that the second respondent would construe that payment as an exercise of the option. The witness did concede that the lease agreement was not an agreement of sale. It merely conferred the plaintiffs with a right to purchase the property once they activated the option to buy clause in the contract. The relevant notice required to trigger the exercise of the option was not given.

Clause 20(b) of the lease agreement stated that the date of sale shall be deemed to be the date on which "*such notice as aforesaid shall be received by the Lessor, and with effect from such date the said lease shall be deemed to have terminated.*" The notice referred to was one for the exercise of the right to purchase the property. The witness stated that when she started paying rentals she was actually purchasing the property. When she made the final lump sum person, she thought she had all but purchased the property. She could not state what the date of sale was as required by clause 20(b). While the witness was able to confirm

the rentals for the first to the fourth year, she could not confirm whether or not the rentals for the subsequent years were indeed paid. She also averred that the payment of \$72, 435.00 covered the rentals for the subsequent years up to 2018 since the receipt from the second respondent dated 20 November 2018 was inscribed with the words “*balance of purchase price*”.

The application for absolution from the instance

At the close of the plaintiff’s case Mr *Madzoka* advised that he had instructions to apply for absolution from the instance. I directed counsel to file written submissions. During the course of the plaintiff’s case, the plaintiff abandoned its claim for damages for lost income. The remaining issues are whether the plaintiffs have a right to seek the eviction of the first defendant from the property and whether the defendants should be evicted from the property. I pause to observe that there is only one issue for determination.

A determination of the first issue effectively disposes of what the parties consider to be the second issue. If the court determines that the plaintiff has a right to evict the first defendant then the second issue falls away. I say so because from a reading of the pleadings, the first defendant essentially challenges the plaintiff’s right to seek eviction on the basis that its lease with the second defendant had long expired. Alternatively, it argued that even if the lease were deemed to be extant, still no rights accrued to the plaintiffs at law to seek the eviction of the first defendant because they never acquired possession or physical occupation of the property.

The First Defendant’s Submissions

In its submissions, the first defendant submitted that the narrow issue for determination was whether the plaintiffs, through their sole witness managed to adduce evidence upon which a court applying its mind reasonably could or might find for the plaintiffs. The first defendant averred that the plaintiffs failed to adduce evidence upon which the court acting reasonably could grant them the relief they sought. Two main reasons were advanced to support this submission. Firstly it was argued that the plaintiffs failed to establish a *prima facie* right to seek the eviction of the first defendant. The second reason was that the plaintiffs’ evidence fell short of establishing a *prima facie* case for the eviction of the first defendant.

The basis upon which the eviction order was sought was the lease agreement between the plaintiffs and the second defendant. That lease agreement was signed on 9 March 2010. It was for a fixed duration of four years which expired on 28 February 2014. The lease ceased

to have any effect and the plaintiffs lost any rights that they derived from same. The right to claim possession or occupation was also extinguished. The allegation that the lease was renewed was not supported by any evidence at the trial. The plaintiffs failed to discharge the onus upon them to prove that the lease was extant. The only conclusion that could be reached was that the lease was never renewed. That conclusion was further reinforced by the plaintiffs' failure to produce evidence of payment of rentals for the period 2015, 2016 and 2017. The witness conceded under cross examination that there was no proof of payment of rentals after the period the lease was allegedly renewed.

The first defendant further submitted that even assuming the lease was extant, it did not confer the plaintiffs with rights to seek the eviction of the first defendant. The plaintiffs were not in possession of the property. Without possession they had no right to seek the ejection of the first defendant unless such rights were ceded to them by the second defendant.

The first defendant cited the case of *Pedzisai v Chikonyora*¹, where it was held that a lessee to buy does not have *locus standi* to sue a third party for ejection unless he had occupation of the property before the third party took occupation. Whether the plaintiffs were ever in possession of the property was a question of fact in respect of which the plaintiffs had onus of proof. It was further submitted that *in casu*, going by the terms of the lease agreement, the plaintiffs' rights to occupy the property had not fully accrued. Reference was made to clauses 4, 5, 11 and 20 of the lease agreement.

The first defendant further submitted that the plaintiffs wish to put up a fence as well as erect a bill board did not constitute possession. The fact that the plaintiffs' contractors were allegedly chased away by people on the property all but confirmed that when attempts were made to put up structures, the property was already occupied by the first defendant.

On the basis of the foregoing, the first defendant prayed that it be absolved from the instance in respect of the plaintiffs claim for eviction.

The Plaintiffs' Submissions

The submissions were in the form of notice of opposition accompanied by an opposing affidavit deposed to by their legal practitioner, Mr *Matsanura*. The opposing affidavit raised two preliminary points. First it was averred that the application for absolution from instance was fatally defective for want of compliance with the rules of the court. The

¹ 1992 (2) ZLR 445 (S)

application was not in Form No. 23 as required by r 59(1) of the High Court Rules, 2021 (the Rules).

Further, it was averred that the application was not accompanied by an affidavit as required by the same rules. In the absence of an affidavit, then there was no application before the court. The second point was that the application for absolution was fatally defective as it was based on the terms of a contract to which the first defendant was not a party. It made serious inroads into the doctrine of privity of contract which precluded a party from seeking to benefit from terms of a contract that they were not part to. The alleged breach of the lease agreement between the plaintiffs and the second defendant had nothing to do with the first defendant. The court was urged to dismiss the application for absolution with costs on the punitive scale.

As regards the merits of the application, the deponent responded to the first defendant's submissions paragraph by paragraph as if he was responding to a founding affidavit. He denied that construction work on the property had not commenced. He attached to the affidavit a copy of an approved plan drawn on 4 February 2010, and approved by the City of Harare. That plan was not tendered in evidence as part of the plaintiffs' case. He argued that the lease agreement remained valid since no allegations of breach had been alleged by either party. First defendant could not declare the lease agreement to have been breached when it was not party thereto. Mr *Matsanura* further averred that the validity of the lease agreement was confirmed by the second defendant on several occasions. He attached to his affidavit a letter from the second defendant as well as the second defendant's summary of evidence. The said letter was not tendered during the plaintiff's case. The summary of evidence was only filed following the joinder of the second defendant.

Mr *Matsanura* insisted that the lease agreement gave the plaintiffs absolute rights over the property. In asserting so he relied on clause 12 of the lease agreement which reads:

“THAT the Lessee shall not cede or assign this lease or sublet or part with possession of the stand or any part thereof or alienate, mortgage, donate, or otherwise dispose of the same...”

Counsel argued that the plaintiffs could not be restrained from parting with the possession that they did not have in the first place. He further argued that the second defendant even denied allocating the property to the first defendant. The second defendant recognised the plaintiffs as the leaseholders.

Counsel insisted that the plaintiffs had established a *prima facie* case. Their evidence proved that a valid lease agreement existed. Rentals were paid in compliance with the lease

agreement. The balance of the purchase price was paid. The owner of the property had confirmed that the first defendant was never allocated the land. He urged the court to dismiss the application for absolution with costs on the legal practitioner and client scale

The Analysis

After the filing of the closing submissions, counsel were invited to address the court on the preliminary points raised by the plaintiffs as well as clarify other aspects of their submissions. The first preliminary point was that the application for absolution was defective for want of compliance with the application procedure per r 59(1) of the Rules. The second point was that the application for absolution was defective, relying as it did, on alleged breaches to a contract that the first defendant was not part to. Following oral submissions by counsel and exchanges with the court, Mr *Matsanura* understandably abandoned both preliminary points for lack of merit. Rule 56(6) does not require that an application for absolution be made in terms of r 59. It provides as follows:

“56(6) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or his or her counsel on his or her behalf may address the court and the plaintiff or his or her counsel on his or her behalf may reply. The defendant or his or her counsel may thereupon reply on any matter arising out of the address of the plaintiff or his or her counsel.”

From a proper reading of the rule, an application for absolution from the instance is made by way of an address to the court at the close of the plaintiff’s case. The court may however in the exercise of its discretion in terms of s 176 of the Constitution, require that litigants submit written submissions in aid of their respective positions. This is what the court directed at the close of the plaintiffs’ case. The procedure that had been advocated by Mr *Matsanura* would result in the absurd scenario where motion proceedings are instituted within action proceedings that are at their tail end. It meant that the court would have to grapple with new evidence adduced through affidavits, which is exactly what Mr *Matsanura* sought to do in his opposing affidavit.

The opposing affidavit introduced fresh evidence that was never placed before the court in the course of the plaintiffs’ case. The plaintiffs sought to introduce new evidence through the backdoor. Once a party has closed its case, it cannot adduce further evidence in the manner attempted by the plaintiffs. To further aggravate an already untenable situation, the opposing affidavit itself was deposed to by the plaintiff’s counsel who was obviously

relating to matters of an evidentiary nature that he had no clue of. The court will only accept his affidavit to the extent that it seeks to rebut averments made in the first defendant's submissions without the introduction of fresh evidence.

The second preliminary point was similarly devoid of merit. A reading of the plaintiffs' declaration shows that the cause of action is premised upon a lease agreement with the second defendant. In its plea, the first defendant puts in issue the existence of that lease, alleging that it had long expired and was never renewed. The existence of the lease, or its validity is therefore central to the disposal of the issue before the court.

Absolution from the instance is a remedy available to a defendant at the close of the plaintiff's case, if the plaintiff has failed to adduce such sufficient evidence upon which a reasonable court might grant judgment in favour of such plaintiff. Courts are generally loath to grant absolution as the remedy makes serious encroachment into the *audi alteram partem*, which requires the other party to be heard before a decision that affects their rights is rendered.

In *Mazibuko v Santam Insurance Co Ltd and Anor*², the court set out the test for absolution from the instance as follows:

"In an application for absolution made by the defendant at the close of the plaintiff's case the question to which the Court must address itself is whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff; in other words whether plaintiff has made out a *prima facie* case".

I associate myself with the views of the court in the *Mazibuko* case. In *MC Plumbing (Private) Limited v Hualong Construction (Private) Limited*³, CHIGUMBA J explained the position of the law as follows:

"Absolution from the instance means that the plaintiff has not proved a case against the defendant, and it is to be distinguished from a positive finding that no claim exists against the defendant. Where a defendant has been absolved from the instance, the plaintiff may reinstitute the action provided that it has not prescribed. The rationale behind absolving a defendant from the instance is that, due to the insufficiency of the plaintiff's evidence and failure to establish an essential element of its claim, the defendant should be spared the trouble and the expense of continuing to mount a defence to a hopeless claim."⁴

After the abandonment of the claim for damages, the only issue that resolves the matter is whether the plaintiffs have asserted a right that entitles them to seek the eviction of the first defendant from the property. It is common cause that the lease agreement between

² 1982 (3) SA 125 (AD) at 132H.

³ HH 88/15 at p 6 of the judgment

⁴ *Tizai Chiswanda (In His Capacity As Father And Guardian of Chidochashe Chiswanda) v Ok Zimbabwe Limited* SC 84/20

the plaintiffs and the second defendant was set to endure for a period of four years, from 9 March 2010 to 28 February 2014. The letter of 10 May 2010 from the second defendant to the plaintiffs, which accompanied the signed agreement stated that buildings worth US\$100,000.00 had to be erected on the property on or before 24 February 2014. The date was significant because it was the date by which the plaintiffs were expected to take occupation of the property.

While I agree with Mr *Matsanura*'s submission that only the plaintiffs and the second defendant were privy to the said lease agreement, still the status of that agreement cannot escape scrutiny in these proceedings. In its plea, the defendant averred that the lease agreement had lapsed. It took occupation of the property in 2017, having accepted an offer by the same second defendant who signed a lease with the plaintiffs. The first defendant did so on the understanding that the property was free of any leasehold.

The plaintiffs therefore bore the onus of proving that the lease agreement was still subsisting, having been renewed after it lapsed on 28 February 2014. That was the easiest of burdens to discharge. The plaintiffs could achieve that feat in so many ways. They could place before the court evidence to show that the lease agreement was renewed, and that following its renewal they continued to comply with their obligations under the agreement. They could have demonstrated that the second defendant condoned their failure to comply with several conditions that they were required to comply with within specific timeframes. The other easier route would have been to call the second defendant, or any of his proxies to give evidence in support of their cause.

While the evidence of rental payments for the first four years was placed on record and was not contested, that was not the case with rentals for the period after the alleged renewal of lease beyond 2014. There is also no evidence of the renewal of the lease agreement following its expiry in 2014. On 20 November 2018, the plaintiffs paid what is endorsed on the face of the receipt as the "*balance of the purchase price*". The first plaintiff could not assertively confirm if that amount included the rentals for the period 2015 to 2018. In the absence of a confirmation by the second defendant, it is hard to accept that the said payment all but confirms that the lease was indeed renewed.

The plaintiffs' counsel sought to patch the evident gaps in the plaintiffs' case by surreptitiously attaching the second defendant's summary of evidence and other documentation to his opposing affidavit. These documents were never part of the plaintiffs' case. That was one of the most brainless things to be done by an officer of the court who

deposed to that irregular document. That act betrays either a serious misunderstanding of elementary principles of the law of evidence or it is outright dishonest. The second defendant's summary of evidence could only be placed before the court through that party. Unfortunately the application for absolution was made before the second defendant's evidence was formally placed before the court.

As already stated, the plaintiffs had an opportunity to call the second defendant as a witness but they chose not, yet they desperately needed his evidence. They had not even cited the second defendant as a party to the proceedings. He was only joined to the proceedings at the instigation of the court.

The plaintiffs also failed to prove that they ever had possession of the property either in the sense of having physical occupation or having some rights over the property that would speak to an extension of the lease agreement. According to their own version of events, by the time that they sought to put up a fence and erect billboards on the property, the first defendant was already in occupation. In the absence of corroborating evidence from the second defendant on the status of the lease agreement, the court determines that the plaintiffs failed to prove that they hold a valid lease with the second defendant. In the absence of a valid lease, the plaintiffs have no legal basis to seek the eviction of the first defendant.

COSTS

The general rule is that costs follow the event. I see no reason to depart from this general principle. Regrettably, for the plaintiffs, they have to pay the price for the shambolic manner in which their claim was prosecuted.

DISPOSITION

Resultantly it is ordered that:

1. Absolution from the instance is hereby granted.
2. The plaintiffs shall bear the first defendant's costs of suit.

Mboko T.G. Legal Practitioners, legal practitioners for the applicant
Zvavanoda Law Chambers, legal practitioners for the 1st respondent
Attorney General's Office, legal practitioners for the 2nd respondent