JAKAMOKO INVESTMENTS (PVT) LTD
versus
BRENNAN JAMES MICHAEL DE BRUYN

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 30 & 28 September, 2022

V. Kwande for the applicant
B.A. Chifamba for the respondent

Opposed Application

ZISENGWE J: The applicant seeks the eviction of the respondent from certain residential premises situated in the Midlands city of Kwekwe. The said property was identified by the parties as Stand Number 190 Queque Township and is also known as 19 Burma Road Newton, Kwekwe (hereinafter referred to as "the property").

The applicant, a company duly registered in terms of the laws of Zimbabwe, avers in the main that it is the registered owner of the property and produced the deed of transfer to that effect. It claims that the respondent took occupation of the property in 2015 and has remained in occupation thereof to date without any right, claim or title over the same. It claims that it now seeks to take occupation of the property hence the application for the eviction of the respondent. Applicant's founding affidavit was deposed to by one Woodford A. Scrooby who identified himself therein as a director in the applicant company. The resolution itself was signed by Bryony Scrooby and Woodford Scrooby.

The application is resisted by the respondent the thrust of whose position is that he took occupation of the property consequent to him having purchased the entire shareholding of the

applicant company from one Bryony Scrooby. He avers that not only did the said Bryony Scrooby hold herself out to be the holder of 100% shares of the applicant company but also that the property was owned by it (i.e. applicant).

In his opposing affidavit the respondent chronicled the key events which culminated in him taking and remaining in occupation of the property and which according to him justify the dismissal of the eviction application. These events may be summarised as follows, that he took occupation of the property after entering into an agreement of sale of shares in the applicant with Bryony Scrooby on the 5th of November 2015. According to him in that sale Bryony Scrooby held out to him that she was one of the registered directors in the applicant and the she held 100% shares therein. He claims that he assumed that the company's internal regulations had been complied with to legitimise the sale. As if this that was not assurance enough, he avers that he started receiving communication form the company's accountants (Chapmans Chartered Accountants) demanding accounting fees from him on the basis of him being the new sole shareholder of the company.

More pertinently, he referred to Bulawayo High Court matter HC 2646/17(hereinafter referred to as "the Bulawayo matter") wherein Bryony Scrooby, from whom he had purchased shares, had instituted a claim for the recovery of USD$66 000 (sixty-six thousand United States dollars) being the balance for the purchase price of the shares in the company. He also indicated that Bryony Scrooby's declaration in that matter admitted of no doubt that the sale of the shares to him was a "package deal" which included the sale of the property as well.

He pointed out that the Bulawayo matter was resolved via a deed of settlement in terms of which he was required to pay the amount in question. The therefore claims that the said judgment not having been abandoned remains extant and that he has been honouring his side of the deed of settlement by making periodical payments to extinguish his indebtedness. Ultimately therefore he contends that as a bona fide purchaser of the applicant alongside its sole asset namely the property is entitled to the same.

In its answering affidavit the applicant countered the respondent's averments chiefly in that Bryony Scrooby only hold 50%^shares in the applicant hence had no authority to dispose of the entire shareholding in the applicant. Secondly it was averred by the applicant that the sale of shares in the company by Bryony Scrooby to respondent did not include the sale of the property

and further in this regard that the Bulawayo matter solely related to the outstanding amounts for the purchase price of shares in the applicant and did not extend to the alleged disposal of the house. The high water mark of applicant's contention, therefore, is that Bryony Scrooby in her capacity as shareholder lacked the authority to dispose of the applicant's property and that in any event the agreement of sale did not encompass the disposal of the property to the respondent.

The respondent however raised three preliminary points which in his view are each independently potentially dispositive of the matter. These are; firstly. that the resolution which purportedly authorized the deponent to the applicant's founding affidavit to institute litigation on behalf of the applicant was a nullity because the persons who purported to grant such authority had no power to do so given that they relinquished their positions as directors in that company upon him (i.e. respondent) having purchased 100% shareholding in the applicant company.

Secondly, respondent contends that there are material disputes of fact rendering the dispute incapable of resolution without the need for oral evidence. He referred in particular to the now disputed fact that he purchased the 100% shareholding in the applicant company whose rights and interests encompassed ownership of the very house that forms the subject matter of the dispute.

Thirdly, it is applicant's contention that the applicant failed to set out a legally cognisable cause of action namely the failure to disclose the circumstances that led to him (i.e. respondent) taking occupation of the property. Each of these will preliminary points will be dealt with in turn.

The validity of the resolution passed by applicant

Whether or not the resolution authorising the deponent to the applicant's founding affidavit is valid is dependant on the relationship if any, between Woodford A. Scrooby and Bryany Scrooby on the one hand and the applicant on the other. Whereas the respondent contends that the former two have since relinquished any directorship in the company and therefore cannot purport to grant such authority, the applicant argues otherwise. It avers that the resolution was properly passed because both Scroobys are current directors of the applicant.

This particular point is incapable of proper adjudication without delving into the merits of the application itself. It is an issue that lies not the very heart of this application. The issue of the relationship between Scroobys and the applicant sought, in my respectful view should not have been raised as a preliminary issue as it effectively pre-empts the merits of the application and

accordingly is deferred to such a stage when the merits of the case are determined should the remaining points *in limine* not dispose of the matter.

Whether there are material disputes of fact

The question of whether or not there are material disputes of fact is a different kettle of fish and presents intractable problems for the applicant for the reasons articulated hereunder. What constitutes material disputes of fact has been the subject of many a judgement and a few examples will suffice. In *Supa Plant Investments (Pvt*) *Ltd* v *Edgar Chidavaenzi* 2009 (2) ZLR 132 (H) MAKARAU JP (*as she then was*) defined a material dispute of fact in the following terms;

> *"A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence*".

Material disputes of fact can also arise where the respondent admits the allegations contained in the applicant's affidavit but alleges other facts which the applicant disputes. In this regard, the following was stated in *Savanhu v Marere & 2 Ors* SC22/99:

> "*The appellant chose to proceed by way of a court application to claim the order of specific performance against the first respondent. As the proceedings were by way of a court application and there were disputes of fact the final relief could only have been granted if the facts stated by the first respondent together with the admitted facts in the appellant's affidavit justified such an order. Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634H-635B."*

An appreciation of the averments contained applicant's founding and answering affidavits and those in respondent's opposing affidavit reveals that the matter is littered with several material disputes of fact despite the applicant's contention to the contrary.

First and foremost, and perhaps central to the dispute is the relationship (both past and present, if any) between bryony Scrooby and the applicant. Whereas the applicant contends that Bryony Scrooby only held 50% shares of the applicant company and therefore could not have purported to dispose of 100% of the shares in the company to the respondent, the respondent avers that all documentary proof points to the Bryony having held 100% shares in the applicant. Neither party produced documentation showing the distribution of shares in the applicant

company at the time when the agreement of sale took place. Surely this on its own presents a clear material dispute of fact which cannot be resolved without the leading of further evidence.

Related to the above is the capacity in which Bryony Scroobie purports to continue acting on behalf of the applicant. This question arises from the fact that she (i.e. Bryony Scrooby) apparently signed the resolution authorising Woodford A. Scrooby to depose to the applicant's founding affidavit. One therefore gets the impression that she is still actively participating in the affairs of the applicant. The explanation proffered by counsel is that Bryany Scrooby still enjoys directorship of the applicant company despite having relinquished her shares.

The respondent however swiftly referred to clause 4.2. of the agreement of sale which reads;

> "*4. <u>Document</u>*
>
> *Within twenty-one (21) days of the effective date representatives of the parties shall meet at the offices of Patel Ferrao and Associate and the seller shall deliver to the purchaser:*
>
> *4.1. .....*
>
> *4.2. Signed resignations of offices by the directors of the company and by its Company Secretary".*

The dispute of fact that therefore arises is whether the Bryany Scroobie retained any directorship in the applicant company to continue transacting on its behalf as she purports to do. This is clearly an issue that does not lend itself to resolution without leading further evidence.

Thirdly, and perhaps most importantly there is the question of whether or not the house from which the applicant seeks the eviction of the respondent was part and parcel of the alleged package deal involving the sale of shares from Bryony Scrooby to the respondent. In his opposing affidavit the respondent averred that he purchased the property in question from Bryany Scrooby who held herself out as being the sole shareholder of the applicant and therefore that he (i.e. respondent) owned the company alongside all its assets notably the property in question.

In response the applicant sought to draw a distinction between the sale of the shares in the company on one hand the sale for the property on the other. In this regard a perusal of Clauses B and 5.5 of the Agreement of Sale appears to show not only that the property was the sole

property held by the applicant but also that sale of shares by Bryony Scrooby to the Respondent included the property as well.

Clause B of the said Agreement of Sale reads;

"*The company is the owner of the property being a certain piece of land situate in the district of Kwekwe called Stand 190 Queque township of Queque township held by it under deed of transfer 1771/96 "the property*")

Clause 5.5. on the other hand reads;

"*the sole asset of the company shall be the property*"

Further in in this regard, the respondent referred to Bryony Scrooby's declaration in the action proceedings in Bulawayo matter where she averred as follows;

3. *On the 5th of November 2015, the plaintiff and defendant entered into an agreement of sale in respect of shares in a company called Jakamoko Investment (Pvt) Ltd.*

4. ***The sale also included immovable property known as Stand 190 Queque Township which was owned by Jakamoko Investments.***

5. *In terms of the agreement, the total purchase price for the shares* ***and immovable property*** *was US$115 000 (one hundred and fifteen thousand United States dollars)*

Now that the applicant is denying the inclusion of the property in the sale of shares between Bryany Scrooby on the one hand and the respondent on the other, the question that naturally arises is whether or not the agreement of sale encompassed the sale of the property. This equally presents a material dispute of fact.

To further illustrate the existence of disputes of fact it is necessary to consider the nature of the respondent's opposition to the application as juxtaposed against applicant's basis for the application. The applicant to my mind appears to labour under the misapprehension that once a person proves that he enjoys real rights in immovable property then he or she enjoys an unfettered right to evict any person who happens to be in possession of the same regardless of the circumstances.

While it is correct that the action for eviction is based on the *actio rei vindicatio* which holds that the owner of a thing is entitled to claim possession of his property from whoever is in possession of it without his consent, the person in such possession might however proffer a

defence to the possession of the property. In *Savanhu* v *Hwange Colliery Company* SC 8/15, the Supreme Court held as follows;

> "*the actio rei vindicatio is an action by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in Chetty v Naidoo 1974 (3) SA 13(A) : It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner* ***unless he is vested with some right against the owner (e.g. a right of retention or a contractual right***". (Emphasis my own).

In *Susan January* v *Norman Maferefu* SC 14/20 UCHENA JA listed the main defences to a claim under the *actio vindicatio*. He said the following;

> "*There are basically four main defences to a claim of rei vindicatio which are:*
>
> *(i) that the applicant is not the owner of the property in question*
>
> *(ii) that the property in question no longer exists and can no longer be identified*
>
> *(iii) that the respondent's possession of such property is lawful*
>
> *(iv) that the respondent is no longer in physical control of the property – see the cases of Chetty v Naidoo (supra) and Residents of Joe Slovo Community v Thabelisha Homes 2010 (3) SA 454 (CC)".*

In the present case the respondent clearly relies on the first and third defences as he asserts that he purchased the property in question together with the purchase of shares in the applicant company.

Having therefore demonstrated the existence of material disputes of fact, what fate to befall this application is the question that now begs. It is trite that where material disputes of fact emerge in application proceedings there are basically four avenues available to the court namely;

(i) to dismiss the application should applicant have foreseen material disputes of fact arising; *Masukusa* v *National Foods and Anor* 1983 (1) ZLR 232; *Bevcorp (Pvt) Ltd* v *Nyoni & Ors* 1992 (1) ZLR 352; *Wenzhou Enterprises (Pvt) Ltd* v *Chen Shialong* HH 61-15

(ii) to refer the matter to trial in terms if r 46(10) of the High Court Rules, 2021; see *Chirinda* v *Chitepo* SC 42/92; *Dulys (Pvt) Ltd* v *Brown* SC 172/93; *Masukusa* v *National Foods & Anor* (*supra*)

(iii) to hear oral evidence in terms of r 58(12) of the Rules of the High Court, 2021; see *Barcklie* v *Bridle* 1955 SR 350; *Bhura* v *Lalla* 1974 (1) RLR 31

(iv) to take robust approach and decide the matter on the available evidence, see *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Leech* 1987 (2) ZLR 338; *Musevenzo* v *Beji & Anor* HH 268/13

Mr Chifamba for the respondent urged the court to dismiss the application as the disputes of fact were inevitable and readily foreseeable. Ms Kwande for the applicant on the other hand implored the court to refer the matter for trial as this to her would potentially yield a more just outcome. I however believe that there is justification in dismissing the application. This is particularly so in light of the previous litigation between the parties in the High Court, Bulawayo matter. The applicant was aware that the respondent would obviously resist the application on the basis that he purchased the property. It is strange that the applicant's founding affidavit would be conspicuously silent on such prior litigation as it bore no more than a bare skeleton of the nature of the dispute without the slightest allusion to the Bulawayo matter and to the circumstances giving rise to the respondent's occupation of the property.

Counsel for the applicant sought to suggest that the Bulawayo matter was irrelevant as it pitted different parties and the subject matter was different. Nothing can be further from the truth. The subject matter in Bulawayo matter and the present one is essentially the same (namely the sale of the shares and the property to the respondent) and the main protagonists are the same (namely the applicant, Bryony Scrooby and the respondent). The only difference being the nature of the dispute. At the very least, Bryony Scrooby who ostensibly as a co-director signed the applicant's resolution authorising Woodward A. Scrooby to institute the current proceedings knew of and foresaw respondent's potential claim to the property. In *Carole Patricia Williams & Anor v Malcom Sydney Williams & 2 Ors* HH 12-02, the court had occasion to deal with a situation which resembles the present. In that case the parties had earlier squared off in action proceedings in a matter involving the same subject matter, but the applicant had instituted application proceedings knowing fully well that disputes of fact were likely to arise. The court per GUVAVA J (as she then was) had this to say in dismissing the application:

> "*In this case the applicants must have known that there were disputes of fact as they had initially issued out summons in case No HC 15403/98 relating to the same*

parties and on similar issues. The respondents' opposing affidavit has raised the same disputed issues as they had pleaded in the earlier case. This case was subsequently withdrawn by the plaintiffs (applicant in this case). Although the applicants sought to deal with them in the replying affidavit, these are issues which can only be properly dealt with by adducing evidence. In the case of Masukusa v National Foods Ltd & Another (supra) the court, in dealing with this very question, said at page 236F -

> *"Now in the present case I have not the slightest doubt that the applicant should have realized that a serious dispute of fact was to develop as between himself and both respondents. Should I nevertheless, in the interest of saving costs and generally getting on with the matter, condone the wrong procedural approach? In my view it would be wrong to do so. There are a number of reasons. In the first place this is a very clear example of the wrong case of procedure. The conflicts of fact were glaring and obvious and were in fact referred to in the applicant's affidavit. In the second place the claim for damages was clearly illiquid and would patently need examination by way of evidence".*

It was clear to the applicant, particularly in light of the position held by Bryony Scrooby in both the Bulawayo and the present matter that the respondent would inevitably bring up the issue of him having purchased shares in the applicant company alongside the property in question. It can hardly be argued that this was is an issue that took the applicant by surprise. The applicant took a gamble by proceeding by way of notice of motion.

Even if one were for a moment to accept the position advanced on behalf of the applicant that the real issue revolves around ownership of shares in the applicant company the result would be the same in the sense that material disputes of fact were inevitable and foreseeable to the applicant. In *Wenzhou Enterprises (Pvt) Ltd v Chen Shialong* (supra) MAKONI J (as she then was) dismissed a matter brought on application in circumstances where she found that the applicant ought to have realised that material disputes of fact arising. That matter, as the present one, incidentally also involved to a dispute over shares in the applicant company with the parties trading accusations on the legitimacy of the shares held by the protagonists. In summarising the nature of the dispute in that case the court observed as follows:

"From the way 1 outlined the facts of this matter at the onset, it is clear that there are material disputes of facts. The versions of the parties as to the events in this matter are so divergent that this court cannot reconcile them on the papers. Both deponents to the affidavits in this matter aver that they are the shareholders and directors of the applicant. They both produce share certificates and allege that the other share certificates are fake. The deponent to the founding affidavit avers that he purchased the respondent's shares. There is no agreement attached."

After making the above observation, the court concluded as follows:

"It must have been clear to the applicant that there is a "bona fide and not mere illusory dispute of fact". See Zimbabwe Bonded Fibre Glass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (S) at 339C. The same approach was adopted in Mashingaidze v Mashingaidze 1995 (1) ZLR 219 @ 221 G-22A where Robinson J (as he then was) stated

> *"It is necessary to discourage the too-oft recurring practice whereby applicants who I know or should know as was the case with the applicant in this matter, that real and substantial disputes of fact will or are likely to arise on the papers, nevertheless resort to application proceedings on the basis, that at the worst, they can count on the court to stand over the matter for trial.*
> *Unless this practice is seen to be curbed, applicant will continue to believe that there have nothing to lose and everything to gain tactically by embarking upon application proceedings not withstanding their knowledge or belief at the time of doing so that the respondent will not be able to show that genuine and serious dispute of fact exist on the papers."*

I will have no difficulty in dismissing the application."

Equally, I believe this is a proper case justifying the dismissal of the application because the dispute of fact was glaring and foreseeable. Accordingly the following order is hereby given;

Order

Application is hereby dismissed with costs.

Kwande Legal Practitioners, applicant's legal practitioners
Mavhiringidze & Mashanyare Legal Practitioners, respondent's legal practitioners