

SHEPHARD TUNDIYA  
v  
ESTATE LATE IDAH TANDIWE MANGWAIRA  
(Represented by Sanra Felistas Shonhiwa, the Executor)

HIGH COURT OF ZIMBABWE  
MAWADZE J & ZISENGWE J  
MASVINGO, 20 September 2023  
Written reasons provided on 27 October 2023

*E Zishiri* for the appellant  
*Mapisaunga*, for the respondent

ZISENGWE J:           The following are the full reasons informing our decision delivered via an *ex tempore* judgment on 20 September 2023. In that judgment we dismissed with costs an appeal against the decision of the Magistrates Court sitting at Kwekwe (the court *a quo*) ordering the eviction of the appellant and those claiming right of occupation through him from certain residential premises situate in the district of Kwekwe. That property was identified as House No. 14 Charles Street, Newtown, Kwekwe (“the property”).

It is common cause that the property does not belong to the appellant but constitutes part of the assets of Estate Late Idah Tandiwe Mangwarira. It is further common cause that Sandra Felistas Shoniwa is the executor dative of the said deceased estate. Most importantly, for current purposes, it is common cause that the appellant is in occupation of the property courtesy of an oral lease agreement entered into between either himself or an entity called Avim Investments (Private) Limited as lessee on the one hand and either the Respondent or one Mrs Matondo as lessor on the other.

The respondent approached the court *a quo* on notice of motion, averring that the appellant had stubbornly refused to vacate the property despite having been served with a notice to vacate. She claimed in this regard that she had served the appellant with the said notice on July 10, 2020, with an instruction to vacate the property by the 4th of October of the same year, as she was now desirous of taking occupation thereof. According to her, much to her dismay and prejudice, the appellant, despite not having any right whatsoever to remain in occupation, remained obstinate and refused to budge. She therefore sought the protection of the law to assist her in the ejection of the appellant.

The application was resisted by the appellant who raised four points in *limine*, namely;

- a) The alleged mis-citation of the applicant it being essentially averred that the applicant should have been cited as Sandra Felistas Shoniwa (in her capacity as the Executor of the late Idah Tandiwa Mangwaira).
- b) That the dispute was fraught with material disputes of fact rendering the use of application procedure unsuitable.
- c) That the lease agreement was between Avim (Pvt) Ltd as lessee and one Mrs Matondo as lessor and that therefore there was a material non-joinder of a party (namely Avim (Private) Limited).
- d) The fourth preliminary point was merely a repetition of (c) above it being averred that the lessee in that agreement was Avim (Pvt) Ltd, a juristic entity with separate legal personality.

Part of the appellant's address on the merits was a regurgitation of the preliminary points above. However, he denied having received any notice to vacate the premises. He elaborated by indicating that he is one of the directors of Avim Investments, who, according to him, is the true lessee in this lease agreement.

In her answering affidavit, the respondent scoffed at the appellant's purported points in *limine* and pointed out that as executrix of the estate of which the property was part, she had sufficient *locus standi* to institute the proceedings.

She also dismissed the assertion that the matter was beset with material disputes of fact rendering it incapable of resolution on the papers. She insisted that apart from bald assertions

on the part of the appellant of the existence of disputes of fact, the opposing affidavit was bereft of an identification of those material disputes of fact.

She further gave two key explanations regarding the appellant's opposition to the application. Firstly, she explained that as a matter of fact she is Mrs. Matondo, which is not only her married surname but also a name that appellant was familiar with, and which she therefore used when entering into the lease agreement with the appellant. Secondly, she averred that the entity Avim Investments which appellant sought to introduce into the fray was completely unknown to her. She insisted that she only dealt with the appellant in the oral lease agreement and that the importation by the appellant of AVIM (Pvt) Ltd into the fray was merely to obfuscate issues.

She further insisted that she had duly served the appellant with notice to vacate the property and that the denial by the appellant of the receipt of the same was feigned designedly to delay the inevitable.

Needless to say, that at the conclusion of the hearing, the court *a quo* found for the respondent. It found all the preliminary points to be without merit. The court *a quo* found that there was nothing amiss about the citation of the respondent particularly in light of the fact that it had been shown that the property in question was part of the assets of estate late Idah Mangwaira and that the respondent had been duly appointed as its executrix.

As for the alleged wrong procedure having been adopted, the court *a quo* found that the appellant has failed to identify, let alone prove, the existence of material disputes of fact to support the contention that the respondent had employed the wrong procedure.

With regards to the alleged non-joinder of a party, the court *a quo* was equally unimpressed, finding as it did that there was ample evidence not only that Mrs. Matondo was one and the same person as Sandra Felistas Shonhiwa, but also the executor of the estate of the late Idah Thandiwe Mangwaira.

As to whether the appellant had been given notice to vacate, reliance was placed in part on the letter authored by the respondent legal practitioners, Hore and Partners, at the behest of the respondent and deceased to the appellant. The letter is dated July 3, 2020, and reads as follows:

*Mr Sheperd Tundiya  
14 Charles Street  
Newtown  
Kwekwe*

*3<sup>rd</sup> July 2020*

*Dear Sir/Madam*

*Re Notice of Eviction*

*We refer to the above matter and address you at the instance of our client, Mrs Matondo, the owner of the home you are currently renting out.*

*Instructions are that our client is relocating back to KweKwe and would be occupying the home you are currently occupying.*

*By copy of the letter, you are hereby given 3months notice to vacate the home, Stand No. 14 Charles Street, Kwekwe.*

*May you kindly make arrangements to vacate the premises by the 4<sup>th</sup> of October 2020.*

*Be guided accordingly.*

The court *a quo*, in a succinct and well-reasoned judgement, found that the appellant's allegation of the agreement having been entered into between Avim (Private) Ltd and Respondent had not been substantiated, not least given that the person who had allegedly transacted on behalf of Avim had not been identified, not to mention that individual had not been brought forth by the appellant by way of affidavit to support such a contention.

The court *a quo* proceeded to address the law on eviction, it being predicated on the *rei vindicatio* which entitles the owner of a *res* to obtain possession thereof from a person who retains its possession without lawful excuse.

Disgruntled by the outcome, the appellant mounted the present appeal. His grounds of appeal were couched as follows;

1. *The court quo erred in granting judgement for eviction in a case where there was improper citation. Applicant in the court a quo was wrongly cited as the estate instead of the executrix herself.*
2. *The court a quo erred in granting judgement for eviction in a case that was replete with material disputes of fact. The disputes of fact could not and were actually not resolved by the papers filed of record.*
3. *The court a quo erred in granting judgement for eviction in the absence of an interested party. The court a quo erred in failing to realise that there was a material non-joinder.*

He therefore sought an order setting aside the judgement of the court *a quo* and substituting it with one dismissing the application for eviction with costs.

At the commencement of the hearing of the appeal, the appellant's counsel abandoned the first ground of appeal indicating as he did that in his view that the appellant had been properly cited in the founding affidavit. That effectively left two grounds of appeal, the one predicated on the alleged material disputes of fact and the non-joinder of Avim Investments (Pvt) Ltd.

#### **Material Disputes of fact:**

The appellant submitted heads of argument the high watermark of whose argument on this point was that the notice to vacate having been issued by one Mrs Matondo yet the application had been brought by the respondent, the court was not in a position to decide from the papers whether the two were one and the same person.

Secondly, it was submitted on behalf of the appellant that the true identity of the person who had entered into the agreement with the appellant had not been established with any degree of certainty and that necessitated referring the matter to trial.

Of primary importance in this regard was whether or not there were material disputes of fact which rendered the dispute incapable of resolution without the leading of further evidence.

This question stood to be answered against the trite principle that for a deponent to allege the existence of material disputes of fact, he must establish a real issue of fact which cannot satisfactorily be determined without the aid of oral evidence. He must not make a bare denial or merely allege a dispute, see *Room Hire Co v Jeppe Street Mansions* 1949 (3) SA 1155; *Ismail and Anor v Durban City Council* 1973 (2) SA 362 (N) at 374; *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428. In the *Peterson Case* (*supra*) the court pointed out that the respondent’s allegation of the existence of a dispute of fact alone is not sufficient to deem an application incapable of resolution on the papers for to do so would allow the respondent to raise fictitious issues of fact to delay the proceedings.

We also remained cognisant of the established position that even where material disputes of fact are perceived to exist, the court would still be expected to take a robust and common-sense approach and resolve the matter on the affidavit evidence, see *Muzanenhano v Officer in charge CID Law & Order and Ors* CCZ 3/13; *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC) & *Soffiatini v Mould* 1956(4) SA 150. In the latter case the following was said:

*“It is necessary to take a robust common-sense approach to dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the simple and blatant stratagem. The court must not hesitate to decide on an issue merely because it may be difficult to do so. Justice can be defeated or seriously impeded by an over fastidious approach of a dispute raised in affidavit.”*

Similarly, in *Zimbabwe Bonded Fibre-glass (Private) Limited v Leech* 1987 (2) ZLR 338 at 339 C-E the following was stated.

*“It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a bona fide and not merely an illusory dispute of fact. See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165; *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154; *Joosab & Ors v Shah* 1972 (1) RLR 137 (G) at 138G-H; *Lalla v Spafford NO & Ors* 1973 (2) RLR 241 (G) at 243B; *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC).*

It was against the background of the application of those two related principles that we disposed of the ground of appeal predicated on the alleged existence of material disputes of fact (i.e., ground number 2 above) and in part the 3<sup>rd</sup> ground of appeal as well. We found that there were no real disputes of fact hence we rejected the argument.

The first purported dispute of fact related to the person with whom the appellant contracted in respect of the lease agreement broadly and the identity of the person at whose behest the notice to vacate was issued in particular. As correctly pointed out by the court *a quo*, the respondent averred that she is one and the same person as Mrs. Matondo. In his heads of argument, the appellant took issue with the fact that the court *a quo* referred to Matondo as the respondent's husband's surname when such an averment does not appear *ex-facie* the papers. To adopt such an approach would be to lose the essence of what is meant by "robust and common sense" What the designation "Mrs." is apt to convey when used conjunctively with the surname Matondo is that that is her married surname. The Concise Oxford dictionary 11<sup>th</sup> edition gives the meaning of Mrs as:

*"a title used before a surname or full name to address or refer to a married woman without a higher or honorific title."*

Indeed, it is not uncommon for a woman in the position as the respondent to identify herself in social and other engagements to use her husband's surname when in fact her official registration particulars bear her maiden surname. The respondent indicated in her answering affidavit that when she entered into the oral agreement with the appellant, she used the name that appellant was familiar with, namely Mrs. Matondo. The appellant did not in the lease dispute that averment.

The appellant conveniently turns a blind eye to paragraph 8 of the respondent's answering affidavit where she averred as follows:

*"Ref ad paragraph 8*

*This is denied. The respondent was served with a three months' notice specifically stating that he should vacate Number 14 Charles Street. **The***

***respondent is well acquainted with me and he is very much aware that I am Mrs Matondo. I used this name because that is the name that the respondent was much familiar with.”***

We found it highly improbable if not absurd to suggest as the appellant seems to insinuate firstly that the respondent would assume a fictitious persona or identity and call herself Mrs Matondo supposedly when she was not. It is clear even from the instructions that the respondent gave to counsel when issuing out the notice of eviction that it so entrenched in her psyche and persona to identify herself as Mrs Matondo. This much is evidenced by the fact that counsel in that letter authored on the instructions of the respondent referred to the latter as Mrs Madondo. It would be stretching the bounds of credulity to suggest that it is merely coincidental firstly that appellant accepts that he contracted with a Mrs Madondo in relation to the lease and secondly that the respondent would likewise identify herself as Mrs Matondo to her Legal practitioners and thirdly that in her answering affidavit the respondent would clarify that she and Mrs Matondo are in fact one and the same person the latter being her married surname yet by some dint of fate the respondent is a different person

We found that the court *a quo* could not therefore be faulted in dismissing such a fanciful if not facile proposition. It is hardly surprising that the appellant was unable to bring forth (by way of a supporting affidavit) his version of Mrs Matondo with whom he purportedly dealt (and continues to deal) with who is not the respondent.

The other alleged dispute of fact was closely related to the 2<sup>nd</sup> ground of appeal and relates to whether the lease agreement was between the respondent and Avim Investments (Pvt) Ltd. It was argued in this regard firstly that oral evidence needed to be led to resolve this issue. Secondly it was averred that the evidence favoured the conclusion that the agreement was between Avim (Pvt) Ltd and the respondent and therefore there was a material non-joinder of the former rendering the application fatally defective.

In this regard, we found that the court *a quo* could not be faulted for finding that the overwhelming probabilities were that the lease agreement was between the respondent and the appellant. We found the court *a quo's* reasoning sound and unimpeachable. There would have been no good reason for respondent to insist that her oral lease agreement was exclusively with



the appellant and that at no point did she have any dealings with an outfit called Avim Investments (Private) Limited.

We further observed that it was highly improbable that an enterprise such as the one alluded to by the appellant would enter into oral contracts with third parties. It is statutorily required to keep a record of its transactions for tax, accounting, shareholding liability and other purposes, (see for example s9 of the companies and other business entities Act, Chapter 24:31). Quite apart from the provision of the said Act, it is common knowledge that registered enterprises operate in a formal and structured way and is unlikely to enter into agreements, of such importance as the one at hand orally.

We further pointed out that the handful of receipts ostensibly emanating from Avim Investments (Pvt) Ltd on which so much reliance was placed by the appellant could not *ipso facto* amount to proof of the agreement having been between respondent and Avim. It is not uncommon for a company paying rentals for its directors or employees hence invoices to that effect. As a matter of fact, those receipts negate the notion that Avim would have entered into an oral agreement with respondent. To the contrary they confirm that a company is always keen if not not obliged to keep a record of its contracts and agreements it enters with third parties. As the payment of money was evidenced by receipts, so too was the lease agreement expected to be evidenced by a memorandum of that effect. The latter would stipulate *inter alia*, the rent payable, duration of the lease, dispute resolution mechanisms agreed upon.

In our *ex tempore* judgement, we gave the analogy of a company paying school fees (and issuing receipt or vouchers to that effect) on behalf of one or other of its employee, would not necessarily imply that the contract of enrolment of the child in question is one between the company and the school, it remains one between the parent and the school. We therefore found that the evidence and the probabilities favoured the court *a quo*'s findings that Avim (Pvt) Ltd was not a party to the lease agreement.

Having thus found that the agreement was between the appellant as lessee on one hand and Respondent as lessor on the other, the remaining ground of appeal all but fell away as the joinder of Avim Investments (Pvt) Ltd would only have been necessary had it been a party of the lease agreement. In any event it would have been an untenable contradiction for the respondent

in one breath to deny ever having entered into an agreement with AVIM (Pvt) Ltd and in the next breath to have joined the same entity as a party to the proceedings.

Further, we found it strange that, the appellant who identified himself as a director with Avim Investments (Pvt) Ltd and whose occupation of the property is purportedly courtesy of the lease of agreement in question between the said company and Respondent, fell short of divulging the identity of the person, who had transacted on the company’s behalf.

It was clear to the court *a quo* as it was to us that the appellant sought to hide behind a finger so to speak, to unconscionably harass and frustrate the respondent. So far more than three years have elapsed since notice to vacate was issued to appellant yet he tenaciously clings onto the property as if he has some right claim as title to it.

Tellingly, the appellant’s position *vis-a-vis* the merits on the claim for eviction is conspicuous by its absence. For the sake of completeness, we briefly refer to the law on eviction which is based on the *rei vindicatio*. 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)*”.

Therefore, the requirements of the common law action of *rei vindicatio* are two-fold, that is, the plaintiff must prove ownership of the property and that the defendant was in possession of the thing when the action was instituted.

The appellant in *casu* neither disputed in any meaningful way the averment by the respondent that she was the owner of the property, albeit in a representative capacity as executrix of the estate of the late Idah Thandiwe Mangwaira, nor did he proffer any of the legally recognised defences outlined above. He resorted to the untenable subterfuge of raising spurious points *in limine*. Such unconscionable and unscrupulous conduct cannot escape censure.

It was for the foregoing that we dismissed the appeal with costs.

ZISENGWE J

MAWADZE J agreed.....

*Kwande Legal Practitioners;  
Hore and Partners,*

*Appellant's Legal Practitioners,  
Respondent's Legal Practitioners*