

TURNOVER MAJABVU
versus
TAFADZWA MAJABVU
and
NORTON TOWN COUNCIL

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 8 July 2016 and 17 August 2016

Opposed Application

V Maramba, for applicant
1st respondent in person

CHIGUMBA J: The word *caveat* is a Latin noun which means; 'let him beware. When a caveat is placed over an immovable property, it acts as a warning to the whole world that there is an encumbrance over that property. It is notice personal rights against the owner of the property exist, and that they will have to be discharged before title to that property can pass into the name of another. This is an application in which the relief sought is for a caveat to be placed over an immovable property called stand N196 Ngoni, Norton, to prevent its sale or transfer to anyone pending the finalisation of all litigation, as well as costs of suit. The deponent to the founding affidavit, is the paternal uncle of the first respondent. The person who entered into a rent to buy scheme with the second respondent, Norton Town Council, one Shepherd Majabvu, died on 14 April 2001. Applicant claims that he purchased the property from his deceased brother's employer, Zimbabwe Electricity Supply Authority (ZESA) in 2003, and that he has been in occupation of this property since that date, pursuant to an agreement amongst the deceased's family members, that the property remain in the family. The deceased's son, the first respondent Tafadzwa Majabvu, has sought the eviction of the applicant from the property in the Norton magistrates court (Case number 543-15). He was granted an order of eviction, which the

applicant has appealed against. Is the applicant entitled to a caveat preventing the sale or transfer of the property by the first respondent, in these circumstances?

It is common cause that Shepherd Majabvu died in 2001 and that the applicant pays ZW\$102 000-00 to ZESA in 2003 for the purchase of a house. The applicant did not attach any documents to show whether the house which he purchased is the one which had been allocated to the first respondent's father. The receipt of the money paid to ZESA in 2003 has no address. It does not state that the applicant had purchased Shepherd the deceased's house. No agreement of sale was attached to show how the parties had agreed to regulate the relationship between the applicant and ZESA, between the applicant and the estate of his late brother, and between the applicant and the rest of the Majabvu family. The applicant attached, as annexure 'D' to the papers, a lease with option to purchase number A/617/2008, between Norton town Council, and the first respondent. The lease was valid for a period of six years.

The first respondent deposed to an opposing affidavit in which he confirmed that he was granted an order for the eviction of the applicant from house number N196 Ngoni township in Norton. He denied that he intended to sell the property pending the resolution of the appeal against the eviction order, or at all. He averred that the applicant had connived with other relatives to deny him the right to inherit his father's rights in the property in question. He claimed that the applicant has been unlawfully enjoying the occupation of this property since 2003, at his expense, and collecting rentals from lodgers which he has not accounted for, to the estate of the late Shepherd Majabvu. In the answering affidavit the applicant insisted that people were coming to view the house and that these people had advised him that the property was being sold by the first respondent.

In his heads of argument, the applicant submitted that he is entitled to a caveat even if he has no right over the property in question (a real right) and referred the court to the case of *Sibanda v Stevenson & Registrar of Deeds*¹, as authority for this proposition, as well as the following cases *Mutapati v Chiro*²; *Beckford v Beckford*³; *Mudvova v Mudvova*⁴. The first

¹ HH 311-14

² HH 243-11

³ HH124-06

respondent, who is a self-actor, did not file heads of argument in support of his claim and was accordingly barred at the hearing of the matter in terms of r 238 (2b) of the rules of this court. Judgment in the matter was reserved to enable the court to fully explore the legal effect of making an application, to prevent the sale or transfer of personal rights in a property in which one has no title, and no real rights, where the question of personal rights over the property has not been proved, and where a lower court's decision for the eviction of the applicant has been appealed against, and the appeal is pending? The first issue for determination is to define a caveat.

The word *caveat* is a Latin noun which means; 'let him beware'. See Oxford Dictionary of Law⁵. It is a notice, usually in the form of an entry in a register, to the effect that no action of a certain kind may be taken without first informing the person who gave the notice. A caveat in Zimbabwe will take the form of an endorsement on the title deeds or title over the property that with an issue number and the year in which it was placed over the property. For example XN 34-2016. In order to uplift the caveat one obtains details of the *caveator* from the Deeds Registry and may approach them to learn what the caveat is about. If it is for payment of a certain sum of money, on producing proof that the money has been paid, and confirmation of this from the *caveator*, the registrar of Deeds will uplift the caveat. What is exercising my mind in this matter is the fact that there are no title deeds registered in the name of the first respondent on which a caveat can be placed.

The rights of the applicant as against the first respondent are at best, personal rights. The rights of the first respondent as against the second respondent, are at best, also personal rights. Neither the applicant nor the first respondent has any real rights over the property. Should a caveat be placed over the first respondent's lease agreement with the second respondent which may already have expired because the six year period of duration of the lease has expired according to my calculation? What would be the effect of such an endorsement of the face of the lease agreement? Would it have the legally binding effect of a caveat? What are the applicant's real rights over this property, and do these rights entitle him to place a caveat over it against the

⁴ HH 228-15

⁵ Quick reference 8th ed p 93

first, or the second respondent? Applicant paid money to ZESA, not to the second respondent, for an unidentified property.

HERBASTEIN AND VAN WINSEN in *Civil Practice and Procedure of the Superior Courts in South Africa*, 3rd ed at p 596 where it stated as follows:

The legal effect of a caveat in connection with double sales was set out by the Supreme Court in the case of *Mwayipaida Family Trust v Madorobha & 3 Ors*⁶. Although the case before this court does not concern a double sale, that case can be relied on as authority for the fact that once a caveat is registered over the title deed of an immovable property, it should not be transferred into the name of a third party without recourse to the *caveator*. It is also authority for the proposition that a person who buys property will be required to show that they made diligent inquiry into the title to the property to establish whether there are any third party rights before entering into an agreement to buy the property. In the case of *Nanzombe v Masuku & Ors*⁷ it was held that:-

“In the case of *Bulle v Merchant Bank of Central African and Others* HH 2/96 it was held that a caveat recorded against a title deed does not confer on the judgment creditor real rights. In the same vein in this instance the caveat placed against the title deed does not confer any real right on first respondent.”

The effect of placing a caveat over immovable property at the instance of a party who has only real rights is therefore that:

“--- a judgment creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such a debtor to the ownership or possession of such property which right arose prior to the attachment or even the judgment creditor had notice when the attachment was made. An attachment in execution acts as a judicial mortgage *orpignus judiciali*.”

Although this case concerned a sale in execution of property placed under judicial attachment, in my view it confirms the proposition that a person who possesses real rights against the registered owner of immovable property cannot enforce those real rights against an order of execution in judicial attachment.

⁶ ZWSC22-004

⁷ ZWBH 134-15

From the papers filed of record, the applicant has not proved that he has any rights over this property, real or personal. His receipt shows that he paid money to ZESA for the purchase of a property. It does not specify that he purchased the property in question. The registered owner of this property is Norton Town Council, the second respondent. It is common cause that it is the first respondent, the rent to buy tenant, who has personal rights to cession of the property from Norton Town Council. There is no privity of contract between the applicant, and the first, or the second respondent on the papers. It is trite that ‘...what is not denied in affidavits must be taken as admitted . See *Fawcett Security Operations P/L v Director of Customs and Excise and Ors* 1993 (2) ZLR 121 (S) at 127F; *Nhidza v Unifreight Ltd* SC-27-99; and *Minister of Lands and Agriculture v Commercial Farmers Union* SC-111-2001 at 60....’. See *Dr Daniel Shumba & Anor v The Zimbabwe Electoral Commission & Anor*⁸, and ⁹. If it is trite that an application stands or falls on the papers which are filed of record¹⁰, then this is a classic case in which the applicant has failed to make the necessary averments to establish a legal right to have a caveat placed over property which is registered in the name of the 2nd respondent, who has a lease agreement with the 1st respondent, in circumstances where the applicant has been ordered to be evicted from the premises by the magistrates court. The noting of an appeal against the eviction order does not suspend the operation of appeal because the magistrates court does not have inherent jurisdiction. For these reasons, despite the fact that both the respondents were barred, the application before the court is dismissed with costs on a higher scale for lack of merit. In the result IT BE AND IS HEREBY ORDERED THAT;-

1. The application is dismissed.
2. The applicant shall pay the respondents’ costs on a legal practitioner and client scale.

⁸ ZWSC11-008, @p5

⁹ HH 390-14;HH263-14; HH365-15

¹⁰ ZWSC48-12

Messrs Maposa, aandomene, Maramba applicants' legal practitioners