BARD NOMINEES (PRIVATE) LIMITED
versus
ECOBANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 17 July 2014 and 10 September 2014

Opposed application

N. Munetsi, for the applicant
F. Zuva, for the respondent

MAFUSIRE J: The plaintiff sued the defendant for unpaid rent, allegedly due in terms of a lease agreement. The defendant contested liability. For a lease the duration of which was five years, the defendant had paid the agreed rent for only one year and three months before it stopped. It said it had subsequently purchased the property in question and that therefore it could not be asked to continue paying rent when the property had become its own. It pleaded *confusio*. By agreement the matter had eventually proceeded as a special case. I heard it on 17 July 2014 and reserved judgment.

In my view, the pleadings and the submissions generated more heat than light. There was a lot of clutter. The real issue got clouded. It seems it was the salient facts that were more relevant. But the parties had paid fleeting attention to these.

There were three players; the plaintiff, the defendant and a company called Wykeham Investments (Private) Limited ("***Wykeham***"). There were three agreements; two of sale and one of lease. At the centre of the dispute was an immovable property, namely Subdivision G of Stand 2554 Salisbury Township (hereafter referred to as "***the property***"). All the agreements were executed with the knowledge and consent of all the players.

The facts on the surface, and as pleaded, were largely common cause. It was the background facts that seemed to have caused problems. They were these. At all relevant times Wykeham was the registered owner of the property. By a written agreement signed on 24 August 2010, Wykeham sold the property to the plaintiff. The purchase price was US$420 000-00. It was payable on transfer. That was the first agreement.

That agreement had some interesting clauses. These constituted part of the salient facts. The "**risk and profit**" clause said the risk and profit in the property would pass to the plaintiff upon transfer. The clause also envisaged the plaintiff leasing the property back to Wykeham. The lease-back aspect was captured more fully in the "***vacuo possessio***" clause. It said Wykeham would give vacant possession of the property to the plaintiff upon transfer. The clause went on to provide as follows:

> "However, immediately upon being given possession, the purchaser shall lease the property to the seller for a period of 5 years. To that end, the parties shall execute a separate lease agreement in respect of the property."

Despite those provisions, on the ground the situation panned out quite differently. Among other things, the plaintiff did not take vacant possession of the property, and the property was not leased back to Wykeham. I shall come back to this aspect later on.

Another interesting clause in the first agreement was a "**sale-back**" provision. It said upon the expiry of the lease after the five year period, Wykeham would have the option to buy back the property. The plaintiff irrevocably agreed to sell back to Wykeham. The sale-back price would be US$420 000-00. But again this did not happen that way. Among other things, Wykeham did not buy back the property from the plaintiff.

On the same day of the first agreement, and contrary to its provisions, the plaintiff leased the property to the defendant. That was the second agreement. It was in writing. It also had some interesting provisions. In the preamble it said the lessor, i.e. the plaintiff, was the registered owner of the property. But of course, the plaintiff was not the registered owner of the property. The registered owner was Wykeham. As a matter-of-fact, the plaintiff never took transfer of the property, even though all the relevant transfer documents had been signed. Instead, Wykeham had gone on to register a mortgage bond over the property in favour of the plaintiff. This much was common cause.

The lease period in terms of the second agreement was also five years. The rents would escalate from a base of US$4 500 per month. One interesting provision was the "**sale of the property**" clause. It said at the expiry of the lease, i.e. after the five years, the lessee, i.e. the defendant, would have the option to purchase the property from the lessor, the plaintiff. The purchase price would be US$420 000-00. But, as should now be obvious, events did not turn out that way.

One year and some four months later, there was the third agreement. It was on 2 December 2011. It was between Wykeham and the defendant. It was one of sale. In terms of

it Wykeham sold the property to the defendant. The purchase price was US$570 000-00. Of that, US$150 000-00 would be paid directly to Wykeham prior to the transfer of the property. The balance of US$420 000-00 would be paid to, or on behalf of, the plaintiff upon the registration of transfer. This was to offset Wykeham's obligations to the plaintiff in terms of the "**sale back**" clause of the first agreement.

There were special and general conditions attached to the third agreement. It was mostly in respect of them that much heat was generated. One clause said that the seller, Wykeham, warrantied that upon payment of the full purchase price the purchaser, i.e. the defendant, would have vacant possession of the property. This was strange. The defendant was already in possession of the property. In fact, the defendant argued that it was already in possession of the property well before the first agreement. In other words, the defendant was always the party in possession of the property prior to all these agreements. The plaintiff seems never to have refuted this position at all.

The "**risk and profit**" clause of the third agreement said the risk and profit in the property would pass from the seller to the purchaser on the date of transfer, "***… or the date on which the Purchaser is given occupation of the property, whichever is the sooner and from that date the Purchaser shall be entitled to all rents and other profits (if any) accruing upon the property…***"

Evidently, it was that wording that gave rise to an argument by the defendant, later on in its heads of argument, that since it was already in possession of the property by the time of the third agreement, and that since it had been entitled to all the rents and other profits accruing on the property, there was no reason why it would have had to pay rent to the plaintiff in the first place. Again I shall get back to this argument later.

In February 2012, the defendant paid the full US$570 000-00 to the conveyancers appointed in terms of the third agreement. It seems US$150 000-00 was released directly to Wykeham as per agreement. US$420 000-00 was held in trust until transfer. The property was transferred to the defendant in May 2013. The defendant had stopped paying rent to the plaintiff in January 2012. The plaintiff's claim for rent was from February 2012, when the defendant had stopped paying, to May 2013, when the defendant had finally taken transfer. Plaintiff's argument was that until it had taken transfer the defendant remained obligated to pay rent to it in terms of the lease agreement.

In the plea, the defendant argued that it would not pay rent to the plaintiff from February 2012 because it had become the owner of the property, or the landlord. It said after the first agreement with Wykeham the plaintiff had never taken transfer and that all it had acquired were personal rights. It said it was those personal rights that the plaintiff had leased to it in terms of the second agreement; that those rights had extinguished upon the defendant buying the property in terms of the third agreement and that the obligation to pay rent had similarly extinguished contemporaneously.

The matter had come up for a pre-trial conference and had subsequently been referred to trial upon the single issue whether or not the defendant had become exempted from paying rentals to the plaintiff upon its payment of the purchase price into the conveyancers' trust account.

There was a lot of clutter in the defendant's arguments. The one argument, evidently based on the wording of the "**risk and profit**" clause of the third agreement which I have quoted above, was that the lease agreement, i.e. the second agreement, was null and void allegedly because the plaintiff had never taken possession of the property and that therefore neither the risk nor the profit in the property had ever passed to it. It was argued that in terms of the lease agreement the plaintiff had purported to give the defendant rights it had never obtained in the first place. Therefore the lease agreement was null and void.

In my view, the defendant's arguments that it never had to pay the plaintiff rent in the first place because it had always been the party in possession of the property prior to all those agreements, and that the lease agreement was null and void, had no merit. These arguments, only raised for the first time in the heads of argument, were, in my view, not made in good faith. My reasons are these. All the three agreements were done with the full knowledge and consent of all the players. By each of them the parties intended to create certain rights and obligations for one another. Therefore, I have to take all three documents as one composite agreement and try and give effect to the intention of the parties as expressed in them. This was the approach of the court in *Total Oil Products Pty Ltd v Perfect & Anor* 1964 (2) SA 297 (D). In that case the owner of a property had leased it to the lessee in terms of one agreement. The lessee had leased the property back to the owner in terms of a second agreement. In terms of a third agreement the owner had leased certain portions of the property to a third party. Following a breach by the owner of its obligations to the lessee in terms of the second agreement, the lessee sought to evict both the owner and the third party. Resisting ejectment, the owner raised the argument that the second contract had been

terminated by *confusio* since an owner cannot hire his own property. On the facts, the court found no *confusio*, but for reasons criticised as *obiter* by the learned author COOPER, in his book *Landlord and Tenant*, 2nd ed., at pp 31 – 32. Of the tripartite arrangements in that case, the court said - and COOPER commented as much - that the position sought to be achieved by the owner and the lessee, through the first two agreements, could have been effected through one agreement but that the parties had chosen two agreements to give the lessee security for the amount it had granted to the owner. At p 31 the learned author says:

> "It is obvious that it was the parties' intention that the two contracts should form, and operate, as one composite agreement and that the two contracts cannot be treated independently of each other."

In the present case, the defendant knew that the plaintiff had bought the property from Wykeham but that it had not taken transfer. With that knowledge, and it being the party in possession of the property at all material times, the defendant had gone on to agree to lease the property from the plaintiff in terms of the second agreement. There was nothing null and void about that lease agreement. Also, there could be no question of the risk and profit in the property having already passed to the defendant at the time that it had taken possession prior to the agreement, whatever that time had been. To construe the situation as the defendant contended would mean that the third agreement had superseded the first two. There was simply no evidence that that had been the intention of the parties.

The defendant's null and void argument is devoid of merit also on another score. In the same way that in law a seller does not have to own the property that he or she sells, it is trite that a lessor may also let property to which he has no title. The lessee may not dispute the lessor's title: COOPER, *supra*, at p 27 – 28. See also R H CHRISTIE *Business Law in Zimbabwe*, 2nd ed., at p 277 and the case of *Shell Rhodesia (Pvt) Ltd* v *Eliasov* 1979 RLR 211, 1979 (2) SA 915. Like the seller without title who must guarantee the purchaser against eviction, the lessor will be liable to the lessee in damages should a third party with superior title disturb the lessee's possession. The lessor warrants merely that no person with a superior right will disturb the lessee's use and enjoyment of the property. Therefore, in the present case, the plaintiff did not have to have taken title to the property before it could lease it to the defendant as he did.

Another argument sprung by the defendant and which was related to the null and void one was one based on the lack of possession of the property by the plaintiff. In one breath the defendant argued that by acceding to the third agreement between Wykeham and the

defendant the plaintiff had allegedly parted with possession of the property. However, in the next breath the defendant argued that in any event the plaintiff had never taken possession of the property. The argument was then developed to say that by so parting with possession the plaintiff had divested itself of the rights that accrued from the incidence of possession and had become disentitled to any rights to profits accruing from the property. The plaintiff was said to lack even the right to evict any trespassers to the property. Reference was made to the case of *Jadwat & Moola* v *Seedat* 1956 (4) SA 273, particularly the remarks of CANEY J, at p 276C – D. These were as follows:

> "Clearly the buyer of a property who has not obtained transfer (nor cession of the owner's cause of action) is not entitled to sue for ejectment. *Nicholas* v *Wigglesworth*. 1937 N.P.D. 376. Nor, in my opinion, can a lessee who has obtained the right to possession, but not obtained possession itself, sue a trespasser for ejectment."

In *Nicholas* v *Wigglesworth,* the case referred to in *Jadwat,* HATHORN J had this to say, at p380:

> "It is settled law that a purchaser of leased property, who has not received transfer, cannot sue for rent, even though as between himself and the landlord, he is entitled to it. That is because there is no *vinculum juris* between him and the tenant; see *Wille* on Landlord and Tenant, 2nd Edition, p. 165, for a correct statement of the position. A reference to the decided cases on the point shows that the Courts have always declined to assist the purchaser unless there exists a *vinculu juris* between him and the tenant."

The learned judge went on to cite the cases of *Saib* v *Saib & Pillay* 20 NLR 40; *Flax* v *van der Linde* [1928] CPD 495 and *Goosen* v *van Zyl* [1921] OPD 127 in all of which the courts would decline to assist the purchaser against the sitting tenants in claims for ejectment and/or rent without them first having taken ownership of the premises or cession of the rights of action.

But plainly, *Jadwat*, *Nicholas* and all the other cases referred to in the latter, are distinguishable from the present. *In casu*, there was *vinculum juris* between the plaintiff and the defendant regarding rent. Furthermore, and at any rate, the defendant *in casu* took the remarks of CANEY J in *Jadwat's* case rather out of context. In *Jadwat's* case, the defendants, lessees of the property in question which was owned by the plaintiff and which they had in turn sub-let to a third party, sought to challenge the authority of the plaintiff to evict them and the third party on the basis that the plaintiff had lost the title to evict them, having parted with possession of the property in favour of the third party. The defendants lost. The court held

that even though the owner had parted with possession there was nothing to suggest that her right to sue as owner had been excluded. The following is the full text of CANEY J's remarks on the point:

> "An action for ejectment on the grounds of a defendant being in wrongful and unlawful occupation is in essence based upon his being a trespasser, and trespass is an infringement of possession, which is one of the rights of ownership. If the owner has parted with possession, he cannot maintain an action for trespass against a third party and sue him for ejectment on that ground, since possession is not in him but in the one to whom he parted with it; the owner has a cause of action only if his reversionary right to possession is injured by the trespass. *Thomas v. Guirguis, supra*[1]. If, however, the owner has not parted with possession, but has parted with the right to or of possession, he retains the right to sue for a trespass and to claim ejectment. He has the right to eject the trespasser in order that he may perform his contractual obligation to the person to whom he has parted with the right to possession, as in *Jeena v. Minister of Lands, supra*[2]. This, in my opinion, is clearly so whether he has parted with the right to possession by selling the property or by giving a lease of it or in some other manner conferring on another the right to possession. **Clearly the buyer of a property who has not obtained transfer (nor cession of the owner's cause of action) is not entitled to sue for ejectment…. Nor, in my opinion, can a lessee who has obtained the right to possession, but not obtained possession itself, sue a trespasser for ejectment.** In each of these instances, the buyer and the lessee has a cause of action against the seller or the lessor to put him in possession, but there is no *nexus* between either of them and a trespasser, nor any locus to bring an action against him."

Thus *Jadwat*'s case in general, and CANEY J's remarks in particular, are clearly in relation to the absence or otherwise of a *nexus* between the party seeking eviction, and the other in possession and sought to be evicted. The case was about the right to seek eviction in a trespass situation; trespass being an infringement of the right of possession, a delictual wrong. In other words, and as I understand the judgment, one has to have lost possession, or the right to, or of, possession, in order for one to have title to sue for the eviction of a trespasser. This was not the case in the present case. In the present case, the plaintiff sought to enforce a right to contractual rentals. The granting of possession of the property to the defendant by the plaintiff in terms of the second agreement, i.e. the lease, was practically a fiction, or rather, something done symbolically, because the defendant was already in possession. I was not told in terms of what agreement had the defendant obtained occupation of the property prior to those agreements. But this was immaterial to the issue before me.

[1] 1953 (2) SA 36 (W)
[2] 1955 (2) SA 380 (AD)

The defendant's main defence was undoubtedly the one based on *confusio* or merger. *Confusio* occurs where a party acquires the other's rights in a contract, as when a tenant buys the property he is leasing: R.H. CHRISTIE, *supra*, at p 113. *Confusio* extinguishes an obligation: FARLAM & HATHAWAY *CONTRACT, Cases, Materials and Commentary*, 3rd ed., p 750. In *Grootchwaing Salt Works, Ltd* v *Van Tonder* 1920 AD 492, INNES CJ defined *confusio* in the following terms:

> "Now *confusio* in the sense with which we are here concerned is the occurrence of two qualities or capacities in the same person, which mutually destroy one another. In regard to contractual obligations it is the concurrence of the debtor and creditor in the same person and in respect of the same obligation. … [I]t is common cause that *confusio* takes place as between lessor and lessee when the latter acquires the leased property. As to the consequences of *confusio* there can be no doubt that speaking generally it destroys the obligations in respect of which it operates."

Related to *confusio* is the rule that an owner cannot hire his own property. Thus, subject to some exceptions which are not relevant in this matter, a contract whereby a person purports to acquire the right to use and enjoy property which is already an incident of his ownership is void: COOPER, *supra*, at p 29.

The defendant's argument on this point was that *confusio* occurred in February 2012 when it had paid the purchase price of US$570 000-00 in terms of the third agreement. But there is an inherent fallacy in this argument, both in law and in fact. In law, the defendant did not become the owner of the property on payment of the purchase price. It had merely become entitled to take ownership. Ownership of an immovable property takes place upon the registration of transfer through the deeds office. That is when the real rights in the property are created. Section 14 of the Deeds Registries Act, *Cap 20:05*, says that the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar of deeds. Section 2 defines "owner" in relation to an immovable property as the "**registered**" owner.

It was common cause that the property was transferred to the defendant only in May 2013. It was common cause that the balance of the purchase due to the plaintiff in the sum of US$420 000-00 was only transferred at that time. Thus, in law, *confusio* occurred only in May 2013, not earlier.

On the facts also, it is clear that the parties willed that *confusio* would not take place earlier than the date of transfer. This much is plain from a reading of the third agreement as a whole. Under the "**terms of payment**" clause, whilst the US$150 000-00 due to Wykeham

would be released directly on payment, the balance of US$420 000-00 due to the plaintiff would only be released upon the registration of transfer.

Even the "**risk and profit**" and the "**vacant possession**" clauses of the third agreement that the defendant relied upon to craft the argument that it enjoyed, or ought to have enjoyed, the fruits from the property from day one as it was already in possession, also evinced the intention that *confusio* would only occur upon transfer. Clause 2 of the special condition, which I highlighted earlier on, had the seller, i.e. Wykeham, warrantying that only upon payment of the **full** purchase price, not part of it, should the defendant take vacant possession of the property. On the ground, even though the defendant seems to have made a once off payment in the sum of US$570 000-00 in February 2012 in accordance with the agreement, only US$150 000-00 was released to Wykeham. Thus, in terms of the intention of the parties, this was a part payment of the purchase price. The **full** payment was only in May 2013 when the balance of US$420 000-00 was released to the plaintiff. This is what the "**terms of payment**" clause provided

The defendant argued that it should not be held responsible allegedly for the delay by the conveyancers in registering transfer, and that once it had paid the full purchase price in February 2012, it had become entitled to the property. It said payment to the conveyancers was payment to the plaintiff. With respect, this type of argument was part of the clutter. Until the registration of transfer, the purchase price in the conveyancers' trust account, and even that released to Wykeham in advance, remained the defendant's money. Not only is this, in my view, the position at law, but also that is what the parties had actually willed in terms of the third agreement.

One last argument by the defendant was that it had entered into the third agreement with Wykeham on the assumption that the plaintiff had consented to an early buy-back of the property by Wykeham. This obviously was in reference to the first agreement. But the defendant knew full well that nothing of the sort had happened, either in reality or in fiction. What happened was that the plaintiff bought the property from Wykeham, and on the same day, leased it to the defendant. One year and four months later, the defendant bought the property from Wykeham, not because Wykeham had bought it back from the plaintiff, but because the plaintiff had never taken transfer in the first place. That was at all times the mainstay of the defendant's defence.

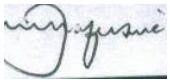
In the premises, except for the scale of costs sought by the plaintiff, its claim is allowed. As I said before, defendant contested liability only. Quantum was not in issue. The

plaintiff's claim was for payment of the sum of US$83 720, together with costs of suit on an attorney and client scale, and interest thereon at the prescribed rate from 31 May 2013. I am satisfied that there is no basis for costs at the higher scale. I therefore order as follows:

1 The defendant shall pay the plaintiff the sum of US$83 720 (eighty three thousand seven hundred and twenty United States dollars), together with interest thereon at the rate of 5% per annum from 31 May 2013 to the date of payment in full,

2 The defendant shall pay the costs of suit.

10 September 2014



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