HB-136-15
HC-1106-14
X REF HC 256-14; 2810-13

SIBUSISIWE BANGO

And

A.H.S. MADLELA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 12 FEBRUARY AND 2 JULY 2015

Opposed Matter

Advocate L. Nkomo for applicant
Advocate Mrs H. Moyo for the respondent

TAKUVA J: This is an application for summary judgment in terms of Order 10 Rule 64 of the High Court Rules 1971.

The facts are as follows; On 6 November 2013 applicant issued summons against the respondent under cover of HC 2810/13. Defendant entered appearance to defend and subsequently filed his plea. The applicant then filed this application arguing that the defendant has no defence to the claim made against him.

The applicant is the Executrix of the estate late Grey Bango. On 24 July 2003, an offer letter was issued by the Minister of Lands, Agriculture and Rural Resettlement to G.M. BANGO. The land offered is sub-division 4 of Marula Block in Bulilimamangwe District of Matabeleland South Province. The farm is approximately 1665 – 82 ha in extent.

When applicant's father died, she was offered the same piece of land by the same Ministry on 17 May 2012. (see annexures G1 and G2). On this basis the applicant contended that she has a *bona fide* claim in that the respondent has no offer letter, no contract and hence no legal right whatsoever to occupy the land. Further, respondent was advised by government officials that he has no legitimate claim to the land and was therefore given 45 days to vacate the land – see annexures H, l and J on pages 25 – 27 of the record.

Defendant on the other hand has a different story namely that he was verbally allocated the land under a certain government policy that was in place in 1999 – the ARDA Scheme.

Rule 64 of the High Court Rules 1971 deals with applications for summary judgments. It states;

> "(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
> (2) A court application in terms of sub-rule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any and stating that in his belief there is no *bona fide* defence to the action.
> (3) A deponent may attach to his affidavit filed in terms of sub-rule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action.
> (4) …"

In *Chrisma* v *Stutchbury and Anor* 1973 (4) SA 123 (Z); 1973 (1) RLR 277 at 279 D BECK J said;

> "it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact and in law, that this drastic relief will be afforded to a plaintiff." See also *Dube* v *Medical Services International Ltd* 1989 (2) ZLR 280 (SC).

The courts have stated that summary judgment must not be given lightly.

In casu, the applicant has submitted that the respondent has no defence to the claim against him for the following reasons;

(a) the land in question was awarded to the applicant through offer letters – see annexures G1 and G2 on pages 18, 19 and 20 of the record.
(b) the applicant has the lawful right to occupy the land by virtue of the offer letter i.e. G2. The respondent has no such corresponding right.

(c) the respondent's request to be given that piece of land was turned down by the Government on 18 September 2003 – see annexure H on page 25 of the record.
(d) on 18 March 2005, the respondent was reminded that he was occupying that land illegally – see annexure l on page 26 of the record.
(e) the Ministry of Lands, Land Reform and Resettlement wrote to the respondent on 10 October 2006 giving him 45 days notice to wind up his operations and "vacate the farm". Respondent continued his illegal occupation - see annexure J.

On the other hand, the respondent has mentioned so many averments that he believes to amount to a defence or defences against the applicant's claim.

In his plea, the respondent stated that he was "verbally offered Unit 4 of Marula Block Bulilima as a vacant stand in October 1999."

In the notice of opposition, the respondent raised the defence of *lis alibi pedens* alleging that case numbers HC 256/14 and HC 978/14 filed by applicant had not been "validly withdrawn". He also raised the defence of lack of *locus standi* on the part of the applicant in that she "should have issued proceedings in this matter on behalf of the estate of the late Grey Bango as the Executor of his Estate. Applicant does not hold an offer letter for the property in dispute and as such has no capacity to institute legal action against myself."

Further, the respondent attached a letter from the Minister of Local Government, Rural and Urban Development dated 15 May 2013 in which the Honourable Dr I.M.C Chombo recommended the "immediate withdrawal of the other beneficiary's offer letter and subsequent processing of another offer letter in favour of Mr Madlela for the same piece of land …" This letter was addressed to the Honourable Dr H. Mrerwa in his capacity as the then Minister of Lands and Rural Resettlement. The letter is on page 29 of the record and is marked Annexure "A".

Respondent filed heads of argument in which further and new "defences" were raised. It is now alleged that the applicant's founding affidavit is "non compliant and fatally defective" in that;

(1) she has not in fact stated that the facts that form the cause of action are within her personal knowledge.
(2) there is no averment in the affidavit that the applicant is able to depose to the facts verifying the cause of action.
(3) applicant does not have personal knowledge of the facts that found the cause of action in this matter as her knowledge derives from "letters and information from others which essentially amounts to hearsay."
(4) the affidavit was not dated and is therefore fatally defective for that reason.
(5) the respondent contented that he has raised *bona fide* defences with such clarity as to raise clear legal objections and clear dispute or conflict on the facts of the matter. Respondent prayed that the application to summary judgment be dismissed with costs.

The sole issue for determination here is whether the applicant has made out a case for summary judgment. The principles are well settled. The defendant has to establish that

(i) there is a mere possibility of his success;
(ii) he has a plausible case;
(iii) there is a triable issue and
(iv) there is a reasonable possibility that an injustice may be done if summary judgment is granted – see *Jena* v *Nechipote* 1986 (1) ZLR 29 (S0; *Standard Chartered Bank* v *Matiza* 1994 (1) ZLR 186 (H); *van Hoogstraten* v *James & Ors* 2010 (1) ZLR 608 (H); *Timnda Truck Parts (Pvt) Ltd* v *Autolite Distributors (Pvt) Ltd* 1996 (1) ZLR 244 (H).

Let me subject the respondent's defences to the test outlined above. As regards the allegation that the applicant's founding affidavit is fatally defective this is totally without merit. The respondent is clutching at straws. The applicant in her founding affidavit states the following, "…the facts deposed hereto are within my knowledge and correct unless the context or I aver otherwise." In paragraph 14 she states; "I verily believe that I have set out a good case for the relief sought … and I verify the claims as set out in the summons and declaration annexure B (hereto)." The applicant's claim is not based on hearsay but on the offer letter that related to the land in issue. The facts are clear, the applicant inherited land from her father and was subsequently issued with an offer letter in her own right. For these reasons this defence is not plausible.

The second defence is that the applicant has no *locus standi*. This defence has no substance or merit in that applicant has annexed documents that show her right to institute these proceedings – see annexures G, G1 and G2 on pages 18, 19 and 22 of the record of proceedings. Clearly therefore, this argument does not hold water and is *mala fide*.

The third defence is one of *lis alibi pendens*. The argument here is that although the previous applications filed under HC 256/14 and HC 978/14 were withdrawn, this withdrawal is invalid because the applicant did not tender costs. This reasoning is faulty and not supported by the rules of this court. O 7 R 52 (2) only applies to summons actions and not to court applications made in terms of O 32. The respondent, in the absence of an agreement on costs should simply prepare a bill of costs and seek a court order compelling the other party to pay costs. In casu, parties engaged each other through correspondence and respondent promised to send an estimate of costs. The mere fact that a withdrawn application has been made without a tender of costs does not render that application pending. Consequently, the issue of *lis pendens* does not arise, rendering such a defence hopeless in that there is not even a mere possibility of it succeeding.

The fourth defence is that it is not clear whether conditions of the offer were met. In particular, it was argued that there is no proof that applicant accepted the offer of land. This, so

the argument went casts doubt on the existence of a contract between applicant and the State. In my view, this argument is fanciful in that paragraph 4 of the offer letter states:

> "4. You are requested to indicate on the attached form whether you accept this offer or not, within 30 days of receipt of this offer." (emphasis added) This defence is not *bona fide* or arguable for two reasons. Firstly, the "attached" form is no longer attached to the offer letter which means that it was completed and detached from the offer letter. Secondly, it would be illogical for the applicant to defend land she had not accepted.

The fifth defence is that respondent was given Unit 4 by the Minister of Local Government in a letter dated 15 May 2013. There are problems with this defence. Firstly Minister Chombo is not the responsible authority in terms of the Land Acquisition Act [Chapter 20:10]. He therefore cannot lawfully offer land in terms of this Act.

Secondly, the letter is a mere recommendation to the Minister of Lands and Rural Resettlement who is the lawful authority. There is no triable issue that is raised by such a defence in that the respondent was advised in clear language by the relevant lawful authority that he continues to occupy this land illegally. Further respondent argued that it is a *bona fide* defence that the applicant has not provided proof that the land was gazetted. Again applicant is not raising a *bona fide* defence because the fact that he requested the State to give him that farm means he believed it to belong to the State. Also, why would the government parcel out land that it had not yet acquired. Further, the *mala fides* of this defence arises from the fact that respondent did not raise this defence in the plea and notice of opposition. It is clearly an afterthought. It will be absurd for the respondent to argue this defence. It is simply unarguable.

Finally respondent submitted that he was offered the land verbally in 1999. Respondent's situation is legally untenable in that subsequent to this alleged offer he was informed in writing that he has no lawful right to occupy the land in question. See annexures "H", "l" and "J". He took no steps to enforce his so called right arising from the verbal offer. Instead he

intransigently continued to occupy the land preventing legitimate beneficiaries from setting foot on the farm. Respondent failed to regularize his occupation until those he claims to have verbally offered him the piece of land left office or died. The land reform program is implemented in terms of the law. Applicant has a clear right in circumstances where the respondent has no right at all to resist the eviction.

I find for these reasons that the respondent has no *bona fide* defence to the applicant's claim for eviction.

Accordingly, it is ordered that:

1. Summary judgment be and is hereby granted to the applicant in HC 2810/13 as follows:
2. The respondent and all those claiming occupation through him be and are hereby directed to vacate sub-division 4 of Vlakfontain of Marula Block within seven days of granting of this order, failing which the Deputy Sheriff, Bulawayo, be and is hereby authorized to evict the defendant and all those claiming occupation through him and given vacant possession of the premises.
3. The respondent pays costs of suit of this application.

Cheda & Partners, applicant's legal practitioners
Lazarus & Sarif, respondent's legal practitioners