

THE ADMINISTRATOR – AFARAS MTAUSI GWARADZIMBA

And

SMM HOLDINGS (PVT) LTD

Versus

ZHOU ADAM

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 14 March 2023 & 23 March 2023

Application for summary judgment

Ms. P. Chigariro, for the applicant
The respondent in person

DUBE-BANDA J

[1] This is an application for summary judgment wherein the applicants seek vindictory relief, the object of which is to regain possession of a property known as No. 1 Old Mabula, Maglas Township, Zvishavane (the house).

[2] The salient facts of this case are by and large common cause. SMM Holdings (Pvt) Ltd is a company under a Reconstruction Order in terms of the Reconstruction of State Indebted Insolvent Companies Act [Chapter 24:27]. The first applicant is the duly appointed Administrator of the company. These proceedings have been duly authorised.

[3] The respondent was employed by the company and he retired on 12 March 2012. During the course of his employment, he was allocated the house as an employment benefit. The company is the owner of the house. The company is the owner of the house and the respondent has remained in occupation of the house. He is owed arrear salaries in the sum of USD2 250.21.

[4] The applicants sued out a summons for the eviction of the respondent predicated on the common law remedy of *re vindicatio*. The respondent filed a notice of appearance to defend and a plea. The applicants launched this application contending that the respondent has *no bona*

fide defence to the claim, and that he is defending the matter purely to delay its finalization. This application is opposed.

[5] In opposing this application, the respondent contends that the company owes him arrear salaries in the amount of USD2 250.21. He avers that it was agreed that he will remain in the property until such time that the amount owed to him is paid in full, and such payment has not been made, and therefore he is in lawful occupation of the house.

[6] Summary judgment is a procedure that protects a plaintiff against an ill-disposed defendant who defends the matter purely to delay its finalization. It is a remedy that may be deployed to prevent an abuse of the court procedure by a recalcitrant defendant. See: *Meek v Kruger* 1958 (3) SA 154 (T) @ 158C. The remedy is extraordinary and drastic; it makes inroads on a defendant's procedural right to have its case heard in the ordinary course of events, in that it permits the granting of a final order in a defendant action without a trial. The application for summary judgment may be used only where the merits of the claim are easily ascertainable without the necessity of holding a trial with evidence and cross-examination. It is granted on the supposition that the plaintiff's claim is unimpeachable because the defendant has no *bona fide* defence to the claim. Courts are reluctant to grant summary judgment unless satisfied that the plaintiff has an unanswerable case, and even where it is established that the case is unanswerable, the court nevertheless retains discretion to refuse to accede to the application.

[7] No *onus*, no evidential burden, and no obligation rests on the defendant to satisfy the court that the facts set out by him are true or that the balance of probabilities in the case lies in his favour. See: *Arend & another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C). The only question on which the court is called upon to decide is whether the defendant has disclosed a *bona fide* defence which if proved at the trial, would constitute a complete defence to the plaintiff's claim. See: *Breitenbach v Fiat* SA 1976 (2) SA 226 (T). The defendant need not set out his defence in the affidavit with the precision that will subsequently be necessary in his plea if the application for summary judgment fails, and he is given leave to defend the action. See: *Wright v Van Zyl* (3) SA 488 (C) @ 492. He must nevertheless formulate the defence sufficiently clear to place the court in a position to determine whether the defence, if true, will constitute a real defence to the claim.

[8] The court must guard against an injustice of expecting the defendant to satisfy the court that he has a *bona fide* defence without the benefit of further particulars, discovery and examination. The defendant must only establish a *prima facie* defence and must allege facts which if he can succeed in establishing them at trial would entitle him to succeed in his defence at trial. See: *Rex v Rhodian Limited* 195 R & N 723.

[9] Once the applicant has established an unanswerable case, verified the cause of action and the amount claimed, for respondent to succeed in defeating such a claim it must disclose facts upon which its defence is based with sufficient clarity and completeness to persuade the court that if proven at the trial, will constitute a *bona fide* defence to the claim. See: *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 239 A-B. In *Kingstons Ltd v L D* HH 718-19. In *Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458 F-G. ZIYAMBI JA made the important point which is apposite:

“Not every defence raised by a defendant will succeed in defeating a plaintiff’s claim for summary judgment. Thus, what the defendant must do is to raise a *bona fide* defence – a ‘plausible case’ – with ‘sufficient clarity and completeness’ to enable the court to determine whether the affidavit discloses a *bona fide* defence. He must allege facts which, if established ‘would entitle him to succeed.’ See *Jena v Nechipote* 1986 (1) ZLR 29 (S); *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S-139-86; *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 R&N 723 (SR).”

[10] The first enquiry is to establish, from the affidavit and the attached documents, whether the applicants have verified the cause of action. The requirements to verify the cause of action has been considered in several cases. In *Scropton Trading (Pvt) Ltd v Khumalo* 1998 (2) ZLR 313 at 315 E-F GUBBAY CJ had this to say: -

“... the cause of action must be verified. It must be established by proof. The supporting affidavit must contain evidence which establish the facts upon which reliance is placed for the contention that the claim made is unimpeachable.”

[11] The applicants’ claim is predicated on the common law principle of *rei vindicatio*. The *rei vindicatio* is premised on the notion that an owner may not be deprived of his or her property against his or her will and is entitled to recover the property from any person who retains possession of it without his or her consent. See: *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B. Therefore, no other person may withhold property from the owner unless he or she is vested with some right enforceable against the owner such as a right of retention against the owner or a contractual right.

[12] It is trite law that possession should also be lawful to be a valid defence against the *rei vindicatio*. See: *Hako v Minister of Safety and Security and Another* 1996 (2) SA 891 (Tk). An owner who institutes the *rei vindicatio* is required to allege and prove that he or she is the owner of the thing; the thing was in the possession of the defendant at the commencement of the action; and the thing which is vindicated is still in existence and clearly identifiable. In this matter, ownership of the house by the company and the possession thereof by the respondent have been made common cause between the parties. It is also not in dispute that the house being vindicated is still in existence and clearly identifiable. The respondent retired in 2013 and he is no longer in the employment of the company. The house was allocated to him during his employment to occupy whilst employed by the company. The applicants have succeeded in verifying the cause of action.

[13] The *onus* to establish any right to retain possession of the thing always rests on the defendant. It is incumbent on the respondent to establish entitlement to retain possession of the house. The respondent is refusing to release the house based on the arrear salary which he alleges are owing and payable to him. He says it was verbally made an undertaking that he shall remain at the house until such time that he was paid his arrear salaries. The document the respondent attached to his papers shows that the company in writing acknowledged indebtedness to him in the sum of USD2 250.21, and does not say he must remain at the house until such time that he was paid his salary dues.

[14] The issue for consideration is whether the respondent has disclosed a *bona fide* defence which if proved at the trial, would constitute a complete defence to the plaintiff's claim. It is accepted that a company does not function on its own but through an agent authorised by it. The respondent does not say who represented the company in making such an undertaking. There is nothing to show that the fictional person (company) made such an undertaking. This defence of an undertaking cannot succeed at the trial. What is clear is that the company acknowledged in writing indebtedness to him and no more. The respondent has no business in occupying the company house when he has retired and is out of employment. The benefits which accrue in connection with a contract of employment fall away upon termination of the contract of employment. The respondent cannot at law retain the house pending payment of his salary arrears. There is no *nexus* between his occupation of the house and his arrear salaries.

[15] The respondent has not established a defence that will succeed in defeating applicant's claim for summary judgment. The respondent has no *bona fide* defence. The facts which allege, even if established at the trial would not entitle him to succeed. The applicant's claim is unimpeachable because the respondent has no *bona fide* defence to the claim. The applicants' case is unanswerable.

[16] In the circumstances, the applicant has made a good case for summary judgment predicated on the common law principle of *rei vindicatio*. It is for the above reasons that this application must succeed.

[17] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the respondent must pay the applicants' costs.

In the result, it is ordered that:

- i. Summary judgment be and is hereby granted.
- ii. The respondent and all those claiming the right of occupation through him of house number 1 Old Mabula, Maglas Township, Zvishavane are ordered to vacate the house within seven days this order, failing which the Sheriff of the High Court or his lawful assistants be and are hereby authorised and directed to evict them from the house.
- iii. The respondent to pay the costs of suit.

Chigariro Phiri & Partners, applicant's legal practitioners