

**LUBECK INVESTMENTS (PVT) LTD  
t/a HIGHER LEARNING CENTRE**

**versus**

**BESTER DUNDUZA**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 18 JUNE 2014 & 15 JANUARY 2015

*C. Van Heerden* for the applicant  
Respondent in person

Application for summary judgment

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

The background facts are as follows:

Applicant, plaintiff at the time, issued summons under HC 880/09 against one Richard Dunduza (1<sup>st</sup> defendant) now deceased and one Tafara Chikati (2<sup>nd</sup> defendant), seeking payment from defendants the sum of ZAR351 784 (Three hundred and fifty one thousand seven hundred and eighty four South African Rands). Applicant subsequently obtained the following order in his favour:-

- “1. The first defendant shall pay the sum of ZAR351 784,00 (Three hundred and fifty one thousand seven hundred and eighty four South African Rands) to the plaintiff.
2. The first defendant shall pay interest on the above sum at the prescribed rate from 1<sup>st</sup> March 2009 to date of full and final payment.
3. The first defendant shall pay costs of suit on an attorney/client scale”.

This order was granted on 29 April 2010 and shortly thereafter on 7 May 2010, applicant obtained a writ of execution against 1<sup>st</sup> defendant one Richard Dunduza's immovable property being stand number 9469 Nkulumane, Bulawayo for the recovery of the sum mentioned above. The Deputy Sheriff has mandated Bulawayo Real Estate to sell the property by private treaty. The property was advertised and interested parties were referred to view the property. Respondent who is the spouse of Richard Dunduza and is in occupation of the house has been frustrating efforts by prospective buyers to view the property. Prospective buyers were insulted and threatened with violence by respondent and those occupying the property through her.

Applicant, having failed to obtain satisfaction from the order obtained under HC 880/09 issued summons for eviction of respondent under HC 1841/13. Respondent entered appearance to defend and applicant then filed this application.

As pointed out in my introductory remarks the basis of the application is Order 10 Rule 64 which states:

“64. Application for summary judgment

- (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.”

Applicant *in casu* had contended that respondent has no *bona fide* defence in case number HC 1841/13 in that the order under HC 880/09 is a lawful order granted on the merits of the matter. The issue therefore is whether or not the respondent has a *bona fide* defence – see *Van Hoogtraten v James & Ors* 2010 (1) ZLR 608 (H); *Jena v Nechipote* 1986 (1) ZLR 29 (S) and *Mapuranyanga v Sheriff of the High Court & Ors* 2003 (1) ZLR 235 (S).

A reading of respondent's notice of opposition reveals the following defences:-

1. that her husband was very ill at the time;

2. that there is no proof that her late husband Richard Dunduza stole applicant's money because applicant issued summons before the criminal matter had been finalised in court;
3. that the property in question is part of the deceased estate and therefore any claims should be made via the Master of the High Court.
4. that she is a widow who is struggling to raise her 4 children.

In my view, none of the proposed defences has any merit. The first is devoid of merit because there is no indication on the papers that Richard Dunduza was not properly served in terms of the rules of this court. As regards the second, it is trite that the institution of criminal proceedings does not preclude a party from instituting a civil action against the same party in the criminal proceedings – see section 4 of the Criminal Procedure and Evidence Act (Chapter 9:07) which provides that:

“Neither a conviction no acquittal following any prosecution shall be a bar to a civil action for damages at the instance of any person who may have suffered any injury from the commission of any offence.”

The 3<sup>rd</sup> proposed line of defence lacks *bona fides* in that the property was attached before respondent's husband died. Therefore it is clearly excluded from the husband's estate. Finally, respondent's hardship may not be used as a defence to a lawful execution of an order of court. Perhaps the respondent could resort to the provisions of Rule 348A of this court's rules to try and stop the sale of a dwelling.

For these reasons I find that respondent has no *bona fide* defence to the applicant's claim for eviction. She has not raised any triable issues.

Accordingly, it is ordered that:-

1. Summary judgment be and is hereby granted to applicant in case number HC 1841/13 in respect of the eviction of the respondent and all those claiming occupation through her from the property known as number 9469 Nkulumane, Bulawayo.
2. There shall be no order as to costs.

*Lazarus & Sarif*, applicant's legal practitioners