ASHANTI GOLDFIELDS ZIMBABWE LIMITED
t/a FREDDA REBECCA MINE
versus
NYASHA MUTENGWA

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 30 July & 5 September 2013.

Opposed Application

Miss *E. Chimombe,* for the applicant.
J. Kajokoto, for the respondent

MAWADZE J. This is an application for summary judgment wherein the applicant seeks the eviction of the respondent and all those claiming occupation through him from house number 1131, Chipadze Township, Bindura and costs of suit.

The facts of this matter are largely common cause. The respondent was employed by the applicant. With the passage of time the apparently benevolent employer, being the applicant decided to sell some of the houses to some employees who were sitting tenants. Some sort of agreement was entered between the applicant represented by its General Manager and Financial Director and the employees represented by the workers committee members being the Chairman and two committee members. The said agreement or memorandum is dated 1 December 2003 and is in the following terms;

> "MEMORANDUM OF AGREEMENT
> BETWEEN
> ASHANTI GOLD FIEDS MANAGEMENT
> AND
> EMPLOYEES
>
> Ashanti Goldfield Zimbabwe agrees to dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low Density to its employees who are sitting tenants effective 01 December 2003. Find the agreed prices attached"

The said agreement is attached to applicant's founding affidavit as Annexure F1 to F4. Attached to this agreement is a schedule which has a list of the employees involved, the house

they occupy, the value of each house (in Zimbabwe dollars) and the monthly instalments or repayment each employee was to pay. The respondent occupied house no. 1131 which was then valued at Zimbabwean dollars $1 200 00.00 and was to pay a monthly instalment of Zimbabwe $20 000.

Pursuant to the signing of the Memorandum of Agreement explained above and on 12 December 2003 applicant and the respondent entered into what is called "Agreement of Lease" in which the applicant agreed to lease house no 1131 Chipadze, Bindura (the house) to the respondent for a period of 60 months (5 years) commencing 1 January 2004 at the monthly rentals of Zimbabwean $20 000.00 which was reviewable in accordance with Annexure 'A' to that lease agreement (which provided for revaluation of the property whenever employees are awarded a salary increment). These monthly rentals were deducted from respondent's salary. Clause 3 of the lease agreement provided for the option to buy the house. It provides as follows;

"3. <u>OPTION TO PURCHASE</u>

3.1. The lessee shall have the option to purchase the property after sixty months.
3.2. The rentals paid by the Lessee to the Lessor in terms hereof shall be taken and be deducted from the amount due in respect of the purchase price determined in accordance with the provisions of Clause 3.1. (above)".

The lease agreement is signed by a representative of the applicant and the respondent. From other decided cases I have been referred to dealt with by this court it is common cause that a number of employees entered into such a lease agreement. It would appear to my mind that the dispute in this case and other cases already dealt with by this court relates to interpretation to be accorded to the "Memorandum of Agreement" dated 1 December 2003 and the lease agreement dated 12 December 2003 and the relationship between the two documents. I shall revert to this point later.

After the issuing of the Memorandum of Agreement on 1 December 2003 and before the signing of the lease agreement on 12 December 2003, the Workers Committee through what was now called the Housing Committee issued out a Memorandum to all employees of the applicant copied to the applicant. This Memorandum explained the Agreement reached on 1 December

2003. Most importantly it invited the employees who were sitting tenants to take up the offer to buy the houses. The relevant part of this Memorandum dated 2 December 2003 reads as follows;

> "Please note that you have until February 29 2004 to decide whether to purchase the house you are living in or not, after which date the offer will be extended to an employee who is willing to purchase the property. The offer is now open, therefore employees who are ready can see the Members to formalise the purchase" (underling mine).

It was after this invitation that respondent entered into the lease agreement with the applicants on 12 December 2003. In addition to that the respondent has attached as Annexures A1 to A3 his payslips which reflect that money was deducted from his salary which money is reflected as "rent to buy". The payslips are as follows;

A1 dated 31 October 2004 has a deduction indicated as "Bal rent to buy $52 755.00"

A2 dated 25 March 2004 has a deduction indicated as "Bal rent to but $116 000.00"

A3 dated 25 June 2004 has a deduction reflected as "Bal rent to buy $56 895.00"

The respondent has also attached to his opposing affidavit a memorandum from the applicant written by applicant's Financial Controller to the respondent and copied to the Housing Committee dated 14 March 2004. Its contents are as follows;

> "This memo serves as an acknowledgement that we have received $1 100 000.00 (one million one hundred thousand dollars) as payment towards yours house. The outstanding balance is now $60 000.00 (sixty thousand dollars)

It is common cause that the respondent who was employed by the applicant and was the sitting tenant in this house as at 1 December 2003 was summarily dismissed on 15 July 2009 following a disciplinary hearing held in terms of their Code of Conduct. This means that as at the date of his dismissal the respondent has been in occupation of the house for a period of sixty seven (67) months, which is in excess of the sixty months stipulated in the Lease Agreement dated 12 December 2003. After the dismissal on 15 July 2009 the respondent on 4 September 2009 was advised to vacate the house on the basis that the lease agreement which entitled him to occupy the house had lapsed due to the termination of respondent's contract of employment (see Annexure D to applicant's founding affidavit). The respondent refused to vacate the house. This prompted the applicant to issue summons out of this court in HC 4395/09 (main matter) seeking

the eviction of the respondent and all those claiming occupation through him and costs of suit. The respondent entered on appearance to defend and filed a plea which plea had been dismissed by applicant as not raising a good *prima facie* defense, culminating in this application for summary judgment.

It is useful as this stage to deal with the respondent's plea (Annexure E to E4 to applicant's founding affidavit). In his plea defendant stated that prior to 1 December 2003 he was occupying the house in issue on the basis of the contract of employment and that since 1 December 2003 he was now occupying the house on the basis of a sale agreement. The respondent said he has since fully paid for the house and awaits the transfer of the house into his name. It is respondent's contention that the lease agreement dated 12 December 2003 was the vehicle through which respondent and other employees purchased the houses as they paid for the houses through the process of rent to buy with the monthly repayments deducted from their salaries. The respondent, in his plea contends that he has now acquired rights and interest in the same house hence applicant cannot evict him from the house. In fact the respondent proceeded to file a counter claim seeking an order to compel applicant to transfer its rights, interest and title in the said house to the respondent within 30 days of the grant of such an order and costs of suit.

The question to be addressed in this matter is whether given the facts I have painstakingly outlined, the applicant is entitled to this extra ordinary remedy in the form of a summary judgment?

An application for summary judgment is made in terms of order 10 R64 of the High Court Rules 1971 in circumstances were the applicant is of the belief that the respondent has no *bona fide* defence to his action. The respondent may oppose such an application in terms of Order 10 R66 (1) (b) of the Rules by showing that he has got a *prima face* defense to this action.

The law in relation to the requirements for granting a summary judgment is clear. The old case of *Roscoe v Stewart* 1937 CPD 138 which is cited by the celebrated authors Hebstein And Van Winsen – Civil Procedure Of The Superior Courts In South Africa 2nd Edition page 225, makes the point that summary judgment is a remedy designed to eliminate or dispose of bogus defences and defences which are bad at law. The mischief which is curbed by this drastic remedy is to prevent unscrupulous litigants seeking to delay a clear and just claim by raising

frivolous defences see *Nedlaw Investments & Trust Corporation Limited v Zimbabwe Development Bank* SC 5/2000 in which it was clearly state that;

> "…… the quintessence of the drastic remedy is that a plaintiff, whose belief is that the defendant's defence is not *bona fide* and entered solely for dilatory purposes should be granted immediate relief without the expense and delay of a trial"

In order to successfully fend off an application for summary judgment a defendant has to show that he has a good *prima facie* defense to the action. Our courts have had the opportunity to define what constitutes a good *prima facie* defense. In the case of *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235(H) of 238 G – 239 A – MALABA J (as he then was) has this to say;

> "….. he must at least disclose his defense and material facts upon which it is based with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence (Haharaj v Barclays National Bank Ltd. 1976 (1) SA 418 at 426 D -…….. the statement of material facts (must) be sufficiently full to persuade the court that what the defendant has alleged, if proved at trial, will constitute a defense to the plaintiff's claim"

Having laid out these principals of law applicable to this case I now proceeded to apply these principles to the facts of this case.

The applicant believes that the appearance to defend entered by the respondent and his subsequent plea do not disclose a *bone fide* defense but was solely entered for purposes of delay. In argument applicant submitted that there was never an agreement of sale between the applicant and the respondent. It is applicant's view that the memorandum of agreement dated 7 December 2003 cannot be construed as an agreement of sale and reliance was placed on the case of *Ashanti Goldfields Zimbabwe Ltd v Clement Kovi* SC 7/09 in which CHEDA J.A. had to interpret this same document and clearly stated that it cannot be said to be an agreement of sale. Similarly the applicant submitted that the lease agreement dated 12 December 2003 cannot be construed also on an agreement of sale as it merely provides in Clause 3 that an option to purchase this property would be offered to the respondent after sixty months. The applicant's case therefore is that the agreement of lease having been terminated after the respondent left the employ of the applicant, the respondent has no right whatsoever to remain in the house as the applicant remains the registered owner of the house.

While it is correct that the pronouncements of the Supreme Court are binding to this court I believe the case in which applicant seems to have reposed all his faith in of *Ashanti Goldfields*

Zimbabwe Ltd vs. Kovi supra can be distinguished from the facts of this case. In fact MAKARAU J.P. (as she then was) in a number of cases involving the applicant and its employees in *Antonio v Ashanti Goldfields Zimbabwe & Anor; Mujati v Ashanti Golfields Ltd & Anor; Ashanti Goldfieds Zimbabwe Ltd v Bonde 2009* (2) ZLR 371 (H) at 285 F – G distinguished the *Ashanti Goldfields Zimbabwe Ltd vs. Kovi* case supra, as follows;

> " I am bound by all the decisions of the Supreme Court on points of law. Where however, the facts that were placed before the Supreme Court are different from the facts before me, I believe I am at liberty to interpret their facts in light of the law handed down by the Supreme Court. The doctrine of stare decisis applies to points of law and not to factual disputes".

A number of my brother and sister judges who have been seized with matters involving the applicant and its employees in relation to these houses have adopted the approach enunciated by MAKARAU JP (as she then was) in arriving at a different conclusions on the facts presented in each particular case despite the sentiments expressed in *Ashanti Goldfileds Zimbabwe Ltd v Kovi* supra in relation to the Memorandum of Agreement dated 7 December 2003 and the Lease Agreement dated 12 December 2003. Few examples are sufficient to illustrate this point.

In the case of *Ashanti Goldfields Zimbabwe Ltd v Jhafati Mdala* HC 5664/07 CHATUKUTA J. after a protracted trial did find that, on the facts presented before her, inclusive of the Memorandum of Agreement dated 7 December 2003 and the Lease Agreement dated 12 December 2003, indeed Ashanti Goldfields Zimbabwe Ltd had sold the house to the defendant.

In the case of *Ashanti Goldfields Zimbabwe Limited T/A Freda Rebecca Mine v Shingirai Matimura & Ors* HH 54/11 GOWORA J. (as she then was) declined to grant a summary judgment wherein the applicant had sought the eviction of the respondents, whilst respondents had advanced a similar argument like in the instant case. Indeed the Memorandum of Agreement dated 7 December 2003 and the Lease Agreement similar to one dated 12 December 2003 were some of the documents in issue in that case.

Lastly in the case of *Govha v Shanti Goldfields Zimbabwe T/A Freda Rebecca Mine & Anor*. HH 48/12 and in *Ashanti Goldfields Zimbabwe Limited T/A Freda Rebecca Mine v Ephraim Pfidze* HH 347/12 MATHONSI J. in both cases faced with facts almost on all fours with the present case declined to grant a summary judgment in both cases for the eviction of the respondents (employees) .

It is clear from the facts of this case that the respondent has raised a good *prima facie* defense to the action for eviction. The Memorandum of Agreement dated 1 December 2003 which I have alluded to in my introductory remarks shows that the respondent was one of the sitting tenants who were eligible to purchase the house in issue. The respondent contends that he acted in terms of the Memorandum dated 2 December 2013 which invited all employees who were sitting tenants to exercise the offer to purchase the houses as at 29 February 2004. In fact the respondent argues that he proceeded, in exercising this option, to enter into a lease agreement dated 12 December 2003 which he described as the vehicle with which the employees were to purchase the houses, as they all started to pay what was called "rent to buy". Indeed respondent attached some of his payslips for 2004 which show that monthly deductions in various amounts were made as "rent to buy". In addition to that the respondent has included a memorandum from the applicant addressed to him acknowledging receipt of $1 100 000.00 towards the purchase of house and indicating that outstanding balance as $60 000.00 only. As already stated the respondent was in occupation of this house (as a sitting tenant) for a period of in excess of 60 months. (Clause 3 of the lease agreement) before he was dismissed from work and the lease agreement purportedly terminated.

Considering all these the factors placed before the court by the respondent, one cannot say with certainty at this stage that respondent did not exercise the option to purchase the house in issue. The applicant has not been able to meaningfully explain why after a period of 60 months and in view of the proof of monthly deductions and confirmation by applicant of such payment as part of the purchase price in March 2004, applicant is still of the view that respondent did not purchase the house.

I am satisfied that the respondent has presented an arguable case. It cannot be said that defence raised by the respondent is simply raised for purposes of delaying the inevitable. It would therefore be unfair and improper and this stage to close the door to the defendant and deny him the opportunity to defend the claim. On the facts before me it cannot be said that the applicant's case is unanswerable and unassailable. The parties should be allowed to have their day in court and present evidence on whether respondent exercised the right to purchase the house in issue and paid the full purchase price. The claim for eviction at this stage is premature. The application for summary judgment is therefore without merit.

In the result, the summary judgment application is dismissed with costs.

Magwaliba & Kwirira, applicant's legal practitioners
Manyurureni & Company, respondent's legal practitioners