CHRISTOPHER MASWI
and
MAIDEI MASWI
versus
DR. SAMUEL TAKAWIRA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 17 July 2014, 30 July 2014

Opposed Application

N. Mugiya, for the applicants
A. Masango, for the respondent

CHIGUMBA J: The land reform program is based on the lofty ideal that every Zimbabwean citizen is entitled to own land. Many Zimbabweans have benefitted from this program since its inception. The average citizen considers the program to be noble, being based on the need to redress colonial distortions and imbalances in land ownership in this country. In the preamble to our new Constitution, is a reference to "…our heroic resistance to colonialism, racism, and all forms of domination and oppression…"[1] Our founding values and principles include the recognition of and respect for the liberation struggle. [2]The distribution of land prior to our independence was inequitable. Clearly there was a need to bring about balance. There have been a lot of challenges emanating from the manner in which this national program was implemented. This is not a story about the pros or cons of the land reform program, or the alleged deficiencies in its implementation. This is a dispute which illustrates the nature of the challenges that have marred the land reform program in this county, and that are still contributing to the lack of cohesion of the program on the ground. It is also a story about greed.

[1] Constitution of Zimbabwe (Amendment No. 20) Act 2013@p15

[2] S3 (1)(i), Chapter 1, Constitution. @ p16

This is an application for summary judgment.

The applicants caused summons to be issued against the respondent on 14 December 2012, in terms of which they sought the abovementioned relief. The basis of their claim, as set out in the declaration to the summons, is that, they were allocated Plot 15 on 4 December 2001, in terms of the land reform program. (See the offer of state land and holding model A2, Phase II, ref L/183, at record page 6). On 19 September 2002, the District Administrator wrote a letter to the applicants in which they were advised to be prepared to pay for the improvements on plot 15 after the necessary government valuations had been done. Subsequently, on 12 February 2009, applicants were allocated the adjoining plot 16, and their holdings increased from the 72 hectares which they had been allocated in 2001, to 142.40 hectares. The applicants averred that these two plots have infrastructure such as a farm house, sorting sheds, tobacco barns, generators, and a workers' compound. The applicants averred further, that they have paid in full, for these developments on the two plots. On 14 May 2012, the applicants were issued with a 99 year lease which confirmed their ownership of the two plots. (See record page 29)

It is alleged that in 2002, the defendant forcibly occupied the main house at the farm, and has refused to give vacant possession of this farmhouse to the applicants, to date. It is alleged further, that the defendant has his own duly allocated piece of land in the same neighborhood, some kilometers away from the applicant's farm.

The applicants allege that efforts to persuade the defendant to vacate the farmhouse by the District Administrator, the police, the Provincial Lands Officer, have been fruitless. They allege that the defendant has hired thugs to assault them, and has threatened them with death, each time an attempt to evict him is made. Finally, the applicants averred that they are currently paying the electricity bill for the defendant's use of electricity whilst he is on the premises, because the electricity bill is in their name.

On 10 January 2013, the defendant filed a notice of appearance to defend. On 28 January 2013, the applicants filed for summary judgment, on the basis that, the defendant had no defence, and had merely entered appearance to defend in order to delay the proceedings. They accused the defendant of abusing court process, and of deliberately refusing to obey court orders. The defendant opposed the application for summary judgment, by filing a notice of opposition on 11 February 2013. In his opposing affidavit, the respondent objected to the nature of the relief

sought on the basis that the applicants had no *locus standi* to seek his eviction, only the state, and the owner of the land, could evict him. The second objection raised was that the application was defective for failure to cite the Minister of Lands and Rural Resettlement as a party to the proceedings. In regards to the merits of the application the respondent denied that the applicants had been allocated plot 16, and attached an offer letter dated 2 December 2008, which purported to show that Plot 16 of Earling In Mazowe, measuring 70.40 hectares, had been allocated to one J Sibanda of 3605 Nhovo close, Budiriro 2, by the Minister of State for National Security, Lands, Land Reform and Resettlement in the President's Office, honorable D.N.E. Mutasa.

The respondent accused the second applicant of having unlawfully caused the annexation and acquisition of plot 16 by corrupt means. For this reason, he averred that applicants had no right to evict him from Plot 16. He denied that the applicants had paid any money to government as compensation for the improvements on the property. Finally, the respondent averred that it was government policy that any existing tobacco barns, storage facilities, and irrigation infrastructure are classified as communal facilities and regardless of where they are allocated every beneficiary of the land reform program was entitled to have access to those facilities.

The respondent averred that the 99 year lease does not empower the lessee to claim ownership of the improvements on the land at the expense of the other beneficiaries of the A1 land reform program. The beneficiaries of the Kumusha Farm land reform program are alleged to have authorized the respondent to protect their right to access of all the communal areas, and minutes of their Association's meeting held on 18 January 2004 are attached as proof. The applicants, in reply raised a query as the whereabouts of J. Sibanda who was allegedly allocated Plot 16 in 2008, and persisted in the relief that they sought.

The Law

Order 10 of the High Court Rules 1971 provides for the remedy of summary judgment as follows:

> "**ORDER 10**
> SUMMARY JUDGMENT
> ***64. Application for summary judgment***
>
> (1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pretrial 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".

This is what our courts have had to say about summary judgment: In the case of *Stanbic Bank Zimbabwe Limited v Dickie & Anor* [3] the court said the following:

> "Summary judgment is a procedure that should not lightly be entered upon. It is an extraordinary relief and an applicant must bring himself clearly within the rules. The claim must be substantiated in the founding affidavit. Further evidence is not permitted without leave and then only to traverse new matter raised by the defence which could not reasonably have been anticipated at the time of the application. The plaintiff therefore is putting all his eggs in one basket. …".

The Supreme Court in *Chiadzwa* v *Paulkner* [4]set out the requirements of what an applicant for summary judgment must set out in its founding affidavit, as:

> "(summary judgment), an affidavit must fulfill three requirements:
> 1. It should be made by the plaintiff himself or by any other person who can swear positively to the facts.
> 2. It must verify the cause of action and the amount, if any, claimed.
> 3. It must contain a statement by the deponent that in his belief there is no *bona fide* defence to the action."

It is my view that the deponent to the founding affidavit in this application successfully fulfilled the requirements set out above in ad paras 1, 7, and 14 (at record page 4-5). We know that a 99 year lease is conferred on beneficiaries to the land reform program by the Minister of Lands and Rural Resettlement, and that; in this case the applicants' lease was registered as a notarial deed with the Deeds Registry office. This means that notice was given to the whole world, that the applicants had acquired certain rights conferred on them by the government, in terms of the Agricultural Land Settlement Act [*Cap 20:01*] which rights included security of tenure, in respect of Lot 15 of Ealing Estate situate in Mazoe. The terms of the lease agreement included payment of an annual rent amount, and payment of UDS$7 989-00 every year for a period of twenty five years towards the purchase by the lessee of the improvements on the

[3] 1998 (1) ZLR 205 (HC)

[4] 1991 (2) ZLR 33 (S)

property. Lot 15 is described as being 129 3060 hectares in extent, and one surmises that Lot 15 is the combination of Lots 15 and 16, which had an estimated hectarage of 142.40 on the offer letter dated 12 February 2009.

The status of the offer letter dated 2 December 2008, in favor of J Sibanda, in my view is not in doubt. The law is now settled. In the leading case of *Commercial Farmers Union & 9 Ors v Minister of Lands and Rural Resettlement & 6 Ors*[5] *(CFU)*

The Supreme Court made the following observation:

> "The Legislature in enacting the above provision clearly intended to confer on the acquiring authority the power to issue to individuals offer letters which would entitle the individuals to occupy and use the land described in those offer letters…"

The applicants were first issued with offer letters, then with a land settlement lease, valid for 99 years. Clearly, both the offer letter and the land settlement lease are recognized as being 'lawful authority' which may be issued by the acquiring authority to any person who has been allocated with gazette land. The question is, how does the acquiring authority rank the lawful authority to occupy land where one or more inconsistent offer letters or land settlement leases are issued in respect of the same property? This issue was settled at pp 20-21 of the CFU case, as follows:

> "I have no doubt that the Minister as the acquiring authority can redistribute land he has acquired in terms of s 16B of the Constitution by means of the following documents -(a) an offer letter; (b) a permit; and (c) a land settlement lease. The Minister is entitled to issue a land settlement lease in terms of s 8 of the Land Settlement Act [*Cap 20:01*]…The Minister has an unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate the land by way of an offer letter or by way of a permit or by way of a land settlement lease. It is entirely up to the Minister to choose which method to use...I am satisfied that the Minister can issue an offer letter as a means of allocating acquired land to an individual. Having concluded that the Minister has the legal

[5] SC 31-2000 @p19: 'lawful authority' means –(a)an offer letter; or(b) a permit; or(c) land settlement lease; and 'lawfully authorised' shall be construed accordingly; "'offer letter' means a letter issued by the acquiring authority to any person that offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter;

> power or authority to issue an offer letter, a permit or a land settlement lease, it follows that the holders of those documents have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease".

The applicants have the requisite legal authority to occupy and use the land allocated to them by the Minister in terms of the land settlement lease. The defendant does not. The defendant is not J Sibanda, who was purportedly allocated with Plot 16 in 2008. In any event the applicant's land settlement lease was issued well after 2008, in 2012. In the CFU case, the right of the Minister as the acquiring authority, to redistribute, allocate and re-allocate land was described as "unfettered". In my view, even if J Sibanda had been allocated Plot 16 in 2008, the Minister had the unfettered discretion to issue that same Plot 16 to the applicants subsequently, which he clearly did.

The defendant did not place any evidence before the court to show that he has the legal authority to occupy Plot 16 except to make bald and unsubstantiated references to government policy. Having established that the applicants' cause of action is sustainable as a matter of law, the onus now shifts to the defendant (respondent) to provide sufficient evidence of a *bona fide defence* to the applicant's claim. The term "*bona fide* defence" has been interpreted by these courts, and the law is settled in regards to its meaning. In the case of *Hales* v *Doverick Investments Private Limited* [6], a sale of a hotel and the land on which the hotel was situated was cancelled by the seller because the buyer had breached the contract by failing to make payments in accordance with the contract. The buyer did not deny that it had breached the contract by failing to make these payments. However, it opposed the seller's application for summary judgment for its ejectment from the property on the grounds that it had made improvements to property and was therefore entitled to retain possession of the property under an improvement lien.

The seller denied that the buyer had made any improvements on the property and that the buyer had any defence to the application for summary judgment for ejectment. It was held, that, where a plaintiff applies for summary judgment against the defendant and the defendant raises a

[6] 1998 (2) ZLR 235 (HC)

defence, the onus is on the defendant to satisfy the court that he has a good prima facie defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence with sufficient clarity and in sufficient detail (my underlining for emphasis) to allow the court to decide whether, if these facts are proved at the trial, this will constitute valid defence to the plaintiff's claim. It is not sufficient for the defendant to make vague generalisations or to provide bald and sketchy facts".

The court in *Hales* v *Doverick* set out in some detail, what other courts had found in regards to summary judgment, and what a defendant needed to do in order to withstand this extraordinary remedy. At pp 238-239 the court said the following:

> "The test that is to be applied to the defendant's affidavit is clear on the authorities. In the phrase ``good prima facie defence to the action" in r 66(1)(b) of the Rules of Court 1971, was interpreted by MURRAY CJ at p 633G to mean:
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> ``.... that the defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence at the trial."
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> In *Jena* v *Nechipote* 1986 (1) ZLR 29 (S**)** GUBBAY JA (as he then was) said at p 30D-E:
>
> > ``All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that `there is a mere possibility of success'; `he has a plausible case'; there is a real possibility that an injustice may be done if summary judgment is granted."

The defendant's affidavit should not only disclose the nature of the defence relied upon to resist plaintiff's claim for ejectment, but must set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing. In *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86 at pp 4-5 of the cyclostyled judgment MCNALLY JA referred to the degree of particularity and completeness which the facts averred by the defendant in its affidavit filed in opposition to an application for summary judgment must achieve as being that:

> ``... while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence 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 **(***Maharaj* v *Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426D).*
>
> ... the statement of material facts must be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff's claim .... if the defence is averred in a manner which appears in all the circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of bona fides ***(****Breitenbach* v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 at 228D-E)
>
> ... he must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts **(***District Bank Ltd* v *Hoosain & Ors* 1984 (4) SA 544 at 547G-H).'

The court must decide whether the allegations by the respondent that Plot 16 was allocated to J Sibanda in 2008, that the applicants do not have *locus standi* in terms of the 99 year lease to cause his eviction, that he has a right to access all the equipment on the farm in terms of government policy, constitutes a valid defence to the applicants' claim. To restate the tests set out above on what constitutes a good *bona fide* defence the court may ask itself the following questions:

1. Are these allegations by the respondent sufficiently clear and complete?
2. Have the material facts on which these allegations are made been disclosed and the evidence to substantiate them attached to the opposing affidavit?
3. Is there a mere possibility of success at trial, such that an injustice will be done if summary judgment is granted?

In my view, there is no evidence which has been attached to the respondent's papers to establish a *prima facie* right, or entitlement, to be in occupation of what was formerly Plot 16 of Earling Farm in Mazowe district. There is no evidence of the government policy alluded to by the respondent, that all infrastructure is jointly owned by the community, such that the holder of a 99 year lease can be barricaded out of land that was legally allocated to him, on the basis that the infrastructure, which he is expected to pay for, in full, happens to be part of the allocated land. There is no evidence before the court that any injustice will be done if summary judgment is granted in this case. In fact an injustice would be done if summary judgment is not granted. The respondent appears to have resorted to self help and ensconced himself on land that was

lawfully allocated to the applicants. The respondent is living in open defiance of the law. He cannot be allowed to thumb his nose at the law and get away with it. At p 23 of the CFU judgment the court stated that:[7] The applicants are before this court to assert their rights. This court is enjoined and duty bound to assist them, especially in light of the thuggish behavior and greed exhibited by the respondent. To mark its displeasure at the lawless conduct of the respondent, an award of costs on a higher scale has been deemed appropriate. In the result, IT IS ORDERED THAT:

1. Summary judgment be and is hereby granted in favor of the applicants.
2. The respondent and all those claiming occupation through him be and are hereby ordered to vacate Earling Farm, Plot 15 and 16 Mvurwi, forthwith or at least 48 hours from the date of this order.
3. The respondent is ordered to keep the peace towards the applicants at all times and is barred from making threats of whatever nature to the applicants.
4. The respondent is interdicted from coming to Plot 15 and 16 Earling Farm, Mvurwi without the consent of the applicants or such other lawful authority.
5. The respondent to pay costs of suit on an attorney-client scale.

Messrs Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Messrs Musunga Law Chambers, respondent's legal practitioners

[7] The holders of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights.