**COSMAS NYONI**

**Versus**

**GILBERT ZHOU**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 30 March 2023 & 6 April 2023

**Application for summary judgment**

*L. Nkomo,* for the applicant
*B. Ndove,* for the respondent

**DUBE-BANDA J**

[1] This is an application for summary judgment. The applicant seeks an order couched as follows:

i. That the respondent and all those claiming occupation through him be and are hereby ordered to vacate Plot Number 11 Black Waters Farm within seven days of service of this order.
ii. The Sheriff of the High Court of Zimbabwe be and is hereby ordered to evict the respondent and all those claiming occupation through him from Plot Number 11 Black Waters Farm, should they fail to vacate.
iii. Costs at an attorney-client scale.

[2] The application is opposed.

[3] The salient facts of this matter are that the Government of Zimbabwe (acquiring authority) allocated the now late Lydia Ncube (late Ncube) Plot Number 11 Black Waters Farm (the property). She held the property in terms of an Offer Letter issued by the Government. The property is measuring 200 hectares. On 1 July 2014 she signed an agreement with the respondent, in terms of which the latter was to occupy, develop and utilize a portion of the property measuring 100 hectares for a period not less than the duration of the lease agreement between Ncube and the Government. Consequent to the death of Lydia Ncube, the Government allocated the property to the applicant. The Government through the Minister of Lands, Agriculture, Water and Rural Resettlement issued an Offer Letter to the applicant. The Offer

Letter is dated 9 December 2020. On 27 October 2021 the applicant sued out a summons seeking the eviction of the respondent from the property and all those claiming the right of occupation through him.

[4] The respondent filed a plea, and in his plea, he averred *inter alia* that he has an improvement *lien* on the property valued at $110 000.00, and that he has a right of occupation until such time that he has been compensated for his improvements. He pleaded further that the agreement with the late Ncube is legal on the basis that it was sanctioned by the Ministry of Lands; and that the applicant is estopped from seeking his eviction from the property. He further pleaded unjust enrichment.

[5] The applicant filed this application stating that in his belief there is no genuine and sincere defence to the action and that the appearance to defend has been entered solely for purposes of delay. *Per contra* the respondent contends that this is not a case for summary judgment as he has genuine and sincere defence to the action.

[6] In his heads of argument the respondent *in limine* took issue with the applicant's answering affidavit. The respondent contended that r 30(7) of the High Court Rules, 2021 does not permit an applicant to file a further affidavit without leave of court. I agree. Neither leave was sought nor granted for the filing of the answering affidavit. In the circumstances the concession by Mr. *Nkomo* the respondent's counsel that the answering affidavit was not filed as provided for in the rules of court is understandable and was fairly made. In the result, the applicant's purported answering affidavit filed on 30 November 2022 is an irregular pleading and is expunged from the record, and no reference shall be made to it in this judgment. It is non-existent.

[7] 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.

[8] 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 genuine and sincere defence to the claim.

[9] 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.

[10] Once the applicant has established an unanswerable case, verified the cause of action, 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 genuine and sincere 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)."

[11] 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."

[12] It is on the basis of these legal principles that this summary judgment application must be viewed and considered.

[13] The first question is whether the applicant has verified the cause of action. It is common cause that the property is Gazetted land in terms of the provisions of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28] (the Act). The applicants' claim is predicated on the Offer Letter issued to him by the acquiring authority as defined in the Act. The Offer Letter is in his name. He applied to the acquiring authority and he was allocated land measuring 200 hectares. He has lawful authority by virtue of the Offer Letter as provided for in terms of s 2 of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28] to occupy the property. Lawful authority is defined in s 2 of the Act as an offer letter; or a permit; or a land settlement lease.

[14] It is common cause that the respondent is in occupation of 100 hectares of the land. The applicant contends that the respondent has no lawful authority to occupy Gazetted land in that he has no offer letter, no permit, no land settlement lease to occupy 100 hectares of the land. On these facts the applicant has verified his cause of action.

[15] Turning my attention to the defences raised by the respondent, I deem it necessary once more to consider what is required of a respondent to successfully resist an application for summary judgement. In *Maharaj v Barclays National Bank Ltd* 1976(1) SA 418 (A) at 426A-C the Court`s approach to summary judgement was set out as follows:

> "Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine

> whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be."

[16] The respondent in an attempt to show that he has genuine and sincere defence to the action contends that: he has an improvement *lien* on the property; that the applicant is estopped from seeking his eviction; and his eviction will result in applicant's unjust enrichment.

[17] Regarding the improvement *lien,* the respondent contends that he has made improvements valued at $110 000.00 on the land, and such gives him the right of retention until such time he has been compensated by the applicant or the estate of the late Ncube. In respect of *estoppel*, he argues that the applicant is a beneficiary and a successor in title to the estate of the late Ncube. He personally rectified the development agreement by signing it as a witness, and he has received payments in terms of the same agreement. It is argued further that by his conduct the applicant aided, abated and benefited from the agreement he now calls illegal. It is submitted further that he is estopped from relying on the illegality of the agreement in seeking the eviction of the respondent. Regarding unjust enrichment the respondent relies on the fact that he says he made improvements on the land and that the agreement with the late Ncube permits him to remain on the land until such time that he has been fully compensated.

[18] The property in issue is not just a property, it is Gazetted property in terms of the law. The legislature clearly prescribed the categories of persons who may lawfully occupy Gazetted property. In *Nkomo v Masunda* HH 38/09 the court said:

> "Mr Masunda's intended reoccupation and use of the lodge does not seem to be lawful on the face of it. I say so because s 3 (1) of the Gazetted Land Consequential Provisions) Act 20:28 prohibits any one from occupying gazetted land without lawful authority. It provides that:
>
> "Occupation of Gazetted land without lawful authority
>
> Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority."
> Lawful authority is defined in section 2 as,
> (*a*) an offer letter; or
> (*b*) a permit; or
> (*c*) a land settlement lease;

and "lawfully authorised" shall be construed accordingly."

See: *TBIC (Private) Limited & Another v Mangenje & 5 Others* SC 13/ 2018.

[19] The respondent has no lawful authority in the form of an offer letter, a permit or lease issued in terms of the Act authorizing him to occupy the 100 hectares of the land. That being the case he is prohibited by operation of law to occupy or use the 100 hectares of the land. The submission by Mr *Ndove* that the respondent is occupying the property on the authority of the Offer Letter issued to the late Ncube and the development agreement is just a *red herring*. I say so because Ncube is deceased and her Offer Letter terminated at her death. This is trite. The respondent cannot claim the right of occupation of Gazetted land on the strength of an offer letter that terminated at the death of its holder, i.e., the late Ncube.

[20] Further the applicant does not claim the right of occupation on the strength of being a beneficiary to the estate of the late Ncube, but on the authority of an Offer Letter issued in his name by the acquiring authority. The applicant has lawful authority to occupy the whole property measuring 200 hectares, and to sue for eviction whosoever is in occupation of the property or any part thereof. See: *McGregor v Saburi & Ors* (HC 7748 of 2010) [2011] ZWHHC 33 (22 February 2011) were the court said:

> "The applicant has argued that an offer letter does not give authority to evict a person already in occupation. Nothing could be further from the truth. The holder of an offer letter has authority granted by the owner of the land, that is the State, to occupy and utilize the land in question. He has a right and a legitimate interest to access the property. That right is enforceable against any other person who may seek to deprive him of it or frustrate his enjoyment of the same. The holder of an offer letter is perfectly entitled to seek an eviction order against persons who may illegally be in occupation of such property. He may not however take the law into his own hands and act without a court order. The offer letter confers upon its holder the "*locus standi*" to approach the courts for appropriate relief, contrary to the applicant's assertions. In my view the right to evict illegal occupiers is not limited exclusively to the State or the responsible Minister as the applicant would have us believe; it extends to the beneficiaries as well."

[21] The applicant being a holder of an offer letter has a right at law to seek the eviction of the respondent from the property or any part thereof.

[22] Regarding the issue of a *lien* arising from the alleged improvement, this court cannot permit the respondent to remain in unlawful occupation of the property on the basis that he

made improvements to such property. Whether he is entitled to compensation or not is the inquiry at this point in time, the inquiry is that he has no lawful authority to occupy the property, which is Gazetted land. This court cannot sanction a contravention of the law, an illegality. The submission that the respondent has an improvement *lien* is not a genuine and sincere defence to the action for eviction.

[23] Further the defence of *estoppel* is not available to the respondent. Estoppel is traditionally understood to be a rule of evidence that estops (prevents) the representor from denying the truth of the representation that he previously made to the representee, where the latter relied on the representation to his detriment. This rule precludes the representor from going back on her representation. See: *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) 291. The respondent contends that the applicant ratified the agreement with the late Ncube by signing it as a witness, and receiving payments arising from the agreement. It is argued further that by his conduct he aided, abated and benefited from the agreement between the late Ncube and the respondent, and therefore he is estopped from relying on the illegality of the agreement as the basis for the eviction.

[24] The inquiry at this stage is whether the respondent disclosed a genuine and sincere defence or *bona fide* defence which if proved at the trial would constitute a defence to the claim for eviction. Even if the facts alleged by him are correct, still the defence of *estoppel* is not available to him *viz* eviction. One cannot by estoppel create a situation that is unlawful. By operation of law the respondent is prohibited from occupying Gazetted land, i.e., the 100 hectares of the property without lawful authority. He has no lawful authority to occupy such property. He cannot be permitted to continue an illegality. This court cannot give recognition of the act or give legal sanction to the very situation which the Legislature wishes to prevent.

[25] The respondent contended further that the applicant is not entitled to evict him from the property in that to allow such claim would result in unjust enrichment. He relies for this on the contention that he improved the property and on *paragraph* 1.5 of the agreement with the late Ncube which says:

> "In the event of the parties deciding to resile or cancel this agreement for whatever reason, it is agreed that the structures erected on the portion of land allocated to the 2nd party shall not be demolished but the 1st party shall compensate the 2nd party, in full, for all developments as he would have made before the 1st party vacates the farm. For the avoidance of doubt, the 1st party shall not evict or remove the 2nd party from the

> farm unless she pays in full and in terms of a valuation report prepared by a registered property valuer, the value of any such improvements as the 2nd party would have done, (if any)."

[26] Mr *Nkomo* submitted that there is no privity of contract between the applicant and the respondent. The doctrine of privity of contract is a common law principle which provides that a contract cannot confer rights or impose obligations upon a person who is not a party to the contract. The general rule at common law states that a contract creates rights and obligations only as between the parties to such contract. As a corollary, a third party neither acquires a right nor any liabilities under such contract. This is what the proclaimed doctrine of "privity of contract" enunciates and establishes as the overarching rule underlying any contractual relation. See: *TBIC (Private) Limited & Another v Mangenje & 5 Others* SC 13/ 2018, were the court said:

> "The doctrine of privity of contract provides that contractual remedies are enforceable only by or against parties to a contract, and not third parties, since contracts only create personal rights. According to Lilienthal, privity of contract is the general proposition that an agreement between A and B cannot be sued upon by C even though C would be benefited by its performance. Lilienthal further posts that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it."

[27] First, the agreement was between the late Ncube and the respondent. The applicant claims possessory rights over the property on the basis of an Offer Letter issued to him. He does not claim on the basis of being a beneficiary to the estate of the late Ncube. The question is whether the respondent has disclosed a genuine and sincere defence to the action which if proved at the trial would constitute a complete defence to the applicant's claim. He has not. There is no privity of contract between the applicant and the respondent. The agreement between the late Ncube and the respondent does not impose any obligations on the applicant. The unjust enrichment is not a defence at law in the light of the fact that the property in issue is Gazetted land and the respondent has no lawful authority to occupy such land.

[28] The respondent has no genuine and sincere defence to the action. The applicant's claim is unanswerable. 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 genuine and sincere defence to the action. The applicants' case is unanswerable.

[29] I take the robust view that the argument that the applicant should have joined the responsible Minister in this matter is of no moment. Even if correct that indeed the responsible Minister should have been joined in these proceedings, this cannot amount to a defence at law against the eviction of the respondent from the property. It is for these reasons that this application for summary judgment must succeed.

[30] 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 be and are hereby ordered to vacate Plot 11 of Black Waters Farm within seven days of service of 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 Farm.
iii. The respondent to pay the costs of suit.

*Mabundu & Ndlovu Law Chambers,* applicant's legal practitioners
*Ndove & Associates*, respondent's legal practitioners