WILLDALE LIMITED
versus
CHRIS PETROS KWARAMBA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 10 July 2013 & 26 August 2013

Opposed application

Z. T.Zvobgo, for applicant
A. Debwe, for respondent

MAFUSIRE J: This is an application for summary judgment. The applicant seeks the eviction of the respondent and all those claiming occupation through him from a portion of its land known as Sub-division 1 of Teneriffe Kinvarra, Zvimba District [hereafter referred to as **the property**].

The essential facts are fairly common cause. The applicant is a brick making company. It carries on business from pieces of land just outside the outskirts of the Harare metropolis. One of those pieces of land is the property. In 2002 the government, in pursuit of its programme of land reform, allocated 90 hectares of the property to the respondent.

The property had duly been gazetted. The applicant had duly been issued with the usual offer-letter. However, settling respondent on the property had been a mistake. It was no longer agricultural land. In 1991 it had been turned into industrial land in terms of a development permit issued by government through the then Ministry of Local Government, Rural and Urban Development. The applicant had been authorised, among other things, to manufacture bricks on the property and several others owned by it in the area.

The applicant had filed a formal objection to the notice for compulsory acquisition. However, its efforts bore fruit only in March 2012 when the notice had been uplifted through an order of this court. The order had been obtained at the instance of the applicant duly supported by the government through the then Ministry of Lands, Agriculture and Rural Resettlement. That Ministry and the Registrar of Deeds had been the only parties cited as respondents. The respondent in the present matter had not been cited.

As the process to free the property from compulsory acquisition was underway, the applicant was making efforts to get the respondent off the property. At times there was friction between the parties. The applicant would complain of the respondent encroaching on sites on which its business was being run and of interfering with production. In an effort to encourage the respondent to go away the applicant had undertaken to meet his relocation costs. To speed up the process the applicant had approached the relevant authorities to have the respondent resettled elsewhere. However, the ministry's position was that the respondent himself had to take the initiative.

Once the property had been declared free from compulsory acquisition, the applicant gave respondent a notice to vacate. It issued out a summons for eviction when the respondent had refused to comply. In the declaration it was averred that since the property had been listed for compulsory acquisition by mistake, after the mistake had finally been rectified the respondent no longer had the right to remain in occupation.

Respondent's defence was that since he had been officially allocated the piece of land by government the applicant had no right to force him off the property until such time that he had been offered an alternative piece of land. Respondent relied strongly on the order of this court by HLATSHWAYO J. in July 2005 in HC 3106/05. In that case the respondent had filed an urgent application against the police and the Ministry of Lands, Agriculture and Rural Resettlement for the restoration to him of vacant occupation of the property. He had claimed that the police and the ministry officials had connived with the applicant to unlawfully evict him. The applicant had not been a party to that application. The application had been granted by consent. The relevant portion of the final order read as follows:

> "**It is ordered that**
>
> (a) The 1st, 2nd and 3rd Respondents are hereby ordered to restore vacant and undisturbed possession and occupation of Subdivision 1 of Teneriffe of Kinvarra in Zvimba to the Applicant upon sight of this order.
>
> (b) Should 1st, 2nd and 3rd Respondents fail to comply with (a) above, the Deputy Sheriff Harare with assistance of Zvimba Police, if need be, be and is hereby directed to restore vacant and undisturbed occupation of the farm to the Applicant."

Mr *Debwe*, for the respondent, submitted that the above order was still in force. He argued that the subsequent order in March 2012 which cancelled the notice of compulsory

acquisition and in which the respondent had not been cited as a party had not set aside that previous order.

The relevant portion of the subsequent order read as follows:

"1. The notice published in the Government Gazette on 18 January 2002 indicating the President's intention to acquire land held by the Applicant under Deed of Transfer 04012/95 in respect of certain piece of land situated in the district of Salisbury being the Remaining Extent of Teneriffe portion of Kinvarra measuring 246, 2617 ('the first Property') be and is hereby cancelled.

2. The notice published in the Government Gazette on 8th February 2002 indicating the President's intention to acquire land held by the Applicant under Deed of Transfer 04012/95 in respect of certain piece of land in the district of Salisbury being Swanwick of Teneriffe of Kinvarra and S/DB of Homefield measuring 243, 4000 hectares ('the second Property') be and is hereby cancelled.

3. Accordingly, the First Property and the Second Property be and are hereby released from compulsory acquisition and returned to the Applicant.

4. The Registrar of Deeds be and is hereby directed to cancel any and all endorsements made on the title deed."

The respondent's defence has no merit. There is nothing contradictory about the two orders of court above. The earlier order by HLATSHWAYO J had merely restored vacant possession of the property to the respondent after he had satisfied the court that his eviction had been unlawful. If he had been despoiled the obvious route for him was that order of spoliation. But that order had nothing to do with future lawful processes to evict him. The order did not make him immune for all time from lawful eviction.

It is also not a defence to the applicant's claim for the respondent to say that the government has an obligation to provide him with an alternative piece of land or that he has been on the applicant's property for more than a decade. His "grievance" against government, if any, should not be held against the applicant. For more than a decade the applicant had suffered under a government mistake. It had not rested until that mistake had been rectified. It had also undertaken to meet the respondent's costs of relocation. However, the respondent seems to have sat back and to have taken no initiative himself to be resettled elsewhere.

An owner of a property is entitled to the full enjoyment of that property unless by agreement or operation of the law there has been a diminution of that right. These rights include that of undisturbed possession.

Summary judgment is governed by Order 10 of the High Court of Zimbabwe Rules. A plaintiff who believes that despite the appearance to defend the defendant does not have a *bona fide* defence to the action can apply for summary judgment at any time before the holding of a pre-trial conference. The plaintiff or anyone who can swear positively to the facts has to verify the cause of action and the amount claimed. In terms of r 66 one way the defendant can avoid summary judgment being entered against him or her is by lodging sufficient security to the satisfaction of the registrar to satisfy any judgment that may be granted against him or her. The other way is to satisfy the court that he or she has a *bona fide* defence to the action. It is the extent to which the defendant has to satisfy the court that he or she has a *bona fide* defence to the action that is sometimes problematic.

The remedy of summary judgment is a drastic one. It is one that is not lightly granted: see *Roscoe v Stewart* 1937 CPD 138; *Shingadia v Shingadia* 1966 RLR 785; *Chrismar (Pvt) Ltd v Stutchbury & Anor* 1973 (4) RLR 123; *Jena v Nechipote* 1986 (1) ZLR 29 (SC); *Reid v Gore* 1987 (2) ZLR 134; *Joan Spencer Rex v Rhodian Investments (Pvt) Ltd* 1998 (2) ZLR (H); *Hales v Doverick Investments (Private) Limited* 1998 (2) ZLR 235 (H); *Dube v Medical Services International Ltd* 1998 (2) ZLR 280 (SC) and *Chindori-Chininga v National Council for Negro Women* 2001 (2) ZLR 305 (H).

Summary judgment is some kind of an exception to the *audi alteram partem* rule of natural justice. The remedy permits the premature closure of the doors of court against a defendant who would have evinced an intention to defend the plaintiff's claim. With summary judgment the defendant has no room to ventilate his or her defence fully.

However, with summary judgment the defendant is granted a wedge to force the doors of court to remain open for him. If such doors have been closed already the defendant has a key to unlock them. That wedge or key are those facts to be alleged by him or her which, if he or she succeeds in establishing them, would amount to a defence at the trial. The court does not examine or scrutinize this wedge or key scrupulously. If it is satisfied that the facts amount to a *prima facie* defence the court will keep open the doors of court for the defendant. Summary judgment will be refused. In *Xavier Francis Mbayiwa v Eastern Highlands Motel*

(Pvt) Ltd S-139-86 the Supreme Court, McNALLY JA, quoted with approval the judgment in *Maharaj v Barclays National bank Ltd* 1976 (1) SA 418, at p 426D, as follows[1]:

> "… 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."

In *Stationery Box (Private) Limited v Natcon (Private) Limited and Farai Ndemera* HH-64-10, MAKARAU JP, (as she then was), espoused the same principle as follows[2]:

> "The test to be applied in summary judgment applications is clear and settled on the authorities. The defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence. Obviously implied in this test but often overlooked by legal practitioners is that the defendant must raise a defence. His facts must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating as they may be and which he may very well be able to prove at the trial of the matter do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted."

In the *Hales v Doverick Investments* case above, the court said:

> "Where a Plaintiff applies for summary judgment against the Defendant and the Defendant raises a 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 … It is not sufficient for the Defendant to make vague and generalizations or to provide bald and sketchy facts."

In the *Jena v Nechipote* case above, GUBBAY CJ stated[3]:

> "All that defendant has to establish in order to succeed in having an application for summary judgment dismissed is that 'there is a mere possibility of his success', 'he has a plausible case', 'there is a triable issue', or 'there is a reasonable possibility that an injustice may be done if summary judgment is granted'. These tests have been laid down in many cases…"

What is set out above is the one side of the coin. The flip side is that summary judgment is a necessary remedy in a case where the plaintiff has an unassailable case against the defendant. A plaintiff must not be saddled all the way to trial with a bogus defence. If the defendant raises facts or issues which even if he or she succeeds in establishing them but nonetheless amount to no defence on the merits then the court will grant summary judgment.

[1] At p 4 of the cyclostyled judgment
[2] At p 3 of the cyclostyled judgment
[3] At p 30

In *Beresford Landplan (Private) Limited v Urquhart* 1975 (1) RLR 260 the court said of summary judgment[4]:

> "…. [it] is the principal means … by which unscrupulous litigants seeking only to delay a just claim by defending are frustrated, and it is of the utmost importance that its utility … should not be impaired."

Thus, in spite of it being a drastic or extra-ordinary remedy, the efficacy of summary judgment should not be impaired where clearly the defendant has no defence. It was put as follows in *Nedlaw Investments & Trust Corporation Limited v Zimbabwe Development Bank* S-5-2000[5]:

> "…the quintessence of this drastic remedy is that a Plaintiff, whose belief it 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 *Shingadia's* case above, it was stated that summary judgment should not be granted when there is a real difficulty on a matter of law but that however difficult that point of law might be, once the court is satisfied that the point is really unarguable then judgment should be granted.

In the present case I do not see what facts are in dispute or what point of law has been raised. The applicant has taken steps to lawfully evict the respondent from its property. The order of HLATSHWAYO J above cannot be used to block the eviction. The order was concerned with merely restoring the status *quo ante* after the respondent's rights of occupation had been terminated unprocedurally.

The respondent's occupation of the property had been predicated on the offer of resettlement by government. However, it had turned out that the offer had been based on a mistake. The mistake had eventually been corrected. With that the basis of the respondent's occupation of the property had fallen away. He could no longer continue to insist on his continued stay on the property. There is not a single issue for trial.

Mr *Debwe* submitted that if summary judgment was granted an injustice would be done to the respondent whose occupation of the property had been authorised by the government. However, such an injustice, if any, would not be one stemming from the enforcement by the applicant of its rights to its property. Whilst I express no opinion on the

[4] At p 265
[5] At p 6 of the cyclostyled judgment

respondent's perceived right to be relocated elsewhere, respondent is clearly barking up the wrong tree by holding on to applicant's property.

In the result the application for summary judgment is hereby granted. I make the following orders:

1. The respondent and all those claiming rights of occupation through him shall within thirty (30) days of the date of service of this order vacate the property known as certain piece of land situated in the district of Salisbury being Swanwick of Teneriffe of Kinvarra and Subdivision B of Homefield, measuring 243,400 hectares.
2. In the event that the respondent fails and/or neglects to comply with the above order then the Sheriff for Zimbabwe or his lawful deputy shall be authorised, directed and empowered to evict the respondent and all those claiming rights of occupation through him from the property aforesaid.
3. The respondent shall pay the costs of this application and of the main action.

Dube, Manikai & Hwacha, legal practitioners for applicant
Debwe & Partners, legal practitioners for respondent