MOREBLESSINGS MPOFU
and
LEO T. MPOFU
versus
F. A STEWART (PVT) LTD
and
JOSEPH STEWART
and
MINISTER OF LANDS AND
RURAL RESETTLEMENT, N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 17 MARCH 2017 AND 30 MARCH 2017

Opposed Application

L Mpofu for the applicants
J Tshuma for the 1st and 2nd respondents

MATHONSI J: In this summary judgment application the applicants, who are the proud holders of an offer letter issued in their favour by the Minister of Lands and Rural Resettlement on 3 December 2014, seek an order summarily evicting the first and second respondents from a piece of land known as Subdivision 22 of Insindi in Gwanda (the farm) on the pain of attorney and client costs.

In HC 371/16, the present applicants sued out a summons against the present respondents averring in their declaration that the first respondent is the former owner of the farm located in Gwanda District Matabeleland South which it still currently occupies along with the second respondent. They averred further that the farm was gazetted by the Government of Zimbabwe on 2 June 2000 for purposes of re-allocation to other prospective farmers. After making several unsuccessful applications to the Government for farming land, they were finally rewarded by being offered the farm on 3 December 2014, a farm which measures 228 hectares, under the Model A2 scheme in terms of an offer letter.

The applicants averred further that after accepting the offer, they demanded that the first and second respondents vacate the farm but they have resisted. The applicants started setting up structures and preparing for farming activities prompting the respondents to approach the magistrates court in Gwanda for a peace order. The applicants prayed for the grant of the eviction order aforesaid.

The first and second respondents entered appearance and filed a plea averring that they are in occupation of a portion of Insindi Ranch which has not been acquired by the Government of Zimbabwe. They have no knowledge of the piece of land described in the applicants' summons. Further, they denied that the Minister has lawful authority to offer land that has not been acquired. As they are in occupation of a portion of Insindi Ranch which is not subdivision 22 and has not been acquired they cannot be evicted as claimed by the applicants.

The applicants have made this application for summary judgment stating that the plea does not disclose a *bona fide* defence and that what is contested in the plea can be clarified through documentary evidence. In that regard they attached the offer letter dated 3 December 2014, the acceptance of the offer, a copy of the Zimbabwe Government Gazette dated 2 June 2000 showing that the farm known as Insindi Ranch was gazetted on that date and further documentation showing that an attempt was made to down size 6 farms in Matabeleland South Province including Insindi Ranch even before the farm was offered to the applicants. Having done that the applicants sought summary judgment.

It is remarkable that the founding affidavit does not comply with r64 (2) of the High Court Rules 1971 in terms of which the application is made. That subrule requires a court application for summary judgment to be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts "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." The affidavit does not meet that threshold as it does not verify the cause of action.

However I do not intend to decide the matter on such technicalities, and would therefore condone that failure to comply even without being asked to. This is because I am of the view that the merits of the matter have to be interrogated for the benefit of the parties. The first and second respondents have opposed the application. In doing so they have drawn attention to the fact that the Government of Zimbabwe had given notice of intention to acquire Insindi Ranch in

year 2000 acting in terms of the acquisition regime which subsisted at the time under the Land Acquisition Act [Chapter 20:10]. The respondents objected to the acquisition in accordance with the prevailing law at the time resulting in the Minister filing an application for a confirmation order in the Administrative Court under case number LA 125/00.

The litigation in that court was settled between the parties, an agreement was reached and endorsed by the court which reduced it to a Consent Court Order issued on 10 December 2002. It reads in relevant part:

"IT IS HEREBY ORDERED

1. ----
2. ----
3. ----
4. ----
5. ----
6. ----
7. ----
8. That in terms of section 7 of the Land Acquisition Act [Chapter 20:10], the acquisition by the applicant of A PORTION OF INSINDI RANCH east of the Bulawayo/Gwanda Road measuring 6000.0 hectares situate in the District of Gwanda be and is hereby confirmed. There shall be no order as to costs.
9. That the proceedings in terms of the Land Acquisition Act for the compulsory acquisition of the REMAINING PORTION OF INSINDI RANCH measuring 7420 hectares situate in the District of Gwanda, that is to say the portion of the said farm west of the Bulawayo /Gwanda Road are hereby withdrawn by the applicant in terms of its agreement with the respondent. There shall be no order as to costs.
10. The applicant shall at its own cost subdivide the farm INSINDI RANCH into two portions measuring 6000,90 hectares, which portion shall accrue to the state, and 7420 hectares which portion shall accrue to the 1st respondent herein."

According to the first and second respondents, armed with that agreement and the consent order, they have remained in occupation of the farm to the west of the road for 12 years until the two applicants came to disturb them in 2014. The Minister had no lawful authority to offer the farm to the applicants and they hold him bound by the terms of the agreement which was reduced to a consent order. They therefore have a *bona fide* defence against any action to dislodge them.

What I have to decide therefore is whether the applicants' claim is unassailable in the circumstances as to warrant the grant of summary judgment. *Mr Mpofu* for the applicants

submitted that the farm was gazetted in year 2000, it was incorporated in the Seventh Schedule of the former constitution of Zimbabwe by virtue of s16B of Constitutional Amendment No 17 and as such became state land. Accordingly, the acquiring authority was at liberty to offer it to the applicants by offer letter dated 3 December 2014. The applicants' title to the farm is therefore unassailable. In making that point *Mr Mpofu* relied on the authority, among others, of *Commercial Farmers Union* v *Minister of Lands & Others* 2010 (1) ZLR 546 (S) that the holder of an offer letter has the right of action to sue for the eviction of any illegal occupier of his or her land allocated to him or her in terms of the offer letter.

Mr Tshuma for the first and second respondents submitted on the other hand that there are triable issues in this matter and as such it is not a matter upon which the drastic remedy of summary judgment may be granted. The first respondent has been occupying the farm by virtue of an agreement with the Government of Zimbabwe which is in the form of a court order. After the agreement the farm was never acquired for resettlement. It could not be offered to the applicants. In addition, the identity of the farm offered to the applicants, despite the visit by officials from the Ministry of Lands, is disputed because as far as the first and second respondents know the farm was only subdivided into east and west by court order made in 2002. He relied on the authority of *Vukutu (Pvt) Ltd* v *Kwinje and Another* HH 364-16 in which MAFUSIRE J was confronted with a similar problem which he decided in favour of a farmer in the same position as the first and second respondents.

I shall return to that judgment later but for now let me express the view that summary judgment is a drastic and extra-ordinary remedy in the sense that a party who has expressed a willingness to defend an action is summarily denied the benefit of the *audi alteram partem* rule. It is a remedy which summarily denies a *mala fide* defendant the chance to waste the court's time and abuse the process of the court at the expense of a genuine litigant whose case is otherwise unarguable both in fact and in law. See *NRZ Contributory Pension Fund* v *Verigy Enterprises (Pvt) Ltd t/a Piccola Roma and Others* HB 13/17; *Bulawayo City Council* v *Dicks Auto Parts (Pvt) Ltd* HB 245/16.

For that reason it is granted to a plaintiff whose case is unassailable. It is only when all the proposed defences to the plaintiff's claim are clearly unarguable both in fact and in law that

this drastic remedy is available to the plaintiff. See *Chrisma* v *Stutchbury and Another* 1973 (1) RLR 277 (SR) 279.

On the other hand, to succeed in defeating a summary judgment application the respondent must disclose a defence and material facts upon which that defence is based with sufficient clarity and completeness so as to persuade the court that if proved at the trial such facts will constitute a defence to the claim. See *African Banking Corp of Zimbabwe Ltd and Another* v *PWC Motors (Pvt) Ltd and Others* 2013 (1) ZLR 376 (H) 380 D-E; *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) 239 A-B; *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) 458 F-H.

Looking at the present matter the first and second respondents have advanced the defence that they occupy the farm in terms of a court order of the Administrative court borne out of an agreement entered into with the Government of Zimbabwe represented by the acquiring authority. They hold the Government to that agreement. The flipside of that argument is that the promulgation of s16B of Constitutional Amendment No 17 in 2005 retrospectively nullified all agreements and court orders concerning farm land when it transferred ownership of all farms to the state. See *Mangenje* v *TBIC Investments (Pvt) Ltd and Others*; *Mangenje* v *Minister of Lands and Others* 2013 (2) ZLR 534 (H) 561 F, 562 A –B; *Mike Campbell (Pvt) Ltd* v *Minister of Lands and Another* 2008 (1) ZLR 17 (S).

I have already made reference to the judgment of MAFUSIRE J in *Vukutu (Pvt) Ltd, supra.* The relevance of that judgment is that it decided that Constitutional Amendment No 17 did not take away vested rights, rights which subsisted before it came into effect like the right of the first and second respondents in terms of the agreement concluded with the Government of Zimbabwe and/or the court order of the Administrative Court. In upholding the rights of a "former owner" as it were the learned judge also relied on the provisions of s291 of the current constitution which provides:

> "Subject to this constitution, any person who, immediately before the effective date, was using or occupying, or was entitled to use or occupy, any agricultural land by virtue of a lease or other agreement with the state continues to be entitled to use or occupy that land on or after the effective date, in accordance with the lease or other agreement."

In the present case the first respondent was in occupation of the farm in terms of an agreement with the state at the effective date of the constitution namely 22 August 2013. Therefore by operation of law it was entitled to continue to occupy the farm. The applicants have not placed before me any evidence to suggest that the farm was acquired by the state after the effective date for purposes of allocating it to the applicants. It would seem therefore that the first respondent is entitled to shelter under the protection afforded by s291.

Happily it is unnecessary for the resolution of this matter to decide all the legal implications arising from the effects of the Administrative Court Order and the provisions of s291 of the constitution. It is enough that they point to an arguable case for the first and second respondents. It is also arguable whether, in light of its commitment in the agreement concluded with the first respondent in 2002, the Government of Zimbabwe did not fetter its entitlement to allocate the same farm to the applicants. For those reasons, the first and second respondents have succeeded to defeat the summary judgment application as it cannot be said that all their proposed defences to the claim are clearly unarguable.

In the result, it is ordered that:

1) The summary judgment application is hereby dismissed.
2) The costs shall be in the main cause.

Malinga and Mpofu, applicants' legal practitioners
Webb, Low & Barry, 1st and 2nd respondents' legal practitioners