

HAYES CONSTRUCTION (PRIVATE) LIMITED
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 12 June and 10 August 2022

Summary Judgment

Mr *B Diza*, for the applicant
Mr *R Zinhema*, for the respondent

MHURI J: On 2 September 2021 applicant (plaintiff then) issued summons against the respondent (defendant then) claiming:

1. An order compelling respondent to execute an agreement of sale in favour of applicant for stand 19376 Southerton Township.
2. That in the event that respondent does not within seven (7) days of the granting of the order, execute the agreement, applicant shall be deemed the owner of the stand.
3. Costs of suit.

Respondent entered appearance to defend the action, the result of which applicant then applied for summary judgment on the basis that respondent has no defence to the claim and that it entered appearance to defend for the purpose of delaying the day of reckoning.

The background of the matter is captured in applicant's founding affidavit and in brief is as follows:

1. That on 17 October 2019 respondent's Council provisionally allocated stand 19376 Southerton Township for flats development to applicant.
2. The terms were that applicant pays for:
 - (i) ZWL\$10 000.00 application fee as an expression of interest.
 - (ii) ZWL\$8 000.00 administration fee within 7 days of the issuance of the letter.
 - (iii) A deposit towards land intrinsic price at a rate of ZWL\$250.00 per square metre within 14 days of the date of issue of the offer letter.

The provisional letter had a rider that failure to pay the stipulated amount within the prescribed time frame shall result in the offer being withdrawn and that other details of the condition of sale shall be provided in the memorandum of agreement to be entered into between the parties once full payment is made.

In compliance with the terms of the provisional offer, applicant made the payments. By a letter dated the 25th of September 2020 addressed to Machaya & Associates Legal Practitioners by the respondent's acting Director of Housing and Community Services, applicant was advised that following his compliance with all the conditions as set out in the provisional allocation letter he was to approach the Chamber Secretary Department for other detailed conditions of sale as provided for in the Memorandum of Agreement to be entered into between the applicant and the respondent.

On the 9th of November 2021, respondents' legal practitioners wrote to applicant's legal practitioners a letter to this effect:

"Pursuant to my undertaking to appraise you on the developments after our round table meeting on Wednesday the 3rd of November 2021. I have received instructions to request your indulgence one last time until Friday the 12th of November 2021 with the anticipation of bringing finality to the matter."

It was applicant's submission that because it complied with the terms of the provisional offer, respondent's acknowledgement of the same, respondent's efforts to settle the matter out of court and there being no issues raised by respondent, it was motivated to bring this application for summary judgment as there is no defence to the claim.

Respondent opposes the application for summary judgment on the basis that the relief being sought by applicant i.e. execution of the agreement is premature because respondent as a local authority has certain processes to follow before the agreement of sale is executed. These are:

- (i) survey of the land
- (ii) valuation of the stand
- (iii) advertisement of the value in case there are objections
- (iv) after publication and there is no challenge then execution of the agreement.

It was respondent's further submission that there is a triable issue that the thing to be sold is unknown and respondent should therefore be allowed to prove this at trial. The letters relied upon by applicant were a way of trying to expedite the processes required.

Further respondent raised the point that the relief being sought by applicant in the summons differs from the relief sought in the draft order namely that in paragraph 2 of the summons it is stated:

“... the plaintiff shall be deemed the owner of stand 19376 of Southerton Township, Harare.”

whereas in para 3 of the draft order it is stated:

“In the event that respondent does not comply with paragraph (2) above the sheriff for Zimbabwe shall execute the agreement in the place and stead of respondent.”

On this last point, applicant submitted that the draft order be amended and substituted with the prayer in the summons.

Rule 30 of the High Court Rule SI 202/2021 provides the procedure for summary judgment. In particular subrule (20) provides:

“A court application in terms of subrule (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 stating that in his or her belief there is no genuine and sincere defence to the action and that appearance to defend has been entered solely for purposes of delay.”

It has been stated times without number that the remedy of summary judgment is a drastic one afforded to a litigant who is of the belief that his case is unanswerable and the defendant has no *bona fide* defence to the claim and that the appearance to defend has been done for dilatory purposes.

- See
1. *Nedlaw Investments & Trust Corporation Limited v Zimbabwe Development Bank* SC 5/2000.
 2. *Mashezha v Prime Bank Limited* HH 55/2002

In the case of *Stationery Box (Pvt) Ltd v Natcon (Pvt) Ltd & Anor* HH 64-10 the position was clearly that:

“The test to be applied in summary judgment application is clear and settled. The onus resting on a defendant resisting summary judgment has been described as amongst the lightest that the rules of procedure cast on the litigants. He does not have to prove his defence. He must merely allege facts which, if he can succeed in establishing them at the trial, would entitle him to succeed in his defence. The defence so set up must, however, be plausible and *bona fide*....”

The facts alleged 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.
...”

The following are not in dispute, that:

1. Applicant was provisionally allocated stand 19376.
2. Applicant had to make certain payments in compliance with the terms of the provisional allocation *vis*, payment of:
 - An application fee
 - Administration fee
 - Deposit towards land intrinsic price.
3. Applicant paid the said sums of money.
4. Respondent in a letter acknowledged that applicant had complied with all the conditions set out in the provisional allocation letter.
5. In the said letter respondent advised applicant to approach the Chamber Secretary Department for the other detailed conditions of sale as provided for in the memorandum of agreement to be entered into between the parties.
6. No such memorandum of agreement was entered into hence the relief being sought.
7. In the provisional allocation letter, the last paragraph the point is made that other detailed conditions of sale shall be provided for in the Memorandum of Agreement to be entered into between the parties once full payment is made.

From the facts alluded to as common cause, I find that applicant has an unanswerable claim against respondent. Respondent has no *bona fide* defence and appearance to defend was entered for delay purposes. Upon full payment in compliance with the provisional allocation letter, a memorandum of agreement of the sale was to be entered into by the parties. The other conditions referred to are in the memorandum of agreement, to that end applicant cannot know of and fulfil those details without the agreement. The defence that because the applicant's payments were not made timeously resulting in the offer being immediately withdrawn is not *bona fide*. If the offer was immediately withdrawn, the respondent's letter of the 25th of September 2020 would have stated so and so would have the "without prejudice" letter of the 9th of November 2021.

Having found that applicant has established an unanswerable claim, it is ordered that:

1. Summary judgment be and is hereby granted.
2. Respondent executes an agreement of sale in favour of applicant in respect of stand 19376 Southerton Township, Harare within 45 (forty-five) days of the date of this order.
3. Respondent pays costs of suit.

Diza Munetsi Attorneys, applicant's legal practitioners
Gambe Law, respondent's legal practitioners