

GUTU RURAL DISRICT COUNCIL
versus
JAISON PARADZAI MUGAYO

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 23September 2021 & 31 December 2021

Opposed application

Mr W.T Davira for the applicant
Mr M. Mureri, for the respondent

WAMAMBO J: This is an application for summary judgement where applicant seeks the eviction of respondent from Stand No. 190, Council Houses, Redbricks Gutu and Gutu District Council Houses, Bhasera, Gutu

A closer examination of the applicants founding affidavit will reflect the basis upon which the application is made. The Chief Executive Officer of Gutu Rural District Council deposes as follows:

Applicant issued summons for the eviction of respondent from Stand No. 190 Council Houses, Redbricks Gutu and Gutu District Council Houses, Bhasera, Gutu.

Respondent was employed as head of department in the Housing department of Gutu Rural District Council. As part of his employment benefits he was offered Stand No. 190, Council Houses, Redbricks Gutu and Gutu District Council Houses, Bhasera, Gutu. On 19 October 2016

respondent was transferred to Bhasera sub office and offered applicants residential quota at Bhasera Service Centre as part of his employment benefits.

In 2017 respondent was discharged from employment after a disciplinary hearing was conducted. The decision to discharge respondent remains extant although efforts have been exerted by respondent to appeal against the decision.

The respondent continues to occupy both properties as mentioned above to the prejudice of applicant who cannot take occupation thereof or allocate the same dwellings to her employees.

The applicant asserts that the appearance to defend entered by respondent does not disclose any *bona fide* defence to her claim. Further that respondent has entered an appearance to defend just for delaying purposes.

Applicant avers that she is the sole owner of the two properties and that respondent occupied the said properties only because of the employment relationship that was then in existence. Now that the employment relationship has come to an end respondent has no lawful right of retention or any other right to remain in occupation at the said applicant's houses.

In oral argument *Mr Davira* for the applicant points out that respondents appears to rely on the fact that he has appealed against a decision of the Labour Court. The case of *Montclair Hotel and Casino v Farai Mukuhwa HH 501/12* is cited as a matter that douses the respondent argument.

In respondent's opposing affidavit he avers as follows:

The respondent was dismissed in 2017 and then lodged an appeal to the National Employment Council Exemption Committee on 20 March 2018. The Committee was supposed to give its ruling within 14 days but did not adhere to the time lines. Respondent then appealed to the Designated agent on 27 November 2018. Applicant filed summons for eviction of respondent at Gutu Magistrate Court. Respondent approached the Labour Court for an order stopping applicant from evicting respondent pending the appeal before the Designated Agent.

An order was granted under LC/H/ORD/262/19 to the effect that execution of the decision to dismiss respondent should be stayed pending the outcome of the appeal. Respondent then decided to remain in occupation of the accommodation provided by respondent pending the "outcome of the appeal. Applicant withdrew the summons for eviction against respondent at Gutu Magistrates court and filed summons to the High Court.

Respondent argues that the Labour Court order is to the effect that he should remain in occupation of the accommodation provided by applicant and further that this decision is still extant and has not been appealed against. In oral submissions *Mr Mureri* for the respondent abided and relied on papers filed of record and did not make further submissions.

It is relevant at this juncture to refer to some case law dealing with an application for summary judgement. In *Cargo Marketing International (Private) Limited v Dynamic Air Freight Deutschland SC 170/97* at page 9 KORSAN JA pronounced himself thus:-

"The court may only grant leave to defend provided there is a bona fide defence. Once the court arrives at the conclusion that the defence is not bona fide and that it is being put up for purposes of delay then summary judgement is apt. Beesford Land Plan (Pvt) Ltd v Urquhart 1975 (3) SA (R.AD) 619 at 624 A-D.

In Jera v Nechipote 1986 (1) ZLR (SC) GUBBAY JA (as he then was) lays out the requirements for summary required thus:- "

"All that a defendant has to establish in order to succeed in having an application for summary judgement 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 a injustice may be done if summary judgement is granted. Those tests have been laid down in many cases typical of which in this country are Davis v Terry 1957 (4) SA 98 (SR, Rex v Rhodian Investment Trust (Pvt) Ltd 1957 (4) SA 631 (SR)

Kassim Brothers (Pvt) Ltd v Kassim & Another 1964 (1) SA 651 (SR) Shingadia v Shingadia 1966 (3) SA 24 (SR) Webb v Shell Zimbabwe (Pvt) Ltd 1982 (1) ZLR 102. "

In the instant matter the following is clear. Respondent was an employee of applicant who was dismissed after proper legal processes were followed. The accommodation he occupies was granted to him specifically because he was an employee of the applicant. It should be noted that the properties are actually two one at Gutu and one at Bhasera. That he may be appealing against the decision to terminate his employment does not preclude his employer from retaining or availing the same properties to another employee.

MATHONSI J (as he then was) in *Mont Clair Hotel and Casino v Farai Mukuhwa HH 501/12* at page 3 said:

"It is the owner of the property which was given to the respondent by virtue of an employment contract which has now come to an end. Whether the respondent is challenging the termination or not is immaterial on employer is entitled to vindicate. The Supreme Court has confirmed a position long held by this court in respect of such matters see Zimbabwe Broadcasting Holdings v Gono 2010 (1) ZLR 8(H) at 9G, 10 A-C, Medical

Investments Ltd v Pedzisai 2010 (1) ZLR 111 (H, 114C, DHL International LTD V Madzikanda 2010 (1) ZLR 201 (H 204 B-D, Moyo v Gwandingwi N.O & Anor 2011 (2) ZLR 368 (H) 374 A PG Industries Zimbabwe (Ltd v Machawira 2012 (1) ZLR 552 (H, 556B William Bains & Co Holdings (Pvt) Ltd v Nyamukunda HH 309/13 Steelmakers Zimbabwe (Pvt) Ltd v Mandiyeyi HH 479/15."

Effectively respondent retains use of two separate properties owned by applicant. The fact that he is unhappy about the termination of his employment does not amount to a *bona fide* defence or fall under any of the requirements as more fully set out in *Jena v Nechipote* (supra).

In the circumstances I am satisfied that applicant has satisfied the requirements for the granting of summary judgement in the circumstances as set out above.

To that end I am satisfied that costs on a higher scale are justified as well. Since 2017 and despite lodging various applications respondent has been aware of the termination of his employment. He has held on to two of his former employer's properties in circumstances where his employment effectively ended.

I am in agreement with the following sentiments by MATHONSI J (as he then was) in *Mont Clair Hotel and Casino v Farai Mukuhwa HH 501/12* at page 3 and find them applicable to this case: -

"There must be consequences for pursuing this kind of defence. It is an ward for costs on a punitive scale as it is those which are the dose respondent badly needs for taking the court down the garden path. "

I hereby make an order as follows:

1. The application for summary judgement be and is hereby granted.
2. The respondent and all those claiming occupation through him be and are hereby evicted from Stand No.190, Council Houses, Redbricks Gutu and Gutu District Council Houses, Bhasera, Gutu within seven (7) days of being served with this order.
3. The respondent shall bear the costs of suit on an attorney client scale.

WAMAMBO J.....

Gundu, Dube & Pamacheche applicant's legal practitioners
Matutu & Mureri, respondent's legal practitioners