

HH 54-2011
HC 4956/08
HC 6966/08
HC 7043/08
HC 7117/08
HC 6967/08
HC 2250/09

ASHANTI GOLDFIELDS ZIMBABWE LIMITED
t/a FREDA REBECCA MINE
versus
SHINGIRAI MATIMURA
and
DUMIZWENI SIBANDA
and
RAYMOND FUNGAYI TENGWA
and
PRIMROSE NHAMBURA
and
FRANK MUCHENGWA
and
SIMBISAI KAHUTE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 17 August 2010 and 23 February 2011

Opposed Court Application

T. Magwaliba, for the plaintiff
G.C. Manyurureni, for the defendants

GOWORA J: The plaintiff has sued the defendants for eviction under separate case numbers. The defendants filed their respective pleas and subsequent to their having entered appearance to defend the plaintiff has filed individual applications for summary judgment against all of the defendants. The applications are vigorously defended. At the instance of the parties the matters have been consolidated as the basic facts surrounding the dispute and the issues are identical. The facts surrounding the applications are as follows.

The first defendant is in occupation of an immovable property called 1433 Muhacha Drive, Chiwaridzo Township Bindura. The second defendant is in occupation of an immovable known as Stand 1439 Chiwaridzo Township Bindura. The third defendant is in occupation of an immovable known as Stand 484 Oval Road Bindura. The fourth defendant is in occupation of an immovable property known as 1278 Mukuyu Road Chiwaridzo Township Bindura. The fifth defendant is in occupation of an immovable property known as 1606 Chiwaridzo

2

HH 54-2011

HC 4956/08

HC 6966/08

HC 7043/08

HC 7117/08

HC 6967/08

HC 2250/09

Township Bindura and the sixth defendant is in occupation of 1491 Mushamba Road Chiwaridzo Township Bindura.

All the defendants are former employees of the plaintiff. In 2003 the Board of Directors of the plaintiff made a resolution to dispose of the properties that the employees were occupying. Subsequent to this resolution a contract was signed between the representatives of the management of the plaintiff and representatives of the employees called the Housing Committee. The document is dated 1st December 2003 and is in the following terms:

MEMORANDUM OF AGREEMENT
BETWEEN

Ashanti Goldfields Management

And

Employees

Ashanti Goldfields Zimbabwe agrees to dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low Density to its employees who are sitting tenants effective 01 December 2003. Find the agreed prices attached.

For and on behalf of Ashanti Goldfields Zimbabwe

Signed by management representatives

For and on behalf of the employees

Signed by the employees representatives

Those employees who wished to participate in the scheme signed lease agreements with the plaintiff, which agreements are identical in the operational terms with the exception of the description of the property, the rent payable and the occupant of the stand in question. The plaintiff has claimed that the defendants have defaulted in paying rentals for the properties

each of them is occupying and that it is therefore entitled to an order for their eviction therefrom. The defendants, on the other hand contend that they are not tenants having purchased the properties in terms of the so-called lease agreements and that the plaintiff is not entitled to an order for their eviction.

The substance of the defence proffered by the defendants in their individual pleas is as follows:

“The so-called agreement of lease was never meant to operate as a lease. It was a vehicle through which payment of the purchase price in respect of the said property was to be made. It was meant to give practical effect to the agreement of sale entered into between the plaintiff and the defendant in this case. The plaintiff has since sold the property in question to the defendant herein although it is yet to register to transfer its rights, title and interest in the said property in favour of the defendant. The terms of the so-called lease were never meant to be implemented in the spirit of a lease agreement.”

The first defendant has alleged that his occupation of the immovable property is in terms of an agreement of sale concluded with the plaintiff. He further alleges that he has paid full value for it and has attached a copy of his payslip and a copy of a schedule generated by the plaintiff headed ‘Housing Fund’. The first document indicates that on 25 January 2005 an amount of Z\$20 000 was deducted from his salary or wages under the heading rent to buy. The same document has underneath the income and deductions for the same month a portion headed Statistical data. An amount of Z\$960 000 is reflected as ‘balance rent to buy’. Turning to the other document, captioned Housing Fund, the portion referring to the first defendant shows that an amount of Z\$ 1427.00 was deducted from his salary or wages on 6 July 2005 under the caption ‘rent to buy’.

Turning to the second defendant, his defence to the application is that he has paid full value for the property in question in terms of an agreement concluded between the parties. He has attached to his affidavit a copy of a schedule showing that on nineteen different occasions from 28 February 2004 to 30 September 2005 various amounts were deducted from his salary or wages under the caption rent to buy.

Whilst the first two defendants have attached ‘proof’ of payment of what they say is the purchase price to their documents, the third defendant was content with merely stating that

HH 54-2011
HC 4956/08
HC 6966/08
HC 7043/08
HC 7117/08
HC 6967/08
HC 2250/09

he had also purchased the property from the plaintiff and it was not entitled to eject him from the same.

The fourth defendant has also said that she paid full value for the house that plaintiff is seeking to evict her from. She has produced with her opposing papers a receipt issued by the plaintiff on 21 June 2004 for an amount of Six Million Zimbabwe dollars and a second one issued on 31 January 2005 for the sum of One Million Eight Hundred Thousand Dollars.

In respect of the fifth defendant, it is clear on the papers that the defendant's deceased wife was the former employee of the plaintiff. The defendant's wife died on 19 August 2008, which demise predated the issue of the summons against the defendant herein. It seems to me that once the defendant raised the issue of the property having been purchased by his late wife, the plaintiff should not have proceeded with an application for summary judgment. It is not competent for this court to deal with the matter in the absence of an executor who would advance the basis of the defence against the eviction. In my view unless cited as an executor to his late wife, the fifth defendant cannot really mount a defence as any averments or allegations by him would amount to hearsay unless he did so in the capacity of executor of the deceased estate. The defendant has however attached to his opposing papers documents which suggest that there was an agreement wherein payments were made monthly and that as at 25 February 2004 the balance owing on the alleged agreement of rent to buy was Z\$1 180 000. The balance as at 24 May of the same year is reflected as Z\$1 120 000.

The case for the sixth defendant is also on the basis that he alleges that he has paid full value for the immovable property in question. In proof that he has paid value for the property he has attached a copy of the payslip issued by the plaintiff on 24 January 2005 showing an amount of Z\$20 000 being deducted from his wages as rent to buy. The same payslip reflects an amount of Z\$960 000 as owing for rent to buy. The defendant has also attached a copy of a receipt issued out to him by the plaintiff showing an amount of Z\$1 000 000.00 as having been paid on 1 July 2005 for **“payment of house”**.

The plaintiff contends that this court has to determine whether or not the parties herein entered into an agreement of sale in respect of the houses in question and whether or not the respondents are entitled to an order for the transfer of the stands into their names and lastly

whether or not the plaintiff has any grounds for the ejection of the defendants from the houses they are occupying. It seems to me that only the last issue has been properly captured by the legal practitioners as being before me for adjudication. The issues that arise from the declaration and the pleas are for determination by the court which hears the trial. At the stage of the summary judgment it is enough for the court to decide if the defendant has raised a *prima facie* defence to escape summary judgment. I am not enjoined at this stage of the proceedings to make a decision as to whether or not the contract executed by the parties is a lease agreement or an agreement for the sale to the employees of the properties they are occupying. I am in fact pre-empting the trial. There would be nothing for that court to adjudicate on.

The plaintiff has decided to approach this court for order for summary judgment against all the defendants. In arguing for an order for summary judgment the plaintiff has contended that the Supreme Court in the case of *Ashanti Goldfields Zimbabwe Ltd v Kovi* SC 7/09 has already determined that the lease signed by the plaintiff and each of the employees does not constitute an agreement for the sale of the houses as contended by the defendants. It is correct as submitted by Mr *Magwaliba* that in the *Kovi*'s case the court found that what had been agreed between the parties was an agreement for the lease of the house and that there was nothing to show that in fact the respondent before them, *Kovi*, had exercised the option to purchase the property as provided for in the agreement. The court also found that there was nothing to show that he had paid for the purchase price and found that the lump sum payments made were arrear rentals.

The defendants herein have not disputed the court's findings in *Kovi*'s case. They have however sought to distinguish that authority from their own cases. Firstly they argue that the facts in *Kovi*'s case were materially different to their own. They point to the fact that they were in fact paying monthly rentals which were reflected on their payslips as rent to buy payments. They have also produced to the court minutes of board meetings held by the plaintiff's board of directors prior to the agreements having been concluded. On 8 May 2003 the minutes record that the process of the sale of the residential properties was progressing well and that the plaintiff's finance director and a workers' representative had gone to consult

HH 54-2011
HC 4956/08
HC 6966/08
HC 7043/08
HC 7117/08
HC 6967/08
HC 2250/09

a legal practitioner on how to resolve the outstanding issues. Again on 24 August 2003 the minutes record that there was a lot of progress on the sale of the residential properties to the employees. The houses had been re-evaluated by one Kwaku-Akosa-Bempah when he visited the mine in the second quarter of 2003. It was further recorded that the finance director and a workers' representative had been to the lawyer with the final draft and that the lawyer's comments would be discussed in a subsequent meeting. Finally on 16 December 2003 it was minuted that there had been a lot of progress on the sale of the residential properties and that management had approved and concluded the sale. The employees were reportedly filling in the contract forms.

Each of the defendants has annexed to the opposing affidavit the agreement signed by the plaintiff and the workers' representative. To this document is attached a schedule with the names of the employees the stand number of the house in question its initial value, the revalued price and the monthly repayment. Each of the parties has annexed a copy of the lease agreement to its papers. I note that there is an annexure A which forms part of the agreement. It reads as follows:

“The value of the property will be revalued each time the employee is awarded the annual salary increment. The outstanding balance as at the effective date of the increment is what is revalued.

The revaluation will be calculated as follows;

50% of the salary increment (%) multiplied by the outstanding balance (as at that date).

The revalued outstanding balance will then be divided by the remaining period to get the monthly payment”.

It is trite that in opposing an application for summary judgment a defendant must show that he has a *prima facie* defence to the plaintiff's claim. The test to be applied in determining what constitutes a *prima facie* defence was clearly set out by MURRAY CJ in *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723; 1957 (4) SA 631 (SR) in which is stated that the defendant only needs to allege facts, which if he can succeed in establishing at the trial would entitle him to succeed in his defence at the trial. It is not necessary therefore that the defendant make out a case for the probable success of his defence at this stage. The onus on him at this stage is much lighter than would be required of him at the trial stage.

HH 54-2011
 HC 4956/08
 HC 6966/08
 HC 7043/08
 HC 7117/08
 HC 6967/08
 HC 2250/09

In *Jena v Nechipote* 1986 (1) ZLR 29 (S) GUBBAY JA (as he then was) stated the onus facing the defendant facing an application for summary judgment in the following terms:

“All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that ‘there is a mere possibility of 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’.

In determining whether or not summary judgment should then be granted in respect of all the defendants I am guided by requirements that have been set by the authorities which entitle a defendant to escape an order for summary judgment sought against him. I think that based on the documents submitted by the defendants it appears that the parties may well have gone beyond a simple lease agreement in respect of the residences that the employees were occupying. In *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR (H) MALABA J (as he was then) in considering the burden of proof that rests on a defendant in a summary judgment had this to say:

“The defendant’s affidavit should not only disclose the nature of the defence relied upon to resist the plaintiff’s claim for ejection, but must set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing. In *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S-139-86 at pp4-5 of the cyclostyled judgment MCNALLY JA referred to the degree of particularity and completeness which the facts averred by the defendant in its affidavit filed in opposition to an application for summary judgment must achieve as being that:

‘...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 (*Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 426D)

... the statement of material facts [must] be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff’s claim.....if the defence is averred in such a manner which appears in all the circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirements of bona fides (*Breitenbach v Fiat SA* (Edms) Bpk 1976 (2) SA 226 at 228D-E)

...he must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague

HH 54-2011
HC 4956/08
HC 6966/08
HC 7043/08
HC 7117/08
HC 6967/08
HC 2250/09

generalities and conclusory allegations not substantiated by solid facts (*District Bank Ltd v Hoosain & Ors* 1984 (4) SA 544 at 547G-H).”

What is required therefore of a defendant is that he place before the court such facts as would show a prima facie defence to the application for summary judgment. The facts must be sufficiently detailed to the extent that the court hearing the application can be satisfied that the defence being proffered is a plausible one. The affidavit must not just contain facts that he seeks to rely upon, the facts themselves must be such that they reveal a defence that can be sustained at trial. There is need therefore for the opposing affidavit to go beyond what is contained in the plea. In addition the averments in the affidavit must themselves lead to a plausible defence or be such that the court hearing the application concludes that an injustice is likely to occur if summary judgment were to be granted in favour of the plaintiff. In effect the defendant has to allege facts which convince the court that there are triable issues between the parties and an order for summary judgment would result in an injustice to one if not both parties. All the defendants have alleged the necessary facts. All of them with the exception of the third defendant, have annexed to their opposing papers receipts showing payments of amounts other than rentals. He, like the others has alleged that he purchased the property he is in occupation of. Despite this I cannot say that his affidavit falls short of the requirement that a defendant allege facts which if proved at the trial may result in him defeating the claim by the plaintiff. See *Jena v Nechipote (supra)*. At p 30F-G GUBBAY JA said:

“Although the relevant allegations in the defendant’s affidavit are somewhat bald-particulars should have been given of when, where and in what amounts, the debt was repaid-I am nevertheless satisfied that, upon an application of any of the tests I have referred to, the defendant’s affidavit reveals a prima facie defence. Consequently summary judgment ought not to have been granted.”

The submissions on behalf of the plaintiff are that annexure C which is the agreement signed by the plaintiff’s representatives and the employees’ representative was designedly incomplete and partial and that it lacked the usual clauses associated with an agreement of sale in commercial practice and that it would not be reasonable to expect a corporation in the position of the applicant to have sold in excess of three hundred houses in such a perfunctory

document. It is further argued that the document does not provide for the payment of the purchase price or the time when it should be paid.

Each of the defendants herein filed a plea before the plaintiff embarked on the application for summary judgment for the eviction of the same from the immovable properties. Each of the defendants pleaded that not only had they concluded agreements with the plaintiff in terms of which they purchased the properties but that they had paid in full for the properties in question. Each went on to allege that the lease agreement was a vehicle through which the sale of the properties could be facilitated. The plaintiff clearly in applying for summary judgment should have anticipated that the defendants would allege payment in respect of the properties and that the receipts issued to them reflecting payments as being for the purchases of these houses would be produced. The plaintiff did not see it fit to address this aspect of the dispute contenting itself with the submission that the Supreme Court had already ruled that the memorandum did not constitute an agreement of sale. The plaintiff has not addressed itself to the import of the statements from the board of directors in three meetings where reference is made to progress having been made in selling houses to the employees. The plaintiff has not sought to explain the receipt by its housing fund of payments from the employees for the purchase of houses. The plaintiff has not explained to the court the annexure to the lease agreement which provides for the re-evaluation of the purchase price in the event of the tenant who is an employee is awarded an annual increase in his or her salary.

It is not for me to decide at this stage whether in fact what the parties concluded was a lease as suggested by the plaintiff or whether the lease agreement was in fact a vehicle devised by the parties to facilitate the purchase and payment by the employees of the houses they were occupying. That is a task I believe for the trial court. For my part I am restricted to determining whether on the papers before me the defendants have established a prima facie defence. The lease agreements were all signed in early December 2003 and when the board met on 16 December 2003 it was minuted that the management had approved and concluded the sale and that the employees were 'filling in the contract forms'. The defendants in the pleas filed by them alleged that the plaintiff had authorised anticipation of the payment of the purchase prices. Indeed there are receipts for amounts reflected as purchase prices which go

10
HH 54-2011
HC 4956/08
HC 6966/08
HC 7043/08
HC 7117/08
HC 6967/08
HC 2250/09

way beyond the stipulated rentals that the plaintiff insists were the only payments due under the lease agreements. There are references in the payslips to balances due on 'rent to buy'. All these factors in my view go towards the establishment of a prima facie defence on the part of the defendants to the claim for summary judgment.

In the premises the defendants have discharged the onus upon them and the applications for summary judgment cannot succeed.

Each of the parties has asked for costs. The plaintiff had prayed for an order for punitive costs on the basis of the judgment of Kovi on the basis that these proceedings were an abuse of court process. I do not agree as the facts in Kovi's case were distinguishable from the present set of facts. It is also not clear to what extent Kovi went in an effort to prove the agreement of sale. As far as the defendants are concerned the prayer by them was for an order for costs on the ordinary scale and I will order accordingly.

In the premises the applications are without merits and the applications against all the defendants are therefore dismissed with costs on the ordinary scale.

Magwaliba and Kwirira, legal practitioners for the plaintiff
Manyurureni and Co, legal practitioners for the defendants