

1. NATIONAL SOCIAL SECURITY AUTHORITY
versus
N. SVOVA AND 17 ORS
2. NATIONAL SOCIAL SECURITY AUTHORITY
versus
R. MAKASI AND 11 ORS
3. NATIONAL SOCIAL SECURITY AUTHORITY
versus
P. MUDYIWA AND 7 ORS
4. NATIONAL SOCIAL SECURITY AUTHORITY
versus
W. MUGOBOGOBO AND 10 ORS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 18, 25 and 4 September 2013

T. Mazonde, for the applicant
T. Mpofu, for the respondents

Opposed Application

MATHONSI J: When these matters first came before me on 18 July 2013, Mr *Mpofu* for the respondents sought a postponement to enable the respondents to attend to a host of house-keeping issues which were then outstanding. In particular, the respondents desired to submit bonds of security in terms of r 66 (1) of the High Court of Zimbabwe Rules, 1971 in order to meet the summary judgment applications. Although the application was strongly opposed by Mr *Mazonde* who appeared for the applicant, I granted the application as it was apparent that Mr *Mpofu* was not ready to argue the matter and the issue of security would have disposed of the applications. I postponed the matter to 25 July 2013 for that purpose.

On that date, Mr *Mpofu* then made another application for a postponement this time to enable the respondents to prosecute a chamber application for consolidation of these 4 matters with yet another related matter, HC 673/09. The application had been brought to my attention, albeit without the court record and not by the registrar of this court but by

respondent's counsel instructing Mr *Mpofu*, late on 24 July 2013. I must say that the application in question has nothing to do with these matters which stand alone and could not detain me in dealing with those matters that had already been placed before me.

Mr *Mpofu* also sought to have the matter deferred to allow the respondents to lodge an application for the upliftment of the bar operating against the respondents by reasons of failure to file heads of argument in all the 4 matters. He submitted that the application would be filed later that day. It became apparent that that the respondents were buying time as it should have been apparent to them that there was a bar requiring upliftment which should have been attended to. The applicant cannot be prejudiced because of the dilatoriness of the respondents. I refused to postpone the matters and in terms of r 238 (2b) proceeded to deal with the applications on the merits.

I must point out for completeness that the respondents have failed to find security to the satisfaction of the registrar in terms r 66 (1) as notified and Mr *Mpofu* conceded that fact. What they have done is to file what they have titled "bond(s) of security in terms of r66 (1)(a)" signed by their legal practitioners. In terms of r 66 (1) upon the hearing of a summary judgment application under r 64, the defendant has 2 options namely to give security "to the satisfaction of the registrar" to satisfy any judgment which may be given against him in the action; or with the court's leave, by oral evidence, that he has a good *prima facie* defence to the action.

Clearly therefore the security bonds filed by the respondents did not satisfy the requirements of r 66 (1). This is simply because the satisfaction of the registrar was not secured. For that reason the respondents could not be given leave to defend in terms of r 69. I therefore proceeded on the merits of the matter to determine whether the respondents have shown a good *prima facie* defence to the actions.

The background is that the applicant is the owner of 4 blocks of flats situated on stand 13301 Salisbury Township Harare known as Monaco occupied by 18 residents, Cannes with 12 residents, St Maxime with 8 residents and Juan Les Pins which has 10 residents. The applicant instituted 4 sets of summons action against the occupants of the blocks of flats seeking their eviction namely HC 674/09 for Monaco, HC 675/09 for Cannes, HC 856/09 for St Maxime and HC 857/09 in respect of Juan Les Pins.

In its identical declarations, the applicant averred that the occupants had taken occupation originally by virtue of lease agreements which expired before year 2000. Thereafter, it had granted the tenants an option to purchase the units which they occupied

which option they had exercised, but failed to pay the purchase price in terms of the option as a result of which their right to purchase lapsed. The occupants having refused to vacate the flats despite demand, the applicant sought an order for their ejection, holding over damages and costs of suit.

When the occupants, who are the respondents in these matters entered appearance and filed identical pleas to the claims, the applicant filed these summary judgment applications in which it sought to defer the claims for holding over damages electing to pursue only the ejection of the respondents.

By order of this court issued on 3 October 2012, per ZHOU J, in HC 8831/12 the four matters were consolidated to be determined at a single hearing. It is on that basis that the matters were placed before me and that only one judgment is being issued.

In my view, these matters resolve themselves on the facts which are common cause. Despite the respondents' bizarre averment in their pleas that they paid \$24 million (Zimbabwean Currency), as the purchase price for the blocks of flats, it is common cause now that they did not pay a single penny towards the purchase price and they have belatedly offered to pay the applicant a sum of \$650 000-00 as purchase price, which offer the applicant has rejected insisting that the flats are no longer for sale.

It is common cause that the lease agreements under which the respondents moved into the flats lapsed in year 2000 when they were given and took an option to purchase the flats in question. They are therefore occupying the flats not by virtue of any lease agreement but because they lay a claim to the flats in terms of the purported sale agreement allegedly entered into.

It is also common cause that the respondents, through their residents association, approached this court seeking an order for specific performance in HC 4633/05. The application was dismissed by judgment of this court delivered on 3 July 2007, per OMERJEE J, on the basis that the respondents had breached the sale agreement by failing to make payment of the purchase price within the time given namely 31 July 2000, and as such the applicant "was entitled to unilaterally cancel the agreement or ignore it altogether."

The respondents appealed against the judgment of this court to the Supreme Court which, on 22 October 2010 handed down judgment in *St Tropez Residents Association v National Social Security Authority & Anor* SC 19/10 upholding the judgment of this court. The Supreme Court ruled that the applicant had not waived its right to cancel the agreement

when the respondent failed to pay the purchase price by 31 July 2000 and that they were not entitled to specific performance.

With the rights of the parties having been determined by the Supreme Court, the applicant has brought these summary judgment applications on the basis that the respondents have not a *bona fide* defence to the claim for eviction.

Summary judgment is available to a plaintiff whose belief it is that his claim is unassailable and therefore should not be subjected to the delays attendant to a trial. While it is an extra-ordinary remedy which is very stringent in effect as it closes the door to a defendant to defend the claim, it is available to a party whose claim is so unanswerable that it should be saved the agony of a trial: *Ashanti Gold Field Zimbabwe t/a Rebecca Mine v Pfidze* HH 347/12 at p 3.

In order to defeat a summary judgment application a defendant 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: *Hales v Dollerick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) 239 A-B; *African Banking Corporation of Zimbabwe Ltd t/a Banc ABC v PWC Motors (Pvt) Ltd & Ors* HH 123/13.

Not every defence raised by a defendant will succeed in defeating a claim for summary judgment. It must be a *bona fide* defence, a plausible case. If it is averred in a manner which is needlessly bald, vague and sketchy, it will constitute material to be considered by the court in relation to the *bona fides* of that defence; *Kingstons Ltd v L.D. Ineson (Pvt) Ltd* 2006 (I) ZLR 451 (S) 458 F-H; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) 228 D-E.

In *casu*, the respondents have argued that summary judgment should not be granted on the basis of *Ad Lis Alibi Pendenis* as an application was made by the applicant for the striking out of their pleas as being bad at law which application was argued before GOWORA J (as she then was) but judgment has not been handed down.

In my view that argument cannot defeat a summary judgment application. As I have already stated, summary judgment is available to a litigant whose claim is unanswerable and who should not be delayed by a trial for that reason. The attack on the respondent's plea was in pursuance of what the applicant perceived was an unassailable claim. Why the judgment has not been handed down even as GOWORA J moved to the Supreme Court almost 2 years ago, is unknown. Since then, the Supreme Court has determined the respective rights of the

parties, thereby entitling the applicant to make an approach to this court for summary judgment.

In my view, it matters not that an interlocutory application had been made which would not have resolved the matter to finality anywhere. Upholding the argument based on *ad lis alibi pendenis* in the circumstances of this matter would defeat the very purpose of the relief of summary judgment premised as it is, on the time honoured principle that unscrupulous litigants bent on delaying just claims should be suppressed at all costs.

The respondents also submitted that they have made a counter claim in which they seek an order directing the applicant to transfer the flats to them on the basis that they purchased them for \$24 million, (Zimbabwean currency) and as such they are entitled to take transfer. In *Greenland v Zichire* HH 93/13, I bemoaned the unacceptable and detestful habit of litigants to trifle with courts of law which is fast developing in this jurisdiction and is regrettable indeed.

Just how the respondents hope to sustain the counter claim they have made is an unfathomable mystery. These are the same respondents who are offering to pay the applicant \$650 000-00 as purchase price for the flats because it is common cause that they did not pay anything towards the purchase price. They then have the temerity, in the same breath to submit a counter claim alleging having paid \$24 million as purchase price. This trifling with the court must simply stop. It is the kind of kindergarten behaviour which should find no place in our courts and must be suppressed with an order for punitive costs as a seal of the court's disapproval of such abuse of court process.

The respondents have also sought to argue that the Supreme Court did not determine the rights of the parties and that they are still in with a chance to take another crack at goal as it were. I do not agree. What the Supreme Court did was to settle the dispute once and for all. It made it clear that the respondents have no right over the properties arising out of their option to purchase because they did not effect payment of the purchase price by 31 July 2000.

What this means is that the respondents are left with nothing. They do not have a sale agreement to enforce. They do not have a lease agreement in terms of which they can remain in occupation. They can only remain in occupation by the grace of the applicant, which grace the applicant has withheld and is instead seeking their ejection. I am satisfied that the applicant's claim for ejection is unassailable.

The applicant has applied that the issue of arrear rentals and holding over damages be referred to trial in terms of r 73 of the High Court of Zimbabwe, Rules, 1971. I am of the

view that it is appropriate to refer those issues to trial and enter summary judgment on ejectment only.

The applicant sought an order for costs *de boniis propriis* against the legal practice of *Venturas & Samukange* as they should have known that the respondents do not have a defence but proceeded that notwithstanding to file what the applicant has called “a bogus defence.” I have not acceded to that application because it would appear that *Venturas & Samukange*, underwent a damascane experience after filing opposition to the applications. They renounced agency and virtually “absconded” leaving the respondents to their devices. I agree however that this is an appropriate case for costs to be awarded on a punitive scale as I have already stated.

In the result, I make the following order; that

1. In case No HC 674/09 summary judgment be and is hereby entered for the applicant against the respondents for eviction only.

2. Within 48 hours of the date of this order the respondents and all those claiming occupation through them, shall vacate such of the flats or apartments or rooms or premises at Monaco, St Tropez Apartments Block, Samora Machel Avenue East, Eastlea Harare failing which the sheriff for Zimbabwe or his lawful deputy duly assisted by the Zimbabwe republic Police if need be, is directed, authorised and empowered to evict the respondents and all those claiming occupation through them from the premises aforesaid and as specified below, give vacant possession to the applicant;

2.1 N. Svova	1 st respondent	7 Monaco
2.2 E. Madzima & G.Madzima	2 nd respondents	7A Monaco
2.3 M. Makoni	3 rd respondent	3 Monaco
2.4 C. Chidziva	4 th respondent	8A Monaco
2.5 M. Manyika	5 th respondent	9 Monaco
2.6 N.S. Barnabas	6 th respondent	9A Monaco

2.7 S. Maredza & P Maredza	7 th respondent	10 Monaco
2.8 L. Ushumba	8 th respondent	10A Monaco
2.9 C.R. Muzenda	9 th respondent	11 Monaco
2.10 F. Mlotswa	10 th respondent	11A Monaco
2.11 N. Karimahanga & R Karimahanga	11 th respondent	14 Monaco
2.12 P. Chabuka	12 th respondent	14A Monaco
2.13 L. Marumbwa	13 th respondent	15 Monaco
2.14 P. C Hama	14 th respondent	15A Monaco
2.15 B & E Mpofu	15 th respondent	12 Monaco
2.16 T. Mguni	16 th respondent	12A Monaco
2.17 C. Deka	17 th respondent	13 Monaco
2.18 C. Chivaura	18 th respondent	13A Monaco

3. The applicant's claim for holding over damages be and is hereby referred to trial in terms of Order 10 Rule 73 of the rules of this Honourable Court.

4. The respondents shall pay the costs of this application on the scale of legal practitioner and client jointly and severally the one paying the others to be absolved.

5. In case No HC 675/09 summary judgment be and is hereby entered for the applicant against the respondents for eviction only.

5.1 Within forty eight [48] hours of the date of this order the respondents, and all those claiming occupation through them, shall vacate such of the flats or apartments or rooms or premises at Cannes, St Tropez Apartments Block, Samora Machel Avenue East, Eastlea, Harare failing which the Sheriff for Zimbabwe, or his lawful deputy duly assisted by the Zimbabwe Republic Police if need be, shall be entitled, directed, authorised and empowered to evict the respondents, and all those claiming

occupation through them, from the premises aforesaid and as specified below give vacant possession of the same to the plaintiff:

5.2 R. Makasi	First Respondent	1 Cannes
5.3 S. Hlatshwayo	Second Respondent	1 A Cannes
5.4 S. Sibanda	Third Respondent	2 Cannes
5.5 R. Mashave	Fourth Respondent	2A Cannes
5.6 B. Duri	Fifth Respondent	3 Cannes
5.7 W. Zhakata	Sixth Respondent	3A Cannes
5.8 E. Makunda	Seventh Respondent	4 Cannes
5.9 W. Grabowski	Eighth Respondent	4A Cannes
5.10 D. Mudambanuki & S. Mudambanuki	Ninth Respondents	5 Cannes
5.11 L. Cheuka	Tenth Respondent	5A Cannes
5.12 N. Chikwinya	Eleventh Respondent	6 Cannes
5.13 J. Magarangoma	Twelfth Respondent	6A Cannes

6. The applicant's claim for holding over damages be and is hereby referred to trial in terms of order 10 rule 73 of the Rules of this Honourable court.

7. The respondents shall pay the costs of this application on the scale of legal practitioner and client jointly and severally, the one paying the others to be absolved.

8. In case No HC 856/09 summary judgment be and is hereby entered for the applicant against the respondents for eviction only.

8.1 Within forty eight [48] hours of the date of this order the respondents, and all those claiming occupation through them, shall vacate such of the flats or apartments or rooms or premises at St Maxime, St Tropez apartments Block, Samora Machel Avenue East, Eastlea, Harare failing which the Sheriff for Zimbabwe, or his lawful deputy duly assisted by the Zimbabwe Republic Police if need be, shall be entitled, directed, authorised and empowered to evict the respondents, and all those claiming occupation through them, from the premises aforesaid and as specified below give vacant possession of the same to the plaintiff:

8.2.P. Mudyiwa & T. Mudyiwa	First Respondent	22 St Maxime
8.3 I. Zenda	Second Respondent	22A St Maxime
8.4 S. Nyathi	Third Respondent	23 St Maxime
8.5 N.N. Matunhire	Fourth Respondent	23A St Maxime
8.6 T. Mangwande	Fifth Respondent	24 St Maxime
8.7 M. Mkwakwami	Sixth Respondent	24A St Maxime
8.8 C. Manyida	Seventh Respondent	25 St Maxime
8.9 F. Jangara	Eighth Respondent	25A St Maxime

9. The applicant's claim for holding over damages be and is hereby referred to trial in terms of order 10 r 73 of the Rules of this Honourable.

10. The respondents shall pay the costs of this application on the scale of legal practitioner and client jointly and severally, the one the others to be absolved.

11. In case No HC 857/09 summary judgment be and is hereby entered for the applicant against the respondents for eviction only.

11.1 Within forty eight [48] hours of the date of this order the respondents, and all those claiming occupation through them, shall vacate such of the flats or apartments or rooms or premises at Juan Les Pins, St Tropez Apartments Block, Samora Machel Avenue East, Eastlea, Harare failing which the Sheriff for Zimbabwe, or his lawful deputy, duly assisted by the Zimbabwe Republic Police if need be, shall be entitled, directed, authorised and empowered to evict the respondents, and all those claiming occupation through them, from the premises aforesaid and as specified below give vacant possession of the same to the plaintiff:

11.2 W. Magobogobo	First Respondent	26 Juan Les Pins
11.3 P. Mazarire	Second Respondent	26A Juan Les Pins
11.4 E. Maposa	Third Respondent	27 Juan Les Pins
11.5 E. Musonza	Fourth Respondent	27A Juan Les Pins
11.6 R. Katsika	Fifth Respondent	28 Juan Les Pins
11.7 J. Ngulube	Sixth Respondent	28A Juan Les Pins

11.8 E. Musimwa	Eighth Respondent	29A Juan Les Pins
11.9 K. Sibanda	Ninth Respondent	30 Juan Les Pins
11.1o Chipoyera	Tenth Respondent	30A Juan Les Pins

12. The applicant's claim for holding over damages be and is hereby referred to trial in terms of order 10 r73 of the Rules of this Honourable court.

13. Respondents shall pay the costs of this application on the scale of legal practitioner and client jointly and severally the one paying the others to be absolved.

Scanlen & Holderness, applicant's legal practitioners
Kawonde & Company, respondents' legal practitioners