

GERALD MUSEKA
versus
HOFISI SEMBURI

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 14 July 2017 & 26 July 2017

Opposed Matter

D. Muskwe, for the plaintiff
C. Nhemwa, for the defendant

CHIWESHE JP: The plaintiff is the holder of an offer letter to lease a certain piece of State land, namely subdivision 14, 15 and 19 of Maynard Farm, in the district of Chegutu, Mashonaland West. The offer letter was issued under the hand of the Minister of Lands on 8 June 2007.

The plaintiff had previously occupied a portion of Maynard Farm under the A1 scheme which was then upgraded to the A2 scheme by virtue of the said offer letter. According to the plaintiff, the former white owner of this farm had left some of his employees on the property. Some of the employees were prepared to provide labour to the plaintiff but some left for greener pastures elsewhere.

The defendant was among these former employees. He is currently employed by Zimplats Mines as a mechanic –cum – electrician. He has staff accommodation at the Mines. He is also resident at Maynard Farm where he occupies staff quarters. The plaintiff has demanded that the defendant, having no reason now to be at the farm, vacates the staff quarters and the farm altogether. The plaintiff wishes to house its farm manager in the staff quarters presently occupied by the defendant. The defendant has refused to so vacate the farm.

The plaintiff approached this court through summons seeking an order for the eviction of the defendant. Further, the plaintiff seeks an order for holding over damages at the rate of \$50.00 per month beginning 1 January 2013, being the date that the plaintiff began charging

the defendant rentals for the use of the staff quarters. The defendant filed an appearance to defend on 17 February 2016 and his plea on 24 March 2016. Being of the view that the defendant has no *bona fide* defence to his claim and that appearance to defend had been entered for purposes of delay, the plaintiff has filed the present application for summary judgment to be entered against the defendant.

The law governing applications of this nature is well traversed in this jurisdiction. In *African Banking Corporation of Zimbabwe and Another v PWC Motors (Pvt) Ltd* 2013 (1) ZLR 376 H it was stated thus -

“Summary judgment is an extraordinary and drastic remedy which is allowed where a plaintiff has an unanswerable case and ought not to be put to the expense and delay of a trial. An affidavit filed by or on behalf of an applicant in summary judgment proceedings must verify the cause of action as set out in the summons and aver a belief that the appearance to defend entered by the respondent is not *bona fide* but entered for the purpose of delaying the proceedings.

On the other hand, for a respondent to successfully oppose summary judgment, he must show a good *prima facie* defence to the applicant’s claim. The respondent must show or allege facts that if proved at trial would entitle him to succeed. The defence tendered by the respondent must be valid at law and must not be inherently unconvincing.”

See also *Chrismar (Pvt) Ltd v Stutchbury* 1973 (4) SA 123, *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) ZLR 263 and *Kingston (Pvt) Ltd v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S).

The defendant’s defence is clearly spelt out in his plea. Under para 2 thereof the defendant states that “the area occupied by the employees of the former white farmer is a common area and does not form part of the plaintiff’s allocated farm.” Further, at para 4 of the same, he states “The house occupied by the defendant is outside the boundaries of the plaintiff’s farm but he has refused to allow the Land Officer to indicate the boundaries so as to resolve the dispute.”

The defendant’s defence therefore is that he occupies an area outside the plaintiff’s farm in regard to which the plaintiff has no *locus standi* to evict him. He explains in his opposing affidavit that the farm compound (where workers are housed) was excluded from the demarcations made to accommodate the new A2 farmers. The idea, according to the defendant, was that the workers would be employed by all the farmers and therefore it would be prudent to leave an island where they would be accommodated, outside the boundaries of

the new farmers. The plaintiff argues to the contrary, insisting that the compound is within the boundaries of his part of the farm.

In the result we have two conflicting versions as to the extent of the boundaries of the plaintiff's farm. It is the plaintiff's word against the defendant's. The plaintiff has produced diagrams and maps to buttress his assertions. But as the defendant correctly submits, these are not official diagrams and maps and for that reason bear no probative value in the present application.

It is common cause that the farm in question is State land, having been acquired by the Ministry of Lands for purposes of resettlement. It is that Ministry that proceeded to demarcate the land into plots and to allocate these plots to beneficiaries. One of those beneficiaries is the plaintiff. It is clear that the Ministry of Lands is the acquiring authority, the demarcating authority and the allocating authority. A dispute arising as to the boundaries of any such plot cannot be resolved without the input of the demarcating authority. It is that authority that is vested with the power to put out boundaries on such properties.

The plaintiff has not cited the Ministry of Lands (as he should have done from the outset) nor has he sought to join them in the present application. No affidavit from officers of that Ministry has been filed to confirm or refute the plaintiff's averments or those of the defendant. In the absence of such input, the application is doomed to failure. In my view therefore the plaintiff's claim is not unanswerable. The plaintiff ignored the wise suggestion by the defendant that a Land Officer be called to indicate the official boundaries. Instead the plaintiff rushed to seek summary judgment without engaging the responsible Ministry.

I conclude therefore that the defendant has a *bona fide* defence to the plaintiff's claim. He raised a triable issue that cannot be disposed of summarily.

It was for these reasons that I dismissed the application with costs.

Muskwe & Associates, plaintiff's legal practitioners
C Nhemwa & Associates, defendant's legal practitioners