JOICE MLAMBO
versus
ISAAC MUGUTI CHIVENDERE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 20 July 2021 and 4 November 2021

Application for summary judgment

Adv Donzvambeva, for the applicant
Mr *T Sibanda*, for the respondent

CHINAMORA J:

Background facts:

The application before me is one for summary judgment which was filed in this court on 7 September 2020. The brief facts are that, on 4 September 2019, the applicant issued summons for eviction of the respondent and all those claiming occupation through him. Subdivision 3 of Circle V of Lancastershire Estate, Shurugwi. In addition, the applicant asked for an order for the removal and demolition of the illegal structures erected on the said property. The applicant is the widow of the late Smart Moyo, who was the holder of an offer letter for this property. After Mr Moyo's death, the applicant applied to the Minister of Lands, Agriculture, Water, Climate and Rural Resettlement ("the Minister") for succession in title, so that she could be the new holder in title and beneficiary of the property. While this application was being processed, on 20 August 2019, the applicant was issued with an A2 Temporary Permit to the property, which is Annexure "A" on pages 8-9 of the record.

The applicant avers that, without her consent and authority, the respondent invaded Subdivision 3 of Circle V of Lancastershire Estate, Shurugwi, and started conducting mining

activities. The respondent then erected cyanidation tanks, cabins, mills and fenced off an area without the applicant's agreement. It was the applicant's submission that the respondent's actions were unlawful as he had no authority to act in the manner he did. The respondent denied invading the aforesaid property. He says that he is on the property legally in terms of mining rights acquired by the Zimbabwe National War Veterans Association (Shurugwi District) ("the War Veterans Association"). He also claims that the Mining Commissioner resolved the dispute in January 2013 and allowed him to remain on the property for mining purposes. For this reason, he refused to vacate Subdivision 3 of Circle V of Lancastershire Estate, Shurugwi. As the applicant is convinced that the respondent has no bona fide defence to the claim for eviction and ancillary relief sought, she applied for summary judgment. This is the application that I am seized with.

The applicable law

The law on summary judgment is settled in our jurisdiction. The procedure is employed where a plaintiff who believes that the defence proffered by a defendant is not *bona fide* and has been entered essentially for dilatory purposes. In addition, the plaintiff's claim(s) must be demonstrably inarguable. Such a plaintiff applies to the court for summary judgment to avoid the inevitable delays arising from going to trial. (See *Chiadzwa* v *Paulkner* 1991 (2) ZLR 33(5) and *Chrisnar (Pvt) Ltd* v *Stutchbury and Anor* 1973 (1) RLR 277 G at 279).

Application for summary judgment

On the day of hearing, the respondent sought consolidation of this application with an application (involving the same parties herein) filed under HC 4608/20 for an interdict *pendente lite*. In HC 4608/20 (where the respondent is the applicant) he asked for an order which prohibited the applicant and those claiming through her from interfering with the respondent's mining activities on claims located in the applicant's property. The applicant objected to consolidation arguing that such a course of action had been overtaken by events as this application was ready for hearing. The respondent further sought to join the War Veterans Association to these proceedings, which application was opposed.

The applicant contended that the said association was not a legal *persona* and, as such, could not sue or be sued in its own name. Since I agreed with the applicant's submissions, I

declined the requests and went on to deal with the application for summary judgment. In my view, it unnecessary to entertain the application for an interdict *pendent lite* when the main application was being argued before me. The respondent raised points *in limine,* namely, (a) the applicant had no *locus standi* to bring this application; (b) there are material disputes of fact; and (c) there has been a material non-joinder of the executor of the estate of the applicant's deceased husband and the Minister of Lands, Agriculture, Water, Climate and Rural Resettlement. Let me proceed to deal with these preliminary points.

Preliminary points

Applicant's *locus standi*

The respondent challenged the applicant's *locus standi*, arguing that the executor of her late husband's estate should have instituted the proceedings. In response, the applicant submitted that the lawsuit was brought not on behalf of the deceased estate, but on the basis on the Temporary Permit (Annexure "A") issued to her in her own right. On the authority of *Maria Sjambok and Anor* v *Chinyama and Anor* HH 118-15, a permit like the one issued to the applicant has been held as sufficient to clothe one with legal standing. Consequently, the point *in limine* taken is without merit and I dismiss it. I move on to consider the next preliminary point on material dispute of facts.

Material dispute of fact

The respondent alleges that there is a material dispute of facts which cannot be resolved on the papers without the parties adducing oral evidence. In paragraph 7 of the respondent's affidavit (on page 29 of the record), he refers to he perceives as a material dispute of facts. The questions he poses are: (a) whether or not he invaded the applicant's property; (b) whether or not he has a legal basis to occupy the property; (c) whether or not the law permits him to exploit the claims on the applicant's property; and (d) whether or not the affidavit of Munjodzi Gede and Win Zhou are legitimate. I do not believe that the mere raising of these issues *ipso facto* creates a material dispute of facts, more so, one whose resolution requires *viva voce* testimony. In coming to this conclusion, I share the wisdom of MATHONSI J in *The Railways Enterprises t/a Paroun Trucking* v *Dowood and David Bruno Luwo* HB 53-16, where the learned judge said:

> "a party does not create a real dispute of facts by merely denying the allegations made by the applicant in its founding affidavit. That party must present a story in its defence which would lead the court to the conclusion that indeed a dispute of facts exists that cannot be resolved on the papers"

In this jurisdiction, in *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H), MAKARAU J (as she then was) provides an interesting guidance on how to identify whether or not a material dispute of facts exists in these terms:

> "A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

The position stated by Justice MAKARAU is inspired by common sense. Even if it is accepted that the issues raised by the respondent create an apparent conflict, in my view, no *viva voce* evidence is needed to settle those issues. In *Douglas Muzanenhamo* v *Officer in Charge CID Law & Order and Ors* CCZ 3/13, the Constitutional Court encouraged courts to take a robust and common sense approach in the interest of justice. If the approach urged in *Supa Plant Investments supra* and *Douglas Muzanenhamo supra* is deployed, it is apparent that no material dispute of facts is discernable. I make the following pertinent observations. Firstly, in the face of applicant's contention that he invaded her property, the respondent could not produce any document verifying the basis of his occupation. Firstly, he did not provide the court with an offer letter, a permit or a settlement lease. In this context, it is relevant to look at s 3 (1) of Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*].

Secondly, the respondent neither attached to his opposing papers nor produced in court, a registration certificate issued by the Minister of Mines and Minerals to establish his right to be on the mining claims on the applicant's property. Without these critical documents, there can be no material dispute of facts to talk about. Such documents are issued by government departments when someone is allowed to occupy property owned by the State or, in the case of mining, when a person's claims are registered and a prospecting or mining registration certificate is issued. No reason has been given in the opposing affidavit why such proof has not been availed in *casu*. It is noteworthy that, instead, the respondent attached a letter dated 13 September 2012 (on page 63 of the record) written by Lt Col (Rtd) Shumba to Falcon Gold Zimbabwe Limited, which reads:

"Dear Sir

RE: ACKNOWLEDGEMENT OF OFFER UNDER THE WAR VETERANS ASSOCIATION PROJECTS

Thank you for your letter dated 12 September 2012 referenced above.

The War Veterans Association Shurugwi District would like to express their gratitude towards your offer of seven (7) gold claims, namely, Rolly 17 to 23 situated in Shurugwi District.

By copy of this letter, we hereby acknowledge receipt of offer and pay the one dollar per claim as stated in your offer letter (total seven dollars).

Yours sincerely

J Shumba Lt Col (Rtd)
Chairman

War veterans Association (Shurugwi District)

Besides this letter, there is a Certificate of Agent-Transferor (on page 62 of the record) confirming the sale and transfer of mining claims by Falcon Gold Zimbabwe Limited to the War Veterans Association. The above letter and certificate do not assist the respondent's cause. In fact, they make it evident that the claims that the respondent asserts to be his do not belong to him. On the contrary, they offered to (and accepted and paid for) by the War Veterans Association. This position was confirmed by a letter from the Ministry of Mines dated 31 January 2013, which is on page 99 of the record. It is apparent that there is no document on record (such as an agreement of sale or cession of rights) proving the respondent's ownership or entitlement to the gold claims. In the absence of anything establishing his claimed right to the mining claims or to carry out mining activities on the applicant's property, the respondent has failed to substantiate the entitlement to be on Subdivision 3 of Circle V of Lancastershire Estate, Shurugwi. That is the gravamen of the respondent's defence to the lawsuit for eviction and other relief. The effect of the respondent's failure to show the basis of his occupation of the applicant's property is to expose that he has no *bona fide* defence to the applicant's claim.

Thus, the applicant's averments that she is the lawful occupier of the property by virtue of the A2 Temporary Permit remain uncontroverted. Accordingly, the relief sought ought to be

afforded. In conclusion, I add that the decision I have reached in this matter makes it unnecessary to deal with the interdict application under HC 4608/20. My views in this respect appear at the beginning of this judgment. I now address the issue of costs.

Costs of suit

Generally, costs are in the discretion of the court and, invariably, follow the result. In ordinary circumstances, a decision to award costs on the higher scale of attorney and client is not taken lightly. Nevertheless, courts will award such costs where it is clear that the losing litigant was not genuine in the pursuance of a stand in the litigation. (See Rubin L in the *Law of Costs in South Africa* Juta & Co 1949 at p 190). The respondent resisted the applicant's claim in circumstances where, clearly, he had no defence, let alone a *bona fide* one. While he steadfastly maintained that he had a right to be on the applicant's property in order to carry out mining activities in terms of mining rights he acquired upon registration from the Minister of Mines and Mineral Resources, he had no such rights. The reality is that the said claims were acquired by the War Veterans Association from Falcon Gold Zimbabwe Limited. As I have already noted, the respondent has no offer letter, permit or settlement lease which allows him to be on land occupied by the applicant under a permit issued by the Minister. Quite clearly, the applicant has been put to the unnecessary expense of, firstly, having to issue summons against the respondent and, secondly, mounting this application for summary judgment. The conduct of the respondent deserves to be censured by an award of attorney and client costs. For this reason, I will award costs at this punitive level so that the applicant is not put out of pocket in respect of the expenses caused to him by the needless litigation.

Disposition

In the result, it is ordered that:

1. Summary judgment be and is hereby entered in favour of the applicant as follows:

    1.1 The respondent and all those claiming occupation through him are hereby evicted from Subdivision 3 of Circle V of Lancastershire Estate, Shurugwi.

1.2 Respondent be and is hereby ordered to remove illegal structures he erected on Subdivision 3 of Circle V of Lancastershire Estate, Shurugwi, within seven (7) days of this order, failing which the Sheriff or his lawful deputy is ordered to remove and/demolish same.

1.3 Respondent be and is hereby ordered to pay the applicant's costs of suit on an attorney and client scale.

Mangwana & Partners, applicant's legal practitioners
Chinawa Law Chambers, respondent's legal practitioners