

ASHANTI GOLDFIELDS ZIMBABWE LIMITED  
t/a FREDA REBECCA MINE  
versus  
JOACHIM C NGUWO

HIGH COURT OF ZIMBABWE  
MUTEMA J  
HARARE, 29 March, 2011

### **Opposed Application**

*T Magwaliba*, for the applicant  
*G C Manyurureni*, for the respondent

MUTEMA J: On 29 March, 2011 I dismissed unconditionally an application for summary judgment by the applicant.

On 4 May, 2011 I dismissed a chamber application for leave to appeal to the Supreme Court against the order dismissing the application for summary judgment. The application for the leave to appeal had been made pursuant to s 43(2)(d) of the High Court Act, [*Cap 7:06*]. That provision states that:

- “(2) No appeal shall lie –
- (a) ...
  - (b) ...
  - (c) ...
  - (d) From an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court ...”

I dismissed the application for leave on the basis of the provision of s 43 (2)(b) of the same Act which provides:

- “(2) No appeal shall lie –
- (a) ...

(b) From an order of a judge of the High Court in which he refuses an application for summary judgment and gives unconditional leave to defend an action;”

In view of the clear and unambiguous provisions of s 43 (2)(b) of the High Court Act, and the fact that my order was one dismissing an application for summary judgment wherein I gave unconditional leave to the respondent to defend the action, that order is not subject to any appeal and s 43(2)(d) does not apply. Even the Supreme Court cannot grant leave to appeal against such an order.

The provisions in s 43(2)(b) of the High Court Act [*Cap 7:06*] have been literally interpreted in a number of precedents. In *Haulage (Pvt) Ltd v Mumurgwi Bus Service (Pvt) Ltd* 1980 (1) SA 729 (ZRA), the court, in interpreting s 31 (1)(b) of the predecessor High Court Act, [*Cap 14*] (ZR) whose provisions fell on all fours with those in our current s 43 (2)(b) of the High Court Act, [*Cap 7:06*] held that in providing in s 31 (1)(b) of the High Court Act [*Cap 14*] (ZR) that no appeal shall lie from an order of a judge of the General Division giving ‘unconditional leave to defend an action’ , the Legislature intended to refer only to the granting of unconditional leave to defend in summary judgment proceedings in terms of what are now rr 69 and 70 of the Rules of the High Court (Order 10 of the High Court (General Division) Rules in Rhodesia Government Notice 995 of 1971). Implicitly, from the provisions of s 31 (1)(b) of [*Cap 14*], where conditional leave to defend is granted in summary judgment proceedings, the right of either party to appeal is restricted to a right of appeal (with leave of the court under s 31(1)(b)) only against the conditions imposed. Pertinent to note here is that the provisions of s 31 (1)(b) of the then [*Cap 14*] are similar to those of s 43 (2)(b) of the present High Court Act and Rules 69 and 70 of Order 10 of the High Court Rules 1971 are also still the same. See also *Howff (Pvt) Ltd v Tromp’s Engineering (Pvt) Ltd* 1977 (2) SA 267 (R); *Rheeder v Spence* 1971 (1) SA 1041 (R).

In spite of the plain language of the relevant legislation and case law cited above to the effect that refusal of an application for summary judgment coupled with unconditional leave to defend an action is not appealable the applicant’s legal practitioner, following my refusal of leave to appeal, has since noted an appeal to the Supreme Court against my order refusing summary judgment. Whence he got the leave to lodge such appeal is alien to the applicable law. He has now requested for written reasons for my order of 29 March, 2011 to

enable him to prosecute his appeal. It is not for me to withhold them in spite of the law saying no such appeal shall lie from such an order. Those reasons are herewith provided.

In the summary judgment application para 1 of the draft order is couched thus:

- “1. Summary judgment be and is hereby entered in favour of the applicant against the respondent for the ejection of the respondent and all persons claiming occupation through him from the immovable property known as No. 251 Wary Avenue, Bindura.”

This is one of scores of similar cases wherein the respondents, just like the present respondent, are ex-employees of the applicant whom the applicant is seeking to evict from the several company houses on the basis that the respondents were tenants and since their employment with the applicant has terminated they must vacate the houses.

Just like other respondents, the respondent herein argues that the applicant sold the house to him and he has since paid off the full purchase price while he was still an employee, hence the applicant cannot legally evict him.

The circumstances surrounding the case are somewhat queer. What is common ground is that the applicant anticipated closure of its mine having foreseen viability difficulties. The management and workers engaged each other with a view to disposing of company houses by way of sale to sitting tenants. Some housing committee was established to oversee and conclude that process. Several meetings were held which culminated in management and employees signing a Memorandum of Agreement to the effect that the applicant “agreed to dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low Density to its employees who are sitting tenants effective on 1 December, 2003. Find the agreed prices attached.” The schedules attached reflect names of the beneficiaries, house numbers, new valuations and monthly repayments.

Then comes the queerness of the entire arrangement. On 12 December, 2003 the applicant concluded what is termed a Memorandum of Agreement of Lease with the various sitting tenants who were to purchase the houses. In the so called lease agreement are clauses, *inter alia*, providing for the amount of rent payable per month which was to “escalate periodically at the rate and on the basis described in Annexure “A” hereto.” The Annexure “A” provides, “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 revalued outstanding balance will then be divided by the

remaining period to get the monthly payment.” The “lease” was to endure for five years commencing on 1 January, 2004 and had an option to purchase the property after the five year period. The rentals paid by the lessee in terms of the “lease” were to be taken into account and be deducted from the amount due in respect of the purchase price.

The respondent’s various payslips over the years reflect two pertinent items, viz a deduction itemised as “Rent to Buy” and another itemised “Bal. Rent to Buy.”

It is essentially the foregoing facts upon which the contention revolves. The applicant contends that no sale agreement was concluded but a lease, while the respondent contends that a sale agreement was in fact concluded and that the purported lease was simply a “finance lease whose lifespan would go as far as the last instalment towards the purchase of the house by myself” and was never meant to be an operating lease.

While the applicant relied on the case of *Ashanti Goldfields Zimbabwe Limited v Clemence Kovi SC 7/09* which held that the arrangement between the parties was not a sale but a lease, respondent argued that facts of the present case are different from those in the *Kovi* case. He further contended that in a trial cause in:

1. *Simbarashe Antonio v Ashanti Goldfields Zimbabwe Limited & Registrar of Deeds*
2. *Kingstone Mujati v Ashanti Godfields Zimbabwe Limited t/a Freda Rebecca Mine & Registrar of Deeds*
3. *Ashanti Goldfields Zimbabwe Limited v Kwadzanayi Bonde* HH 135/09 the High Court (MAKARAU JP as she then was) distinguished the *Kovi* case *supra* on the facts similar to ones in *casu* and held that there was a sale. Therein the learned judge at p 10 of the cyclostyled judgment held as follows:

“The plaintiffs allege that it was the first agreement that was entered into with the requisite intention of creating a binding agreement between the parties. The subsequent lease agreements were not as they were meant and understood by both parties to be mere vehicles of facilitating the payment of the purchase prices for the housing units. That in my view should end the enquiry.”

And at pp 13 and 14 she held as follows:

“In concluding as I do, I am aware of the Supreme Court judgment in *Ashanti Goldfields Zimbabwe Limited v Clemence Kovi SC 7/09* in which it was held that the agreement of 1 December, 2003 between the defendant before me and a similarly placed employee to the plaintiffs before me was not an agreement of sale. It was held in that case that in the agreement, the defendant agreed to offer for sale the housing units to its employees. While the Supreme Court in the *Kovi* matter found no evidence

that the employee in that matter took up the offer, in *casu*, I believe I have such evidence. The clear evidence led before me shows that each of the three employees took up the offer made to them and exercised the option by commencing to make periodic payments to the defendant. More importantly in my view such payments were accepted by the defendant's management of the day as a reduction in the purchase price of the housing units involved."

Since the facts and arguments in *casu* fall on all fours with the cases dealt with by MAKARAU JP (as she then was) cited above and also that the applicant's counsel in the instant case represented the same client in the above cited matters, he ought to have realised the futility of launching the application for summary judgment as he must have known that the respondent has a triable or arguable defence. Over and above that, the parties in that case are still awaiting the outcome of the appeal noted at the Supreme Court. The applicant was accordingly trying a long shot in the dark. The foregoing were the reasons why the application for summary judgment was refused and the respondent given unconditional leave to defend the action.

*Magwaliba & Kwirira*, applicant's legal practitioners

*Manyurureni & Company*, respondent's legal practitioners