HONEYCOMB HILL (PRIVATE)LIMITED
versus
HERENTALS COLLEGE (PRIVATE)LIMITED

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 4 November 2014 and 14 January 2015

Opposed Application

M.E Motsi, for the applicant
A. Mambosasa, for the respondent

NDEWERE J: In January, 2012, the applicant entered into discussion with the first defendant to sell immovable property No. 7 Cowie Road, Tynwald to the defendant. According to the discussions, the purchase price for the property was going to be $180 000-00. A draft agreement capturing the spirit of the discussion was prepared but it was never signed. It is not clear from the facts why the draft agreement was not signed. Instead, a lease agreement for the same property was concluded between the applicant and two others and the first defendant on 12 January, 2014. The lease was for two years, with an option to renew for four years provided the lessee shall have given the lessor written notice of the lessee's intention to exercise this option at least two months prior to the expiry of the two year lease period. Before the two year lease period expired, a misunderstanding arose between the parties on whether the agreement between the parties was a lease agreement or a sale agreement. This misunderstanding is borne out by the respondent's letter to applicant dated 16 May, 2012, insisting that the agreement between the parties was a lease agreement and not a sale agreement since no subdivision permit had been issued for the property in question. They said an agreement of sale in the absence of a subdivision permit for the property would contravene the provisions of the Regional Town and Country Planning Act [*Cap 29:12*] and would thus be unlawful. The relevant section of the above Act is s 39 which forbids persons from subdividing or entering into any agreement for the change of ownership of any portion of a property without a permit granted in terms of s 40 of the Act.

It appears an amicable resolution of the issue failed because the applicant issued summons against the respondent and the City of Harare on 14 June, 2012. The basis of the claim in the summons is not the lease agreement; but the sale discussions. I call them sale discussions because no sale agreement was ever signed. The wrangle continued and on 15 May, 2013, the applicant advised the respondent that they could not renew the lease when it expired in December, 2013 and gave notice to that effect. The respondent wrote back on 19 July, 2013, and advised the applicant that they were not going to vacate the premises at the expiration of the lease unless the applicant paid in full the value of improvements effected by the respondent in terms of Clause 8 of the lease agreement. In the letter of 19 July, 2013, the respondent also referred to an amount of US$140 000-00 which it said it had paid to the applicant as a loan advance. The respondent demanded payment of the loan advance of US$140 000-00 within 7 days.

The applicant responded to the letter of demand on 23 July, 2013, asking for the value of improvements effected at the premises in accordance with Clause 8 of the lease agreement. The applicant also indicated that it would hold on to the US140 000-00, to be used as a set off against the withholding damages.

On 27 March, 2014, the applicant then applied for summary judgment. The applicant said the respondent did not have a *bona fide* defence to his claim and had entered appearance for purposes of delay.

After a careful analysis of the facts before me I have come to the conclusion that an application for summary judgment cannot succeed.

In terms of r 64 (1), a summary judgment is entered "for what is claimed in the summons and costs." So we start by looking at what applicant has claimed in the summons. Indeed, the applicant enjoins its summons of 14 June, 2012 to its application as Annexure D. The applicant has claimed eviction, holding over damages and costs. However, in its answering affidavit, the applicant somersaults and says the summons were withdrawn. So why were they referred to in the founding affidavit and attached? Clause 7 of the founding affidavit categorically says,

> "I verify the cause of action set out in the summons commencing action and the amount claimed therein."

The summons are then attached as Annexure D; on page 30-34 of the record. There is no indication in the founding affidavit that the summons were withdrawn. This appears for the

first time in an answering affidavit and yet it is the founding affidavit which is required to contain all relevant facts in the matter. In *Austerlands (Pvt) L*td v *Trade and Investment Bank and 2 Others* SC 92/05the court said;

> "The general rule that has been laid down in this regard is that an application stands or falls on the founding affidavit and the facts alleged in it. This is how it should be because the founding affidavit informs the respondent of the case against the respondent that the respondent must meet."

In *Magwiza* v *Ziumbe NO & Anor* 2000 (2) ZLR 489 (SC) the court said

> "It is well established that in application proceedings, the cause of action should be fully set out in the founding affidavit and that new matters should not be raised in an answering affidavit."

There is also no second summons to "verify the cause of action and the amount claimed therein." The applicant is therefore bound by his founding affidavit and the court rejects the applicant's attempt to embellish its case as the application proceeds.

The applicant in the summons for eviction, holding over damages and costs did not rely on the lease agreement which existed between the parties. He chose to found his cause of action on a non-existent sale agreement. This means the respondent has a *bona fide defence* against the claim since there is no valid sale agreement between the parties.

Paragraph 4 of the plaintiff's declaration says;

> "In January 2012, plaintiff and defendant entered into a verbal agreement of sale in terms of which defendant would purchase a portion of the plaintiff's undivided property in Tynwald."

Paragraph 6 says

> "A draft agreement was duly prepared by the plaintiff's legal practitioners but was never signed by the defendant."

From the above two paragraphs, it is clear there was no agreement of sale between the parties. An agreement of sale of immovable property has to be in writing; but plaintiff's was verbal. An attempt was made to reduce it into writing, and it was never signed. So there is no sale agreement to talk about. During the hearing, the respondent conceded that there was no sale agreement.

However, there is a valid agreement which applicant referred to in his declaration, one of lease. In para 7 of its declaration, the plaintiff, instead of founding his cause of action of eviction and holding over damages on the lease, actually refuses to accept the lease agreement

as valid and does not use it as the basis of its cause of action. The plaintiff is bound by his declaration and since he has relied on a non-existent agreement for his cause of action, he cannot succeed in getting summary judgment because defendant has a *bona fide* defence on that issue. If he wishes to pursue with his claim he has to go to trial to ventilate the issue of a sale agreement.

In addition, no proof has been adduced to show how the holding over damages of US$10 000-00 have been arrived at. Damages always have to be proved even where there is no opposition. How much more is proof of damages required when there is opposition as in this case? The rental was $20 000-00 for two years but we are suddenly presented with a figure of $10 000-00, without any justification. So even the quantum of damages being claimed is a triable issue.

During the hearing, the applicant conceded that it owes the respondent US$120 000-00. It is difficult for a landlord to succeed in evicting a tenant it owes $120 000-00 through summary judgment as such a remedy may lead to an injustice. It is best that parties go to trial over the matters in dispute. Both parties further conceded that the improvements have not been evaluated. So there is still a lot of homework to be done and evidence to be furnished before applicant's claim can be finalised.

Consequently, the application for summary judgment cannot succeed. The application is dismissed with costs.

Mabula & Motsi, applicant's legal practitioners
Messrs Mambosasa, respondent's legal practitioners