

**EXCELSIOR ENTERPRISES P/L**

**And**

**THOMSEN GUMBI AND 7 OTHERS**

IN THE HIGH COURT OF ZIMBABWE  
CHIWESHE J  
BULAWAYO 1 AUGUST & 25 SEPTEMBER 2003

*K I Phulu* for the applicant  
*Siziba* for the respondents

Judgment

**CHIWESHE J:** The applicant and the respondents entered into a written lease agreement in respect of premises called the Lobengula Flea Market located at 69 Lobengula Street, Bulawayo. The premises are owned by the applicant.

In terms of clause 12 of the agreement the respondents and others who have since vacated the premises, agreed to vacate the premises by 31 December 2002. The respondents, notwithstanding that undertaking, refused to vacate the premises by due date. The applicant issued eviction summons against the respondents. Appearance to defend was entered on behalf of all the respondents. In their plea the respondents argue that although the applicant gave them notice to vacate the premises, such was on condition that the applicant would pay compensation to them in respect of property damaged and stolen from the premises in the sum of \$6 548 544,00. They also argued that the applicant was not entitled to evict them as it had not obtained a certificate to that effect from the Rent Board in terms of part IV of the Rent Regulations (Statutory Instrument 982 of 1982) as read with the Commercial premises (Rent) Regulations (Statutory Instrument 626 of 1983).

The applicant is of the view that the respondents have no *bona fide* defence to its claim and that appearance has been entered solely for purposes of delay. The applicant seeks an order for summary judgment. In order to succeed the applicant must show that his version of events is unanswerable and conversely in order to successfully oppose the application the respondents must establish that there is a mere possibility of their success or that they have a plausible case or that there is a triable issue or that there is a reasonable possibility that an injustice may be done if summary judgment were granted. In other words the respondents must show that they have a *bona fide* defence. (see *Jena v Nechipote* 1986(1) ZLR 29. A *bona fide* defence has been defined as one which is honest and which if proved at the trial will constitute a defence to the plaintiff's claim.

The respondents' defence is to the effect that they were induced to sign the agreement to vacate the premises by a misrepresentation made by the applicant or its directors that they would be compensated for their property before the due date. That there is a dispute regarding compensation is common cause. Indeed the respondents have sued the applicant's officers in a separate action to recover the same. Whilst the written agreement is silent as to compensation the respondents argue that the undertaking to compensate was made verbally as a condition attached to their vacation of the premises. In these circumstances it cannot be held that their defence is devoid of honesty. Although the respondents cite "third parties" in their separate action for compensation these third parties are officers of the applicant. It is neither possible nor desirable in an application of this nature to go into details as to whether same were acting for the applicant or in their personal capacities. The

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defence that the respondents raise will if proved at the trial constitute a defence against the applicant's claim. For that reason the application cannot succeed.

The second wrung of the respondents' defence is that the applicant has not obtained the approval of the rent board to evict them. This defence is irrelevant given the written agreement between the parties.

In the circumstances I would hold that the respondents have a *bona fide* defence to the applicant's claim. Accordingly, it is ordered that the application be and is hereby dismissed with costs.

*Coghlan & Welsh* applicant's legal practitioners  
*Cheda & Partners* respondents' legal practitioners