

**TROTS INVESTMENTS (PVT) LTD**

**Versus**

**SAMUEL LAZARUS MAMBIRO**  
**T/a MAMBIRO FIBRE TIMBER INDUSTRIES**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 7 JUNE 2007

*Mrs H Moyo* for the applicant  
*H Shenje* for the respondent

Opposed Application

**NDOU J:** The applicant is the owner of stand 6435A, Bulawayo Township also known as No. 9 Welbeek Road, Thorngrove by virtue of a deed of transfer dated 29 August 2003. The respondent is in occupation of the said premises by virtue of an agreement of lease he entered with the previous owner of the premises, namely the Schwegmann Trust dated 22 September 1999. The lease between the respondent and the said Trust expired by the effluxion of time on 31 December 2002. The applicant has instituted proceedings for, *inter alia*, the ejectment of the respondent and all those claiming through him from the said premises on the grounds that the respondent is not paying any rent for the premises and has refused to recognise the applicant as the new owner or to negotiate with the applicant or his agents for a fair rent. The respondent entered appearance to defend the applicant's said action in HC 513/04. The pleadings are drawing to a close as evinced by the fact that the respondent (as defendant) had supplied to the applicant (as plaintiff) further particulars on defendant's plea as requested by the applicant. The applicant has applied for summary judgment. The applicant filed its heads of argument on 18 November 2005. The heads of argument were served on the respondent. The respondent did not bother to file his own heads of argument. In terms of Order 32

Rule 238 (2a) of the Rules of the High Court, 1971 the respondent were required to file their heads of argument within ten days after the service of the applicant's heads of argument. The applicant's heads of argument were served on the respondent's legal practitioners on 18 November 2005. In the circumstances,

Judgment No. HB 61/07  
Case No. HC 1285/05  
X Ref HC 513/04 & 2233/05

Mrs Moyo for the applicant, was correct when she submitted that respondent is barred. On 25 November 2005 the applicant filed an application to file a further affidavit. Up to the date of the commencement of this hearing on 16 February 2006 the respondent had not filed its heads of argument. This application for summary judgment was set down for 16 February 2006 against this background. The respondent seeks that this application be removed from the roll so that his application to file a further affidavit be dealt with first. As the bar has not been uplifted this is a case where I should exercise my discretion in terms of Rule 238 (2b). Accordingly I have decided to hear the application for summary judgment on its merits. It is trite that “the special procedure of summary judgment was conceived so that a *mala fide* defendant might summarily be denied, except under onerous conditions, the benefit of the fundamental principle of the *audi alteram partem*. So extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that this is only when all the proposed defences to the plaintiff’s claim are clearly unarguable, both in fact and in law, that this drastic relief will be afforded to a plaintiff” – *Chrismar (Pvt) Ltd v Stutchbury* 1973(1) RLR 277G. See also *G D Haulage (Pvt) Ltd v Mumurgwi Bus Svs (Pvt) Ltd* 1979 RLR 447 (A); *Rex v Rhodian Invstms Trust (Pvt)* 1957(4) SA 631 (SR) and *Shingadia v Shingadia* 1966(3) SA 24 (R). Since the applicant’s acquisition of the disputed property is no longer an issue according to the respondent’s opposing papers, the main issue centres around the whole question of statutory tenancy in terms of section 22(2) of the Commercial Premises (Rent) Regulations, 1983 (S.I 676 of 1983). There is no doubt that if there was statutory tenancy in existence between Schwegmann Family Trust and the respondent at the time the applicant acquired the disputed property, the sale was subject to the lessee’s right in terms of the *huur gaat voor koop* rule, i.e. hire takes precedence over purchase – *De Wet v Union Government* 1934 AD 59 and *Schwegmann Family Trust v Total Ties & Anor* HB-17-07. There is a material dispute between the parties on whether the rentals paid by the respondent were sufficient to qualify him as a statutory tenant i.e. whether the respondent is still a statutory tenant in terms of section 22(2) of the Commercial Premises (Rent) Regulations, *supra*. What are the correct rentals due? Has the respondent paid them on time and in full? If the rentals were varied (as is apparent from the papers) was such variation done in terms of the Rent Regulations, *supra*? All these are clearly arguable issues both in fact and in law.

Judgment No. HB 61/07  
Case No. HC 1285/05  
X Ref HC 513/04 & 2233/05

Summary judgment should not be granted when a really difficulty as to matter of law arises – *Shingadia v Shingadia, supra*. The issues here are really arguable and the applicant is not entitled to summary judgment in terms of Order 10 Rule 64.

Accordingly, the application for summary judgment is dismissed with no order as to costs.

*Joel Pincus, Konson & Wolhuter*, applicant's legal practitioners  
*Shenje & Co*, respondent's legal practitioners