

ASHANTI GOLDFIELDS ZIMBABWE LIMITED
T/A FREDA REBECCA MINE
versus
TATENDA TAKAVADA

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 6 February, 2012

Opposed Application

T Magwaliba, for the applicant
The respondent in person

MUTEMA J: This is an application for summary judgment whose draft order reads:

- “1. The respondent be and are (*sic*) hereby ordered to vacate the plaintiff’s premises to wit House No. 1117 Haka Way, Chipadze Township, within seven (7) days of this order.
2. The respondent pays costs of suit.”

This is one of several similar matters in which the applicant is seeking the eviction of its former employees from company houses on the basis that the former employees were mere tenants whose employment has since terminated. The former employees, just like the respondent herein, argue that the applicant sold the houses to them.

The respondent argues that he has a *bona fide* defence to the applicant’s claim. That defence is explained as follows:

In 1998, the applicant, as part of its staff retention scheme, proposed to sell its housing units to its employees over a five year period. By then, the life-span of the mine had been projected to be around five years. The scheme would also help the applicant realise better value from the disposal of the houses in that manner as opposed to by selling them upon closure of the mine in an environment akin to a ghost town. As a sequel to the proposal, a lot of deliberations were held on the issue and a housing committee was put in place composed of representatives of the employees and the applicant. The relevant minutes were attached to the opposing papers. Minutes of 8 May, 2003 read:

“2.1 Sale of Residential Properties

The process was still on going and progressing well. The Finance Director, together with the workers' representative went to consult a lawyer to resolve the outstanding issues. The lawyer came up with what he advised as the best option. Minor changes were made to what the lawyer proposed to suit the employee's needs. Whether that is acceptable will be determined when forms are taken back to the lawyers. IT WAS AGREED that the issue be pursued closely so that it comes to rest."

Minutes of 24 August, 2003 read:

"2.1 Sale of Residential Properties

There was a lot of progress on the sale of residential properties. A hurdle on the revaluation of the houses was cleared with Mr Kwaku-Akosah-Bempah when he visited the mine during the second quarter. The Finance Director together with the worker's representative had been to the lawyer with the final draft to which the lawyer had already responded. ..."

Thereafter, what was termed a Memorandum of Agreement BETWEEN Ashanti Goldfields Management and Employees was signed. It provided:

"Ashanti Goldfields Zimbabwe agrees to dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low Density to its employees who are sitting tenants effective 1 December 2003. Find the agreed prices attached."

The attached schedule has names of the sitting tenants, house number, new valuation of the house and monthly repayment amount.

On 12 December 2003, the respondent (and other employees) entered into what is headed Agreement of Lease with the applicant. The material clauses of the "lease" state that the lease period would be for five years, monthly rent of not more than 25% of the lessee's basic salary which would escalate periodically at a rate and on the basis described in Annexure "A" viz "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 revaluation will be calculated as follows:

50% of the salary increment (%) x the outstanding balance (as at that date). The revalued outstanding balance will then be divided by the remaining period to get the monthly payment."

The purported lease agreement was simply a vehicle through which deductions would be made from the respondent's salary. This explains why the applicant on the respondent's payslip put a deduction titled "Rent to Buy" and why the applicant accepted a lump sum

payment in full and final settlement of the sums payable to it under the agreement of sale before the expiration of the purported lease period.

Also, the minutes of 16 December, 2003 are apposite. The relevant part reads:

“3.0 Sale of Residential Properties

There was a lot of progress on the sale of residential properties. Management had approved and concluded the sale. The employees are busy filling in the contract forms”

Pertinent to note here is that this was said after 12 December, 2003 purported lease agreement.

While there exists a plethora of case law on the subject of summary judgment, the *locus classicus* is that of *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (AD) at 426 A where CORBETT JA said:

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material alleged by the plaintiff in his summons ... are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. All that the court enquires into is:

- (a) Whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded; and
- (b) Whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.”

On the facts so disclosed in *casu* I am persuaded that the respondent’s defence is *bona fide* and good in law. I also derive solace in reaching this conclusion from the salutary words of GUBBAY JA (as he then was) in *Jena v Nechipote* 1986 (1) ZLR 29 (S) at 30 where the LEARNED JUDGE OF APPEAL held:

“All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that there is a mere possibility of his success; he has a plausible defence; there is a triable issue; or there is a reasonable possibility that an injustice may be done if summary judgment is granted.”

The respondent's explanation expounded above; right through its chronology of events pertaining to the disposal of residential properties does amount to a trial issue. Exists a reasonable possibility of an injustice being done if summary judgment were to be granted.

I am constrained to utter the following strictures concerning the applicant's obduracy. As stated above, there are scores of similar cases involving the applicant and its former employees. One such is *Ashanti Goldfields Zimbabwe Limited t/a Freda Rebecca Mine v Joachim C Nguwo* HH 58/2012 wherein I dismissed a similar application on the same grounds. The applicant seems to be engaged in a process of judge-hunting because several similar cases are either pending before other judges or have been dealt with meeting with the same fate of dismissal. In 1. *Simbarashe Antonio v Ashanti Goldfields Zimbabwe Limited & Registrar of Deeds*; 2. *Kingstone Mujati v Ashanti Goldfields Zimbabwe Limited t/a Freda Rebecca Mine & Registrar of Deeds*; and 3. *Ashanti Goldfields Zimbabwe Limited v Kwadzanayi Bonde* HH 139-09 MAKARAU JP (as she then was), following a full trial based on similar claims, distinguished the *Ashanti Goldfields Zimbabwe Limited v Clemence Kovi* SC 7/09 which the applicant seems to rely on in its claims and held that the facts in HH 139-09 established a sale. Those facts fall on all fours with the facts in *casu* as well as those in the *Nguwo* case *supra* in which I dismissed the application for summary judgment and gave the respondent unconditional leave to defend. Although the judgment in HH 135-09 was appealed against and the appeal is still pending, it is only prudent and proper that the applicant should await its outcome and stop judge-hunting in order to avoid creating a multiplicity of contradictory judgments involving the same issue thereby causing confusion and injustice.

Since the facts and argument in *casu* fall on all fours with the cases dealt with by MAKARAU JP (as she then was) cited *supra*, and the *Nguwo* case I dealt with *supra*, the present application for summary judgment be and is hereby dismissed and the defendant is given unconditional leave to defend the action. The applicant is ordered to pay the costs of this application.

Magwaliba & Kwirira, applicant's legal practitioners