

P B ARNOTT AND SON (PRIVATE) LIMITED
versus
STEVEN MANOTA
and
EVELYN JAMES
and
NESBERT MANOTA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 6 September 2012 and 17 January 2013

A. Mugandiwa for the applicant
E. Mutandiro for the respondents

ZHOU J: This is an application for summary judgment against the three respondents who are the defendants in Case No. HC 8904/10 (hereinafter referred to as “the main matter” or “the action”). The applicant is the plaintiff in the main matter, in which it instituted proceedings for the ejection of the respondents from the assistant manager’s house at Good Hope Farm. The facts which underlie the dispute between the parties are as follows:

The now deceased Ernest Manota who died on 9 September 2010 was a former employee of the applicant. During his employment he had been allocated for occupation a residential house which is referred to in the papers as an “assistant manager’s house”, which is located on Good Hope Farm. After the death of Ernest Manota the respondents remained in occupation of the house. The second respondent is his widow while the first and third respondents are his sons. There are also other children of the deceased who remain in occupation together with the three respondents cited in the instant application. The respondents were given notice to vacate the house on 8 October 2010, but have remained in occupation to date. Faced with the respondents’ continued occupation of the house, the applicant instituted an action for their eviction under Case No. HC 8904/10. The respondents entered appearance to defend the action, prompting the applicant to make the instant application for summary judgment.

Summary judgment is allowed where the applicant has a clear and unassailable case and ought not be subjected to the expense and delay of going to trial. It is a drastic remedy.

The remedy is intended to “prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights”. *Joob Joob Investments v Stocks Mavundla Zek* 2009 (5) SA 1 at 11G; See also *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) ZLR 260 at 272B; *Pitchford Investments (Pvt) Ltd v Muzari* 2005 (1) ZLR 1(H) at 3D-H; *Majoni v Minister of Local Government and National Housing* 2001 (1) ZLR 143(S) at 144A-C. In order to successfully oppose an application for summary judgment a defendant must show a good *bona fide* defence to the plaintiff’s claim. In other words, defendant must raise an issue which if proved at trial would entitle him or her to succeed. See *Niri v Coleman & Ors* 2002 (2) ZLR 580(H) at 584E-585B. The defendant is not expected to establish his or her defence on the probabilities, but must set forth the grounds of defence with sufficient detail to enable the court to conclude that he has a *bona fide* defence and that the opposition has not been filed solely for the purposes of delay. See *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* SC 139-86 at p. 4-5; *Stationery Box (Pvt) Ltd v Natcon (Pvt) Ltd* 2010 (1) ZLR 227(H) at 231F, 233B.

The respondents have raised two points *in limine*, namely:

- (a) that the deponent to the applicant’s affidavit, Peter Bruce Arnott, has no *locus standi* to represent the applicant in the absence of a resolution of the applicant’s board of directors; and
- (b) that the applicant is not the owner of the land on which the house is located, and therefore has no *locus standi* to seek the eviction of the respondents from the house. On the merits, the respondents rely on the same ground that the applicant lost ownership of Good Hope Farm when it was gazetted in 2005.

The question of the authority of Peter Bruce Arnott to represent the applicant or whether the applicant had authorised the proceedings was not raised by the respondents in the main case. The special plea taken by the respondents in Case No. HC 8904/10 was that the applicant “has no *locus standi in judicio* to claim for the eviction of both (*sic*)defendants, as the plaintiff is not the registered owner of the property in question by reason of the property in question having been compulsorily acquired by the Government in 2005”. The respondents cannot contest the filing of the application for summary judgment on the ground that the application has not been authorised by the applicant yet they have not objected to the summons on the same ground. Summary judgment proceedings merely seek judgment in terms of the summons. Although the proceedings are issued under a different case number from the main action they do not represent a fresh claim. That is the reason why the

applicant is required to merely verify the claim as set out in the summons and aver a belief that the respondents have no *bona fide* defence to that claim. In deposing to an affidavit in an application in support of summary judgment the deponent is merely acting as a witness who has knowledge of the facts and can swear positively to the facts in the affidavit in verifying the cause of action and alleging that the respondents have no *bona fide* defence to the claim in terms of Order 10 Rule 64(2) of the Rules of this Court. See *Time Bank of Zimbabwe Ltd v Moyo* 2002 (1) ZLR 121(H) at 125F-130A. The applicant is represented in these proceedings by its legal practitioners and not by the deponent to the affidavit filed in support of the application. This case is distinguishable from the case of *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514(S), where a director of a company instituted proceedings in the name of a company against fellow directors who questioned his authority to institute the proceedings on behalf of the company. I am satisfied that the proceedings before this Court have been instituted by the applicant and not by some unauthorised person on its behalf. See *Mall (Cape) (Pty) Ltd v Merion Ko-operasie Bpk* 1957 (2) SA 347(C). The first objection *in limine* must therefore fail.

The respondents' second ground of objection is that the applicant is not the owner of the farm on which the house that they occupy is located. The applicants have attached to the opposing affidavit a copy of the *Zimbabwean Government Gazette Extraordinary of 10th June, 2005* which contains a preliminary notice of intention to acquire the Remaining Extent of Good Hope. The notice which was issued in terms of s 5 (1) of the Land Acquisition Act [Cap 20:10] states that the Government intends to compulsorily acquire the land "for urban expansion". The respondents contend that by virtue of the publication of that notice the applicant lost ownership of the land. No authority has been cited for that submission. There is nothing to show that the land was acquired by the Government as suggested by the respondents. The notice is only a notice of intention to acquire the land. The respondents correctly accept that the land is not agricultural land; neither is it being required for resettlement. Its acquisition does not, therefore, fall within the ambit of s 16B(2) of the Constitution of Zimbabwe. The respondents have not pointed to any other provision in terms of which the applicant lost ownership of the property. Thus the defence advanced is not valid at law.

The letter dated 2 November 2010 written by A. S. Tome, Provincial Administrator for the Harare Metropolitan Province, does not create rights for the respondents to remain in occupation of the house without the consent of the applicant. It is clear that that letter was

generated for the purpose of resisting eviction. The letter does not deprive the applicant of its ownership of Good Hope farm.

In my view the respondents have no *bona fide* defence to the applicant's claim and entered appearance for the purposes of delaying finalisation of the matter.

I have been invited to award costs against the respondents on an attorney-client scale. The applicant has been unnecessarily put out of pocket by the respondents' refusal to vacate the house on its farm. See *Neil v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607; *Mahembe v Matambo* 2003 (1) ZLR 148(H) at 150A-E. The opposition to the claim is not *bona fide*, as the respondents are unilaterally seeking to change the basis upon which they occupied the house in question. The respondents know that they occupied the house by virtue of their relationship with the late Ernest Manota. They do not pay rent or any expenses in respect of water or electricity or other services from which they benefit by their occupation of the house. The opposition to the claim is vexatious. The vexatiousness of the opposition justifies a special order of costs. *Mahembe v Matambo (supra)* at 150D.

In the result, it is ordered as follows:

1. Summary judgment in Case No. HC 8904/10 is granted in favour of the applicant and against the respondents.
2. The respondents and all persons claiming occupation through them shall vacate the assistant manager's house at Good Hope Farm within seven days of service of this order, failing which the Deputy Sheriff shall take all steps necessary to eject them and to give vacant possession of the house to the applicant.
3. The respondents shall pay the costs of suit on an attorney-client scale jointly and severally the one paying the others to be absolved.

Wintertons, applicant's legal practitioners
C.Nhemwa & Associates, respondents' legal practitioners