

NHLANHLA NDLOVU

Versus

MELITAH MAPHOSA

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 16 OCTOBER 2003

R Moyo-Majwabu for the applicant
N Mathonsi for the respondent

Opposed Matter

CHIWESHE J: In this matter the salient facts are common cause. They are as follows:

One Mguni the registered owner of stand number 5206, Gwabalanda, Bulawayo sold this property to the respondent in terms of an agreement of sale entered into on 13 January 1997. The respondent took occupation in January 1997 and as of 30 August 1997 she had paid the purchase price in full. It turned out that the property had been mortgaged by the said Mguni to Zimbank in terms of which arrangement Zimbank held the title deeds to the property. This fact was not known to the respondent at the time she bought the property. Transfer could not be effected until the title deeds were released. The title deeds could only be released after Mguni had paid up his obligations to Zimbank. In order to extradite the process the respondent paid certain monies to Zimbank on behalf of Mguni.

Meanwhile despite having been paid the full purchase price by the respondent, the said Mguni and unbeknown to the respondent sold the same property to the applicant. The applicant proceeded to obtain an order of this court directing that Mguni transfers the property to him. That order was granted on 30 March 1999. In

those proceedings the respondent had not been cited nor was she aware that such proceedings had been instituted. Needless to say the court had not been aware of the respondent's interests in the matter. At the time the respondent was in fact in occupation and believing she had right to title had effected some improvements on the property.

The applicant seeks an order evicting the respondent from the said premises. The respondent has indicated her intention to defend the action. The applicant believes that the respondent does not have any bona fide defence to the claim and that appearance has been entered solely for purposes of delay. He has therefore filed the present application seeking an order for summary judgment. The application is opposed.

Summary judgment is granted where the plaintiff has a clear case and ought not to be subjected to the expense and delay of going to trial. In order to succeed the plaintiff must show that his version of events is unanswerable. That is trite. See *Gaffe v Universal Trading (Private) Limited* 1976 (2) RLR 200 (GD).

In *Jena v Nechipote* 1966 (1) ZLR 29 it was held that the defendant will succeed in his opposition of such application if he can show that he has a mere possibility of success, or that he has 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 *Joan Spencer Rex v Rhodan Investment Trust (Private) Limited* it was held that the phrase "bona fide defence" must be interpreted to mean that the defendant must set up a defence which is honest and which if proved at the trial will constitute a defence to the plaintiff's claim.

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I am of the view that had this court been aware of the respondent's interest in the property in question, it would not have granted the order to transfer the property to the applicant without hearing the respondent. If the respondent had been heard her prospects of success would have been excellent. She entered into an agreement of sale with Mguni long before the applicant came into the picture. She paid the full purchase price. She took occupation. She made improvements to the property. She *bona fide* believed that transfer would be effected in her favour. She even paid Zimbank on behalf of Mguni in order to secure the release of the title deeds so that transfer could be made in her favour.

It appears to me an injustice would result if summary judgment were granted. The respondent has raised an important triable issue – that is, whether Mguni could validly transfer the property to the applicant given the above facts. If she were to succeed to prove that the transfer to the applicant was indeed invalid, that fact would constitute a defence to the plaintiff's claim.

I do not believe that it is necessary to go into the merits or otherwise of the respondent's defence as the plaintiff suggests we do in his heads of argument. That is the prerogative of the trial court. The respondent needs not prove that she will of necessity succeed in her defence. It is sufficient for her to show that she has a mere possibility of success or that she has 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.

Accordingly, the application is dismissed with costs.

James, Moyo-Majwabu & Nyoni applicant's legal practitioners
Coghlan & Welsh respondent's legal practitioners