HB 149-18
HC 3035/17
XREF HC 2818/13

MARIE STORM GILLESPIE
versus
SIKENGELE MSEMA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 16 MAY 2018 AND 14 JUNE 2018

Opposed Application

S Collier for the applicant
S Siziba for the respondent

MATHONSI J: This application is a two-in-one. The applicant seeks a dismissal of the respondent's claim filed in HC 2818/13 on the ground that it is frivolous or vexatious as provided for in rule 75 of the High Court Rules, 1971. The second leg of the application is for summary judgment in respect of the applicant's own claim in reconvention in the same matter for an order of cancellation of an agreement of sale the parties entered into on 11 May 2005 in terms of which the applicant sold to the respondent a house, being Stand 3762 Bulawayo also known as 3 Blake Road Malindela Bulawayo (the property) and ancillary relief thereof. Both applications are opposed by the respondent.

Briefly, in HC 2818/13 the respondent caused to be issued against the applicant as the first defendant therein, and two others, a summons wherein he claimed an order confirming the sale of the property entered into between the parties in 2005 for 15000 Pounds, that upon payment of the full purchase price of £ 15000-00 the applicant and all those claiming occupation through her vacate the property, that the applicant or the sheriff effect transfer of the property to the respondent and costs of suit.

The respondent made the averment in the declaration that the agreed purchase price for the property was ZW $332 000 000-00 and that the parties had agreed that as they were both leaving the country, the respondent proceeding to the United Kingdom while the applicant was proceeding to New Zealand, the purchase price would be paid in foreign currency being £15 000-

00. She averred further that the said purchase price was to be liquidated in monthly instalments. She commenced making payments and by May 2010 she had paid £13 400-00 but the applicant had sought to unilaterally alter the purchase price to £16 000-00 which the respondent refused to accept. The respondent then craved for "specific performance" even though, by her own pleading, the full purchase price was not paid.

The claim was contested by the present applicant who denied that the purchase price was £15 000-00 asserting that it was in fact agreed at £31 050-05 after deducting the sum of $2 million (Zimbabwe currency) which the respondent had already paid. She averred further that in pursuance of the agreement, the respondent had, on 19 May 2005, signed an acknowledgment of debt in her favour in which she acknowledged to be indebted to the applicant in the sum of ZW$330 000 000-00 being the remainder of the purchase price which was then converted to British Pounds Sterling at the then prevailing exchange of 1:10628. It converted to a sum of £31 050-05 due by the respondent.

The applicant averred further that that amount was to be paid in monthly instalments of £600-00 with effect from 30 June 2005, until the full amount was paid. In breach of the agreement the respondent failed to comply and to date has only paid £14 550-00 in irregular instalments. She prayed for the dismissal of the respondent's claim. She was however not done, as she filed a claim in reconvention in which she sought and order for the cancellation of the sale agreement and that she be allowed to retain the sum of £14 550-00 paid pending a debatement of whatever damages, if any, she may have incurred as a result of the respondent's breach.

With that summons action still pending the applicant has made this hybrid application aforesaid. Regarding the rule 75 application the applicant states in her founding affidavit that on 19 May 2005 the respondent signed an acknowledgment of debt which I have already made reference to in which she acknowledged owing her £31 050-05 computed at the rate prevailing on that date, namely Z$106 28-00 per £1-00. The respondent only paid £14 550-00 and in November 2009 started claiming that the purchase price should be £15 000-00. The applicant attached both the agreement of sale signed by the parties on 11 May 2005 and the acknowledgment of debt signed by both parties on 19 May 2005. Indeed in terms of clause 2 of

the sale agreement the purchase price was Z$332 000 000-00 which was to be paid in full before registration of transfer.

In terms of clause 8.2 the applicant's rights in the event of a breach included:

> "8.2. To cancel this agreement retake possession of the property, (the purchaser hereby waiving any lien it may have over the property for improvements and giving and granting to the seller an irrevocable power of attorney and authority to enter upon and take possession of the property), to claim and recover from the purchaser any damages which the seller may have sustained by reason of the breach and subsequent cancellation by the seller. Until such time as such damages have been liquidated by agreement or by the decision of a competent court, the purchaser hereby authorizes the seller to retain any amount received by her from the purchaser and to deduct such amounts from the said damages."
> (The underlining is mine)

It is in terms of that provision that the applicant seeks to be allowed to retain the amount of £ 14 550-00 paid by the respondent until her damages have been determined.

The acknowledgment of debt itself is actually an unequivocal one. It reads:

> "ACKNOWLEDGEMENT OF DEBT
> I SIKENGELE MSEMA, ID 08-532437M28 do hereby acknowledge myself to be truly and lawfully indebted to MARIA GILLESPIE in the sum of $332 000 000,00 (Three Hundred and Thirty Two Million Dollars) of which I have repaid the sum of $2 000 000 (Two million Dollars) and I undertake to pay $330 000 000,00 in British Pounds at the rate of GBP 10, 628 per ZW 1,00.
> I agree to repay GBP 6000,00 per month with effect from 30 June 2005 until the debt has been repaid in full.
>
> SIGNED at BULAWAYO this 19th day of May 2005."

There is an obvious error in the presentation of the rate as £10 628 for every Z$1-00. It should have been the other way round. It is an issue that has not been taken by any of the parties presumably in recognition that it was a typing error. Nothing more needs to be said about that.

With that background and the documentary evidence produced, the applicant stated that there is no legal basis for the respondent to make a claim for transfer of the property to her or to even suggest that the purchase price should be £15 000-00 when she accepted indebtedness of what works out to £31 050-05. The respondent seeks transfer against a payment of what she admits to be only £13 400-00. To that extent the claim is frivolous or vexatious.

On summary judgment, the applicant's case is that the respondent clearly has no defence to her counter claim having failed to pay the agreed purchase price and as such appearance has been entered solely for purposes of delay. The sum of £14 550-00 that she paid is not the purchase price which is why even the claim in convention is frivolous. Summary judgment should be entered in the applicant's favour.

The respondent opposed the application disputing the validity of the acknowledgment of debt on the basis that "there was no meeting of the minds" on the exchange rate. The respondent denied breaching the contract maintaining that what was paid to the applicant extinguished the debt completely. According to him hyperinflation altered the parties' contractual obligations making the purchase price of £31 050-05 prejudicial to her. If she had been allowed to pay in Zimbabwean currency her obligation would have been less than the £14 550-00 that she paid.

On the application for the dismissal of her claim the respondent took the view that the applicant has not advanced sufficient reasons for the grant of such an application. While admitting that she signed the acknowledgment of debt on 19 May 2005 the respondent maintained that there was no consensus between the parties on the exchange rate. This is because she was not aware of the correct rate at the time suggesting that the agreed rate was not the correct one. Surprisingly the respondent did not set out what she perceived to be the applicable rate content to leave the issue hanging. The respondent did not even begin to explain why the sum of £15 000-00 or £14 550-00, which is the exact amount she paid should be the agreed purchase price. It is strange indeed.

Rule 75 (1) of the High Court Rules, 1971 allows a defendant who has filed a plea to make a court application for the dismissal of an action on the ground that it is frivolous or vexatious. It has been stated that an action is frivolous or vexatious if it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation. Like summary judgment, an application in terms of rule 75 (1) restricts a party's right to access to the court and is therefore an extraordinary remedy. However courts of law have always restricted vexatious litigants' right of access in order to protect not only their integrity but also the rights of *bona fide* litigants with genuine and meritorious claims. In support of the application *Mr Collier* for the

applicant relied on the authority of *Rogers* v *Rogers and Another* 2008 (1) ZLR 330 (S) at 337 C-D where MALABA JA (as he then was) made the remarks:

> "Summary dismissal of an action in terms of rule 79 (2) of the Rules is an extraordinary remedy to be granted in exceptional cases. The reason is that granting the remedy has the effect of interfering with the elementary right of free access to the court. The object of the rule is to enable the court to stop an action which should not have been launched.
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> In *Lawrence* v *Lord Norreys* (1887) 39 Ch D BOWEN L P at p 234 said:
> 'It is an abuse of the process of the court to prosecute in it any action which is groundless that no reasonable person can possibly expect to obtain relief.'"

In that case the court pronounced that a plaintiff who commences an action in a court of law when he or she has no reasonable grounds to do so has no cause of action and that an action which has no cause of action is obviously unsustainable. Therefore where the court is satisfied that there is not the vestige of a likelihood of the action succeeding under the sun, it should not hesitate to stop such an action under rule 79 (2).

Mr Siziba for the respondent conceded that in its present form the respondent's action in HC 2818/13 cannot be sustained because even by the respondent's own version the purchase price was not paid in full. The respondent therefore cannot obtain the order that is sought in the summons. *Mr Siziba* suggested that there may be a need to amend the claim. Unfortunately that has not been done. He submitted that if the action is summarily dismissed the applicant would be unjustly enriched given that a sum of £14 550-00 was paid. I do not agree. The applicant has not sought to appropriate what was paid towards the purchase price. She only seeks to enforce the provisions of clause 8 (2) of the parties' agreement which allow the seller to retain the money until a determination of any damages as may have been sustained as a result of the purchaser's breach of the agreement. In that regard, most of the submissions made on behalf of the respondent in heads of argument and not in the opposing affidavit, relating to enforcement of penalty stipulations as provided for in section 4 of the Contractual Penalties Act [Chapter 8:04], are irrelevant and misplaced.

It occurs to me that the respondent cannot possibly sustain a claim as pleaded in her summons and declaration. She is bound by the terms of the agreement of the parties signed on 11 May 2005. She is bound by the acknowledgment of debt she signed on 19 May 2005

prescribing an exchange rate which, if applied, clearly shows a purchase price of £31 050-05. It has not been shown why she should not be bound. It would appear that the respondent is attempting not only to ignore the imperatives of those agreements but to unilaterally make a new contract of her own in terms of which the purchase price should be £15 000-00, a sum she has not even paid but still claims transfer. It is untenable.

This court is not in the habit of making contracts for the parties. The concept of sanctity of contract is the corner stone of our law of contract. It postulates that when men and women of full legal capacity have entered into agreements freely and voluntarily with their eyes open it is not for the courts to rewrite those agreements for them. All that the courts are required to do is to enforce those agreements and not to excuse any party from them: See *Magodora & others* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S). I am therefore satisfied that the respondent's claim should be summarily dismissed.

In fact by arriving at that conclusion, it means that one can therefore not escape a finding that summary judgment on the claim in reconvention should be granted. I have already said that it is an extraordinary remedy, but I have also found that there is no basis for not holding the respondent to the terms of both the sale agreement and the acknowledgment of debt. Both have not been shown to be vitiated by duress or any other ground for repudiation. Summary judgment is a remedy available to party whose claim is unassailable and therefore should not be subjected to the delays and rigors of a trial. On the other hand, in order to succeed in repelling a summary judgment application the respondent must show that he or she has a mere possibility of success or that there is a triable issue. See *Jena* v *Nechipote* 1986 (1) ZLR 29 (S); *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235.

In my view the applicant's case is unassailable. It has been shown that the respondent seriously breached the agreement. She only paid less than half of the purchase price. The applicant is therefore entitled to a cancellation of the agreement. She is also entitled in terms of clause 8 (2) of the agreement to retain the amount paid until a debatement of damages, if any, sustained as a result of the breach.

In the result, it is ordered that:

1. The respondent's claim in case number HC 2818/13 be and is hereby dismissed with costs.

2. Summary judgment be and is hereby entered in favour of the applicant in respect of her claim in reconvention in the following;

(a) The agreement of sale entered into by the parties on 11 May 2005 in respect of Stand 3762, Bulawayo Township also known as No. 3 Blake Road Malindela Bulawayo is hereby cancelled.

(b) Pending the determination being sought and obtained by the parties either by agreement between them or by a court of law as to any damages as may have been suffered by the applicant as a result of the respondent's breach of the agreement the applicant shall retain the sum of GBP 14 550-00 paid to her by the respondent.

(c) Costs of suit.

Webb, Low & Barry, applicant's legal practitioners
Lazarus and Sarif, respondent's legal practitioners