NMB BANK LIMITED
versus
ELISHA TEMBO
and
LUCKSON RUHONDE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 13 & 19 September and 21 December 2022

Opposed Matter

E Homera, for the applicant
L Mauwa, for the 1st respondent
TG Manhombo, for the 2nd respondent

MAXWELL J: This is an application for the dismissal of an action made in terms of Rule 31 of the High Court Rules, 2021, Statutory Instrument 202 of 2021, (the Rules). Brighton Vimbainashe Shereni (Shereni) deposed to the founding affidavit. He is the applicant's Recoveries Manager.

BACKGROUND

Shereni outlined the background of the matter. Applicant is the registered owner of an immovable property commonly known as 4077 Budiriro Township Harare held under Deed of Transfer number 3664/17, (the property). Sometime in 2012 the first respondent and his wife and co-director, Elizabeth Murambiwa, through a company called Leafford Investments (Pvt) Ltd (the company), applied for a mortgage bond facility and ceded their jointly owned property as surety. The company failed to pay back the mortgage facility and the applicant under case number HC 7245/15 obtained a court order by consent declaring the property specially executable. A writ of execution was issued by the applicant on 29 February 2016. First respondent approached the applicant in a bid to reach a settlement that would allow them to settle their debt. A compromise agreement was reached, which allowed the first respondent and his

wife to sell the property by private treaty, to the applicant and be given an option to buy back the property within a period of one year from 8 May 2017 to 4 May 2018.

After the lapse of the year, first respondent and his wife failed to clear the arrears and requested for another extension of three months, which was granted. At the end of the three months, nothing had been paid. First respondent and his wife signed all the documents necessary for transfer and the property was transferred into the name of the applicant. First respondent approached applicant seeking a lease agreement to continue residing at the property. First respondent and his wife continued residing on the property as tenants paying rentals. They fell into arrears and applicant issued out summons for their eviction and for the payment of rental arrears. The matter was settled by consent and first respondent and his wife agreed to vacate the property by 31 August 2021.

First respondent's wife sought an additional three months before vacating the property on the basis that they had been affected by the covid-19 pandemic. The extension was granted, expiring on 31 December 2021. The property was subsequently sold. On 5 January 2022, first respondent approached this court under case number HC 30/22, seeking to have the sale of the property declared unlawful for undue influence and arbitrary deviation from the buyback agreement. He alleged that he signed the agreement of sale of the property to the applicant under undue influence. He also claimed that he was misled by the applicant in that the Agreement of Sale was presented as a chance or opportunity for first respondent to own the house back, and that the agreement was just for audit purposes. First respondent also claimed that the property was undervalued and the purchase price was dictated by applicant without his input.

Applicant entered its Appearance to Defend and on 17 February 2022 pleaded to the summons and declaration. Shereni averred that from the plea, it is apparent that the main case is frivolous and vexatious. He also averred that nothing supports the allegation of undue influence and first respondent does not show whether or not his wife was also unduly influenced. Shereni disputed that the private sell agreement was fundamentally or seriously irregular. He pointed out that first respondent in his summons blows hot and cold in that at one point he stated that the property was over-priced and at another that it was under-priced. Shereni pointed out that applicant as the registered owner of the property had every right at law to sale the property at any price it deemed fit. He submitted that the principal case is not one brought with the *bona fide*

intention of obtaining relief, but for the *mala fide* purpose of delaying the inevitable day of reckoning. Further that it is an unbridled contempt of court brought in bad faith deserving summary dismissal. He prayed that the main case be dismissed with costs at an attorney and client scale.

In response first respondent argued that there were material disputes of fact which cannot be resolved on the papers. According to him, the application ought to be dismissed on the basis that applicant consciously took the risk of persisting with the matter as an application despite realizing the inevitability of dispute of facts arising. On the merits, he argued that his right to be heard and to own property is under attack therefore his side of the story should be heard. He disputed that the claim in the main matter is groundless and averred that it was done in good faith without ulterior motives. He pointed out that this was the third time applicant had advanced a loan to them without any problems and they did not anticipate the treatment they received this third time. He averred that there was an inequality in bargaining power which culminated in the issues giving rise to the claim. To him the inequality is unconscionable and the contract should not be allowed to stand. He argued that applicant made it impossible for him to buyback the house by keeping on changing prices, and that the sale was completely manipulated on the basis that applicant had more bargaining power and suppressed his interests. He submitted that his claim had no *mala fides* but was a cry for help against big corporates that take advantage of those without a muscle to flex. He disputed that he is in contempt of court and argued that punitive costs are not warranted in this case. He prayed for the dismissal of the application with costs on a legal practitioner and client scale.

Second respondent narrated how he bought the property in September 2021. He indicated that he is now paying all council rates and fees but is being denied the right to enjoy occupation of the property.

ANALYSIS

PRELIMINARY ISSUE-MATERIAL DISPUTE OF FACTS

First respondent argued that there were material disputes of fact which cannot be resolved on the papers. He argued that it is in dispute whether or not he willfully entered and signed the contracts as he was unduly influenced. Mr *Manhombo* pointed out that that there is an extant

court order which declared the property executable. Mr *Homera* submitted that the transaction in question was based on liquid documents signed by the first respondent and appellant. Further that as the documents were signed by appellant and his wife, there is no indication that the wife was also unduly influenced. In *Rodgers* v *Rodgers* SC 64/07 it was stated that:

> "undue influence is a compendious description of the facts which if alleged in the declaration and proved at the trial would constitute the wrong for the redress of which the action was commenced. Whether there has been undue influence or not is a question which must be decided by reference to the facts and circumstances peculiar to the case. As it is a question of fact undue influence may take many different forms."

It was further stated in that case that there must be evidence that the person claiming undue influenced was forced to do what was against his or her own volition, it must be established by the facts alleged. The undue influence must be shown to have been operative at the time the action complained of was taken and the plaintiff must allege in the declaration all the material facts he or she has to prove at the trial to succeed.

A perusal of the record does not show any undue influence. If anything, the first respondent and his wife were given a long rope by the applicant. What they are complaining about is simply that they came to the end of a long rope. The documents filed are testimony of that. The events as shown by the annexures on record are outlined below. On p 40 of the record there is an order dated 2 February 2016, granting applicant's claim for $25 156.33 plus interest of 36% per annum calculated from 8 July 2015 to the date of full payment both dates inclusive. That order declared the property in question specially executable to satisfy the plaintiff (Applicant's) claim. Following that order, a writ of execution was issued on 29 February 2016. As of 4 May 2017, the company owned by first respondent and his wife was indebted to applicant in the sum of $28 073, 38. On the 5 May 2017, first respondent, his wife and the applicant (the parties) entered into an agreement of sale of the property for the amount of $28 073, 38. The agreement specifically stated that the amount was accruing further interest at the rate of 12% per annum. Subsequently the parties entered into a Memorandum of Option Agreement in which the buyback sum was $31 270. First respondent and his wife were given up to 4 May 2018 to pay the buyback sum. They were also obliged to pay interest of 12% per annum from the date the buyback sum was credited into the company's account. Paragraph E (2) of that agreement stated:

> "For the avoidance of doubt, the first party shall not exercise its right of option to buy back the property if it has not paid in full all the buyback sum and owing to the second party on or before **4th day of May 2018**. If, at the expiry of the option period, the first party has not paid the said buy back sum, the second party is free to either retain the property or sell it to a third [party without any notice to the first party."

The Memorandum of Option Agreement was signed on 8 May 2017. It was amended in October 2017 by which time the amount was $33 150, 45. On 4 April 2018 the company sought an extension of 3 months from 8 May 2018 to buy back the property. The letter was signed by first respondent and his wife. The letter shows that an amount of $10 000 was paid. As stated before, the three months lapsed without any payment being made leading to the transfer of the property into applicant's name. What followed were lease agreements between the parties. The first respondent and his wife fell into arrears, applicant issued out summons for their eviction and a claim for outstanding arrears. The matter was settled by consent under case number Com 127/2021 and first respondent and his wife agreed to vacate the premises by 31 August 2021. On 29 April 2021 first respondent's wife wrote to the applicant's lawyers requesting an extension of their residence at the property. She mentioned that they had cleared the rental arrears and stated:

> "Due to the understand (sic) that the property is also on market ray (sic) we be allowed to run around till maybe end of May so that we can also be able to buy back our property."

The request resulted in a three months lease agreement which expired on 31 December 2021. At the expiry of the lease agreement the property was sold and first respondent cried foul. From the above events, I was not persuaded that first respondent was unduly influenced.

On the issue of whether or not there is a real dispute of fact which could not be resolved without hearing evidence, MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132(H) at 136 F-G, expressed the following sentiments:

> "It is my view that it is not the number of times a denial is made or the vehemence with which a denial is made that will create a conflict of fact such as was referred to by MCNALLY J (as he then was) in *Masukusa v National Foods Ltd and Another* 1983 (1) ZLR 232 (H) and in all the other cases that have followed. A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

In the case of *Eddies Pfugari (Pvt) Ltd* v *Knowe Residents Association & Anor* SC 37/09, in assessing whether the court *a quo* erred in resolving the disputes raised on the papers without hearing evidence, the Supreme Court stated the following:

> "The position is now well established that: in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned."

First respondent complained of the continued alteration of the amount owing yet there is an extant court order with a base amount and percentage of interest to be added thereon. First respondent's complaint is not that applicant made an error in calculation. He did not relate the so-called under valuing and exorbitant pricing to the court order and the period in which he attempted to make the payments he alleged. He cannot ignore an extant court order and base his case on issues that are related to that order. I dismissed the preliminary point. There was no foundation for the allegation of undue influence. The material disputes of fact were not substantiated.

PRELIMINARY ISSUE-NON-JOINDER OF PARTIES

This issue was addressed in first respondent's heads of argument. However he was responding to an issue that was raised in response to his claim in HC 30/22. It was not addressed in oral submissions and is therefore considered abandoned.

WHETHER OR NOT THE CLAIM IS FRIVOLOUS AND VEXATIOUS

The term frivolous and vexatious was defined in *Fisheries Development Corporation of SA Ltd* v *Jargensen & Anor; Fisheries Development Corporation of SA Ltd* v *AWJ Investments (Pty) Ltd & Others* 1979 (3) SA 1331 (W) at 1339E-F as follows:

> "In its legal sense 'vexatious' means 'frivolous', improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant……Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; 'abuse' connotes a misuse, an improper use, a use mala fide, a use for an ulterior motive."

See also *S* v *Cooper & Ors* 1977 (3) SA 475. I find the claim by first respondent hopeless and without foundation when one considers the events leading to the sale of the property. I find that the claim by first respondent is not raised *bona fide* and the action is of a desperate drowning

man clutching at a straw. For such cases r 31 of this court's rules was put in place. The rule states:

> "***31. Application for dismissal of action***
> (1) Where a defendant has filed a plea, he or she may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious and such application shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, stating that in his or her belief the action is frivolous or vexatious and setting out the grounds for such belief and a deponent may attach to his or her affidavit documents which verify his or her belief that the action is frivolous or vexatious and whereupon the court may—
> (a) grant the application in which event it shall dismiss the action and enter judgment of absolution from the instance; or
> (b) dismiss the application in which event the action shall proceed as if no application was made; and
> (c) make such order as to costs as it considers necessary in the circumstances."

The rule enables the court to stop an action which should not have been launched. The annexures filed of record confirm that first respondent's claim is *mala fide*. In *Lawrence* v *Norreys* 39 Ch.D 213 BOWEN LJ at p 234 said:

> "It is abuse of the process of the court to prosecute in it any action which is so groundless that no reasonable person can possibly expect to obtain relief."

The Court will not assist the first respondent to delay the day of reckoning. The application therefore succeeds.

COSTS

It is trite that costs on an attorney and client scale are awarded in exceptional cases. There must be justification for the departure from the ordinary costs. Applicant prayed for such costs to be ordered. In heads of argument, applicant stated that the claim was not warranted and the court must frown at such behavior by awarding costs at an attorney client scale. I agree. First respondent's claim is an abuse of court process. Applicant's prayer will therefore be granted.

DISPOSITION

1. First respondent's claim in HC 30/20 be and is hereby summarily dismissed on the grounds that it is frivolous and vexatious.
2. The lease agreement entered into by the applicant and the first respondent be and is hereby cancelled.

3. The first respondent is to pay the sum of US$1 080 or the equivalent at the auction market rate and holding over damages at the rate of US$1 080 per month calculated from 31 April 2022 to the date of final vacation or eviction.
4. The first respondent and all those claiming occupation through him be and are hereby ordered to vacate Stand Number 2 Zingizi Close, Budiriro 2, Harare within seven days of this order, failing which, the deputy Sheriff be and is hereby authorized to evict the defendant from the said property.
5. First respondent is to pay costs of suit at an attorney and client scale.

Dube-Tachiona, Tsvangirai, applicant's legal practitioners
Marufu Misi Law Chambers, first respondent's legal practitioners
Jiti Law Chambers, second respondent's legal practitioners