EDMUND MBANGANI
versus
SAMUKELISO MABHENA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 21 MARCH 2018 AND 29 MARCH 2018

Opposed Matter

Ms P Mvundla for the applicant
Z C Ncube for the respondent

MOYO J: This is an application in terms of order 11 rule 75 wherein applicant seeks the dismissal of the respondent's case in HC 3196/17 as being frivolous and vexatious. At the hearing of the matter, I dismissed it. Here are my detailed reasons.

The background to this matter is that the two parties entered into an agreement of sale wherein they sold to each other an immovable property. The agreement of sale was reduced to writing and payment was due on 13 August 2017. It is common cause that the purchaser who is the applicant herein and the defendant in the main matter, breached the agreement of sale as he did not pay on the prescribed date. However, from applicant's version it would appear respondent (being the seller) condoned the late payment by conduct as she allegedly signed transfer papers after the default had occurred. On the other hand, the agreement has a clause 8 which provides thus:

> "8. VARIATIONS:
> This agreement contains the whole of the agreement between the parties and any other terms, provisions and conditions whether express or implied and excluded herefrom and any variations, alterations or additions to this agreement shall not be of any force or effect or legal validity unless reduced to writing and signed by the seller and the purchaser."

It would appear that the purchase price was paid to the seller's agents albeit late as it was paid on 4 September 2017. It would appear the parties entered into further negotiations as the seller sought to be paid some form of interest for the breach. That seems to have hit a dead end

and the parties did not find favour with each other. An application by a defendant in terms of order 11 rule 75 means that the plaintiff's case is totally baseless, hollow, and is a clear waste of time. It also means that the defendant cannot be taken through the rigours of a trial on frivolous and vexatious claims. The defendant in essence will be saying the plaintiff is merely wasting time for everyone. In other words it means that the plaintiff has no *prima facie* case which a court of law has to be called upon to adjudicate on. It is a case that is dead before it has even started.

One then looks at the facts of this case to discern if it is entirely hopeless, if there are absolutely no issues for determination at the trial. My view is the test to be applied is not that plaintiff has a good case or that plaintiff is likely to succeed or will definitely succeed, but that, it is that scenario where a plaintiff presents facts to the court, facts that a court can only arrive at a proper conclusion, whether in favour of or against the plaintiff, after the court has fully been appraised of all the core issues and those that are incidental thereto, that the court can then pronounce a judgment either against or in favour of the plaintiff.

I hold the view that this matter is not entirely hopeless, that it is not hollow, that a *prima facie* case has been established on the papers and that indeed the court must be called upon to hear what the plaintiff's gripe is all about.

Remedies that, deny a party to be heard, to present their case before a court of law, are by their nature, drastic, disadvantageous, and inimical in nature and therefore, such measures will only be employed in the most clearest of cases. It cannot be in the interest of justice to deny a party an opportunity to be heard, by dismissing their case as being frivolous and vexatious in circumstances as are in this case before even discerning the issues and gathering all the facts that are relevant to the case.

This case cannot be held to be frivolous and vexatious for the following reasons:

a) Applicant by his own admission breached the agreement of sale that plaintiff seeks to cancel in the main action. It is my view that a court of law must hear the parties and determine the validity or otherwise of the agreement of sale in light of the admitted breach.

b) The purported conduct by the respondent, which "tacitly" condoned the breach must be ventilated upon through a full trial. All the facts and circumstances of the case must be

canvassed for the court to either come to a conclusion that plaintiff condoned the breach or that she did not.

(c) Clause 8 in the agreement of sale stipulates that the agreement cannot be varied either by conduct or orally, that a variation can only be reduced to writing and even if the court were to find (for argument's sake), that respondent condoned the breach by conduct, the court still has to go further and make a determination as to whether plaintiff can be pinned down to such acquiescence in circumstances where an agreement of sale provides otherwise.

I thus hold the view that this is not a matter that can be summarily dismissed for the aforestated reasons.

At the hearing, the parties agreed that costs should be in the cause and I accordingly ordered as such.

It is for these reasons that I dismissed the application with costs being in the cause.

Mutuso, Taruvinga and Mhiribidi, applicant's legal practitioners
Messrs Ncube and Partners, respondent's legal practitioners