NICHOLAS VAN HOOGSTRATEN
versus
FELISTAS RUNYARARO JAMES
and
THE SHERIFF FOR ZIMBABWE
and
THE CHIEF REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 21 January 2010, 16 September 2010 & 8 December 2010

Opposed Application

S. Zingondo, the applicant
A. Bangidza, the respondent

MAKONI J: Sometime in August 2005 and at a sale in execution the applicant purchased the first respondent's rights title and interest in Stand 124, The Grange Township of the Grange commonly known as number 4 Wroxham Road The Grange Harare (the property). On 7 September 2005, the second respondent confirmed the sale. The first respondent then filed and objection to the sale in terms of rule 259. The second respondent dismissed the objection on 4 October 2005.

The first respondent proceeded to file an application, to this court, for the sale to be set aside. The application was dismissed with cost on 1 June 2006. First respondent appealed against the decision to the Supreme Court. The appeal was struck off the roll for want of compliance with Supreme Court Rules. An attempt to have the matter re-instated was dismissed by the Supreme Court on 4 June 2008.

In the meantime, the second respondent, in a letter dated 4 January 2006, but only delivered to the applicant on 4 February 2009, advised that he had recommended that the sale be aborted as the creditor had paid in full. He also returned the applicant's cheque which he advised was now stale.

On 11 May 2009, the applicant instituted an action whereby he claims an order directing the second defendant to transfer the first defendant's right title and interest in the property to him, ejectment of the first defendant and all those claiming through her from the

property and cost of suit. The first respondent entered appearance to defend. The applicant then filed the present proceedings for summary judgment.

It was contended by the applicant that all issues raised by the first respondent in her defence are *res judicata*. The first respondent in effect seeks to impugn the validity of the sale of the property. This issue has been adjudicated upon by this court and the Supreme Court.

The first respondent opposes the application on two main grounds. She contends that the applicant claims damages, which are not liquidated, through summary judgment procedure. In the summons and declaration, the applicant claims holding over damages in the sum of $1000-00. In the application for summary judgment the amount of $1 per month is mentioned. No application to amend the summons and declaration was made.

Secondly she contends that the applicant did not pay the purchase price. He made a payment by a cheque which cheque was not deposited. The cheque became stale and was later returned to him.

The procedure of summary judgment is not available in a claim for damages which are not liquidated. In *casu* the first respondent puts in issue the question of liability and obviously the quantum. It does not assist the applicant to reduce the claim to nominal amount of US1 as he still has to prove the basis for claiming the amount. In any event, the applicant cannot use the affidavit in summary judgment proceedings to amend the summons and declaration. It is merely supposed to verify the cause of action. In actual fact there is no room for amendment of the summons in an application of summary judgment. See *Cold Storage Commission of Rhodesia v Gey Van Pittius GB* 21/73 (not reported).

Applicant submitted that if the court were not inclined to grant to damages, if can still grant the other relief claimed. His application is three pronged and severable. Each claim should be considered separately.

In the case of *Garlicks Wholesale v Davis* 1927 CPD 185 as quoted in *Hugo Franco (Pty) Ltd v Gordon* 1956(4) SA 482 at 484 D-F GARDNER JP remarks:

> "summary judgment could only be granted in respect of all the plaintiffs claims in his summons not only such as he selected as the separate subject of summary judgment"

MURRAY CJ in the Hugo Franco case *supra* continued:

> "*Prime facie*, the plaintiff could have avoided those difficulties if, prior to making its application for summary judgment, it had amended its summons abandoning its alternative claim for the payment of damages and its claim for interests"

I share the view as expressed above. Summary judgment procedure is meant to be simple and straight forward. If parties were allowed to amend or sever claims at summary judgment, it defeats the whole purpose of having the procedure in place. It is no wonder that an applicant is not allowed to file an answering affidavit in summary judgment proceedings.

In *casu*, the plaintiff could have amended its summons abandoning the claim for damages before filing the present application. The applicant cannot succeed in its quest to have the order severed.

Assuming I am wrong on the point, I will proceed to determine the other issues.

The law of summary judgment is settled in our jurisdiction. It is a drastic remedy in which the plaintiff, whose belief is that the defence is not *bona fide* and entered solely for dilatory purposes, should be granted immediate relief without the expense, and delay of trial. See *Chiadzwa v Paulkner* 1991(2) ZLR 33(5) and *Coleman v Sahange* SC 132/91. It has far reaching consequences as it effectively denies the defendant the benefits of the fundamental principle of *audi alterem partem* rule. See *Nedlaw Investments and Truth Corp Ltd v Zimbabwe Development Bank S* 5/2000.

It can only be granted to the plaintiff when all proposed defences to the plaintiff's claim are clearly inarguable both in fact and in law. See *Chrisnar (Pvt) Ltd v Stutchbury and Anor* 1973 (1) RLR 277 G at 279.

The defence does not have to establish its defence on the probabilities. All she need allege are facts which disclose a defence. These facts if pleaded and accepted at the trial, must be sufficient to establish their defence. See *Jena v Nechipote* 1986(1) ZLR at 30.

The first respondent's defence to the applicant's claim of specific performance is that the applicant did not pay the purchase price. It is common cause that the applicant made payment to the second respondent through a cheque. The cheque was not deposited. The cheque was later returned to the applicant as it had become stale. It is also common cause that the first respondent paid the judgment creditor through other means.

The issue of whether the applicant paid the purchase price of the property, is in my view, not *res judicata*. It only came to light in February 2009 when the applicant received the letter from the second respondent advising that the sale had been aborted. The matter before MUSAKWA J was concluded in June 2006.

The applicant is suing for specific performance. He has not performed his obligations in terms of contract of sale neither has he tendered performance. Although he tendered a cheque to the second respondent, his estate was not diminished by the amount of the cheque as it was not deposited: What the applicant is asking the court to do is to order specific performance when he was not paid a cent for the property. In effect he will get the property for free. There is also the issue of when a payment by cheque becomes a payment in terms of the purchases obligations

In any event the first respondent paid to the judgment creditor through other means and not from the proceeds of the sale. In sales in execution the responsibility of officers of execution is first to the judgment creditor and secondly to the debtors. See *Maparanyanga v Sheriff of the High Court & Ors* 2003(1) ZLR 325 S at 335C. If the first respondent paid the judgment creditor, could the second respondent still proceed with the sale?

Having considered the above, it is my view that the first respondent has alleged facts which disclose a defence. In the result I will make the following order.

The application is dismissed with costs.

Ziumbe & Mtambanengwe, applicant's legal practitioners
Manase & Manase, first respondent's legal practitioners