MATTHEW MBUNDIRE
and
FADZAYI MBUNDIRE
versus
DALSO PROPERTIES (PRIVATE) LIMITED
and
LENNON MUCHINGADARE
and
ESTATE AGENT COUNCIL

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 22 November 2016 and 12 January 2017

Opposed matter

T.D. Muskwe, for the applicants
Ms *K. Zvinorova,* for the respondents

CHIWESHE JP: This is an application for summary judgment in terms of rule 64 which reads:

> "(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
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> (2) A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action.
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> (3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action.
>
> (4) Order 32 shall apply to the form and service of an application in terms of this rule and to any opposition thereto."

The first and second applicants are husband and wife. The first respondent is in the property business. The second respondent, a registered estate agent, is the first respondent's managing director. On 13 May 2011 the respondents brokered an agreement of sale entered

into by the applicants and one Sophie Ncube, in terms of which the applicants purchased an immovable property in the district of Salisbury namely, stand 241 Mandara Township of Lot 3 A Mandara measuring 4112 square metres registered under deed of transfer number 3892/2007. In pursuance of that agreement the applicants made a lump sum deposit of $20 000.00 to the respondents. Despite this development the respondents, according to the applicants, then sold the property to a third party. The applicants then sought to recover that sum from respondents. On a number of occasions the respondents promised to so refund this amount but on each occasion failed to do so. The applicants then reported the matter to the Police who preferred charges of fraud against the respondents. To avoid prosecution the second respondent persuaded the applicants to agree to a settlement plan in which the first respondent proposed to pay as follows:- a down payment of $5000.00, then a further payment of $7500.00 on or before 28 October 2012 and the balance on or before 31st December 2012. This agreement was reduced to writing and signed on 28 September 2012.

The respondents failed to honour this agreement as only $5000.00 was paid leaving the balance of $15 000.00 outstanding. It is to recover this amount that the applicants sued the respondents jointly and severally, the one paying the other to be absolved. The third respondent is cited as the body that has professional oversight of the first and second respondents and where appropriate, obligated to compensate clients hard done by their members.

The respondents entered appearance to defend despite their hitherto apparent admission of liability in the sum of $15 000.00. The applicants, believing that the respondents had no *bona fide* defence to their claim and that appearance to defend had been entered merely for purposes of delay, have filed the present application for summary judgment in the sum of $15 000.000. They also claim costs on the punitive scale.

In their opposing affidavit, sworn to by the second respondent, the first and second respondents raise the following issues. Firstly it is averred that the deed of settlement was not properly and freely obtained from the second respondent. The respondent was under the threat of prosecution if he did not sign the agreement. Secondly it is averred that the agreement referred to does not attach liability to the first respondent nor does it state whether second respondent was representing first respondent when he so signed the agreement. Thus, so it is argued, there is no basis upon which the court could find against the first respondent. It is further averred by the respondents that liability is not being denied in principle – what is

denied is the amount of the claim. The value of the vehicle which had been pledged as part payment was initially placed at $7 000.00 but later reduced to $5 000.00. The respondents only agreed to that reduction because of the threat of prosecution. In any event, so assert the respondents, the agreement referred to does not address the breach by the applicants of the initial agreement relating to the sale of the immovable property. As a result the respondents have a potential claim for lost commission and other costs occasioned by the applicant's breach. In light of the above there is a real possibility that the applicant's claim could be dismissed or varied. For these reasons the respondents submit that they have a *bona fide* defence to the applicant's claim and pray that the application for summary judgment be dismissed with costs.

The requirements for an applicant to succeed in an application for summary judgment are laid out in a plethora of decisions. In *Majoni v Minister of Local Government and National Housing* 2001 (1) ZLR 143 (S) the court stated that –

> "The principles applicable in a summary judgment application have been well documented. The quintessence of this drastic remedy is that the plaintiff, whose belief it is that the defence is not *bona fide* and entered solely for dilatory purpose, should be granted immediate relief without the expenses and delay of trial……..)

Summary judgment may be granted when the plaintiff proves that it has a clear and unassailable case against the defendant and that the defence raised, if any, is without substance in law and in fact. See *Pitchford Investments Pvt Ltd vs Muzariri* 2005 (1) ZLR H.

In *Jena v Nechipote* 1986 (1) ZLR 29 (S) the Supreme Court laid down what must be established by the defendant to dispose a claim for summary judgment. It was stated thus:

> "All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that 'there is a mere possibility of his success, 'he has a plausible case', 'there is a triable issue' or, 'there is a reasonable possibility that an injustice may be done if summary judgment is granted."

In my view the defendants have adequately met this threshold. The defences set out in their plea raise triable issues and if summary judgment were to be granted, an injustice would likely ensue. Firstly, there is a dispute as to which of the parties breached an agreement of sale. That is clearly a triable issue as it has a direct bearing on the claim and damages, if any, to be paid. Secondly, the defendants state that they admitted liability under duress, in view of the threat of prosecution. This is not far-fetched as indeed a report had

been made to the police against the defendants. Thirdly, the defendants have put the quantum of the claim into issue, and further, indicated the basis of a counter claim by way of damages arising out of breach of contract. All these are triable issues which must be ventilated by way of a trial.

In the circumstances I conclude that the applicants have not met the requirements for summary judgment. Conversely, the defendants have established the basis upon which this application ought to be dismissed.

Accordingly, it is ordered that the application for summary judgment be and is hereby dismissed with costs.

Muskwe & Associates, applicants' legal practitioners
Messrs Mahuni & Matatu, 1st & 2nd respondents' legal practitioners