REPORTABLE (91)

(1) UPENYU MASHANGWA (2) BLESSING MASHANGWA
v
(1) EMMANUEL MAKANDIWA (2) RUTH MAKANDIWA
(3) UNITED FAMILY INTERNATIONAL CHURCH

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKONI JA & BERE JA
HARARE: 11 NOVEMBER 2019 & 16 SEPTEMBER 2021

S. M. Hashiti, for the appellants

L. Uriri, for the first respondent

MAKONI JA: This is an appeal against the whole consolidated judgment of the High Court dismissing the appellants' application in HC 4197/18 and granting the respondents' application in HC 1774/18.

FACTUAL BACKGROUND

The appellants are husband and wife and were at one point members of the United Family International Church ("UFIC"), the third respondent *in casu*. The first and second respondents are also husband and wife and are the leaders (prophet and prophetess respectively) of UFIC. In the court below, the appellants instituted an action against the respondents, under HC 7214/18 claiming a total sum of US$ 6 535 000.00, to be paid jointly and severally, the one paying the others to be absolved, broken down as follows:

"a) Damages for US$ 700 000.00 being the value of property number 14 Edinburgh, Marlborough, Harare.

b) A refund of the sum of US$1 698 000.00 for misrepresentation.
c) US$37 000.00 being refund for fees paid to Tichaona Mawere.
d) An amount of US$1 100 000.00 being a refund paid to the defendants.
e) An amount of US$2 000 000.00 being damages for fraud and misrepresentation.
f) An amount of US$500 000.00 being damages for mental anguish.
g) US$500 000.00 being damages for defamation of character. (sic)
h) Payment of interest on the sums in (a) to (g) above at the prescribed rate from the date of demand to the date of full and final payment.
i) Payment of costs of suit on a legal practitioner and client scale."

The claims were particularised in the declaration as summarised hereunder.

CLAIM ONE

In 2012, and during church proceedings, the first and second respondents fraudulently misrepresented to the appellants "that anyone with a bank debt or loan was to be cancelled as it was a season of miraculous cancellation of debts" (*sic*). It is alleged that this followed after the respondents had been 'privately' informed that the appellants had an existing ZB Bank loan in the sum of US$500 000.00. As a result of this misrepresentation, the appellants were induced not to pay back the loan and as a consequence the bank executed on their immovable property thus causing them to lose a property worth US$700 000.00.

CLAIM TWO

In the same year, the respondents misrepresented in church that one Tichaona Mawere (Mawere) "was a great lawyer and that he would not lose a case" when in fact he was not a registered legal practitioner. Acting on the misrepresentation, the appellants instructed the said Mawere to handle their matter for a claim of US$1 698 000.00 and expended fees in the sum of US$ 37 000.00. Mawere produced fake court orders resulting in them making a loss to the tune of US$1 735 000.00.

CLAIM THREE

That in the period ranging from 2014 to 2016 the appellants were called on stage in church. The respondents would announce that the appellants "were a successful example in the Ministry". Acting on these "misrepresentations" the appellants made various direct contributions amounting to US$1 100 000.00 to the respondents. The respondents would represent "that in so contributing the plaintiffs (the appellants) would reap what was commensurate with their contributions."

CLAIM FOUR

The appellants were again paraded in church on stage "as a chosen people by God to have succeeded in business". As a result of that further "misrepresentation" the appellants marketed the respondents' prophecies for the advancement of the respondents' interests and "their prophesies as the success story of the prophesies". In the process the appellants were prejudiced to the tune of US$2 000 000.00.

CLAIM FIVE

Before the amendment, which I shall deal with later, the claim was that "the defendants (the respondents) caused damages through defamation (sic) by publishing false articles against the plaintiffs and their business activities, articles claiming that the Plaintiffs perfumes cause cancer."

CLAIM SIX

The appellant's claimed that "the defendants caused mental anguish to the Plaintiffs, emotional embarrassment and torture by exposing the Plaintiffs' private lives on the Defendants' Facebook online page, '*The Truth About Prophet Makandiwa.*"' It was further

averred that the information had been given to the Respondents "in private" and the statements were meant to destroy their reputation,

Upon being served with the summons the respondents entered an appearance to defend. They further addressed a letter to the appellants in terms of r 140 of the High Court Rules, 1971 (the rules) to the effect that the claims in question were vague and embarrassing and that they did not disclose a cause of action. It was averred that it was not clear whether the appellants were suing in terms of contract or under the law of delict and as regards claim five and six, whether the claims were made under defamation or *injuria*. The appellants did not respond to this letter. Consequently, the respondents filed an exception to the appellants' summons and declaration. The exception was dismissed on 12 January 2018 by MANGOTA J who ordered that the appellants amend their declaration in respect of claims five and six, that the respondents file their plea and that the matter proceeds in terms of the rules.

As directed the appellants amended their declaration in respect of claims three, five and six.

CLAIM THREE

It was amended by the addition of paragraph 20.1. It was claimed that upon being confronted by the appellants the respondents undertook to repay the appellants all the money they had contributed upon proof of such payment. Despite being furnished with the proof the respondents have refused or neglected to pay in accordance with their undertaking.

CLAIM FIVE

It was amended by deleting the original claim and substituting it as summarised below. The appellants were in the business of manufacturing and selling perfumes. On or

around 16 August 2016 and after the fallout between the appellants and the respondents the respondents caused to be published an article in the Herald Newspaper in which they said:

> "You just need one person who can move around telling people that your perfumes can cause cancer and the news begins to spread your company will begin to go down." *(sic)*

> "The statement was false and the respondents intended to spread a rumour and thereby injure the appellants in their trade. In view of the close relationship between the parties before the fallout, the words of the respondents caused a rumour to spread that the appellants' perfumes cause cancer. As a result of the statement and the subsequent rumours the public desisted from purchasing appellants' perfumes. Consequently, the appellants through their company ceased to manufacture the perfumes. The appellants suffered damages due to the respondents' wrongful conduct in the sum of USD$500 000.00."

CLAIM SIX

The original claim was deleted and substituted with a claim summarised as follows. On or about 2 February 2017 the respondents caused to be published on their Facebook page titled "The truth about Emmanuel Makandiwa" private and intimate details of the appellants which they had received in confidence. The publication of the details was wrongful and was done with an intention to injure the appellants' standing in society and was done in the wake of the fallout between the parties. Appellants suffered damages, as a result of the unlawful intrusion into their private lives, in the sum of USD$500 000.00.

Following the dismissal of the exception, and on 23 February 2018, the respondents filed an application for the dismissal of the appellants' claims *in toto* in terms of Order 11 r 75 of the rules, under HC 1774/18. The respondents having failed to prosecute their application under HC 1774/18 timeously, the appellants filed a chamber application for dismissal of the same for want of prosecution in terms of Rule 236(3) (b)of the rules, on 8 May 2018 under HC 4197/18. Since both matters were set down for hearing at almost the same time and before different judges, a request was made for their consolidation and it was granted.

DETERMINATION BY THE COURT *A QUO*

The court's approach was to determine the application in terms of r 236 (3) (b) under HC 4197/18 first. It opined that if it granted the relief being sought by the appellants that would be the end of both matters. If it dismissed the application, then it would proceed to hear the respondents' application in terms of r 75 under HC1774/18 which it coined the main matter.

Regarding the application for dismissal for want of prosecution the court found that the reasons proffered for the delay in prosecuting the matter were reasonable. It also stated that it had a discretion to discharge the application or make any other order as it deemed fit in the circumstances. In the result, the application for dismissal for want of prosecution was dismissed and the court ordered that the main matter be heard on the merits.

Pertaining to the issue of the dismissal of the appellants' claims in terms of r 75 of the rules, the court *a quo* dealt with each of the appellants' claims in turn. It found that the appellants' claims were frivolous and vexatious and warranted summary dismissal.

Aggrieved by the decision of the court *a quo*, the appellants noted an appeal to this Court. This is the appeal that this Court is seized with.

GROUNDS OF APPEAL

"1. The court *a quo* erred and misdirected itself in that having found that respondents had by their admission failed to prosecute their cause within the prescribed period, it ought to have dismissed for want of prosecution, no special circumstances existing to exercise a discretion in their favour.
2. The court *a quo* grossly erred and misdirected itself in that a prior judgment of the High Court in HH 10/18 having established that a valid and substantiated cause of action based on fraud existed between the parties, it could not render otherwise.
3. *A fortiori* the court *a quo* effectively reviewed and contradicted an extant earlier judgment of a judge of parallel jurisdiction on the same cause between the same parties contrary to the principles of *res judicata* and issue estoppel.

4. The court *a quo* further erred and misdirected itself in finding contrary to law that fraud and fraudulent misrepresentation did not constitute a valid cause of action at law,

Subsequently;

The court *a quo* erred in failing to find that the question of whether fraud and its constituent elements had been proven was an evidentiary issue reserved for trial.

5. The court further grossly erred and misdirected itself in determining the matter regardless of conflicting material averments which could not be resolved on affidavit *a fortiori*, it could not find as a matter of fact that the claims by the appellants were frivolous and vexatious, absent evidence and its testing in contested action proceedings

ISSUES

Although the appellants raised five grounds in their notice of appeal the matter, in my view, stands to be disposed on three issues *viz*;

1. Whether or not the court *a quo* erred in failing to dismiss the respondents' application for want of prosecution.
2. Whether or not the court *a quo* reviewed and contradicted an extant earlier judgment of a judge of parallel jurisdiction thereby violating the principles of *res judicata* and estoppel.
3. Whether or not the court *a quo* erred and misdirected itself in determining the matter regardless of the existence of alleged conflicting material averments which could not be resolved on affidavit

APPLICATION OF THE LAW TO THE FACTS

1. Whether or not the court *a quo* erred in failing to dismiss the respondents' application for want of prosecution.

In their first ground of appeal the appellants take issue with the fact that the court *a quo* erred and misdirected itself in that having found that the respondents had by their admission failed to prosecute their cause within the prescribed period, it ought to have

dismissed it for want of prosecution, as no special circumstances existed for it to exercise its discretion in their favour.

The law on applications for dismissal for want of prosecution is settled. In *Guardforce Investments (Private) Limited v Ndlovu & Others* SC 24/16 the court said:

> "The respondent applied to have the appellant's case dismissed for want of prosecution in terms of r 236 (3) of the High Court Rules, which provides as follows:
>
> "236. Set down of applications
>
> (3) Where the respondent has filed a notice of opposition and opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set matter down for hearing, the respondent, on notice to the applicant, may either – set the matter down for hearing in terms of rule 223; or make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit."
>
> The discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration –
>
> (a) the length of the delay and the explanation thereof;
> (b) the prospects of success on the merits;
> (c) the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time."

For the appellants to establish that the court *a quo* misdirected itself in the manner alleged they have to satisfy this Court that they met all the requirements as set out in the *Guardforce* case *supra*.

In *casu* the appellants did not satisfy these requirements. They did not relate at all to the prospects of success they had in the main matter. They did not show that they suffered prejudice due to the respondents' non-timeous action.

The grant or refusal of an application for dismissal for want of prosecution is an exercise of discretion. Rule 263 (3) clearly bestowed discretion on the court *a quo* on whether to grant or dismiss the application. *In casu* the court *a quo* exercised its discretion not to dismiss the main matter because the respondents had filed their answering affidavit, heads of argument and applied for set down of the matter following service of the application for dismissal upon them. In this light, the court *a quo* found that despite the delay in filing their answering affidavit and heads of argument, there was no utter disregard of the rules of the court. It further found that the explanation given by the respondents in the circumstances was reasonable and that rule 236, was not mandatory. It gave the court a discretion which must be exercised in the interest of justice and finality to litigation.

For this Court to vacate the court *a quo's* exercise of discretion certain requirements have to be met. The laid down test has to be pleaded and met. It has to be shown that the court *a quo* in its exercise of discretion, was motivated by ulterior motives and not the dispensation of justice. It has to be shown that the exercise of discretion in the manner the court *a quo* did was actuated by malice, bias, improper motives and any other considerations extraneous to the court's conduct prescribed by the law. See *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (SC), *Barclays Bank of Zimbabwe Limited v Mahachi* SC 62/04, *Robinson v Minister of Lands and Anor* 1994 (2) ZLR 171 (S) at 175 A-C.

In my view the appellants have not met the test. They have not shown that the exercise of the court's discretion was motivated by ulterior motives. They have further not proved that there was malice and any other extraneous consideration that influenced the court *a quo* to exercise its discretion in the manner it did. There being no proper basis laid out for

interfering with the decision of the court *a quo* this ground of appeal has no merit and ought to be dismissed.

2. Whether or not the court *a quo* reviewed and contradicted an extant earlier judgment of a judge of parallel jurisdiction thereby violating the principles of *res judicata* and estoppel.

This issue deals with grounds two and three. Put differently the issue is whether the determination of an exception to the summons and declaration taken in terms of Order 21 r 137(1)(b) bars a litigant from seeking a dismissal of the same action for being frivolous and vexatious under Order 11 rule 75.

The thrust of the appellants' argument is that MANGOTA J's finding that they had a substantiated cause of action based on fraud precluded TAGU J from making a finding that the claims were frivolous and vexatious. It was submitted that TAGU J was bound by the principles of *res judicata* and estoppel to abide by the extant order of MANGOTA J.

The referred question can be determined by ascertaining the law governing exceptions and dismissal of actions and the nature of the cases before the respective judges.

EXCEPTIONS TO PLEADINGS

Rules 137 and 141 regulate the procedure to be followed in raising exceptions and the court's powers thereto respectively. In terms of r 137 (1) (b), a party can except to the whole pleadings or the specific offending parts.

Rule 141(a) (ii) empowers the court to make an order striking out or allowing the amendment of the matter contained in a pleading.

In *Herbstein & van Winsen's The Civil Practice of the High Courts of South Africa*, the purpose of an exception procedure was elucidated as follows:

> "The taking of an exception is a procedure which is interposed before the delivery of a plea on the merits by a defendant or before the delivery of a replication or joinder of issue by a plaintiff. It is designed to dispose of pleadings which are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained or to determine such issues between the parties as can be adjudicated upon without the leading of evidence." (emphasis added)

What constitutes a vague and embarrassing pleading was considered in *Trope & Ors v The South African Reserve Bank* 1992 (3) SA 208 at 221A-E, where the court quoted with approval the lower court's statement that:

> "And if the pleadings lack sufficient clarity to enable the defendant to determine those facts and hence the case he has to meet, the pleadings are vague and embarrassing."

The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity are as summarised by Erasmus Superior Court Practice at B1-154A as follows;

"a. In each case the court is obliged to first of all consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it simpler: the reader must be unable to distil from the statement a clear single meaning.

b. If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of.

c. In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance to the case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a matter of detail.

d. The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced."

See also *Sammys Group (Pvt) Ltd v Bourchier Meyburgh N.O. & Ors* SC 45/15

From the cited authorities, it can be noted that an exception relates to the formulation of a claim. A claim must be articulated with sufficient particularity such that it discloses an intelligible cause of action failing which it may be termed vague and embarrassing. However, the court may set aside the pleadings and upon request grant the plaintiff leave, to file an amended pleading within a certain period. Dismissal at this stage is a drastic remedy thus the courts have inclined towards the grant, where an exception is upheld, of leave to the plaintiff to amend the offending pleadings.

THE NATURE OF THE CASE BEFORE MANGOTA J

The court was called upon to determine whether the claims before it were vague and embarrassing to the extent that a party could not easily understand and plead to them without difficulty owing to an unclear cause of action. In the exception, claims 1, 2, 4, 5 and 6 were alleged to be vague and embarrassing. It is only claim 3 which was said to be not only frivolous and vexatious but vague and embarrassing as it did not disclose a cognizable cause of action. However, in their heads of argument, the respondents argued that the summons and declaration were expiciable on the basis that they did not disclose any cause of action against them and that they were vague and embarrassing to the extent that the vagueness and embarrassment went to the root of the cause of action.

A reading of the court's judgment shows that the court was alive to the case before it which was an exception to the summons and declaration for being vague and embarrassing. To that end, it determined the following question:

> '…whether or not one or more or all of the claims do not, as the defendants alleged, disclose a cause of action."

Thereafter, the court analyzed whether each of the appellant's claims established a cause of action against the respondent. However, in finding that four of the appellants' claims showed clear and cogent causes of action and fell under the delict of fraud, the court remarked that the claims were "neither frivolous nor vexatious."

A close look into the court's judgment shows that the phrase frivolous or vexatious was employed concerning whether or not the claims subject to the exception disclosed a cause of action and whether or not they were clear and not vague and embarrassing. It would appear that the phrase was loosely used if regard is had to the issue the court determined and the resultant disposition of the court (an amendment of the vague and embarrassing claims envisaged by r 141.)

DISMISSAL OF ACTION FOR BEING FRIVOLOUS AND VEXATIOUS

Order 11 rule 75 allows a defendant who has filed a plea to seek dismissal of an action that is frivolous and vexatious. It states:

> "**ORDER 11**
> **DISMISSAL OF ACTION**
> **75. Application for dismissal of action**
> (1) Where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious.
> (2) A court application in terms of subrule (1) 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 belief the action is frivolous or vexatious and setting out the grounds for his belief.
> (3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify his belief that the action is frivolous or vexatious."

In *Rogers v Rogers and Anor* 2008 (1) ZLR 330(S) at 337E-G the court dealing with an appeal against a decision dismissing a claim and granting absolution from the instance

in terms of Order 11 r 79(2) on the ground that it was frivolous, accepted the following definition of frivolous:

> "In *S v Cooper & Ors* 1977(3) SA 475 at 476D BOSHOFF J said that the word "frivolous" in its ordinary and natural meaning connotes an action characterized by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense "frivolous or vexatious" when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation. See also *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at p 271; *Corderoy v Union Government* 1918 AD 512 at p 517; *Wood NO v Edwards* 1968(2) RLR 212 at 213 A-F; *Fisheries Development Corporation v Jorgensen & Anor* 1979 (3) SA 1331 at 1339 E-F; *Martin v Attorney General & Anor* 1993(1) ZLR 153(S).
>
> It appears to me that a plaintiff who commences action in a Court of law when he or she has no reasonable grounds to do so has no cause of action. An action without a good cause is baseless and obviously unsustainable."

Dismissal under r 75 is therefore a drastic remedy intended to resolve actions that are baseless and unsustainable.

THE NATURE OF THE CASE BEFORE TAGU J

The court per TAGU J, *inter alia* determined the respondent's application for dismissal of the appellants' claims in terms of Rule 75 on the basis that they were frivolous and vexatious. This was after the appellants had amended their claims pursuant to MANGOTA J's order and the respondent had filed their plea. Notwithstanding the amendment, the respondents argued that the proceedings were not seriously brought with *bona fide* intent of obtaining relief as the appellant's causes of action were founded on falsehoods. As alluded to, Rule 75 allows the course of action taken by the respondents. Thus, the appellants must have averred material facts in the declaration, proof of which would constitute the essential elements of the alleged causes of action entitling them to the judgment of the Court. See *Rogers v Rogers, supra.*

In *casu*, the appellant's claims 1-4 alleged that the respondents made material misrepresentations which caused them financial prejudice, claim 5 related to alleged defamatory statements by the respondent and claim 6 to mental anguish, emotional embarrassment and torture due to the respondent's exposing their private lives on social media platforms. The essential elements of the alleged causes of action must have been provided.

Therefore, r 75 goes beyond the formulation of a claim. It looks into the legal validity of a claim. Unlike an exception, an inquiry into whether a claim is frivolous and vexatious goes beyond the wording of a claim, it looks into whether the claim has any legal basis or merit. Where it is unsustainable, manifestly groundless or utterly hopeless and without foundation it is frivolous and may be dismissed.

ANALYSIS

There is no provision in the rules of the High Court that bars a litigant who excepts to a summons and declaration for being vague and embarrassing under r 137 from seeking the dismissal of the matter under r 75 on the basis that it is frivolous and vexatious. The rules relate to different procedural concepts, are invoked at different legal stages and afford a party distinct legal relief. The respondents properly invoked each of the rules, thus the court per TAGU J cannot be faulted for determining the peculiar application before it which was distinct from the one MANGOTA J dealt with. Therefore, *res judicata* does not arise as the issues dealt with by MANGOTA J and TAGU J were different.

THE PROPRIETY OR OTHERWISE OF MANGOTA J's ORDER

I pause momentarily and digress to note that there is case law to the effect that it is a misdirection for a court to dismiss an exception taken and simultaneously allow a party

to amend their pleadings. In *Chimakure & Anor v Mutambara & Anor* SC 91/20, the court held that:

> "[23] For the sake of convenience, I will begin with the nature of the relief ordered by the court *a quo*. The court dismissed the exception. It found that the pleadings were not excipiable. Once the court found that the exception was not well taken it could not exercise the discretion of affording the respondents an opportunity to file further particulars. Such indulgence could only follow upon a finding that the exception was well taken. To that extent it is my view that the court was guilty of a misdirection." (Emphasis added)

In *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593A at 602C-D the court remarked:

> "As far as I am aware, in cases where an exception has successfully been taken to a plaintiff's initial pleading, whether it be a declaration or the further particulars of a combined summons, on the ground that it discloses no cause of action, the invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time." (own emphasis)

In light of this, this Court finds that it was a misdirection for MANGOTA J to dismiss the respondent's exception on all claims and grant the appellants leave to amend claims 5 and 6.

In conclusion TAGU J properly dealt with the claim for dismissal before him. This is for the reason that there is nothing in the rules to suggest that once the determination of an exception filed under r 137 has been made, a party cannot move for the dismissal of an action under r 75. The appellants' grounds two and three have no merit and ought to be dismissed.

Regarding grounds four and five the court, at the outset during the hearing, enquired of Mr *Hashiti* whether these grounds had been abandoned as they had not been motivated in the Heads of Argument. In response Mr *Hashiti* advised that none of the grounds were being abandoned. On being asked to direct the court to where these grounds were motivated he directed the court to paragraph 15 of the appellants', Heads of Argument. This is what para 15 states;

> "Even if the court per TAGU J could revisit the question, it still did so wrongly and wrongfully. That there is a valid cause of action is beyond doubt. The law allows refunds and reimbursements for unlawfully paid funds. As a result, there cannot be argument that no cause of action can arise."

The argument advanced in this paragraph completely misses the respondents' position. It is not that there is no cause of action. It is that the appellants pleaded falsehoods and that they could never succeed at trial on the facts as pleaded. Their action was therefore frivolous and vexatious.

The paragraph also misconstrues the finding of the court *a quo*. Nowhere in the judgment *a quo* is it stated that a misrepresentation did not constitute a valid cause of action. The court *a quo* examined each claim separately and gave reasons as to why it found each claim to be frivolous and vexatious. The crisp finding of the court *a quo* in respect of each claim was that on the facts as pleaded by the appellants no competent cause could be sustained.

By way of illustration, in claim one the appellants alleged that the respondents alleged that they stopped paying the loan that they had obtained from ZB on the basis of a prophesy made by the respondent to the effect that it was "a season of miraculous cancellation of debts".

It could not on the facts as pleaded by the appellants be established through a deeds search at the Registrar of Deeds' office that the appellants owed ZB Bank Limited USD500 000 and that the property they allegedly lost was bonded in favour of ZB Bank for that amount.

It could not be supported factually through a search carried out in the Civil Registry of the High Court that ZB sued the appellants for USD500 000 between 2012 and 2017 as alleged, and that the property in question was attached or sold in execution as alleged or at all at the instance of ZB Bank Limited.

The reality on the ground which the appellants never controverted was that the property was at all material times owned by Carmeco Investments (Private) Limited (Carmeco) a separate *persona* from the appellants in terms of deed of Transfer No. 10763/2002 dated 24 September 2002. In that regard the law relating to companies applies with full force and effect. The appellants cannot claim to have been prejudiced in respect of what they did not own.

In any event as early as 29 February 2012 Carmeo had sold the property for USD800 000.00 to Nemajo Family Trust as represented by Steward Nyamushaya. The purchase price thereof was paid in full through the appellants' agents McDowells International (Private) Limited.

At no time did it appear from the Deeds Search that Carmeco, which owned the property, mortgaged number 14 Edinburgh Road Marlborough to ZB Bank Limited for the sum of USD 500 000 during the period 2012 to 2017.

The above illustration clearly demonstrates that the appellants pleaded falsehoods. In their notice of opposition to the application the appellants did not controvert these facts. They contended that they did not have to reply to the evidence submitted by the respondents as it was a matter of evidence to be related to at trial. They overlooked the fact that in terms of r75 (2) and (3) a party making an application in terms of subrule (1) is required to do two things. Firstly, he or she shall file an affidavit in which he sets out his belief that the action is frivolous and vexatious and the grounds for his belief. Secondly he or she may attach documents which verify his or her belief that the matter is frivolous and vexatious. Once that information has been placed before the court it should be incumbent upon the other party to controvert it. In *casu* the appellants did not do so. Rather they directed their energy to a vitriolic attack on the respondents instead of addressing the requirements of the r 75.

Having misconstrued the court *a quo*'s finding, grounds of appeal four and five must fail.

Everything considered I find no fault with the reasoning of the court *a quo*. No proper basis has been placed before this Court to interfere with the court *a quo's* exercise of its discretion.

The respondents prayed for costs on a punitive scale mainly on the basis that the *lis a quo* was an unmitigated attack upon their good names. It was shown to be false. The respondents' pockets have not been spared in the bid to protect themselves from a sustained assault upon their good names. I see no reason why costs on a legal practitioner-client scale should not be granted.

Accordingly, I make the following order;

1. The appeal be and is hereby dismissed.
2. The appellants to pay the respondents costs, on a legal practitioner client scale, jointly and severally the one paying the other to be absolved.

GWAUNZA DCJ: I agree

BERE JA: No longer in office

Manase & Manase, appellant's legal practitioners

Venturas & Samkange, respondent's legal practitioners