Judgment No. S.C. 69/99
Civil Appeal No. 39/99

CHRISTINE MACHETU v (1) CLIFFORD CHANDIPA (2) STELLA CHANDIPA (3) ANTHONY SANDO MACHETU (4) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & MUCHECHETERE JA
HARARE, MAY 31 & JUNE 7, 1999

*P Nherere*, for the appellant

*T Chitapi*, for the first, second and third respondents

No appearance for the fourth respondent

EBRAHIM JA: The first and second respondents, Clifford Chandipa and Stella Chandipa, together with Anthony Machetu, the third respondent, brought an application before the High Court seeking summary judgment against the appellant for her to vacate a house that the first and second respondents had purchased from the third respondent. They also sought an order that if the appellant remained on the property following a successful application made by the respondents the Deputy Sheriff be authorised to remove her or any person occupying the property through her.

The first, second and third respondents were granted the summary judgment and it is against this judgment that the appellant appeals.

At the hearing before the court *a quo* the appellant filed a counter-claim. She claimed:-

> "a) an order declaring the agreement of sale between the first, second and third plaintiffs null and void;
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> b) an order setting aside the transfer of the property to the first and second plaintiffs; and
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> c) costs of suit;
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> or alternatively as against the third defendant:
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> d) payment of the sum of $124 000.00; and
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> e) costs of suit."

The learned judge *a quo* on this issue observed:-

> "The counter-claim … is an exact reverse of the claim being made by the applicants. It is not an unrelated counter-claim relating to other aspects. The only additional aspect is an alternative claim for damages aimed specifically at the third applicant by the first respondent (the appellant).
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> … as I say the counter-claim will stand or fall on the same issues as that which this court is called on to decide …".

It seems to me that the issues raised by the respective parties were precisely the same. If the learned judge is correct in his conclusion on the application for summary judgment, it follows that as the counter-claim related to the very same issues, that is the end of the matter. Mr *Nherere*, who represented the appellant in this Court, submitted that the only issue which this Court was required to determine was whether in the circumstances of this case the learned judge *a quo* was correct in granting the summary judgment.

Anthony Machetu and the appellant were divorced on 20 March 1996 in the High Court. The proprietary rights of the parties were specified in a consent paper, in terms of which it was agreed that their matrimonial home should be sold through the supervision and agreement of the parties' legal practitioners. The appellant and Anthony Machetu were to get 40% and 60% respectively of the net proceeds.

The first and second respondents purchased the relevant property and it is their contention that the property was properly sold to them in terms of the divorce order and related consent paper granted by the High Court. Having purchased the property, and having had it registered in their names, the first and second respondents gave the appellant notice to vacate the premises. This she refused to do, it being her assertion that there had been a non-compliance of the terms of the consent paper in that her legal practitioner had not been consulted prior to the sale of the property.

In determining the issue on whether the first, second and third respondents were entitled to the summary judgment they sought, the learned judge *a quo* took account of authorities of this Court pertaining to the granting of summary judgments.

In the case of *Johan van der Walt and Ors v UDC Limited* S-61-97 at pp 2-3 of the cyclostyled judgment appears the following:-

> "… I said in the case of *Zimbabwe Credit Insurance Corporation (Pvt) Ltd v Consolidated Mutual Investments (Pvt) Ltd* S-111-95 at pp 2-3 of the cyclostyled judgment:-

> 'There is ample authority which makes it clear in respect of claims for summary judgment that a defendant is only required to put forward a good *prima facie* defence in order to resist an application for summary judgment brought against him. In order to succeed an applicant in such a case must show that his version is unanswerable, see *Gafee v Universal Trading* 1976 (2) RLR 200; *Oak Holding v Newman Chiadwa* S-50-86. Conversely:-
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> > "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'. These tests have been laid down in many cases …"
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> per GUBBAY JA (as he then was) in *Jena v Nechipote* 1986 (1) ZLR 29 at 30 D-E. The learned judge cites several examples of local cases where such tests have been applied.
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> The reason for these stringent conditions was well explained by BECK J (as he then was) in *Chrismar (Pvt) Ltd v Stutchbury* 1973 (4) SA 123 at 124H:-
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> > "The special procedure of summary judgment was conceived so that a *mala fide* defendant might be denied, except under onerous conditions, the benefit of the fundamental principle of *audi alteram partem*. So extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact and in law, that this drastic relief will be afforded to a plaintiff."
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> See also *Shingadia v Shingadia* 1966 (3) SA 24 (R); *Bank of Credit & Commerce v Jani Investments* 1983 (2) ZLR 317; *Jena v Nechipote supra*.'

I also take note of what was said by MACDONALD AJA (as he then was) in *Beresford Land Plan (Pvt) Ltd v Urquart* 1975 (3) SA 619 (R, AD) at 621H:-

> 'There are numerous ways in which the legal process in civil cases may be abused by unscrupulous litigants, and of these by far the most common, persistent and deleterious in its adverse effect on the administration of justice is the use of such process to delay the enforcement of just claims. It is this aspect of the administration of the civil law which more than any other has tended to bring it into disrepute and there can scarcely be a more important duty imposed upon the courts than to suppress firmly and without delay any manifestation of this all too common abuse. The greater the law's delay, the greater the temptation for unscrupulous litigants to defend

> claims solely to gain time and, in the result, the evil, unless it is eliminated at its first appearance, tends to escalate.'"

The learned judge *a quo* also had regard to the case of *Mubayiwa v Eastern Highlands Hotel* S-139-86 in which this Court summarised the approach to be followed in determining whether a *bona fide* defence had been raised.

The learned judge reminded himself that on the facts of this case what was needed to be determined was whether the sale of the property was properly conducted in terms of para 7 of the consent paper in that it had been sold "through the supervision and agreement" of the parties' legal practitioners.

He had regard to a letter written by Anthony Machetu's legal practitioners to the appellant's legal practitioners on 23 September 1996, requesting that the sale of the house be expedited in terms of the provisions of the consent paper. The appellant's legal practitioners responded and indicated a willingness to co-operate and requested a period of seven days to obtain the appellant's instructions as she was out of the country. Anthony Machetu's legal practitioners acknowledged this letter and indicated they would await a reply. On 14 October 1996 the appellant's legal practitioners responded in the following terms:-

> "Previous correspondence in this matter refers. Will you proceed with the sell (sale) of the house as long as the purchase price does not fall below $400 000.00. Advise us once you get a tentative buyer as we are also in the process of trying to get possible purchasers."

It was the first, second and third respondents' contention that they and their legal practitioners acted on the basis of this letter and agreement was reached

between the first and second respondents and Anthony Machetu. The agreement was finalised in November 1996 and the house was purchased for $440 000.00.

The learned judge *a quo* summarised the chronology of events thus:-

> "The third applicant's (respondent's) legal practitioner indicates quite frankly that he did not send a copy of the agreement of sale to the (appellant) or the (appellant's) legal practitioners as he accepts he should have but refers in his affidavit to a subsequent letter in which he refers to having telephoned Mr Gambe, the (appellant's) legal practitioner, and informed him telephonically of the sale. Accordingly, the chronology of the matter is the exchange of letters on 23 September 1996, the first letter by the third applicant's (respondent's) legal practitioner to the (appellant's) legal practitioner. There is then the reply on 2 October, the acknowledgement on 4 October 1996 and the reply on 14 October 1996 by the (appellant's) legal practitioner giving the go-ahead for the sale with the price not to fall below $400 000.00. An agreement of sale is then concluded on 13 November with the (appellant's) legal practitioner being informed telephonically of the sale."

The defence proffered by the appellant to the application launched by the first, second and third respondents was to deny that they had any right to evict her and to assert that the property was not sold in terms of the terms provided for in the consent paper.

The learned judge *a quo* was not impressed with her defence and concluded:-

> "The first respondent (now the appellant) simply does not deal in her opposing papers with what instructions were given to Mr Gambe to write the letter of 14 October, what instructions were given him subsequent to 14 October. No attempt at all is made to deal sensibly or in detail in any way with the chain of correspondence which led to the sale taking place. The affidavit of the third applicant's (now the third respondent) legal practitioner is simply not dealt with at all in the opposing papers, yet it is the (appellant's) contention, to quote her plea, 'that her legal practitioners were not consulted'. It is, however, quite clear that that is not correct. There is the exchange of correspondence to which I have referred which indicates that the property was sold after an exchange of letters between the legal practitioners. Those letters

> agreed that a sale should take place and that (what) the minimum price should be and it is not contested that the (appellant's) legal practitioner was informed telephonically that the sale had taken place.
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> The consent paper requires that the house be sold through the supervision and agreement of the plaintiff's and defendant's legal practitioners. Correspondence in my view which is not contested and not disputed and not dealt with by the (appellant) clearly shows that the property was sold through the supervision and agreement of the plaintiff's and defendant's legal practitioners. There was an exchange of letters, discussion as to how the house should be sold and agreement as to what price should be obtained and the price of some $440 000.00 which was above the minimum of $400 000.00 was obtained. The agreement was referred to the (appellant's) lawyer, Mr Gambe, telephonically and that that was done is not disputed. In fact there is no attempt by the (appellant) at all to dispute or provide an explanation as to what happened in October/November of 1996."

He concluded that the defence raised by the appellant was not *bona fide* and had no prospect of success. He said:-

> "She has made bald allegations which are not supported by any of the affidavits, indeed by her own affidavits, and has not taken in (the) court into her confidence. I am satisfied there is no basis on which the sale could be set aside as sought by the (appellant).
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> I am accordingly satisfied that the (first, second and third respondents) have met the strict criteria for this court to grant summary judgment …".

In my view, the findings of the learned judge *a quo* are unassailable. He has meticulously analysed the affidavits placed before him by the parties, paid careful attention to all the correspondence and documents filed in support and come to the only conclusion he could have come to.

He made no specific order relating to the appellant's counter-claim. It is clear, however, that the learned judge had to determine the same issue whether he considered it from the point of view of the first, second and third respondents' application or that of the appellant's counter-claim, that is, whether the sale of the

property had been conducted in a manner inconsistent with the court order in particular in relation to the terms of the consent paper. It seems to me that the appellant by lodging her counter-claim did that as a ploy to confuse matters. That she did not succeed was, in my view, entirely justified.

Accordingly I would dismiss the appeal with costs.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

*Makarau & Gowora*, appellant's legal practitioners

*Gollop & Blank*, first, second and third respondents' legal practitioners