AMIEL MATINDIKE
versus
DUFFY MITCHELLE PROPERTY INVESTMENTS (PVT) LTD
T/A K. M. AUCTIONS
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 20 January 2015 & 4 March 2015

Opposed application

M Mavhiringidze, for the applicant
N Bvekwa, for the first respondent

MUREMBA J: This is an application for summary judgment. The background of the case is that the applicant who is the plaintiff in the main matter issued summons against the respondents. The first respondent entered an appearance to defend where upon the applicant made the present application for summary judgment stating that the first respondent has no *bona fide* defence to the action.

The facts of this case are as follows. In 2012 the first respondent conducted an auction sale of immovable properties in execution of this court's judgments at the instructions of the second respondent. Among the properties auctioned were stand numbers 163 Philadelphia Township and 23 Carrick Crescent Hellensvale, Borrowdale, Harare. They were auctioned as Sheriff Sale numbers 1 and 22 respectively.

The highest bids for the respective properties were $192 400.00 and $ 12 150.00 and these bids were made by the applicant. Having been declared the highest bidder the applicant was made to pay 10% of the bid price to the auctioneer before the confirmation of the sales. The applicant duly paid $19 240.00 and $ 1 215.00, but the sales were subject to confirmation by the second respondent.

However, the second respondent did not subsequently confirm the sales. For Sale No. 1 he said that the highest bid was lower than the forced sale value of the property. By way of a letter dated 17 October 2012, the second respondent directed the first respondent to refund the applicant all his money including commission and sell the property by private treaty. When

the first respondent did not take heed the second respondent, on 27 November 2012, wrote yet another letter reiterating that the first respondent was supposed to refund the applicant all the money that he paid.

The sheriff (second respondent) did not confirm Sale No. 22 because the judgment debtor's legal practitioners had objected to the sale. By way of a letter dated 17 October 2012, the second respondent directed the first respondent to refund the applicant all the money that he had paid including commission. The first respondent did not comply. On 6 December 2012, the second respondent had to write another letter and in that letter he actually said, "Please refund him his monies since you are entitled to your commission upon confirmation."

The applicant's claim is for a refund of the money that he paid as deposit. The applicant averred that there is no justification for the respondent to refuse to refund the money when the sales did not go through. The applicant also made a prayer for costs on a legal practitioner client scale for abusing court process by defending an action which is so clear. It was further averred that the appearance to defend was entered for the purposes of delaying proceedings.

In opposing this application the first respondent stated that it conducted the auction in its capacity as an agent and as such was entitled to payment of a commission. It was averred that that money that was paid by the applicant is the commission and not a deposit of the purchase price as the plaintiff was alleging. It was further averred that as an agent once it introduced the purchaser, its work was done and was entitled to payment. The first respondent prayed for the dismissal of the applicant's application with costs on a legal practitioner and client scale on the basis that the application was unwarranted and since the applicant was aware of the legal position he ought not to have made the application.

After the first respondent had filed the notice of opposition and the opposing affidavit the applicant went on to file an answering affidavit without the leave of the court. However, it is apparent that the applicant was aware of the need to seek the court's leave first before filing the answering affidavit. This is evidenced by the fact that he raised it in his heads of argument, well before the first respondent had raised it in its heads of argument. In his heads of argument the applicant indicated that the answering affidavit ought to be admitted despite him having flouted the procedure.

In the heads of argument the first respondent challenged the filing of the answering affidavit by the applicant citing r 67 (c) of the High Court rules which states that an answering

affidavit in a summary judgment application should be filed with the leave of the court. The rule reads,

> "***67. Limitations as to evidence at hearing of application***
> No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence viva voce or by affidavit:
>
> **Provided that the court may do one or more of the followin**g—
> (*a*) …….;
> (*b*) ……..
> (c**) permit the plaintiff to supplement his affidavit with a further affidavit** dealing with either or both of the following—
>
> (i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or
> (ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence.

The applicant's counsel argued that the answering affidavit should be admitted by the court because it was in the interest of justice to do so for it served to demonstrate that the first respondent has no *bona fide* defence. He went on to cite the case of *Scotfin Ltd* v *Afri Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 (H) wherein ROBINSON J at p 176 said,

> 'Let me say, in passing, that I consider that the stage has now been reached where an applicant for summary judgment should always be allowed to file a replying affidavit to show that a respondent's opposition to his application is not bona fide or is ill founded.'"

The applicant's counsel argued that the *Scotfin* case *supra* marked a departure from the previous position of always requiring the leave of the court to file an answering affidavit.

The *Scotfin* case falls on all fours with the present case in that the applicant in that case had also filed an answering affidavit without the leave of the court. In the heads of argument the respondent raised a point *in limine* for the answering affidavit to be struck out on the grounds that it had been filed without the leave of the court. ROBINSON J allowed a departure from r 67 in terms of r 4 C (a) and admitted the answering affidavit on the basis that at the time the applicant made its application it had no knowledge that the respondent would raise the defence that it raised in the opposing affidavit.

ROBINSON J went on to recommend an amendment of r 67. He said:

> "In this regard, I can see no good reason for distinguishing any longer between an applicant for summary judgment and any other applicant insofar as the filing of a replying affidavit is concerned. Accordingly, I would strongly recommend that our Rules of Court be amended to entitle an applicant for summary judgment to file a replying affidavit if he so elects."

This was just but a recommendation. However, it is apparent that despite the recommendation by ROBINSON J, r 67 has not been amended to allow an applicant to file an answering affidavit without the leave of the court if he so elects. The rule still says, "provided that the court may permit the plaintiff to supplement his affidavit with a further affidavit…."

The applicant's counsel submission that the court's leave is no longer required is not correct. The leave of the court is still required for the applicant to file an answering affidavit. So before filing the answering affidavit the applicant should have sought the leave of the court first.

The applicant did not proffer any explanation why it did not seek the leave of the court to file the answering affidavit as is required by r 67 (c). It is clear that the applicant was well aware that he needed the court's leave to do so, but deliberately chose to disregard the rule and mislead the court by saying that in the *Scotfin* case it was said that in summary judgment applications the applicant should always be allowed to file a replying affidavit to show that the respondent's opposition is not *bona fide*. As I have already explained above, this was just but a recommendation by the then Judge ROBINSON. The rule is very clear that the leave of the court should be sought first. In the absence of a satisfactory explanation for the lack of adherence to the rule I do not see why I should admit the answering affidavit. In any case considering the contents of the answering affidavit there is nothing new that is being raised by the applicant which was not said in its founding affidavit. I will therefore disregard the answering affidavit.

In an application for summary judgment the applicant should show that he has an unanswerable claim which is based on a clear cause of action. See rule 64 of the High Court Rules and also *Pitchford Investments (Pvt) Ltd* v *Muzariri* 2005 (1) ZLR 1. In *Cabs* v *Ndahwi* HH 18/10 Makarau JP (as she then was) stated that a plaintiff resorting to summary judgment must have an unanswerable claim as pleaded in his summons and declaration and as verified in the affidavit that must be filed in terms of the rules.

On the other hand, in terms of r 66 (1), for the court to dismiss an application for summary judgment the defendant must satisfy the court that he has a good *prima facie* defence to the action.

In *Hales* v *Daverick Investments (Pvt) Ltd* 1998 (2) ZLR 234 (H) it was held that, **[headnote]**

"Where a plaintiff applies for summary judgment against the defendant and the defendant

> raises a defence, the onus is on the defendant to satisfy the court that he has a good prima facie defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence with sufficient clarity and in sufficient detail to allow the court to decide whether, if these facts are proved at the trial, this will constitute a valid defence to the plaintiff's claim. It is not sufficient for the defendant to make vague generalisations or to provide bald and sketchy facts."

In *Stationery Box (PVT) Ltd v Natcon (Pvt) ltd & Another* HH64-10 as per Makarau JP (as she then was) it was stated that in an application for summary judgment the defendant must raise a defence, but he does not have to prove it. In raising the defence he must merely allege facts which, if he can succeed in establishing them at trial, would entitle him to succeed at the trial. The defence must be plausible and *bona fide*. It must meet the claim squarely and must amount to a defence at law. If it does not, the defendant would not have discharged the onus on him and summary judgment must be granted.

As correctly submitted by the applicant's counsel, the facts of this case are common cause. Initially in the opposing affidavit and in the heads of argument the first respondent stated that it conducted the auction in its capacity as an estate agent. However, during the hearing the first respondent's counsel wisely abandoned that argument and admitted that the first respondent conducted the auction as an auctioneer. It is a fact that the first respondent was engaged by the second respondent to sell these immovable properties pursuant to some judgments of this court. The second respondent therefore employed the first respondent in his capacity as the executing arm of this court. It follows therefore that the sale of the properties was governed by the rules of this court, that is, the High Court Rules of 1971. By virtue of rule 350A, the first respondent was nominated by the second respondent to conduct the sale as an auctioneer and in terms of r 354 the sale was done by public auction.

Rule 353 states that the conditions of sale are prepared by the Sheriff. In terms of r 356 if the sheriff is satisfied that the highest price offered is reasonable he shall declare the highest bidder to be the purchaser, **subject to confirmation of the sale.** In terms of r 359 (1) any interested parties may raise objections against the sale. In terms of r 359 (7) upon hearing the objecting parties the sheriff shall either in terms of r 359 (7) (a) confirm the sale or in terms of r 359 (7) (b), **"cancel the sale and make such order as he considers appropriate in the circumstances and shall without delay notify the parties in writing of his decision."**

What is apparent from rules 356 and 359 is that the sale is not completed or finalised at the time the highest bidder is declared the purchaser, but after the sheriff has confirmed the

sale. If he decides to cancel the sale, he makes an order as he considers appropriate.

In resisting the application, Mr *Bvekwa* submitted that the first respondent has a *bona fide* defence in that it was entitled to its commission because the law relating to auctioneers and estate agents is the same according to Christie, *Business Law in Zimbabwe*.

Mr *Bvekwa* argued that the first respondent's basis for refusing to refund the applicant was that it had substantially performed its mandate, that of introducing the purchaser (applicant) to the second respondent. It was argued that that the sale was later not confirmed is neither here nor there. The job that the first respondent had done entitled it to a commission because the contract was created when the applicant accepted the bid.

Mr *Bvekwa* further submitted that with the sheriff's sale, the sheriff (second respondent) has standard conditions for all auctioneers he appoints to conduct the sales. He said the sheriff has a document which says that the purchaser will be liable to pay the commission. He also said that it is not a condition of the sale that money paid would be refunded. However, Mr *Bvekwa* did not attach the document in question.

It would have been most helpful if Mr *Bvekwa* had attached the sheriff's document which sets out the conditions of sale instead of just making submissions from the bar without any document to back them. As correctly submitted by Mr *Mavhiringidze*, Mr *Bvekwa* was essentially leading evidence from the bar. However, I would like to believe that Mr *Bvekwa* was correct in his submission that with the Sheriff's sale it is a condition of the sale that the burden of paying commission to the auctioneer and other selling costs lies with the purchaser or the successful bidder and not with the Sheriff even if the auctioneer is an agent of the Sheriff. My conclusion is based on the letters which were written by the second respondent (Sheriff) to the first respondent wherein he was instructing the first respondent to refund the applicant all his money including commission.

However, it is a settled positon of the law that in an auction sale commission is only payable to the auctioneer upon the property being sold. In *Crusader Real Estate Consultancy (Pvt) Ltd* v *CABS* 1999 (2) ZLR 257 (S) EBRAHIM JA quoted with approval the words of Bristow J in the case of *Martin* v *Currie* 1921 TPD 50 at p 53 to the effect that,

> "I think it is clear that the employment of an auctioneer does not give him any authority except to sell by auction. The case of *Muller v Kemp* (1 Searle 167) was cited to us, which, on the facts, is not in point, but the court there cited, with approval, a passage from Storey on Agency which states that the agency of an auctioneer ends as soon as the auction is held. **An auctioneer is employed to sell property by auction on the conditions arranged; if he sells the property he gets his commission: if he does not sell the property he gets no commission**."

Even DENNING LJ (as he then was) in *John Meacock & Co (a firm)* v *Abrahams (Loescher Third Party)* [1956] 3 ALL ER 660 confirmed this position of the law when he said,

> "I sometimes think it would be a good thing if auctioneers and estate agents, if a sale did not go through, stipulated for a reasonable remuneration for their time and labour; but I suppose that would not be good business. They always claim to be entitled to full commission, and by so doing, take their chance on the sale going through to completion."

In *casu,* the letters which were written by the second respondent to the first respondent also confirm this position of the law. After he had cancelled Sale No. 1, in a letter dated 17 October 2012, he wrote to the first respondent to the effect, "kindly sell the above immovable property by private treaty and refund all monies paid to yourselves including commission to the auction purchaser"

In respect of Sale No. 22 the sheriff in a letter dated 17 October wrote to the first respondent,

> "please be advised that there is an objection to confirmation of the purchase price by the judgment debtor's legal practitioners Messrs IEG Musimbe & Partners. The auction purchaser now wants to pull out of the sale, I therefore request you to refund all monies including the commission paid to the purchaser."

Despite this order by the sheriff the first respondent still refused to refund the applicant. This prompted the second respondent to write another letter on 6 December 2012 directing the first respondent to refund the applicant all monies paid as commission. The concluding paragraph reads, "Please refund him his monies since you are entitled to your commission upon confirmation."

The position of the law being that the auctioneer is only entitled to his commission upon the property being sold, it was therefore imperative for the first respondent to attach the Sheriff's document which set out the conditions of the sale in order to show that in setting out the conditions of the sale the Sheriff allowed a departure from the settled positon of the law by saying that it was a condition of the sale that the highest bidder was not entitled to a refund even if the sale was not confirmed by the second respondent and that the auctioneer was supposed to get his commission even if the sale did not go through.

In *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd & Another supra* Makarau JP (as she then was) stated that the defence that is raised by the respondent must be plausible and bona fide. **It must amount to a defence at law**. If it does not, the defendant would not have

discharged the onus on him and summary judgment must be granted.

In *casu* in the absence of the relevant Sheriff's document to support the submissions made by Mr *Bvekwa* I cannot say that the first respondent raised a *bona fide* defence for its defence does not amount to a defence at law. At the same time it does not make sense that the first respondent would then contradict himself by instructing the first respondent to refund the applicant in light of its standard document which sets out the conditions for auction sales.

I will seal this case by citing the case of *Time Bank of Zimbabwe Ltd* v *Culroy Farm (Pvt) Ltd & Others* HH 182-03. In that case it was held that in an application for summary judgment all the defendant has to do to resist it, is to raise a *prima facie* defence. He has to establish a mere possibility of his success or that he has a plausible case or that he has a triable issue or that there is a reasonable possibility that an injustice might be done if summary judgment is granted.

In suing the defendants for a debt, the plaintiff bank produced a written acknowledgement of debt, written guarantees of the first defendant's debt by the co-defendants and first defendant's bank account transactions. In opposing the application for summary judgment, the defendants said that they were no longer indebted to the plaintiff and even made averments that in fact it was the plaintiff which owed them money. However, the defendants did not produce any documents to support their averments and their figures made no sense at all.

It was held that without any documents to support the defendant's defence, the court was bound to conclude that the alleged defence was not *bona fide*. It was said that bald allegations and figures should be discouraged in such applications.

In *casu* as is required by the law, the applicant managed to establish that he has an unanswerable claim and a clear cause of action. On the other hand, the first respondent failed to discharge the onus that it had to show that it has a good *prima facie* defence.

Mr *Mavhiringidze* argued for costs on a legal practitioner client scale stating that the first respondent ought to be penalised for disrespecting the court by raising a frivolous defence to the application. Mr *Bvekwa* opposed such costs arguing that the first respondent had put up an arguable case as it genuinely believed that as an agent it had carried out its mandate of introducing the purchaser to the second respondent and as such it was entitled to remuneration. I am inclined to agree with Mr *Mavhiringidze* that the defence raised by the first respondent is frivolous and it even knew it. The instructions by the Sheriff to refund the

applicant's money were clear, but the first respondent continued to be stubborn. Costs on a higher scale are warranted under the circumstances.

In the result, the application for summary judgment is granted with costs on the legal practitioner-client scale.

Madanhi Mugadza & Co Attorneys, applicant's legal practitioners
Bvekwa Legal Practice, defendant's legal practitioners