SIZAKELE NZIMA

Versus

SAZINI PHIRI

IN THE HIGH COURT OF ZIMBABWE

KABASA J

BULAWAYO 12 AND 19 OCTOBER 2023

Application for Summary Judgment

Ms D. Nyaningwe, for the applicant
N. Sibanda, for the respondent

KABASA J: - The applicant issued out summons against the respondent in which she claimed payment of US$58 873 or the equivalent in Zimbabwean dollars payable at the prevailing interbank rate on date of payment, interest on the said sum at the prescribed rate and costs of suit on an attorney-client scale. The respondent entered an appearance to defend and subsequently filed her plea.

The respondent's plea was met with this application for summary judgment. The applicant's claim as elaborated in the declaration is that on 1 September 2022 the respondent acknowledged her indebtedness to the applicant in the sum of US$58 873. The respondent has failed to pay the said amount.

In defending the claim the respondent accepted that she signed the acknowledgement of debt but contended that she did not do so freely and voluntarily. The acknowledgement of debt does not reflect the actual amount owed. She signed the document after being coerced to do so. She was threatened with harm before she signed.

Summary judgment is a drastic remedy as it closes the door on the other party without affording them a hearing. It is for this precise reason that it should only be granted where the applicant has shown that he or she has an unanswerable claim and the respondent has only entered an appearance to defend for the sole purpose of buying time.

The applicant's founding affidavit stated the following as the background to the claim:-

> "Sometime in or around November 2021, applicant and respondent entered into a verbal agreement in which applicant lent respondent money in the sum of US$60 020. It was a material term of the agreement that respondent would pay applicant in instalments of US8 000 per month, starting on the 20th day of July 2022. An acknowledgement of the money owed in the sum total of US$60 020 and the terms of the instalments, was recorded in writing by respondent in a diary extract attached hereto as Annexure "SN2"

The respondent did not pay as agreed but in mid-August 2022 she then paid US$1 147. On 1 September 2022 the respondent then signed the acknowledgement of debt.

The respondent however contends that she borrowed US$10 000 in November 2021 and only learnt later that the applicant was charging 25% interest per week on that amount. She has paid US$8 450 and the acknowledgement of debt was signed after the applicant threatened that she would call on her ancestors to inflict harm on the respondent and her family. At one stage she sent a text message with the word "woooh", which the respondent interpreted as a threat. Further, the respondent's husband was chased away from the lawyer's office on the day the acknowledgement of debt was signed. Efforts to get the police to assist her failed and on 2 February 2023 her lawyers wrote to the applicant enquiring about her attitude towards the setting aside of the acknowledgement of debt. She wanted to vacate the acknowledgement of debt as it was signed under duress and does not show the actual amount owed.

At the hearing of the application counsel for the applicant submitted that the application is based on a liquid document which was signed before Mr. J. Tshuma, a senior counsel at Webb, Low and Barry. The threats alleged are a serious indictment on Mr. Tshuma as the acknowledgement of debt was signed in his presence. The respondent only talks of visits to the police to try and vacate the acknowledgement of debt but no detail is given regarding who she talked to and what became of the complaint. She never approached the court for redress and the inaction speaks to the untruthfulness of her narrative.

Mr. Sibanda, counsel for the respondent, sought to demonstrate the inconsistencies in the applicant's story, which as counsel argued, shows her untruthfulness as regards the amount she lent to the respondent. To demonstrate this point counsel highlighted the fact that the respondent is said to have acknowledged owing US$60 020 and the applicant in her founding

affidavit, paragraph 4:1 thereof states that she gave the respondent US$60 020. However in a letter dated 13 July 2022 the applicant, through her legal practitioners stated that the money owed was US$68 450. How the amount changed from US$60 020 to US$68 450 is a mystery. The applicant also stated in paragraph 4:4 of her founding affidavit that the respondent paid US$1 147 yet in that same 13 July 2022 letter she acknowledged receiving US$8 450. This shows that interest was being added to the amount borrowed. There is therefore need for the matter to be properly ventilated at trial. The application for summary judgment can therefore not be granted in the circumstances.

What I have to determine now is whether a case for summary judgment has been made.

Rule 30 of the High Court Rules, 2021 provides that:-

> "(1) Where the defendant has entered an appearance to defend, 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.
>
> (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 or her belief there is no genuine and sincere defence to the action and that appearance to defend has been entered solely for purposes of delay."

The applicant's founding affidavit must be clear in terms of what is claimed. In *Medclinic Medforun (Pty) Ltd* v *City of Harare* 2019 (3) ZLR 934 (H) DUBE-BANDA J had this to say:-

> "Summary judgment is a procedure that protects a plaintiff against an ill-disposed defendant who defends the matter purely in order to delay its finalisation. It is a remedy that may be deployed to prevent an abuse of the court procedure by a recalcitrant defendant. See *Meek* v *Kruger* 1958 (3) SA 154 (T) at 158 C. The remedy is extraordinary and drastic; it makes inroads on a defendant's procedural right to have its case heard in the ordinary course of events, in that it permits the granting of a final order in a defended action without a trial."

In *Timnda Truck Parts (Pvt) Ltd* v *Autolite Distributors (Pvt) Ltd* HB 16-96 CHATIKOBO J had this to say:-

> "A plaintiff's obligation to verify his cause of action and amount in applying for summary judgment obliges him to produce proof of these and to deal with all the relevant matters within his knowledge."

Has the applicant shown that she has an unanswerable claim? Granted her claim is anchored on a liquid document but is that all the court must look at? I think not. I say so because the respondent accepts signing the acknowledgement of debt but explains that she did so under duress. The amount she borrowed was US$10 000 and she knows not of $58 873 which got to that because of the exorbitant interest the applicant charged.

Before I consider the duress issue and whether the respondent can successfully resist this application, I must look at the applicant and be satisfied she has established her claim and the amount so claimed.

Mr. Sibanda for the respondent highlighted the inconsistencies in the applicant's version. "SN2" which was attached to the acknowledgement of debt states:-

"I borrowed her money in November 2021. I Sazini Phiri owes Sizakele 60 020 US.

Will pay her money in full. Payable instalments monthly 8 000 US starting July 20th."

In a letter written by the applicant's legal practitioners dated 13 July 2022 the applicant says the respondent was indebted to her in the sum of US$68 450 and that she had paid US$8 450 leaving a balance of US$60 000 which is the amount that she was demanding.

US$68 450 is not the same as US$60 020. Where was the US$68 450 coming from in July 2022 when in November 2021 the amount borrowed was given as $60 020?

In that same affidavit the applicant said US$60 020 is what she gave the respondent and only US$1 147 was repaid in mid-August 2022. This would then give a balance of US$58 873. This is at variance with the 13 July 2022 letter which gave the money owed as initially US$68 450 and after payment of US$8 450, a balance of US$60 000 remained. When one subtracts US$1 147 from US$60 000 the balance would be $58 853.

Even if one were to suggest that it was a mathematical error, the point still is there is variance between US$60 000 and S$60 020 the respondent signed for or acknowledged rather in a note scribbled on a diary page.

If one goes by the founding affidavit which gives US$60 020 as amount owed and US$1 147 as amount paid it gives the US$58 873 claimed in the summons but the court cannot overlook the inconsistencies already highlighted.

Surely when one gives someone money they know exactly how much they have given, especially when it is not a trifling amount. US$60 020 or is it US$68 450 is a lot of money and the lender cannot be mistaken as to the amount. The question therefore is what is it that makes the applicant talk of US$68 450 with US$8 450 paid back and in the same breath talk of US$60 020 and only US$1 147 paid back.

If the applicant's story was that a total of US$68 450 is what she gave the respondent that ought to have been the consistent version throughout. The figures do not tally and makes one wonder as to how much exactly was given to the respondent.

In the *Medclinic* case the learned Judge said:-

> "The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable or rather, a sustainable defence of his/her day in court. A defendant with a triable issue should not be shut out. On the factual matrix of this case, it cannot be said that the applicant has verified the amount claimed. The court cannot order the respondent to pay an amount of money that has not been verified."

I would say these remarks apply with equal force *in casu*. How is this court expected to shut the respondent out in a matter where the applicant's claim raises questions? How much did she give to the respondent and how much did the respondent pay back? What is the balance, if any, that is still owing? These are questions which I would not be asking if the applicant's founding affidavit and the documentary evidence attached in proof of her claim left no one in doubt as to the actual amounts involved.

Granted the 25% interest per week the respondent talked about is also not supported by the figures, even the US$60 020 she acknowledged. This is so because at 25% per week, the US$10 000 the respondent says she borrowed would attract US$10 000 in a month. If the money was borrowed in November 2021, it means for November and December of 2021, the interest would be US$20 000. January to September 2022 gives us 9 months and at $10 000 interest per month, the total interest would come up to US$90 000, giving a total of US$110 000, far more than the amount acknowledged in the acknowledgement of debt. However the

respondent need not do more than show that he/she has a defence which, if given the chance, would be properly ventilated at trial.

In the *Medclinic Medforum Hospital (Pty) Limited* case (supra) the learned Judge succinctly captured the applicable principle thus:-

> "No onus, no evidential burden and no obligation rests on the defendant to satisfy the court that the facts set out by him are true or that the balance of probabilities in the case lies in his favour. See *Arend & Anor* v *Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C). The only question on which the court is called upon to decide is whether the defendant has disclosed a *bona fide* defence which, if proved at the trial, would constitute a complete defence to the plaintiff's claim. See *Breitenbach* v *Fiat* SA 1976 (2) SA 226 (T). The defendant need not set out his defence in the affidavit with the precision that will subsequently be necessary in his plea if the application for summary judgment fails and he is given leave to defend the action. See *Wright* v *Van Zyl 1951* (3) SA 488 (C) at 492. He must nevertheless formulate the defence sufficiently clearly to place the court in a position to determine whether the defence, if true, will constitute a real defence to the claim."

I would have been inclined to grant the application had the applicant's claim been shown to be unanswerable in terms of the amount claimed. This is so because the respondent's claims of duress were not easy to comprehend. She signed the acknowledgement before a lawyer and yet she would have the court believe she was threatened before so signing. She also said she received a text message with the word "woooh" and one wonders how such a word can be taken as a threat. She also mentioned the threats which were to be in the form of harm from the applicant's ancestors. Her husband accompanied her to the lawyer's offices in September 2022 and she said they wanted to clarify the issue of the interest and the amount she is said to have borrowed. She was no longer afraid of the respondent's ancestors and the "woooh" text message? She could easily have left with her husband who said he was chased away when he tried to express himself on the issue of the 25% interest.

The respondent could have done more in her quest to set aside this acknowledgement of debt.

That said however, the issue still is that the applicant is the one who makes out her case for summary judgment. The inconsistencies replete in her version of how the US$58 873 was arrived at and how much she gave to the respondent persuaded me not to dismiss the submissions by counsel for the respondent. Counsel for the applicant referred to *International Export Trading Company of Zimbabwe (Pvt) Ltd v Mazambani* HH-195-17 where the court had this to say:

"R.H Christie in his book, Business Law in Zimbabwe 2011ed @ page 82-83 says the following on duress: 'a contract obtained for or by fear induced threats of force obviously cannot be allowed to stand, but because of the infinitely variable nature of force, fear and threats the limits of this principle require careful attention. The fear must be such as would overcome the resistance of a person of ordinary fairness, taking into account the sort of person the victim is……'

The respondent may very well be a person who strongly believes in ancestral spirits and the dark powers that at times are associated with such spirits. It could be that the word "woooh" had certain connotations which worked on her mind sustaining the threats of harm from the spirit world. The presence of a lawyer acting on behalf of the applicant may have worked on her psyche, with the absence of her husband worsening her predicament. It is therefore important that the respondent be afforded the opportunity to ventilate the nature of her fear and why she felt overcome by it to the extent of signing that which she says she would not have signed but for the threats.

This is not a matter where the court can shut the door on the respondent and award summary judgment in an amount that was also not properly verified.

The parties must be able to ventilate the issue at trial with the respondent articulating how much she was given, what she paid back and what the balance, if any, is.

A case for summary judgment has therefore not been made.

As regards costs, this is a case where such costs should be left to be determined at the conclusion of the trial.

In the result, I make the following order:-

1. The application for summary judgment be and is hereby dismissed.

2. Costs shall be in the cause.

Messrs Webb, Low & Barry Inc Ben Baron & Partners, applicant's legal practitioners
Tanaka Law Chambers, respondent's legal practitioners