NETSAYI MAGUNDA

Versus

DOREEN VUNDLA

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 10 OCTOBER 2023 and 26 JUNE 2024

Opposed Application

Applicant in person
N. Mazibuko, for the respondent

MANGOTA J: - The current is an application for summary judgment. Its history is simple and straightforward. It runs in the following order: On 21 July, 2022 the applicant sued the respondent claiming from the latter payment of:

i) USD 15 750 or its equivalent in the local currency;
ii) interest at the prescribed rate reckoned from the date of the summons to the date of full payment - and
iii) costs of suit.

The applicant alleges, in paragraph 4 of her declaration, that she lent and advanced the claimed sum to the respondent at the latter's special instance and request. She states that she loaned the money to her on 12 May, 2021. The respondent, she claims, signed an acknowledgment of debt in respect of the money which she advanced to her. She avers, in paragraph 5 of her declaration, that the respondent committed herself to repaying the loan in two tranches. The respondent, according to her, agreed to repay the first tranche of USD 2000 on or before 7 June, 2021 and the outstanding balance of USD 13 750 on or before 7 August, 2021. The respondent, it is her testimony, paid nothing to her from the date that the money was advanced to her todate. She attached to her summary judgment application the

acknowledgement of debt which the respondent signed. She marked it Annexure C. It is her view that the respondent entered appearance to defend as a way of delaying the inevitable and also as a way of frustrating her effort to recover from her the sum of money which she claims is due to her from her. She moves me to grant the application as prayed for in her draft order.

The respondent opposes the application. She claims that she entered appearance to defend with a *bona fide* intention. She does not deny that she signed the acknowledgment of debt. She states that she signed the same through harassment and duress. She claims that she paid USD 25 000 to the applicant. She insists that she owes the applicant no money. She moves me to dismiss the application with costs.

The case which the applicant placed before me falls under Rule 30 of the High Court Rules, 2021. The rule allows a plaintiff to apply to the court to enter judgment in his favour, in a summary manner, in respect of what he (includes she) claims in the summons and costs. It allows him to file the application for summary judgment at any time before a pre-trial-conference is held. He is at liberty to file the same where he remains of the view that the defendant does not have a *bona fide* defence to his claim and/or that the defence has been entered solely for purposes of delay.

Whilst Rule 30 of the rules of court offers an avenue to the plaintiff or the applicant who genuinely believes in a shortened course of action to his judgment, the rule cannot, in my view, be taken lightly. It cannot be so taken lightly for the simple reason that it tends to close the door against the defendant or the respondent who may very well have a good defence to the claim of the plaintiff or applicant. The rules of fair-play which are the hallmark of any justice delivery system the world over should, at all times, be observed by the court and litigants who can only depart from the same in very exceptional circumstances where the answer to the claim of the plaintiff or the applicant is not only obvious but is also unassailable.

It is for the above-mentioned reason, if for no other, that the court has, by and large, insisted on the *audi alteram partem* rule which the Supreme Court was pleased to define aptly in *Taylor* v *Minister of Higher Education & Others*, 1996(2) ZLR 772 (S). The rule insists that, where a court makes a decision which adversely affects a person in his liberty, property or rights, he (includes she) has a right to be heard before a decision is taken against him.

Summary judgment, it stands to reason and logic, is a drastic remedy which should not be easily resorted to. It follows, therefore, that where the respondent, in a summary judgment application, is able to show that:

i) there is a possibility of his success; or
ii) he has a plausible case; or
iii) there is a triable issue; or
iv) there is a reasonable possibility that an injustice may be done if summary judgment is granted, an application under Rule 30 of the rules of court cannot be granted: *Bhango* v *Madhlela*, HB 136/2015; *Jena* v *Nechipote*, 1986(1) ZLR 96 (S); *Niri* v *Coleman & Ors*, 2002 (2) ZLR 580.

The case authorities which have been cited in the foregoing paragraph show, in clear terms, that a respondent against whom summary judgment has been lodged cannot simply fold his arms in the vein hope that the applicant who alleges must prove. He has a duty to show the court that he has a *bona fide* defence to the applicant's claim. He should, in other words, show that he did not enter appearance to defend as a delaying tactic but that an injustice may be done if summary judgment is granted against him.

The above position of the law was aptly enunciated in *Kingstons Ltd* v *L.D. Inerson (Pvt) Ltd*, 2006 (1) ZLR 45 (S) in which the court remarked on the same as follows:

> "In summary judgment proceedings, not every defence raised by a defendant will succeed in defeating a plaintiff's claim. What the defendant must do is to raise a *bona fide* defence, or a plausible case, with sufficient clarity and completeness to enable the court to determine whether the affidavit discharges a *bona fide* defence. The defendant must allege facts which, if established, would enable him to succeed. If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fide*. The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts".

The cited case authority is *in sync* with litigation the world over. Where the plaintiff *cum*-turned applicant asserts, in an application for summary judgment, what he claims from the defendant now-turned respondent, stating his cause of action as well as the allegation that the respondent who entered appearance to defend does not have a *bona fide* defence to his

claim, the latter must respond in rebuttal to the allegations of the applicant. He cannot simply place reliance on such bald denials as he is able to do in his plea. By applying as he does, the applicant would have led evidence which is gleaned from his founding affidavit and the attachment(s), if any, which he files together with the application. The respondent should, likewise, lead evidence in rebuttal and, where he can, he must attach to his notice of opposition documentary evidence which shows that the application is not only unwarranted but that it should also be dismissed. Where he fails to do so in the face of mounting evidence which has been filed against him, he has no one else to blame but himself when summary judgment is granted against him for his failure to put the court into his confidence.

It is in the context of the above-analysed matters that the current application will be considered. Before I proceed to deal with the main matter, however, I must consider three *in limine* matters which the respondent raised in her Heads. The preliminary issues are that:

i) the applicant failed to comply with Rule 15(8) as read with sub-rule (9) of the same rule making her application to be deemed to have been dismissed;
ii) the summons which the applicant issued is a nullity for its failure to comply with Rule 12(5) (c) as read with Rule 12 (15) which rules are peremptory in nature and also in that the address of service is more than ten (10) kilometers from the seat of the court-and
iii) the answering affidavit falls foul of Rule 30 (7) of the rules of court and it should therefore be expunged from the record.

The settled position of the law is that a party can raise a point of law at any stage of the proceedings. He can raise such even on appeal notwithstanding that the same was not raised *a quo.* The Supreme Court had the occasion to clarify the law on the aspect which is under consideration in *Cold Driven Investments (Pvt) Ltd* v *Telone (Pvt) Ltd*, SC 9/13 in which it remarked as follows:

"*The theme that runs through the principles is that a question of law can be raised at any stage of the proceedings provided that it does not occasion prejudice to the other party".*

The cited case authority shows that, whilst the respondent has the right to raise the issues of the applicant's compliance with Rule 15 (8) as read with sub-rule (9) of the same rule of

court, what it cannot do is to raise such where the same causes prejudice to the applicant. Further, whilst the issue of compliance with Rule 15 of the High Court Rules, 2021 is a question of law which the respondent can raise at any stage of the proceedings, as it is doing *in casu*, the issue of whether or not the applicant paid the requisite fees to the Sheriff as is stipulated in sub-rule (8) of Rule 15 of the rules of court is one of fact. It should, therefore, have been canvassed with the applicant in the respondent's notice of opposition. The respondent who is ably legally represented and is a legal practitioner by profession herself does not advance any reason as to why she refrained from raising the same in her notice of opposition and only did so in her Heads. She, in the process, deprived the applicant of the opportunity to explain herself on the same much to her serious prejudice.

Judicial notice is taken of the fact that, with effect from 1 September 2023, all process which litigants filed at court manually was re- filed electronically through the Integrated Electronic Case Management System which, in short, is referred to as IECMS. The possibility that some important pleading(s) and/or paper(s) failed to find their way into the newly introduced system of filing is more probable than it is fanciful. Because of the observed probability, I took the liberty to call for the physical record of the case of the parties. On perusing it, I observed that the applicant made two payments in respect of her case. These are reflected on receipt numbers JSC 1759976 and JSC 1762184 which the registrar of this court date-stamped 5 July, 2022 and 19 September, 2022 respectively.

Given that the applicant filed her summary judgment application on 20 September, 2022 the possibility that the sum of money which she paid on 19 September, 2022 as is reflected on the registrar's receipt number JSC1762184 which the registrar date-stamped 19 September, 2022 was/is in compliance with Rule 15(8) and (9) of the rules of court cannot be regarded as a far-fetched idea. The respondent does not state the reason for the observed payment if it was not payment which was/is not in compliance with the rule of court which is under consideration currently. She made a payment of $30 in the mentioned regard. If she complied with the rule, as I am satisfied that she did, the respondent's first *in limine* matter would therefore be without merit. It is without merit for the simple reason that the applicant complied with the rule of court which is the subject of the respondent's contestation with her. The respondent's first preliminary point is therefore dismissed.

The plaintiff, it is clear from a reading of the summons which she issued out, did not comply with Rule 12 (5) (c) as read with sub-rule (15) of the High Court Rules, 2021. She did not include in the summons her email address, facsimile, telephone or her cellular phone number as the rule requires her to have done. Nor did she include, in the same, such details of the respondent or the latter's legal representative, if such were known to her.

The question which begs the answer is: does her failure to comply with the rule of court make her case fatally defective to a point where the summons which she issued out of this court remains a nullity. My considered view is that the summons which she issued out of the court cannot be regarded as a nullity as the respondent would have me believe. Whilst the rule is couched in peremptory terms as the respondent correctly states, the same is not cast in such a stone as to render the summons a nullity where the details which are stipulated in the rule are not included in the summons. My views in the mentioned regard find support from the possibility, or even the probability, that the court will not shut its doors to a plaintiff who does not have such details as are stipulated in the rule. If it did so, it would operate on discriminatory terms. It would exclude from its precincts all those who, for one reason or the other, do not have such details as are stipulated in the rule. The drafters of the rules of court did not certainly have the intention to encourage courts to practice selective justice. They encouraged, and still encourage, those who come to court in search of justice to have the same dished out to them irrespective of whether or not they comply with the rule which is under consideration in this part of the judgment. It could not have been the intention of the drafters of the rules of court to deny justice to litigants who do not, for instance, have an email address, a facsimile, a telephone and/or a cellular number.

The view which I hold of the matter is that the rule stipulates inclusion in the summons the details which are contained in the rule for no purpose other than for easy communication and easy service of process from one litigant to the other and *vice versa*. It is for the mentioned reason, if for no other, that the rule stipulates that the plaintiff should include the particulars of the defendant, if such are known to him. The qualification which the drafters of the rules included in sub-rule (15) of the rule remains *in sync* with the view which I hold on this aspect of the application which is before me. The sub-rule reads, in the relevant part, as follows:

"……..*the plaintiff's postal address and, where available, the plaintiff's facsimile address and electronic mail address*". In stating as it does, it acknowledges that there are cases where the plaintiff may not have any or all of the details which are stipulated in Rule 12 (5) (c) and yet the summons which he issues out of the court will still be as valid as any summons which contains the details which are stipulated in the rule. The respondent's second preliminary point is without merit. It is, accordingly, dismissed.

The respondent's third *in limine* matter is valid. Rule 30 of the High Court Rules, 2021 makes reference to such applications as the one which the applicant placed before me for consideration. It, in short, deals with an application for summary judgment. The rule does not accord to the applicant the right to respond to the respondent's notice of opposition in the form of an answering affidavit. In a summary judgment case, therefore, the founding affidavit and the opposing affidavit remain the corner-stone of the case. The answering affidavit is excluded from the equation. Consequently, when the respondent states, as it is doing, that the answering affidavit falls foul of Rule 30 (7) of the rules of court, the assertion which it makes remains unassailable. The answering affidavit is, accordingly, expunged from the record.

On the merits, the respondent made no meaningful defence to the claim of the applicant. The claim is properly stated. It is supported by documentary evidence which the applicant filed of record and marked Annexure C. The annexure is the acknowledgement of debt which the respondent signed. It constitutes the applicant's cause of action. It is a liquid document which the respondent is challenged to either deny or disown. All she does is to make a bare denial leaving her case at that.

The respondent's assertion which, to all intents and purposes, is tantamount to a bald denial is that the acknowledgement of debt was obtained unlawfully through harassment and duress. She does not show the unlawfulness of the annexure. Nor does she state the person who harassed her let alone the nature of harassment which she allegedly underwent for her to sign the document. She does not even show the kind of duress which may have been brought to bear upon her, if ever such occurred to her. Nor does she tell of the person (s) by means of whom she underwent the alleged duress. She states, in her notice of opposition, that she paid the sum of USD 25 000 to the applicant. She alleges that she attached proof of such payment. But she did not attach such. She states that she owes no debt to the applicant.

As a qualified legal practitioner who is ably legally represented herself, the respondent should have done more justice to her case than what she did *in casu.* She, in short, should have performed far much better than what she did. She should, for instance, have shown that the matters which she is raising have some substance. She should have shown that there is a possibility of her success in the main case or that she has a plausible case or that there is a triable issue which I am enjoined to take note of. She should, in short, have stated her case with sufficient completeness to enable me to decide on whether or not she has a *bona fide* defence to the applicant's claim. She states her defence in a bald, vague and sketchy manner and, in the process, she does a complete dis-service to her own case in a manner which takes it to a point of no return.

The applicant's case is solid. It is supported by clear and cogent documentary evidence which the respondent failed to rebut. She, on her part, proved her case on a preponderance of probabilities. The application is, accordingly, granted as prayed in the draft order.

Calderwood, Bryce Hendrie & Partners, respondent's legal practitioners