TINASHE BLASTING SERVICES (PVT) LTD
versus
DEBRA NYAMUKONDIWA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 21 July 2023 & 16 July 2024

Opposed application-Summary judgement

L Madhuku, for the applicant
S Chimedza, for the respondent

MUSITHU J: The applicant seeks relief by way of summary judgement. The relief sought is set out in the draft order accompanying the application as follows:

> "1. Summary judgement be and is hereby granted.
> 2. Defendant shall pay the sum of US$33 000 to plaintiff or the equivalent thereof at the prevailing inter-bank rate made up as follows;
> a) US$18 000 for explosives sold to the defendant.
> b) US$14 500 being arrear rentals for mining compressors.
> c) US$500.00 being damages for repair of the damaged compressor.
> 3. Interest thereon at the prescribed rate from the date of summons to date of full payment.
> 4. Cost of suit on attorney to-client scale."

The application was opposed.

The applicant's case

The applicant and the respondent entered into what they termed "agreement of lease" sometime in 2018 in terms of which the respondent hired out the applicant's mining equipment to wit, compressors on agreed monthly rentals. In terms of clause 2 of the agreement the agreed rental of the mining compressors was US$500.00 per month per compressor. Furthermore, the respondent is alleged to have purchased some mining explosives from the applicant on credit and undertook to make the payment within a reasonable time. The respondent allegedly failed to pay the amount for the hiring of the compressors totaling US$10, 500.00 and the purchase price for the explosives in the sum of US$18 000.00.

On 3 June 2019 the respondent signed an acknowledgement of debt in terms of which he acknowledged his indebtedness to the applicant in the sum of US$28, 500.00 and undertook to make the payment on or before 30 September 2019. Nothwistanding the written undertaking, the respondent failed to pay the said amount. Furthermore, the respondent accrued rentals for compressors in the sum of US$4 000.00 which he failed to pay resulting in the termination of the lease-hire agreement.

On collection of the compressors from the respondent, the applicant noted that the respondent damaged the compressors, and they needed to be repaired at a cost of US$500.00 to restore them to their pre-hire condition. On 30 November 2020, the applicant as the plaintiff issued summons against the defendant who is the respondent in this case demanding payment of the amounts stated above. Pursuant to the lodged summons, the respondent herein as the defendant entered an appearance to defend the matter. The applicant avers that the respondent does not have any *bona fide* defence to the claim and appearance was solely entered to delay the applicant's claim.

The Respondent's case

In opposition, the respondent averred that he had a *bona fide* defence to the applicant's claim. The respondent further averred that the applicant's claim could not be resolved on the papers as there were material disputes of fact. The respondent further contended that the applicant caused unnecessary confusion by giving conflicting dates on when the lease agreement was entered into. The applicant further alleged that as of 3 June 2019, the respondent had already accrued an outstanding debt of US$10 500.00. The respondent avers that the claim was absurd as that would mean he accumulated three months arrears, yet the lease agreement was entered into the same month of June 2019.

The respondent further denied being indebted to the applicant in the sum of US$18, 000.00 for mining explosives allegedly bought from the applicant herein. The respondent averred that the purported acknowledgement of debt tendered by the applicant was forged and should never be entertained by the court. The responded further denied causing any damages to the applicant's compressors and as such, was in no way indebted to the applicant. The court was urged to dismiss the application for summary judgment with costs on the higher scale.

The submissions

At the commencement of the oral submissions, *Mr Chimedza* for the respondent applied for the removal of the bar operating against the respondent for the late filing of his heads of argument. The bar was removed by consent.

Mr Madhuku submitted that the main issue before the court was concerned with the validity of the acknowledgement of debt. The applicant had since filed an answering affidavit to which was attached the supporting affidavit of the legal practitioner, before whom the acknowledgement of debt was signed. The supporting affidavit explained the circumstances under which the acknowledgment of debt was signed.

Mr Madhuku contended that applicant had an unanswerable case, when regard was had to the supporting affidavit of Tonderai Sena, the legal practitioner before whom the acknowledgment of debt was signed. The issue was one that could be easily resolved on the papers. On the issue of disparities in the dates, counsel submitted that a dispute of fact would have probably arisen but that preliminary point had since been abandoned by the respondent. Mr *Madhuku* further submitted that part of the claim which was not covered by the acknowledgement of debt could be referred to trial for determination.

In response, *Mr Chimedza* submitted that the applicant's case was not unassailable and did not make sense. The respondent had a valid defence to the claim as demonstrated in his plea. Counsel submitted that there were also disparities between the case pleaded in the summons and declaration and the case pleaded in the applicant's founding affidavit. The declaration stated that the lease agreement was entered into in 2018, while in the founding affidavit it was claimed that the lease agreement was entered into in June 2019. One could therefore not tell when exactly the agreement was entered into. The respondent also denying that he signed the acknowledgement of debt in the presence of any lawyer. Counsel submitted that apart from the acknowledgment of debt, there was no proof apart that the alleged mining explosives were ever purchased from the applicant.

In his reply, Mr *Madhuku* submitted that it was incorrect that the applicant referred to different dates. He submitted that the declaration referred to 2018 but made the point that the acknowledgement of debt was signed on 3 June 2019. Counsel further submitted that the respondent was attempting to create a new case in the heads of argument contrary to what was pleaded in the opposing affidavit. This was because the respondent did not deny the existence of

an acknowledgment of debt in his opposing affidavit. Counsel further submitted that in para 4 of his opposing affidavit, the respondent claimed that the acknowledgement of debt was forged without elaborating the basis of such an averment. Furthermore, counsel contended that the respondent did not deny that he signed the acknowledgment of debt or that he had no knowledge of the legal practitioner before whom the acknowledgment of debt was signed.

Analysis

An application for summary judgment is a procedure that protects a plaintiff against an ill-disposed defendant who defends a matter merely for the sake of buying time. It is a remedy that may be deployed to prevent the abuse of the court processes by a recalcitrant defendant.[1] The remedy of summary judgment was explained in the case of *Tavenhave & Machingauta Legal Practitioners* v *The Messenger of Court*[2] as follows:

> "Summary judgment is a drastic remedy which will only be granted where it is clear that the defendant has no *bona fide* defence and has entered appearance to defend solely for purposes of delay. Because of the drastic nature of the remedy a court will not grant it if there is any possibility that the defence raised on the papers might succeed. Thus it has been held that a mere possibility of success will suffice to avoid an order for summary judgment and that:
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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, typical of which in this country are *Davis v Terry* 1957 (4) SA 98 (SR); *Rex* v *E Rhodian Investments Trust (Pvt) Ltd* 1957 (4) SA 631 (SR); *Kassim Brothers (Pvt) Ltd v Kassim & Anor* 1964 (1) SA 651 (SR); *Shingadia v Shingadia* 1966 (3) SA 24 (SR); *Webb* v *Shell Zimbabwe (PvT) Ltd* 1982 (1) ZLR 102."
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> See *Jena* v *Nechipote* 1986 (1) ZLR 29 (SC). See also *Kingstons Limited v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458 F-G."

The court should not be placed in an invidious position in determining whether to grant summary judgment. It must be clear and obvious from the papers that the plaintiff's claim is unassailable, and the defendant has merely entered appearance for purposes delaying the inevitable. Going by the above dictum, the court is satisfied that there is a reasonable possibility that an injustice may be done if summary judgment is granted herein. I say so for the following reasons.

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[1] *Meek v Kruger* 1958 (3) SA 154 (T) @ 158C
[2] SC 53/14 at pages 4-5

There are disparities in the dates as to when the lease agreement between the parties was consummated. Paragraph 4 of the plaintiff's declaration claims that the lease agreement was entered into in 2018. Paragraph 1 of the acknowledgment of debt is couched as follows:

> "I, DEBRA NYAMUKONDIWA [Identification Number 49-054285-Z-49], do hereby acknowledge the following:
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> 1. "That I am truly an lawfully indebted to TINASHE BLASTING SERVICES (PRIVATE) LIMITED in the sum of US$28 500 as follows:
> 1.1 US$18 000.00 for mining explosives purchased from it; and
> 1.2 US$10 500.00 for the hiring of the compressor for the year 2018."

The acknowledgement of debt refers to the hiring of the compressor in 2018. Clause 1 of the lease agreement states that the effective date of the agreement was the date of signature of the agreement. The lease agreement showed that it was signed on 3 June 2019. The acknowledgment of debt was also signed on 3 June 2019. Going by the said dates, it means that as at the date of the signing of the agreement of lease and the acknowledgment of debt, the respondent had already incurred hiring charges in excess of US$10,500.00. In his notice of opposition, the respondent preyed on the apparent conflict and pointed to the absurdity of accumulating three months arrears in the same month that the acknowledgment of debt was signed. He also claimed that the acknowledgment of debt was forged.

In *Timnda Truck Parts (Pvt) Ltd* v *Auto Lite Distributors (Pvt) Ltd* 1996 (1) ZLR244(H) it was held that:

> "In an application for summary judgment the applicant must do more than simply assert that he has a good claim, that he believes that the defendant has no *bona fide* defence and that the defendant has entered an appearance to defend for the purpose of delay. The applicant is obliged by r67 of the High Court Rules to adduce evidence in substantiation of its claim to summary judgment. That evidence must establish the facts upon which reliance is placed for the applicant's assertion that the applicant's claim is unimpeachable. The need to adduce such evidence is even stronger when the original summons lacks details of the claim against the defendant."

As already stated, in an application for summary judgment, the plaintiff must clearly demonstrate on the papers that its claim is unimpeachable. The applicant herein found itself in grave difficulty and sought to explain the apparent discrepancies through the supporting affidavit of Tonderai Sena, the legal practitioner before whom the acknowledgment of debt was signed. In the supporting affidavit, the said legal practitioner denied that the acknowledgment of debt was forged. However, the issue does not end with the alleged forging of the acknowledgment of debt. There are also the discrepancies in the dates which I have already alluded to that casts some doubt

on the genuineness of the acknowledgment of debt. Unfortunately, this apparent conflict is not explained in the founding affidavit and the answering affidavit. A clear explanation is required to eliminate any doubts about the genuineness of the acknowledgement of debt.

Para 2 of the lease agreement states that the agreed rental for the mining compressors was US$500.00 per month per compressor payable no later than the last day of each month. Paragraph 7 of the applicant's founding affidavit stated that the parties entered into a lease hire agreement in terms which the respondent rented out the applicant's compressors for the sum of US$500.00 per month form June 2019. Paragraph 8 stated that the defendant failed to pay the monthly rental fees amounting to US$10 500.00 which amount he duly acknowledged in terms of an acknowledgement of debt executed on 3 June 2019.

Going by the applicant's own version as gleaned from its pleadings, the US$10,500.00 debt could only have accrued 3 months after the signing of the lease agreement. It therefore becomes unclear how that debt accrued on the same date that both the lease agreement and the acknowledgement of debt were signed. In his heads of argument, the respondent contended that the facts alleged by the applicant were irreconcilably incoherent to such an extent that no reasonable court could grant the application for summary judgment. The court agrees with this submission. While it is accepted that the applicant's cause of action is based on the acknowledgment of debt, the discrepancies highlighted in that document, when considered together with the lease agreement makes it susceptible to impeachment and therefore unsafe to rely on in granting summary judgment.

The court determines that there is no sufficient evidence on which the court safely grant summary judgment herein. There are triable issues which need to be further ventilated through the leading of *viva voce* evidence at the trial.

Accordingly, it is ordered that:

1. The application for summary judgement be and is hereby dismissed.
2. Costs shall be in the cause.

MUSITHU J: .....

Lovemore Madhuku Lawyers, applicant's legal practitioners
Mudimu Law Chambers, respondent's legal practitioners