CITY PLASTICS (PRIVATE) LIMITED
versus
POLY PACK LIMITED HC 6664/18

POLY PACK LIMITED
and
CITY PLASTICS INDUSTRIES (PRIVATE) LIMITED HC 7975/18

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 1 April, 2019 & 12 February, 2020

Opposed Application

T. Pasirai for applicant in HC 6664/18 and for respondent in HC 7975/18
D. Mehta for respondent in HC 6664/18 and for applicant in HC 7975/18

WAMAMBO J: On 6 November 2018 ZHOU J ordered by consent the consolidation of the two maters dealt with hereunder. The order by ZHOU J reads as follows:-

"*IT IS ORDERED BY CONSENT THAT*

1. *Leave be and is hereby granted to consolidate the following application.*
   (a) *The court application to compel the applicant herein to supply further particulars filed under HC 6664/18*
   (b) *The application for summary judgment filed under case number HC 7975/18*
2. *The issue as to the costs for the consolidated applications be determined by the court that hears them.*

3. There be no order as to costs for this application."

In the submissions before me counsel addressed me on the application for the supply for further particulars (HC 6664/18) first. Submissions on the application for summary judgment (HC 7975/18) then followed. In this judgment I will consider the two consolidated matters following the order in which counsel addressed me.

A point *in limine* was raised by the applicant namely that the application was unopposed. HC 6664/18 (Application to compel the supply of further and better particulars). The reason proffered is that the opposing affidavit was deposed to in Malawi before a Commissioner of Oaths and not a Notary Public, as provided for under the High Court (Authentication of Documents) Rules (RGN No. 995 of 1971). The opposing affidavit was indeed signed before on Chikaiko Yatuta Machika who is designated as a Legal Practitioner and "Commissioner for Oaths with an address P.O. Box 5462, Limbe, Malawi.

The applicant argues that an attempt to cure the defect did not assist at all. At pages 52-53 of the record respondent sought to cure the defect by filing an affidavit by the deponent of the founding affidavit "on the strength of Rule 5 of the High Court (Authentication of Documents Rules) 1971 that he indeed is the one who deposed to the opposing affidavit. This particular affidavit was sworn to before one Isabella Getrude Mndolo who is designated as a Legal Practitioner, Notary Public and Commissioner of Oaths.

Applicant argues that the supplementary affidavit should have been filed by the legal practitioner herself clarifying under what capacity she authenticated the founding affidavit. The relevant provisions of the High Court (Authentication of Documents) Rules 1971 read as follows:-

(3) Any document executed outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production of lodging in any public office in Zimbabwe if it is authenticated –

(a) by a notary public mayor person holding judicial office or

(b) in the case of countries or territories in which Zimbabwe has its own diplomatic or consular representative by the head of a Zimbabwean diplomatic mission the deputy or acting head of such mission, a counsellor first, second or third secretary consul general, consul or vice consul

(4) An affidavit sworn before and attested by a Commissioner outside Zimbabwe shall require no further authentication and may be used in all cases and matters in which

affidavits are admissible as freely as if it had been duly made and sworn to within Zimbabwe.

(5) Nothing contained in these rules shall prevent the acceptance as sufficiently authenticated by any court, tribunal or public office of any document which is shown to the satisfaction of such court, tribunal or public office to have been signed by the person purporting to have signed the same."

A consideration of the facts of this case clearly demonstrates that the founding affidavit does not fall under Rules 3(a) or 3(b) as set out above.

In the circumstances Rule 5 now falls under the spotlight. The Rule as I understand it give me a discretion if I am so satisfied to accept that the founding affidavit was signed by the person purporting to have signed it, and thus to accept it as having been sufficiently authenticated.

In *Oliver Masomera* v *Gideon Hwemende & Others* HH 665/16 CHITAPI J was dealing with an affidavit that did not comply with the provisions of the High Court (Authentication of Documents) Rules RGN 996/1971 when he said at page 5:-

"*The purpose of having documents authenticated especially those executed in foreign countries is to ensure that they are genuine before the court can use them. With respect to affidavits there is more to it than simply authenticating or certifying a document. An affidavit is a piece of evidence and because the person deposing to it is not before the court such person is required to swear to his or her deposition before a lawfully appointed or authorised person to administer the oath or affirmation"*.

Other cases dealing with the same issue among others are *Mystical Trading (Private) Limited* v *Marcol Trading Limited and Others* HH 132/11, *The Sheriff of the High Court* v *Linereagle Close Corporation t/a Eagle Liner and Others* HH 822/15, *Annastacia Pontes* v *The Sheriff of Zimbabwe and 2 Others* HH 374/14.

In *Annastacia Pontes* (supra) one of the respondents (the third respondents) in that case raised the objection that the affidavit filed by the applicant was not compliant with the High Court (Authentication of Documents) Rules. To remedy the same the applicant filed an affidavit complying with the High Court (Authentication of Documents) Rules. The third respondent remained silent on the point and the court found that the filed affidavit assisted in the disposal of that aspect of the application.

It is clear that the situation in this case is rather different. The respondent in this case persisted in their objection. The supplementary affidavit deposed to by the Group Chief Executive

Officer of the respondent one Vijay Kumar Gangadharan is sworn to before Isabella Getrude Mndolo who affixed her Notary Public seal. The affidavit clarifies that the deponent is the one who deposed to the founding affidavit dated 23 July 2018 before Chikaiko Yatuta Machika. The signatures on the two affidavits appear similar. In the circumstances I am satisfied that the founding affidavit was deposed to by one and the same person as the one who deposed to the supplementary affidavit dated 2 November, 2018. To that end the point *in limine* is dismissed.

Now I proceed to the merits.

The background of the matter is that on 28 March 2018 respondent issued summons in HC 2850/18 against the applicant. An appearance to defend was duly entered by applicant. In the summons respondent claims US$777 435.40 being the outstanding balance of goods sold and delivered to the applicant payment of interest at the prescribed rate and costs of suit on a legal practitioner and client scale.

In the declaration it is alleged that respondent in 2009 entered into an agreement whereby applicant would purchase packaging materials from respondent. Applicant agreed to pay for the materials within 30 days of delivery. This relationship subsisted up to August 2015 when applicant started to skip payments. Applicant failed to pay to respondent US$617 285.40 for material sold and delivered. Applicant also failed to pay for plant and machinery in the sum of US$160 150.00. The total outstanding is US$777 435.40.

Applicant made a request for further particulars to which respondent responded. Unsatisfied by the response applicant requested for further and better particulars. The request is made in three main paragraphs as follows:-

1. *Ad paragraph 6.5.*

   1.1.The purchase order for the machinery alleged to have been sold to defendant is requested

   1.2.In the event that the purchase order (sic) who on behalf of the defendant raised the purchase order, on what date was the order made, and to whom on behalf of the plaintiff was the order made

   1.3.In the event that the purchase order was in writing a copy is requested.

2. *Ad paragraph 7.1.*

2.1.Whom on behalf of the plaintiff made the verbal demand, on which date was the demand and by whom on behalf of defendant was it received

2.2. A copy of the written demand is requested.

3. Ad paragraph 7.4.

3.1.Whom on behalf of the defendant acknowledged the debt, on which date was the debt acknowledged and for what amount and to whom on behalf of the plaintiff was the acknowledgement made.

3.2.*A copy of the written acknowledgment of debt is requested.*"

Respondent duly supplied the further and better particulars and seems to have satisfied applicant in their response to paragraphs 1 and 2 of the request. A reading of the affidavit deposed to by Farai Makumbe a Finance Manager of applicant reveals that the further and better particulars that they seek is the written acknowledgement of debt apparently referred to in respondent's declaration in paragraphs 12 and 13. Respondent's position is that the demand in paragraph 3 is a matter of evidence and is thus not required for applicant to plead.

Paragraphs 12 and 13 of respondent's declaration reads as follows:-

"12. *Despite plaintiff making demand and defendant acknowledging its indebtedness and making numerous promises to pay, the defendant has either neglected, failed and/or refused to pay the sum of US$D777 435.40 that is due and owing to the plaintiff.*

13. As plaintiff has been needlessly put to the trouble and expense of having to sue for a debt which has been acknowledged plaintiff claims, costs of suit on a higher scale."

In a rather short presentation of submissions applicant emphasised that the acknowledgement of debt is material. Applicant further submits that the acknowledgement of debt was eventually supplied through the back door in the application for summary judgment (which forms the subject matter in HC 7975/18 dealt with later in this judgement).

Advocate Mehta for the respondent made the following submissions:-

The summons makes no mention of an acknowledgement of debt. The summons reflects that the claim is simply for goods sold and delivered. By averring that there is an acknowledgement

of debt the applicant is misleading the court. However Advocate Mehta was quick to point out in his submissions that there is nit picking by both counsel.

However it is respondent's stance that the supply of an acknowledgement of debt is unnecessary as it is evidence that is not material for purposes of pleading. Respondent in the introductory portion of its heads of argument avers however that the "written acknowledgement of indebtedness is available but unnecessary for the purpose of applicant's pleading." In *Trinity Engineering (Pvt) Ltd* v *Commercial Bank of Zimbabwe Ltd* 1999 (2) ZLR 417 (H) the headnote reads as follows:-

> "*A defendant is entitled to request and be supplied with particulars when the plaintiff's declaration is lacking in certainty and particularity. The facts which the plaintiff may be required to state are facts which fill in the picture of the plaintiff's cause of action. A defendant is not entitled to request further particulars for the purpose of enabling him to ascertain whether he has a defence or to formulate such a defence. Applications for particulars should not amount to a series of interrogatories to the other party*."

In *John Glendinning* v *Najmuddin Kader* HH 575-16 MAFUSIRE J at pages 9 to 10 enunciated the function of further particulars and also crisply laid out circumstances that are clearly not the function of further particulars.

I take heed of the said principles and apply them to this case.

While respondent is of the view that the acknowledgment of indebtedness is material for the application for summary judgment it appears they are of the view that it is not material in the circumstances of this application.

The acknowledgement of indebtedness appears at page 24 of the record.

It is written on a City Practice Industries letter head and reads as follows;

"*Date: July 11, 2017*

The Managing Director
Polypack Ltd
Blantyre
MALAWI

Dear Sir,

<u>REF: PAYMENT PLAN AGREEMENT FOR POLYPACK LTD, ACCOUNT</u>

Our discussion regarding the City Plastic Industries account refers. Kindly take note that –

1. *After returning the stock to Polypack we reconcile both the Polypack and Polyone accounts with City Plastics Ledger.*

2. *In the meantime, City Plastics will start transforming payments to Polypack Ecobank account, Harare from next week onwards.*

3. *We have received commitments from our Board of Directors to settle this amount at the earliest.*

4. *Next week I will have a meeting with our Chairman Webster so we speed up payments.*

5. *As discussed and agreed with Mr Vijay he is free to get in touch or come for any payment flows into your account.*

I believe you will find the above to be an acceptable resolution to help retire the debt and move forward.

Regards,

(Signature)
Farai Makumbe"

It is a generalised letter which will not assist in defining issues with precision. It does not assist the other party to know his defense, or take the other party by surprise. It does not assist the other party to decide whether to admit or deny particular allegations. It certainly does not assist a party to make a decision whether to persist with her claim or withdraw the matter or quantify the claim.

The acknowledgement of indebtedness is couched in so general terms that it is virtually of no assistance to the applicant. One has to consider the full picture of the case wherein it is clear that it is common cause that respondent concedes that he may be owing applicant some amount.

I find favour with the submission made that the application is ill advised and is unmeritorious.

I am satisfied that for purposes of answering to the summons enough information has been supplied by the respondent.

I am of the view that the application amounts to a fishing expedition.

In the circumstances I dismiss the application.

As clearly acknowledged by *Advocate Mehta* there is a lot of nit picking from both counsel. HC 7975/18 (Application for Summary Judgment).

As stated earlier this is an application for summary judgment. A point *in limine* was raised by the respondent. The point *in limine* is that there is no valid application before the court as the founding affidavit is invalid or it was not authenticated by a Notary Public as provided for in the High Court (Authentication of Documents) Rules, 1971. It will be recalled that the same point *in limine* was raised in Case HC 6644/18 above. It is also noted that the deponent to both affidavits under scrutiny is the same, namely Vijay Kumar Gangadwaran.

The applicant's Founding Affidavit was deposed to before Isabella Mndolo. Let me proceed to regurgitate the relevant and last page of the applicant's Affidavit. It appears as follows:

"*THUS SWORN TO AT BLANTYRE, MALAWI ON THIS 24 DAY OF AUGUST, 2018 (sic)*

(Signature is appended)
SIGNED ……

(Signature is appended)
BEFORE ME ……
COMMISSIONER OF OATHS

ISABELLA GETRUDE MNDOLO LLB (HONS) MW
Legal Practitioner, Notary Public
Commissioner of Oaths
P.O. Box 5462
Limbe,
MALAWI"

The respondent argues strenuously that Isabela Getrude Mndolo signed the Founding Affidavit in her capacity as a Commissioner of Oaths and not a Public Notary. Effectively that, the words Notary Public at appearing under the name of the Commissioner of Oaths are not relevant.

The applicant is of the view that the Founding Affidavit was properly authenticated according to Malawian Law. The applicant urges me to accept the affidavit as properly authenticated by employing Section 5 of the High Court (Authentication of Documents Act) Rules.

My attention has been further directed to the case of *Tawanda* v *Ndebele* HB 27/06 which supposedly supports the respondent's stance.

The *Tawanda* v *Ndebele* judgement (supra) concerned a general power of attorney given to a brother by the applicant. The power of attorney was attested to in the United Kingdom and was used to sue the respondent.

The power of attorney was stamped Solicitor. The applicant argued that a solicitor was on officer of the court and should be accorded the same status as that of a notary public.

CHEDA J did not agree with the applicant's argument and at page 4 of the judgement pronounced himself as follows:

> "The office of a notary public is very important and his signature together with the seal of office is important that it commands international recognition to an extent that the mere exhibition of a notarised document is absolutely acceptable for judicial purposes. For this reason, therefore a notary public's office should be protected and recognised for what it is worth. Prosper's signature was not authenticated by a notary public. Therefore its authority is questionable. It is my view therefore that there should be no compromise by seeking to accept a questionably authenticated document either for evidence or expedience purposes. The rules of this court have listed certain officials who are authorised to authenticate documents and those rules should be applied *in toto*".

I agree with the above principle I wish to point out the circumstances of this case are different from the ones in the above case. Among other differences are the following:

In this case the stamp of the official who authenticated the documents bears the official title among others of the notary public. In the earlier case the same official's stamp albeit with a seal was used to prove that the deponent of the affidavit sworn to on 23 July 2018 was the same as the one who swore before a notary public on 2 November 2018.

The same legal practitioner notarised Vijay Kumar Gangadharan's affidavit. That affidavit contains the same stamp as in this case with the added feature of a seal. I take note of the qualifications and seal of the notary public pertaining to the very same Isabella Getrude Mndolo. To the end I am of the view that the document in question was properly authenticated by a notary public. The point *in limine* is thus dismissed.

The application for summary judgment is predicated upon Order 10 Rule 64 of the High Court Rules, 1971. The facts giving rise to the application are as summarised at page 4 of the judgment.

The difference is that in this application based on the same facts applicant herein seeks summary judgment.

Applicant avers as follows:-

In 2016 respondent stopped making payments when it had an outstanding balance of US$777 435.40 for purchases it had made in 2014/15. Responding to numerous efforts made by applicant to secure payment respondent's Finance Director, Farai Makumbe and Chairman one Webster made promises to pay verbally by e-mail and via telephone text messages. An example is given of a letter by Makumbe dated 11 July 2017.

Applicant traverses a number of events that casts negative aspersions on respondent's behaviour in response to the summons issued against it in this case. See paragraphs 11 to 23.

The long and short of it is that applicant avers that the respondent has embarked on a fishing expedition from the very start. Examples of this are given such as the requests for further and better particulars under HC 6664/18 which is one of the two consolidated cases falling under this judgment.

Applicant further avers that despite making numerous promises respondent has not paid anything since 2016. That respondent did not respond to the letter of demand and has also not pleaded.

Applicant is of the view that respondent is also wasting time, and that respondent's main shareholder being a powerfully connected figure this will frighten applicant causing him to abandon his claim. Further that respondent is deliberately wasting time so that the value of money will diminish in real terms as a result of inflation.

Applicant also avers that respondent has no *bone fide* defence to the claim.

According to applicant Annexures A to F show the basis of the application along with documents at pages 74 to 133 confirming supply and delivery of goods from applicant to respondent.

The applicant is also of the view that the Notice of Opposition deposed to by one Farai Makumbe dated 14 September 2018 and signed by the Commissioner of Oaths on 14 October, 2018 is defective.

The respondent on their part are opposed to the application.

Respondent avers as follows:-

The business relationship between applicant and respondent was such that applicant would send plastic products from Malawi for sale and distribution in Zimbabwe.

To that effect respondent acted as applicant's agent and distributors on a consignment basis. Annexure 'A' a letter to the Zimbabwe High Commission in Malawi shows the nature of the agreement between the parties.

In terms of the agreement between the parties unsold, oversupplied or neglected products would be returned to applicant. Some of the products as enunciated above are still indicate in applicant's claim, notably as more fully elaborated in Annexure 'B' being email correspondences between the parties.

I will proceed to deal with the merits of the matter.

The respondent would raise a purchase order to the applicant in its name and also invoice in its name to facilitate importation of applicant's goods into the market; only for commercial expediency and as agreed between the parties Annexure 'C' reflects that goods were being supplied to a customer one Mr Stephen Hair by applicant through respondent.

Respondent would retain a percentage of sale proceeds and remit the balance of payments successfully collected for products to the applicant.

According to the respondent they don't owe any money to applicant. Respondent in paragraph 17 of its heads of argument says –

> "17. As far as the respondent is concerned it does not owe the applicant any money. If at all any money is owed it is certainly not the amount claimed and what is in contention would be not more than $341,143.72 according to the respondent's reconciliations. I attach as Annexure "J" respondents reconciliations from 2015 to 2017 showing that the amount in issue is ……..($29,751.12) which is owed to respondent by the applicant. The reconciliation take into account all ……..put in issue by the applicant in its claim taking into account all the other factors stated herein in connection with the computation of the applicant's claim."

Respondent also submitted that the parties were involved in a reconciliation exercise which was never completed.

Respondent summarily avers as follows.

- Some of the claims have prescribed
- There are serious material disputes of fact as regards the nature of the agreement between the parties and the relationship between the two

Respondent also avers that part of applicant's claim is …….. bad debts that applicant seeks to recover through the respondent.

The opposing affidavit covers a whole 13 pages which I have read in detail.

In *Gamboge Investments (Pvt) Ltd* v *The Occupier Shop 4 – Sikhanyiso Shiri* HB 06-19 TAKUVA J at page 2 said :-

> "*In an application for summary judgment the applicant must show that the respondent's opposition is not bone fide or ill founded and has entered appearance for dilatory purposes. Put differently the respondent must outline a defence and the material facts upon which it basis its defence with sufficient clarity so s to enable the court to decide whether he has a bona fide defence which if proved at the trial will constitute a defence to plaintiff's claim. See Dube v Medical Investments Ltd 1989 (2) ZLR 28R and Mbayiwa v Eastern Highlands Metal (Pvt) Ltd S-139-86.*

In *La Farge Cement Zimbabwe Limited* v *Mugove Chatizembwa* HH 413-18 MATHONSI J. as he then was said the following at page 4:-

> "*Summary judgment is an extra ordinary and indeed drastic remedy in the sense that it negates the right of a litigant who has expressed a willingness to access the court and defend an action to do so. It is however a deliberate remedy designed to deny a mala fide defendant the benefit of the audi alteram partem rule simply because the plaintiff's claim would be unassailable. Therefore where the proposed defences of the defendant to the claim are clearly unarguable both in fact and in law the drastic remedy of summary judgment is availed to the plaintiff See Chrisma v Stuchbury and Anor 1973 (1) RLR 277 (SR) at 279.*
>
> *It is settled that an order to defeat a summary judgment application the respondent must disclose facts upon which his or her defence is based with sufficient clarity and completeness so as to persuade the court that if proved at the trial, will constitute a defence to the claim. It is also settled that not every defence raised by defendant will succeed in defeating a plaintiff's claim for summary judgment. It must be a bone fide defence stated with sufficient clarity and completeness to allow the court to determine whether the opposing affidavit discloses a bone fide defence. See Kingston Ltd v E.D. Inesan (Pvt) Ltd 2006 (1) ZLR 451 (S) at 458 F – G."*

TAGU J in *Timothy Nhamo Nyamweda* v *Innocent Beiza and Patience Benza and Herentals Group of Schools* HH 238/18 had this to say at page 3:-

> "*The requirements for lack of bona fide defence for a successful application for summary judgment was enunciated in the case of Mercantile Bank Ltd* v *Star Pomer CC and Anor 2003(3)* SA 309 where it was said :
>
> "*The defendant must therefore be a condemned to pay plaintiff's claim unless the defendant can show the existence of a triable issue based upon a dispute which is bona fide in nature*

to have been contrived for the purpose of tempusing. The defendant casts upon the defendant the onus of disclosing a defence which is sound in law and which is based on apparently bone fide proportions of fact."

An application of the law to the facts reflects that the parties are clearly poles apart.

The claim by the respondent that the business relationship between respondent company and applicant was that respondent acted as an agent or distributor is to some extent supported by the two letters to the Visa Section of the Zimbabwe High Commission by Mr Farai Makumbe representing the respondent. The two letters are dated 13 September 2016 and 1 October 2014 and appear at pages 151 and 152 of the record. The applicant's position is clearly different. There are also claims of prescription by respondent. The amount owed to applicant has been put in issue by respondent considering that there are neglected or damaged goods that were not sold and returned.

On the nature of Opposition having been commissioned on a different date from that when it was deposed to it would appear that this is an error on the part of the stamping Commissioner of Oaths. One will also note that the date and year are the same but only the month is different. Further it is noted that respondent only received the application on 31 August 2018 and would thus not have responded to such application on 14 August 2018. Thus the date stamp of the Commissioner of Oaths reflecting the date of 14 August 2018 is clearly an error. To that end I find that there is a valid Notice of Opposition.

To my mind if the respondent has fully disclosed facts on which his defence is based with clarity and completeness. I am satisfied it is a *bone fide* defence. If it is proven out that that the relationship between the parties was that of putting respondent as an agent or distributor, that some damaged goods were returned to the applicant, that some claims have prescribed that the amounts owed were not properly computed as a result of the above and other factors this would indeed provide a defence to the claim.

A combination of the above and the factors are appears in more detail in respondent's papers clearly reflects that are material disputes of fact to be resolved through a trial.

It is certainly not a matter where the applicant's claim is unassailable. I find that respondent's claims are arguable in the circumstances.

In the circumstances I dismiss the application with costs.

In the result I make the following order:

IT IS ORDERED THAT

1. The application filed under Case No. HC 6664/18 be and is hereby dismissed with costs.
2. The application filed under HC 797/18 be and is hereby dismissed with costs.

Gill, Godlonton and Gerrans, applicant's legal practitioners in HC 6664/18 and respondent's legal practitioners in HC 7975/18

M.B. Narotam & Associates, applicant's legal practitioners in HC 7975/18 and respondent's legal practitioners in HC 6664/18