

AFRICAN SUN LIMITED
versus
MILDRED ZULU

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 10 February 2022 and 11 May 2022

Summary Judgment

Mr *F.F Nyamayaro*, for the applicant
Ms *RC Chakanya*, for the respondent

MHURI J: On the 4th October 2021 applicant issued summons against respondent claiming a sum of twenty eight thousand united states dollars (US \$28 000.00) being the full amount extended to Respondent on a Staff Car Loan. This amount was extended under a Staff Car Loan Scheme Agreement which Respondent duly signed.

Respondent entered appearance to defend on the 12 October 2021 and on the 19th of October 2021 applicant filed this application for summary judgment in terms of Rule 30(1) of this Court's Rules SI 202 of 2021. The application is predicated on the fact that respondent does not have a genuine and sincere defence to the action, having duly acknowledged her indebtedness to applicant.

In brief, the background of this matter is that Respondent was in Applicant's employment as a General Manager. During her tenure of employment with Applicant, Applicant used to run a Staff Car Loan Scheme under its Motor Vehicle Purchase Loan Scheme.

Respondent was a beneficiary of this Car Loan Scheme. She obtained a sum of US\$28 000.00 which was disbursed straight to the car dealer Jarzim Auto Car Hire in South Africa who supplied her with a car a Toyota Fortuner D4D.

In terms of the Staff Loan Scheme Agreement, the motor vehicle was to be registered in Respondent's name who in turn was to surrender the registration book into the care and custody of Applicant who had the right to retain it until the loan was paid in full. It was a condition, *inter alia* that the agreement would terminate forthwith on the retrenchment of the employee and upon

such termination the amount outstanding on the loan would immediately become due and payable failing which the motor vehicle should immediately be surrendered to the employer until payment of the outstanding amount.

It is a fact that Respondent was retrenched by Applicant, as at the time of retrenchment, she had not repaid the loan. Applicant did not deduct any money from Respondent's salaries as it was facing financial problems. Respondent did not surrender the motor vehicle to applicant. The loan became due and payable but Respondent did not pay. Respondent signed the Staff Car Loan agreement, the motor vehicle purchase loan scheme and the motor vehicle purchase loan scheme acknowledgement of debt on the 11th of October 2019. On the 5th of March 2020 Applicant did a telegraphic money transfer to the car dealer Jarzin Auto Car Hire, for the purchase of Respondent's motor vehicle.

In his founding affidavit, Venon T Musimbe, the applicant's Group Company Secretary averred that Respondent does not have a sincere, genuine and *bona fide* defence to the claim and that the notice to defend the action is clearly dilatory. Applicant is therefore entitled to summary judgment and the relief that Respondent pays the sum of Twenty-Eight Thousand United States Dollars (USD\$28 000.00) and costs of suit at an attorney/client scale.

In opposing the application, Respondent averred in her affidavit that upon retrenchment in September 2020, she was not paid her retrenchment package as well as her pension benefits. She had through electronic mail, advised Respondent through the Human Resources Executive that the motor vehicle issue was to be addressed after the conclusion of the retrenchment package. As this was not responded to, she took it that there was no objection and Applicant was in agreement with the position. Respondent averred that as Applicant owes her the retrenchment packages and pension benefits, she had a defence of set-off as a full defence, as such she has not entered appearance to defend for delay purposes.

As alluded to earlier, the facts in this case are generally common cause.

Applicant correctly submitted that the essence of summary judgment is to enable an applicant who has an unanswerable case to obtain immediate relief without having to go by way of a trial.

CHIWESHE JP (as he then was) put it succinctly in the case of;
KUDAKWASHE BLESSING SHAMUYARIRA

vs

DAVISON MUNODAWAFA GOREDEMA
SPIWE EMMA MONGO,
REGISTRAR OF DEEDS HH 339-17

“that summary judgment by its nature is a drastic remedy which should not be granted save in cases where the defendant is clearly without a *bona fide* defence and for that reason engages in dilatory tactics. Summary judgment may be granted when the plaintiff proves that it has a clear and unassailable case against the defendant and that the defence raised, if any is without substance in law and in fact”.

In casu, Respondent raised the defence of a legal set off averring that Applicant owes her the retrenchment package, notice pay and pension benefits. This issue of the retrenchment package is before the Labour officer for determination, as Respondent challenged the package computed by Applicant. Respondent also submitted that since the retrenchment package has not yet been resolved, Applicant cannot claim repayment of the loan as at this time.

In the case of;

STATIONERY BOX (PRIVATE) LTD

vs

NATCON (PRIVATE) LTD
FARAI NDEMERA 2010 (1) ZLR 227 H

MAKARAU JP (as she was then) stated

“The test to be applied in summary judgment applications is clear and settled on the authorities. The defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence.

Obviously implied in this test but often overlooked by legal practitioners is that the defendant must raise a defence. His facts must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating as they may be and which he may very well be able to prove at the trial of the matter do not amount to a defence at law, the defendant would not have discharged the *onus* on him and summary judgment must be granted.”

In the case of;

METALLON GOLD ZIMBABWE

vs

GOLDEN MILLION (PVT) LTD SC 12/15

ZIYAMBI JA (as she then was) remarked thus

“For set off to operate the defendant must be in a position to say “the plaintiff owes me a debt” rather than “I have a claim against him.” The debt must be capable of easy and speedy proof.”

She also referred to the remarks by GUBBAY CJ to the effect that;

“At common law, set off or compensation is a method by which mutual debts, being liquidated and due, may be extinguished’ if unequal, the smaller is discharged and the larger is proportionally reduced.”

COMMISSIONER OF TAXES

vs

FIRST MERCHANT BANK LTD 1997 (1) ZLR 350 at page 353 (S)

It is not an issue that Applicant has not yet paid Respondent her retrenchment package, notice pay and pension benefits. Applicant still owes respondent as far as the above are concerned. The issue of retrenchment is not an issue between the parties.

In the case of;

MBAYIWA

vs

EASTERN HIGHLANDS MOTEL (PVT) LTD SC 139/86 at page 4-5 McNALLY JA

had this to say:

“.....while the defendant need not deal exhaustively with the facts and the evidence relied on to establish them, he must at least disclose his defence and material facts upon which it is based with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence.

The defendant does not have to prove his defence. He must merely set up facts, which if he can prove at the trial, will entitle him to succeed in his defence. The defence so set up must however be plausible and *bona fide*.”

In this case, Respondent has managed to set up facts, which as stated earlier are common cause, to wit that applicant still owes Respondent her trenchment package, notice pay and pension benefits. This will entitle her to succeed at trial. Her defence of set off is plausible and *bona fide*.

Support is found in the case of *JENA vs NECHIPATE 1986 (1) ZLR 29 (S)*

in which the court stated,

“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 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 judgement is granted”.

Having found that Respondent has managed to establish a defence of set off, applicant's application for summary judgment cannot be granted. Accordingly it is ordered that the application be and is hereby dismissed with costs on the ordinary scale.

Nyamayaro Bakasa Attorneys, applicant's legal practitioners

Muzenda & Chitsama Attorneys, respondent's legal practitioners