

CENTRAL AFRICA BUILDING SOCIETY
versus
EPHISON SIMBARASHE NDAHWI

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 14 January and 3 February 2010.

OPPOSED APPLICATION

Mrs R Matsika for applicant
Mrs J Wood for respondent.

MAKARAU JP: This is an application for summary judgment.

The plaintiff issued summons against the defendant on 10 September 2009 claiming the following:

1. Payment of the amount of US\$52 579.51 with interest thereon capitalized monthly at the rate of 12 % per annum from 7 September 2009 to date of payment in full;
2. Costs of suit on the scale between legal practitioner and client together with collection charges
3. An order declaring the mortgaged property to be especially executable.

In its declaration, the plaintiff pleaded the cause of action between the parties as a loan advanced to the defendant on 29 May 2009 in the sum of US\$50 000-00. It was allegedly a term of the loan agreement that the full amount of the loan together with interest thereon, would become payable in full on or before 29 August 2009.

On 24 August, the defendant passed a mortgage bond over a certain piece of land as security for the loan advanced to him by the plaintiff. It was a specific term of the mortgage bond that the defendant would repay the first installment agreed upon between the parties on or before 7 September 2009. It was allegedly a further term of the mortgage bond that in the event the defendant failed to pay the first installment on due date, the full amount of the loan together with interest thereon would become due and payable. It was alleged in the declaration that the defendant had failed to make the payment on due date hence the issuance of the summons three days later.

The defendant entered an appearance to defend the claim on 23 September 2009.

On 5 October 2009, the plaintiff filed this application for summary judgment. To the application was attached an affidavit deposed to by one Sinikiwe Elizabeth Mukondiwa, (“Mukondiwa”), the plaintiff’s Back Office Operations Manager. In her affidavit, Mukondiwa deposes that she is duly authorised to depose to the affidavit on behalf of the plaintiff and that the facts deposed to in the affidavit are within her personal knowledge.

Mukondiwa proceeds to state boldly and baldly in my view, that she verifies the plaintiff’s cause of action in the matter and the amount claimed by the plaintiff. She however does not state how the amount claimed is arrived at before she proceeds to observe that the defendant has entered appearance to defend the matter solely for the purposes of delay as it is her belief that he does not have a bona fide defence to the claim. In the affidavit, Mukondiwa gives a history of the loan transaction between the parties. She deposes that the defendant was obliged to pay the first installment on 1 July 2009 but failed to do so. She further narrates how the defendant made three payments during the month of July 2009 which in her view fell short of the demand made by the plaintiff to the defendant. This led the plaintiff to claim the full amount of the loan and the interest accrued thereon, she concludes.

The application for summary judgment was opposed.

In opposing the application, the defendant alleged that the issuance of summons in the matter was premature as the debt was not yet due and payable. He further averred that the plaintiff did not give him notice of its intention to foreclose on the mortgage bond and that the amount of the claim was incorrectly stated as he borrowed \$50 000-00 and not the \$52 579.51 that is being claimed.

At the hearing of the matter, *Mrs Matsika* for the applicant applied to amend the plaintiff’s summons by correcting the amounts that are stated in paragraph 6 of the declaration. The effect of the amendment is to increase the amount of interest that has accrued on the capital loan from \$579.51 to \$2 579.51 and the amount of the total amount claimable from the defendant from \$52 058.93 to \$52 579.51. In her oral application for the amendment, she stated that the figures had been incorrectly typed into the declaration.

The application to amend the declaration at this stage in the proceedings was opposed.

In opposing the application, *Mrs Wood* submitted that it is incompetent to amend the pleadings in an application for summary judgment proceedings as the amendment necessarily implies that the plaintiff’s claim as stated in the declaration filed of record is incorrect.

Secondly, I understood *Mrs Wood* to be submitting that the amendment, if granted, would need to be freshly verified by a person who can swear positively to the facts for the summary judgment application to proceed. The affidavit purportedly filed on behalf of the plaintiff of record verified the incorrectly stated claim and cannot be used to verify the amended claim as it predates the amendment.

I find merit in the submissions by *Mrs Wood*.

In my view, the general approach of this court to the amendment of pleadings generally is well settled. The Court will endeavour to permit the parties to a dispute to bring before it any issue upon which they seek to rely to avoid the possibility of stifling, upon technical grounds, an attempt by a party to bring up material facts before the court. Amendments to pleadings are generally granted unless there is some special reason to the contrary.¹

However, summary judgment proceedings demand different considerations. This is so because summary judgment as a procedure is extraordinary in that it takes away from the defendant some of the safeguards that are guaranteed by a full trial. It is a drastic remedy that is based on the supposition that the plaintiff's claim is beyond impeachment on any material basis and that the plaintiff is merely being held back from getting judgment by the rigors of a full trial which are then curtailed to his or her advantage. For the plaintiff to gain such an unusual advantage over the defendant, he or she must meet certain very stringent requirements as set out by the rules. It has thus been held time and again that plaintiffs wishing to use the speedy procedure of summary judgment must bring themselves squarely within the provisions of the rules.²

As stated by GUBBAY CJ in *Scropton Trading (Pvt) Ltd v Khumalo (supra)*, one simply cannot ignore the requirements of rule 64 of the High court Rules 1971 or request the court to condone a departure from strict observance of this rule. To do so would in my view to take away the extraordinary nature of the procedure and also to further erode the protection that defendants have to the right to be heard in full before judgment is given against them. Applications for summary judgment will then resemble all the other opposed applications where the court is enjoined to take a robust view of the facts and condone departures from the observance of the rules in the interests of doing justice as between the parties.

¹ See *Middledorf v Zipper* 1947 (1) SA 545 (SR).

² See *Scropton Trading (Pvt) Ltd v Kumalo* 1998 (2) ZLR 313 (SC), *Chiadzwa v Palkner* 1991 (2) 33 (SC) and *Stanbic Bank Zimbabwe Ltd v Dickie & Anor* 1998 (1) ZLR 205 (HC).

The nature of the procedure that is summary judgment in my view is ample justification for the requirement that a plaintiff resorting to summary judgment must have an unanswerable claim as pleaded in his or her summons and declaration and as verified in the affidavit that must be filed in terms of the rules.

Two issues immediately present themselves from this requirement of the law. Firstly, it appears to me that where the plaintiff's claim as pleaded in the summons or declaration is erroneously stated or is inaccurate for whatever reason and requires amendment, summary judgment cannot be granted on that claim. This is so because the incorrect claim is not beyond reproach.

Further, it appears to me that axiomatically, an incorrectly stated claim is not capable of verification unless the deponent to the verifying affidavit is not telling the truth or is unaware of the facts giving rise to the claim.

It is my view that an incorrectly stated claim is not verifiable and cannot thus be the basis of an application for summary judgment. It cannot be amended for the procedure of summary judgment.

Where the amount claimed in the summons differed from the amount verified in the verifying affidavit, this court dismissed an application for summary judgment.³ Thus one cannot rely on the amount of the claim in the verifying affidavit as the correct amount for the purposes of granting of summary judgment. The same amount must appear in both the pleadings and in the verifying affidavit. In my view, one cannot even rely on those portions of the amount that are not in dispute for the purposes of obtaining summary judgment and discard those that are in doubt.

So stringent are the requirements for summary judgment that without the leave of the court, a supplementary affidavit further verifying the claim cannot be filed. A supplementary affidavit can be filed for the purposes of dealing with issues raised in the opposing affidavit that have the effect of catching the plaintiff by surprise. The plaintiff cannot have two bites at the cherry and must ensure that the declaration and the verifying affidavit are unanswerable at the time of filing.

In *casu*, the plaintiff wishes to amend its declaration before proceeding with the application for summary judgment already filed of record. I have a difficulty with us proceeding in this fashion.

³ See *Stenslunde & Co (Pvt) Ltd v Banwell Engineers Ltd* 1988 (2) ZLR 327 (H),

Firstly, the declaration as filed of record is clearly not without answer. It contains an error that is patent and one which the plaintiff itself realizes must be corrected before proceeding further. Secondly, the verifying affidavit filed of record cannot be used to verify the amounts of the amended claim. In my view, a fresh affidavit will need to be filed, verifying the plaintiff's cause of action as pleaded in the amendment.

While I am not determining the application for summary judgment itself, it appears to me that it is inadequate for a deponent to an affidavit verifying the plaintiff's claim and amount claimed if any to simply state boldly and badly that they verify the claim and the amount claimed without giving details. Verifying the claim in my view denotes more than restating the claim and amount claimed in the same language employed in the pleadings. It requires in the case where an amount is claimed, to break down the amount where appropriate and to show how the total amount of the claim is arrived at, especially in matters where there is an accounting element.

In my view, had the deponent to the verifying affidavit in this matter correctly verified the claim and detailed how the amount of the claim was arrived at, appropriating the payments already made by the defendant to either capital or interest, the plaintiff would have realized that the amount of the interest claimed in the summons was understated and may have taken corrective steps much earlier.

In the result, I make the following order:

The application to amend the plaintiff's declaration is dismissed with costs.

Wintertons, plaintiff's legal practitioners.

Venturas & Samkange respondent's legal practitioners.