STATIONERY BOX (PRIVATE) LIMITED
versus
NATCON (PRIVATE) LIMITED
and
FARAI NDEMERA.

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 11 March and 14 April 2010

OPPOSED APPLICATION

Mr N Madya for plaintiff.
Mr P Chiutsi for defendants.

MAKARAU JP: This is an application for summary judgment.

On 6 October 2009, the plaintiff issued summons against the defendants claiming the sum of US$4 568-85 in respect of certain goods allegedly sold and delivered at first defendant's special instance. In its declaration, the plaintiff alleged that during the period 22 April to 20 May 2009, the plaintiff supplied stationery to the first defendant valued at $9 932-85. On 20 May 2009, the second defendant bound himself as co- principal debtor and surety for the debt due by the first defendant, which at the date of the suretyship, stood at $8 700-00. It was further alleged that the first defendant made several payments to the plaintiff leaving the balance claimed in the summons.

On 13 October 2009, the defendants filed an entry of appearance to defend, prompting the plaintiff to file this application for summary judgment.

The application was opposed.

In opposing the application, the second respondent, who deposed to the affidavit on behalf of both respondents, denied that the first respondent had purchased the stationery from the plaintiff. He averred that the first respondent received an order from its client for the stationery and it in turn sourced the stationery from the plaintiff. When its client failed to pay for the stationery, mainly chalk it would appear, the first respondent advised the plaintiff of the fact. The plaintiff however refused to accept the chalk back. It is further averred that an

agreement was reached between the parties in terms of which the first respondent would sell the chalk, presumably to other its customers and remit periodic payments to the applicant. This the first respondent had been doing prior to the issuing of summons.

At the hearing of the application, the applicant applied for leave to file an answering affidavit. In terms of the rules, the proper term for this affidavit should be "supplementary affidavit" and not answering affidavit. The name of the affidavit is to be derived from the wording of Rule 67 of the High Court Rules 1971, which I refer to below, which grants discretion to the court to allow a plaintiff to supplement his founding affidavit. No answer is permissible in summary judgment proceedings.

In the affidavit, the plaintiff denied that it sold the stationery to the first defendant on consignment. It maintained that it had sold the stationery to the first respondent outrightly and further denied the alleged arrangement between the parties to the effect that the purchase price would be remitted to the applicant as and when the first respondent was able to sell the stationery to its customers.

The filing of a supplementary affidavit is restricted in the discretion of the court, to instances where a defence that was not anticipated by the applicant is raised in the opposing affidavit. (See *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260 (G) and *Omashah v Karasa* 1996 (1) ZLR 584 (H)).

As stated above, paragraph (c) to the proviso to rule 67 of the High Court Rules 1971 grants power to the court to permit the plaintiff to supplement his founding affidavit with a further affidavit dealing with either matters raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit or the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence.

Rule 67 provides as follows:

"No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence viva voce or by affidavit:
Provided that the court may do one or more of the following—
(*a*) permit evidence to be led in respect of any reduction of the plaintiff's claim;
(*b*) put to any person who gives oral evidence questions—
(i) to elucidate what the defence is; or
(ii) to determine whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence;
(*c*) permit the plaintiff to supplement his affidavit with a further affidavit dealing with either or both of the following—
(i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or

(ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence.

In *casu*, I allowed the filing of the answering affidavit on the turn and indicated that my reasons would follow. It is convenient that I now set them out.

The plaintiff's claim against the defendant is for the sum of $4 568,85 in respect of goods sold and delivered. Correspondence between the parties prior to the issuance of summons, which are attached to the founding affidavit, indicated that the defendants had failed to collect the purchase price from their customer and were in the process of collecting the chalks back. The sale agreement between the parties was not denied in any of this correspondence. Liability was also not specifically or impliedly denied at this stage. The logistical arrangement relating to the return of the chalk was informed of the plaintiff not as a defence to the claim. It was simply by way of information with a request that the defendants be granted two weeks to finalise (this arrangement).In my view it was therefore not reasonably expected of plaintiff to deal with the issue of the return of the chalk in its founding affidavit as such return was a mere logistical arrangement that the defendants felt they had to attend to. It was not suggested as a defence to the claim for the payment of the balance of the purchase price.

In opposing the application for summary judgment, the defendant used the return of the chalk as a defence and the plaintiff needed to deal with this unexpected alleged defence.

It is on the basis of the above that I allowed the supplementary affidavit, wrongly headed "Answering Affidavit", to be filed.

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 oft 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 *casu*, the defendants allege that after they had obtained the chalk from the plaintiff and having in turn delivered the chalk to their own customer, they failed to get the customer to pay for the chalk. This may very well be true and I have no doubt that the defendant may be able to prove that this is what happened. The issue to be determined is whether this amounts or

constitutes a defence to the claim raised by the applicant for the balance of the purchase price of the chalk.

The general rule is that once the parties are in agreement over the *merx* and the payment of the purchase price payable for the *merx*, a valid contract of sale comes into being between the parties. The contract them casts upon the seller the obligation to deliver the *merx* sold and upon the purchaser, the obligation to pay the purchase price. To defend a claim under an agreement of sale, then, the purchaser must attack either the existence of the agreement itself or the fact that the goods sold were not delivered to him.

The defendants before me have denied that they purchased the chalk from the plaintiff. Such denial is not only bare but is contradicted by their further averments that they in deed received the chalk from the plaintiff and that they have paid part of the purchase price to the plaintiff. In the face of such an admission, the defence that there was no agreement of sale between the parties in untenable and the plaintiff must succeed.

The plaintiff has generously interpreted the facts alleged by the defendant in the opposing affidavit as raising a contract of consignment. I say generously because the defendants have not so alleged in their papers.

At this stage, I believe that it is pertinent that I set out in full the contents of what I regard as the operative part of the defendants' opposing affidavit. In response to the averments verifying the plaintiff's cause of action and the fact that the defendants had entered appearance to defend solely for the purposes of delay, the defendants had this to say in paragraph 4 of their joint affidavit:

"This is disputed. The applicant did not supply any stationery to the first respondent. The brief facts are that:-

4.1	The first respondent obtained an order for chalks from its customer Kingstones which it in turn sourced from the applicant.
4.2	After receiving the chalks Kingstones failed to pay for them and returned the chalks, the applicant was advised and the Applicant refused to accept the chalks back.
4.3	An agreement was reached with the applicant in terms of which the respondent would sell the chalk and remit payments to the applicant as and when any quantity was sold.
4.4	The 1st respondent has been selling the chalks and remitting the proceeds of the sold quantities to the applicant.
4.5	Indeed the Applicant's Annexure "A" confirms this arrangement."

As was remarked by McNally JA in *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S-139-86 at pp 4-5 of the cyclostyled judgment:

"……while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate 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".

I find the contents of the defendants opposing affidavit contradictory, confusing and lacking the sufficient clarity and completeness that McNally J A referred to.

Whilst the defendants deny that the applicant delivered to them any chalk, they proceed to concede that they sourced for chalk from the applicants which somehow ended up with their customer. In this regard for instance, it is not clear whether the defendants are setting up the defence of agency, in which case they would not be liable for the purchase price of the chalk. The defendants do not clearly raise agency as a defence and it would appear from their subsequent averments that the relationship was not between the plaintiff and Kingstones directly but that Kingstones was a customer of the defendants only.

Similarly, it is equally not clear whether the facts alleged by the defendants as detailed above raise a contract of consignment. I do not think so. I do not read any allegation of a contract whereby the plaintiff as one trader entrusted the chalk to the first defendant for the chalk to be sold by the first defendant on behalf of the plaintiff. The opposing affidavit spells out is clearly in my view that the defendants obtained an order from their own customer for the chalk. They then approached the plaintiff for the chalk. The plaintiff did not seek the defendants out for them to sell its chalk on consignment in which even the plaintiff would be obliged to accept back whatever portion of the consignment remains unsold. Rather, the defendants appear to me quite clear that it was only after their customer had failed to pay for the chalk that they approached the plaintiff with the news and sought to return the chalk to the plaintiff.

In my view, the facts alleged by the defendant do not in themselves constitute a defense. If it was the intention of the defendant to deny liability for the purchase price of the chalk and instead to allege that the customer who failed to pay for the chalk was actually liable for the payment of the chalk directly to the plaintiff, on the basis of either agency or consignment, such must have been alleged clearly.

In my view, it is not the function of the court to put words into the defednant's mouth and thereby establish a possible defence on his behalf when the defendant fails to do so in his opposing affidavit.

I have also considered whether the alleged subsequent agreement between the parties that the defendants would proceed to sell the chalk and remit periodic payments to the plaintiff would constitute a defence to a claim for the purchase price of the chalk. In this regard I have considered whether this subsequent arrangement, if proved, would constitute a variation of the terms of the original agreement between the parties.

It would have assisted me greatly had this been pleaded or argued before me. Instead, even the original agreement of sale is denied in the defendants' papers. How then can I *mero motu* hold that the defendants are raising a possible defence to the plaintiff's claim to the effect that the terms of the original agreement were varied by a subsequent agreement in the circumstances?

The onus resting on a defendant resisting summary judgment has been described as amongst the lightest that the rules of procedure cast on litigants. 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 *casu,* I find the possible defences set up by the defendants not only to be contradictory but also not plausible. They are inherently and seriously unconvincing, giving rise to the inference that they were raised solely for the purposes of delay. (See *Standard Bank of SA Ltd v Pyanayiotts* 2009 (3) SA 363 (W)).

On the basis of the foregoing, I find that the plaintiff's claim is clearly unanswerable.

In the result, I make the following order:

1. Judgment is hereby entered for the plaintiff in the sum of $4 568, 85.
2. The defendants shall bear the costs of suit.

Wintertons, applicant's legal practitioners.

P Chiutsi Legal Practitioners, defendants' legal practitioners.