CONTINENTAL OUTDOOR MEDIA (PVT) LIMITED
versus
WESTVILLE INVESTMENTS (PVT) LIMITED T/A OMNI AFRICA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 22 July 2013 & 5 February 2014

Opposed application

Miss T. Pasi, for the applicant
Mis C.K. Chidovi, for the respondent

TAKUVA J: This is an application for summary judgment, where in the plaintiff claims the following;

(i) Payment of the sum of US$30 763-50
(ii) Interest on the sum of $30 763-50 at the prescribed rate per annum from 23 August 2012 to the date of payment in full,
(iii) 2.5 % collection commission in the sum of US$5 600-00
(iv) Liquidated damages in the sum of US$5 600-00
(v) Costs of suit on a legal practitioner and client scale.

In its declaration the plaintiff pleaded the cause of action between the parties as breach of written Billboard Advertising Rental Agreements. In respect of the first agreement, the defendant rented two of plaintiff's bill boards in order to display defendant's advertisements.
The material terms and conditions of the first agreement were as follows

(i) the agreement commenced on 1 September 2011 and was to expire on 31 August 2012,
(ii) defendant was to pay rentals in the sum of US$700-00 per month per billboard, a total sum of US1 400-00 per month, with all invoices being payable within seven(7) days from the date of the invoice,
(iii) in the event of breach by defendant , defendant acknowledged that it would be further liable for the following:

(a) in the event of termination of the agreement by plaintiff, liquidated damages equal to the total of the rental charges that would have been payable under the agreement if not terminated as a result of defendant's breach,

(b) collection commission on the sum owed by defendant

(c) legal costs incurred by plaintiff in pursuing any outstanding amounts on a legal practitioners and client scale.

Plaintiff and defendant entered into a second written Billboard Advertising Rental Agreement whereby the defendant rented two additional billboards from plaintiff on the same terms as the first agreement save that the second agreement commenced on 1 February 2012 and was to expire on 31 December 2012.

Defendant breached its obligations by failing to make payment of the rental charges owed to plaintiff in terms of both the first and second agreements and accumulated arrears in the total sum of US$32 763-50. Defendant made a payment of US$2 000-00 towards the outstanding balance on or around 6 August 2012. Defendant made no further payments. By letter dated 17 July 2012 defendant acknowledged the debt of US$ 32 763-50 and undertook to repay same in monthly installments of US$6 000-00, the first payment being due and payable by 31 July 2012.

When the first agreement expired on 31 August, the plaintiff did not renew it. On 23 August 2012, the plaintiff terminated the second agreement. This led the plaintiff to claim as shown above.

The application for summary judgment was opposed on the following grounds.

(a) the applicant lacks *locus standi* in that the party that has instituted proceedings against the respondent is not the one that entered into an agreement with the respondent. The respondent contracted with Continental Outdoor (Pvt) Limited and not Continental Outdoor Media (Pvt) Limited the applicant in this matter. It was submitted that the effect of such incorrect citation is that there essentially is no plaintiff and or applicant in the summons and application for summary judgment respectively. Respondent relied on the principle in *Stewart Scott Kennedy* v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 65 at 572 D and *Gariya Safari (Pvt) Ltd* v *Vaninyk* 1997 (2) ZLR 246 (H).

(b) that, applicant cannot competently claim costs on a higher scale of attorney and client scale and collection commission simultaneously.

(c) that applicant breached the second agreement which commenced on 1 February 2012 by its failure to flight "new advertisement materials" on the billboards. Consequently, the amount due and payable to the applicant has always been in dispute. This dispute arises from applicant's failure to display respondent's materials on its billboard at site NO. HAR0012. Such failure disentitles the applicant from claiming the full rental for the month of July 2012.

(d) that the respondent has a strong *bona fide* case.

In respect of the first ground, applicant filed an answering affidavit and notice to apply for its admission. It was contented in that affidavit that the applicant shall apply at the hearing of the application to amend the pleading to correct the mis-description of the applicant as "Continental Outdoor Media (Pvt) Ltd" and to instead read "Continental Outdoor (Pvt) Ltd." The affidavit and applicant's heads of argument were served on the respondent who dealt with this point *in extenso* in its heads of argument.

At the hearing the parties legal practitioners made oral submissions. Respondent's contention was that the filing of an answering affidavit was unprocedural in that in such applications no answer is permissible. Reliance was placed on the following cases;

(a) *Stationery Bex (Pvt) Ltd* v *Natcon (Pvt) Ltd and Farai Ndemera* HH 64/10

(b) *Matanhire* v *BP Shell Marketing Services (Pvt) Ltd* SC 113/04 and

(c) *BGM Traffic Control Systems* v *The Minister for Transport & 2 Ors* HH 12/2009

Respondent finally submitted that the answering affidavit should not be accepted for want of compliance with the rules of court.

In my view the starting point is Or 10, r 67 which states;

> "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) --------
> (b) --------
> (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"

See also *Kinstons Ltd* v *L.D. Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) where ZIYAMBI JA held that, "the *proviso* to r 67 of the High Court Rules 1971 does not give a plaintiff in summary judgment proceedings a licence to dispense with the provisions of the main rule itself which clearly prohibits him from adducing evidence except through his affidavit. The purpose of the proviso is not to enable a plaintiff to reply to respondent's affidavit otherwise summary judgment proceedings would develop into a court application. The proviso therefore is to be restrictively interpreted."

In casu, the respondent introduced a new matter in his opposing affidavit objecting to the misdescription of the applicant. The applicant could not reasonably be expected to have dealt with this point in its first affidavit because the description it gave in the summons is the same as the one in its letters of demand and the agreements. The respondent in its response to the letters of demand, did not take the point that applicant's name had not been cited properly. Further, it is clear from the papers that an entity answering to the name of the applicant is in existence and it is also clear that such an entity had a business relationship with the respondent. The amendment sought will simply clarify who the proper applicant is. It certainly does not prejudice the respondent in anyway. It is a common error made by both parties right from the beginning.

In *Scotfin Ltd* v *African Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 it was stated that "Let me say, in passing that I consider the stage has now been reached where an applicant for summary judgment should always be allowed to file a replying affidavit to show that a respondent's opposition is not *bona fide* or is ill founded."

In *Gariya Safaris (Pvt) Ltd* v *Vanwyk* 1996 (2) ZLR246, the position was stated thus;"The general rule is that a court should allow the substitution of one party for another by the amendment of summons, or pleadings. In exceptional circumstances may a court amend a judgment. In each case the test is whether there is prejudice to any of the parties which cannot be compensated by an order for costs. The court must also be satisfied that the new person is a necessary and proper party to be before it, so that it may effectually and completely determine the cause between the existing parties." (my emphasis)

I must also point out that it is not a question of what the affidavit is called, but rather its contents. The rules simply refer to a further affidavit supplementing the first one. Therefore the court should not be impaired by technical formalism.

For these reasons, the point *in limine* is dismissed and the amendment sought by the applicant is here by granted.

I now turn to the merits of the case. The applicant conceded that it was not competent to claim legal costs on the higher scale of attorney and client and collection commission at the same time. The applicant filed an amended draft order excluding these claims. Quite clearly the concession is properly made and the claims are hereby dismissed.

As regards the contention that the amount due and owing has always been in dispute, it is necessary and instructive to closely examine the undisputed facts or those incapable of denial. These are;

(1) Applicant and respondent entered into two written Billboard Advertising Rental Agreements whereby respondent rented four(4) of applicant' billboards in order to display respondent's advertisements as follows;

(a) the first agreement commenced on 1 September 2011 and was to expire on 31 August 2012 and was for the rental of the following sites

(b) (i) Site No. HAR 0024

(ii) Site No. HAR 0012

(c) the second agreement commenced on 1 February 2012 and was to expire on 31 December 2012. It was for the rental of Site No. HAR 0415 and HAR 0484.

(2) In total breach of its obligations, respondent failed to make payment of the rental charges owed to applicant in terms of these agreements resulting in respondent accumulating arrears in the total sum of US$27 933-50 as at June 2012. On 26 June 2012, applicant wrote to respondent requesting an urgent meeting to discuss payment of this debt. On 17 July 2012, respondent acknowledged the sum due to the applicant i.e $27 933-50 and proposed a payment plan of US$6 000-00 per month commencing 31 July 2012 – see Annexure E on page 18 of the record.

(3) Respondent's payment plan was accepted by the applicant and as the billboard site NO HAR 0012 had been undergoing renovation since 1 July 2012, respondent's

material remained flighted on three of applicant's billboards at sites HAR0024, HAR0415 and HAR0484 respectively. Further rental charges for these billboards in the sum of US$805-00 per billboard per month accrued for the months of July and August 2012.

(4) Respondent defaulted on its undertaking to make payment of US$6 000-00 by 31 July 2012 and as at 1 august 2012, rental arrears in the sum of US$32 763-50 were outstanding as follows;

(a) US$27 933-50 outstanding as at end of June 2012;

(b) Rental charges in the sum of US$805-00 for billboard per month for three bill boards for the month of July 2012, in the total sum of US$2 415- 00;and

(c) Rental charge in the sum of US$805-00 per billboard per month for three billboards for the month of August 2012 in the total sum of $2 415-00. Respondent made one payment of US$2 000-00 reducing the debt to the sum of US$30 763-50 – see Annexure F on p 19 of the record. Respondent then refused or failed to make any further payments resulting in applicant cancelling the second agreement by letter dated 23 August 2012. The first agreement expired on 31 August 2012 and was not renewed by applicant.

(5) Applicant issued summons and declaration which were delivered upon respondent on 6 November 2012. Respondent entered an appearance to defend through its legal practitioners.

From the above chronology, it is clear that the July 2012 rental for billboard on site No. HAR 0012 does not constitute part of the debt claimed as due and owing by the applicant. For that reason, I find that the third ground for opposing the application for summary judgment is indeed a subterfuge that of necessity must meet its inevitable fate, namely its paralysis. The argument collapses because in my view it does not make mathematical sense at all. Consequently, the argument that respondent has no *bona fide* defence is sustainable in so far as the first component of the debt relating to rental charges is concerned. The applicant has not said anything about the second component of the debt namely the liquidated damages. All I can say is that in terms of the second agreement applicant is entitled to claim liquidated damages equal to the monthly rental for two billboards in the total sum of $1 400-00 per month payable from the

date of termination of the agreement being, 23 August 2012 to the date of the expiry of the agreement, being 31, December 2012. The total amount which is readily ascertainable under this head is $5 600-00.

For the respondent to succeed it must satisfy the requirements set by ZIYAMBI JA in the *Kingstons Ltd* case *supra* where it was stated that "In summary judgment proceedings, not every defence raised by a defendant will succeed in defeating a plaintiff's claim. What the defendant must do is to raise a *bona fide* defence, or a plausible case, with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. The defendant must allege facts which if established, would enable him to succeed. If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*. The defendant must take the court to his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts."

In casu the respondent has failed to establish that it has a *bona fide* defence to the claim.

Accordingly, it is ordered that:

(i) Respondent pay to applicant the capital sum of US$30 763-50,

(ii) Respondent pay to applicant interest on the capital sum at the prescribed rate per annum from 23 August 2012 to the date of payment in full.

(iii) Respondent to pay to applicant liquidated damages in the sum of US$5 600-00

(iv) Respondent pay applicant's costs on the ordinary scale.

Gill Godlouton and Gerrans, plaintiff's legal practitioners
Mawere and Sibanda, respondent's legal practitioners