REPORTABLE (59)

SUPERBAKE BAKERIES (PRIVATE) LIMITED
v
RUMTOWERS SECURITY (PRIVATE) LIMITED

IN THE SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GARWE JA & GUVAVA JA
BULAWAYO, JULY 28 & 30, 2014

No Appearance, for the appellant

N Mlala, for the respondent

GUVAVA JA: This is an appeal against the whole judgment of the High Court, Bulawayo, dated 22 February 2011 granting summary judgment against the appellant in the sum of US$6 000.

The facts that were common cause in this matter were as follows. On 16 February, 2007 the appellant and the respondent entered into an agreement in terms of which the respondent offered security services to the appellant for a fee. In terms of the agreement the respondent provided the appellant with security guards to guard its premises twenty four hours a day. The respondent provided three security guards during the day who worked a twelve hour shift and two security guards during the night for the remaining twelve hours.

On 30 June 2009 the appellant summarily cancelled the agreement. The respondent issued summons claiming a total of US$6 000. Of that amount US$3 000 was for services rendered during the months of April, May and June 2009. The remaining US$3 000 was claimed as damages *in lieu* of three (3) months' notice of termination of the agreement.

The appellant entered an appearance to defend and filed a plea in which it denied liability. The appellant opposed the claim on three grounds. It stated in its plea that in terms of the agreement between the parties, payment was to be made in Zimbabwe dollars. It argued that there was no agreement between the parties that required it to make any payment in United States dollars. The appellant also submitted that it had been incorrectly cited as defendant in view of the fact that there was no company called Superbake Bakeries (Pvt) Ltd. Finally it submitted that it had no obligation to pay the money claimed as the respondent's security guards had stolen goods from its premises.

The court *a quo* found that the respondent's claim was unassailable and granted summary judgment in the sum claimed. The appellant, dissatisfied with the judgment, noted an appeal to this court.

At the hearing of the appeal the appellant was in default although it had filed heads of arguments and had been served with a notice of set down at the last known address following the renunciation of agency by its erstwhile legal practitioners.

The matter was dealt with on the merits, reliance being placed on r 36 (4) of the Supreme Court Rules which provides as follows:

> "Where, at the time of the hearing of an appeal, there is no appearance for the appellant, and no written arguments have been filed by him, the court may dismiss the appeal and make such order as to costs as it may think fit …"

In casu, the appellant's heads of argument had been filed of record. My interpretation of Rule 36(4) is that where an appellant fails to appear after filing heads of argument, the court is not precluded from hearing and determining the appeal on the merits.

In my view there are two issues that arise for determination in this appeal. The first issue is whether the appellant, as cited, has the requisite *locus standi* to prosecute the appeal. The second is whether the court *a quo* was correct in granting summary judgment in the aggregate sum of US$6 000.

On the first issue, I am of the view that the court *a quo* improperly relied on Rule 8C of the High Court Rules for its decision that the appellant, as cited, had the requisite *locus standi*.

Rule 8 C provides as follows:

> "Subject to this Order, a person carrying on the business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and Rules 8A and 8B shall apply, *mutatis mutandis*, to any such proceedings."

It is evident from a reading of this rule that it applies only to associations and not corporate bodies. In its responding affidavit in the court *a quo*, the appellant referred to itself as "Harambe Holdings (Private) Limited" trading as "Superbake Bakeries (Pvt) Ltd". This was a bald statement which was not in any way substantiated, an aspect that appears to have escaped the attention of the court *a quo*. I am of the view however that since the

appellant itself appeared to accept that it was a separate legal entity, there is nothing on the papers to suggest that the appellant is not such a body, capable of suing and being sued. My view therefore is that it had the requisite *locus standi*.

The second issue was whether the court a quo correctly granted summary judgment in the sum of US$6 000 and in particular whether the respondent was entitled to summary judgment where the damages claimed arose from an alleged breach of contract.

Summary Judgment in terms of Order 10 of the High Court Rules, 1971, is an extraordinary remedy which is granted to a party so that a matter may be determined expeditiously where a defendant has entered appearance to defend for the purpose of delaying the proceedings. The special procedure of summary judgment was conceived so that a *mala fide* defendant might be summarily denied, except under onerous conditions, the benefit of the fundamental principle of the *audi alteram partem* rule. So extraordinary is the invasion to the basic principle of natural justice that it will not be lightly resorted to. It will only be granted in circumstances where it is established that the plaintiff's claim is clearly unarguable both in fact and in law. In the case of *Hales v Daverick Investments (Private) Limited* 1998 (2) ZLR at 235 E-F MALABA J (as he then was) stated:-

> "Where a plaintiff applies for summary judgment against a defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good *prima facie* defence"

It is evident from the papers that the appellant acknowledged its indebtedness to the respondent in the sum of ZAR 27 600 by letter dated 29 June 2009. The appellant claimed that it had paid the sum of ZAR 2 400. The parties appear to have proceeded on the basis that one US dollar was equivalent to ZAR 10.

I am satisfied on the basis of the appellant's own admission that on the first part of the claim for services rendered it owed an amount of ZAR 27 600. Accordingly summary judgment ought to have been granted in the sum of US$2 760 and not the US$3 000 that was awarded.

On the second part of the claim it is apparent that the respondent was claiming damages for breach of contract. Contrary to the finding by the court *a quo*, I am of the view that such damages cannot properly be awarded in an application for summary judgment. This is because the damages must be proved. In clause 9 of their agreement the parties agreed that in the event that the appellant terminated the services rendered to it by the respondent, the latter would be entitled to claim "as genuinely pre–estimated liquidated damages, 75% of any charges that the appellant might have been liable to pay." This was to be for the period equivalent to the required notice period or "the remaining period of the contract, whichever was applicable".

It is therefore evident that the respondent was required to place before the court evidence to prove the damages claimed. On the basis of clause 9 of the agreement, it was incumbent upon the respondent to establish the following:

> "(i) The basis upon which the damages it claimed constituted "genuinely pre-estimated liquidated" damages
>
> (ii) Whether the amount claimed constituted 75% of such damages, and
>
> (iii) The period the respondent considered applicable, between the period of "due notice of termination" and the "remaining period of the contract"

In the absence of this evidence, I find that the respondent did not prove the damages in the sum of US$3 000 that it claimed and was awarded by the court *a quo*. The

court took the view that it could simply take the period required for notice *in lieu* of notice and multiply the monthly service charges of US$1 000 by three and award damages in the sum of US$3 000. There is no indication that the court *a quo* applied its mind to clause 9 of the agreement at all. On this basis I find that the court *a quo* misdirected itself.

Further, notwithstanding clause 9 of the agreement, it is part of our law that a plaintiff who seeks damages must take into account any necessary expenditure he would have incurred pursuant to the contract. It should be pointed out that damages by their nature do not easily lend themselves to determination in a summary judgment. Damages are never "unarguable". It has already been stated that this is an extraordinary remedy which is not readily granted unless it has been established that a plaintiff's claim is clear both in fact and in law.

I do not find that in this case the appellant's claim for damages meets these stringent conditions.

Before concluding, I believe it is necessary to comment on the claim by the appellant that it was forced to cancel the agreement owing to thefts perpetrated by the respondent's guards on the premises of the former. An examination of the papers before me shows that the allegation was not substantiated in any way. It is not clear who is alleged to have stolen the property. There is no evidence of what was stolen or the value stolen. The opposing affidavit which should have contained this information merely referred to the plea and it thus remained a bald assertion which in my view does not merit any serious consideration. It is clearly not a defence that this court can accept.

Accordingly, I make the following order:

1. The appeal succeeds in part.

2. The order of the court *a quo* be and is hereby set aside and substituted with the following:-

"(i) Summary judgment in the sum of US$2 760 be and is hereby granted in favour of the applicant.

(ii) The respondent be and is hereby granted leave to defend the claim for damages in the sum of US$3 000.

(iii)The respondent shall pay the costs of this application."

3. The appellant shall pay the costs of this appeal.

GWAUNZA JA: I agree

GARWE JA: I agree

Bvekwa Legal Practitioners, appellant's legal practitioners

Cheda & Partners, respondent's legal practitioners