

JOHN KENNETH DALY

Versus

DEAN VELDSMAN

And

GRAHAM VELDSMAN

And

MARK SMITH

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 FEBRUARY 2009

V M Majoko, for the applicant
S B A Longhurst, for the respondents

Opposed Application

NDOU J: The applicant seeks a summary judgment against the respondents. The background facts are the following. Under case number HC 703/05 the applicant issued summons against the respondents in which he claimed against the respondents, jointly and severally, payment in a sum of US\$12 876,00 or its local currency equivalent.

The respondents filed a plea and in the plea they admit that they owe the applicant US\$12 876,00. They, contend, however, that they are excused from paying the same because the applicant has not discharged his obligation to pay staff up to date when the respondents took over business. In terms of the agreement of sale between the parties, it was provided that the applicant would pay the employees all sums due to them by way of leave and/or pension up to the date the respondents took over the business. The respondents contend that they are excused from paying the applicant the sum as he has claimed because the applicant has not paid the employees. The respondents' plea is essentially that the applicant is in breach of the contract that he seeks to have specifically enforced. So the respondents have in case number HC 703/05, confessed and avoided the issue of liability. It is common cause that the applicant did not, in fact, pay off the workers. It is, further, common cause that the

respondents have been taken before a Labour Officer and ordered to “re-employ” the workers or re-instate them or pay several months salary to them. This decision by the Labour Officer has been appealed to the Labour Court. At the time of this hearing, the appeal was still to be decided. It should be pointed out that the respondents have issued process under case number HC 160/05, issued before the main matter in this case, being case number HC 703/05. The relief sought in case number 160/05 is that the current applicant be ordered to pay the workers off, as he is contracted to. It is common cause that case number HC 160/05 has not been finalised. The respondents have, in fact, prayed that decision of the issues in case number HC 704/05 be stayed until the issues in HC 160/05 be resolved. This is stated in the respondents’ plea in HC 703/05. The net effect of the above is that there are two cases before this court which both raise triable issues. These issues are, in HC 160/05, whether the applicant is obliged to pay off the workers and in HC 703/05, whether notwithstanding the fact that the applicant has not fulfilled his obligations under the contract, the applicant is entitled to payment of the full purchase price. It is trite law that where triable issues arise, the applicant is not entitled to summary judgment – *Hughes v Lotriet* 1985(2) ZLR 179 (HC) and *Kodak Ltd v Alpha Film Corp. Ltd* [1930] 2 QB 340. Therefore, by its very existence, case number HC 160/05 defeats summary judgment in the current matter, in that it raised legitimate issues for trial, and also in that it is a counter-claim, which has been accepted as constituting a valid defence to defeat summary judgment, even if it is for less than the amount of the main action – *Wilson v Hoffman & Anor* 1974 (2) SA 44 (R) ; *Scottfin v Hewitt & Ors* 1999(2) ZLR 65 at 69, *Faust Products (Pvt) Ltd v Continental Fashion (Pvt) Ltd* 1987(1) ZLR 45(HC) and *Mhlanga v Green* SC-92-94.

The respondents have proffered a legal defence to the applicant’s claim. The respondents are pleading the *exceptio non adimpleti contractus*, averring that the applicant has come to court to enforce a contract which he himself has been in breach of. It is trite that the *exceptio non adimpleti contractus* is available as a defence to a party from whom specific performance is demanded by the other contracting party, whose reciprocal performance has not been rendered – *Orsner v Len* 1992(3) SA 626(A) and *Anastropoulous v Gelderblom* 1970(2) SA 631(N).

Further, the respondents have raised a procedural issue with this application. The founding affidavit does not verify the cause of action. Order 10 Rule 64(2) of the Rules of the High Court, 1971, require that an applicant for summary judgment must (a) verify the cause of action, and (b) state that in the belief of the deponent, there is no *bona fide* to the main action. The founding affidavit is deficient in this material respect, and the application is, therefore, defective – *Scropton Trading (Pvt) Ltd v Khumalo* 1998(2) ZLR 313 (S); *C Stenslode & Co (Pvt) Ltd v Benwell Engineers Ltd* 1988(2) 327(H) and *Jena v Nechipota* 1986(1) ZLR 29 (S).

From the foregoing the application for summary judgment must fail. Accordingly, the application is dismissed with costs.

Majoko & Majoko, applicant's legal practitioners

Ben Baron & Partners, respondents' legal practitioners