

**SAWA SECURITY (PVT) LTD
t/a MALIGREEN MINE**

versus

RESOURCES AND INVESTMENT (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 7 JUNE 2016

Opposed Application

Ms V. Kwande for the applicant
A. Chihiya for the respondent

BERE J: On 16 April 2015 the applicant issued out summons from this court seeking payment of \$18 000 being unpaid money for security services rendered to the respondent in terms of two separate agreements entered into by the parties. These agreements are marked as Annexures 'C' and 'D' to the application for summary judgment. Also annexed to that application is a hand-written letter by the respondent's representative indicating its commitment to settle the debt of \$18 000.

In its summons the applicant made an uncontroverted averment that the respondent had made a commitment to settle the debt but had failed to do so.

Upon being served with summons commencing action the respondent entered appearance to defend the action on 8 June 2015 and immediately filed a request for further particulars on the same date. The request for further particulars sought to dwell on issues which the respondent was fully aware of.

The applicant's swift response was to file an application for summary judgment alleging that the respondent was employing the usual tactics to waste time knowing fully well that it had no defence to offer to the applicant's claim.

In its notice of opposition to the application for summary judgment the respondent has basically raised two issues, *viz*, that Annexure ‘C’ one of the contracts giving rise to this action was signed under duress and secondly that at the time the applicant’s security officers were guarding respondent’s property, certain goods were stolen whose value exceeds the applicant’s claim. The argument was that the defence of set-off and possibly a counter-claim was available to the respondent and therefore summary judgment application was not a sealed application in this matter.

The law as regards the requirements for summary judgment is settled. The applicant must demonstrate that it has an unassailable case and that the respondent has no *bona fide* defence to the applicant’s case and that the notice of intention to defend the action is motivated by the respondent’s desire to obstruct the smooth conclusion of the applicant’s case. See *Bank of Credit and Commerce Zimbabwe Ltd v Jani Investments (Pvt) Ltd*¹. MACDONALD ACJ in *Beresford Land Plan (Pvt) Ltd v Urquhart*² succinctly puts it when he remarked that “the broad effect that summary judgment procedure was the principle means by which unscrupulous litigants seeking only to delay a just claim by entering appearance to defend, are thwarted and that it is of the greatest importance that the efficacy of the procedure should not be impaired by technical formalism”.

I now deal with the issues raised by the parties in this case. I find the issue of duress being raised by the respondent in this case to be unsustainable for the following reasons. The contract which the respondent says it signed under duress was signed on 19th December 2013. It is inconceivable in my view that if there was any duress, the deponent to the respondent would have signed an acknowledgement of liability loaded with terms of extinguishing the debt on 17 December 2014, almost a year later. If at all there was duress, there would have been no need for the respondent’s representative to acknowledge such tainted liability. The alleged duress is clearly being raised to cloud issues here.

1. 1983 (2) ZLR 317

2. 1975 (1) RLR 260 (AD); 1975 (3) SA 619

The potential counter-claim arising out of the respondent's claim of its allegedly stolen goods at the time the applicant's security guards were guarding its premises was brought to the applicant's attention long before the application for summary judgment was filed in this court. In fact on 26 June 2013, the respondent's secretary wrote to the applicant demanding compensation for its allegedly stolen goods valued at \$24 369. The applicant acknowledged the possibility of such theft having occurred but alleged its insurers were still investigating that issue.

Under such circumstances it is extremely difficult for the applicant's claim to be determined at the stage of summary judgment. The respondent appears to have a *bona fide* defence to the applicant's claim.

The application for summary judgment is dismissed with costs being costs in the main cause.

H. Tafa & Associates, applicant's legal practitioners
Mutata & Partners, respondent's legal practitioners