UNIFIED AFRICA TECHNOLOGIES (PVT) LTD
versus
TWENTY THIRD CENTURY SYSTEMS (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 12 January 2016 and 20 January 2016

Opposed Application - Summary Judgment

Ms *J Chivhanga*, for the applicant
Mrs *R Mabwe*, for the respondent

MUREMBA J: The applicant and the respondent are duly registered companies which are in the business of Information and Communication Technologies (ICT) Services. From around 2011 the applicant was supplying the respondent with computer equipment and the respondent was making payment on presentation of invoices. However, in their dealings the respondent failed to pay for 2 invoices: invoice no. 2130 dated 30 September 2011 and invoice no. 2318 dated 3 February 2012. The respondent later signed an acknowledgement of debt on 29 January 2014 in the sum of US$146 616.31 for the 2 invoices. In that acknowledgement of debt the respondent bound itself to clear the debt in 6 months with effect from 14 February 2014. Payments were to be made in 6 equal instalments of US$24 136-05 per month.

Following the acknowledgment of debt the respondent only paid a sum total of US$26 700.00 between 5 March 2014 and 1 October 2014. It failed to pay the balance of US$119 916.31. This resulted in the applicant issuing out summons on 4 February 2015 claiming the balance. In response the respondent entered an appearance to defend. This then prompted the applicant to make the present application for summary judgment arguing that the respondent has no *bona fide* defence to its claim as it had signed an acknowledgment of debt acknowledging its indebtedness.

In opposing the application for summary judgment the respondent raised a point in *limine* to the effect that the applicant's founding affidavit was not properly attested to because the Commissioner of Oaths, below his signature, stamped the affidavit with a stamp written,

> "Certified True and Correct Copy of the Original. Cannias Duri. Legal Practitioner Commissioner of Oaths, Notary Public Zimbabwe."

The respondent argued that instead of administering the oath to the deponent the commissioner of oaths certified the affidavit as a true and correct copy of the original, meaning that the affidavit tendered to the court and to the respondent is not the original. Mrs *Mabwe* said that what it means is that the deponent did not take the oath before the commissioner of oaths swearing that the contents of the affidavit were true and correct. She said that the contents thereof cannot therefore be taken to be true as the commissioner of oaths did not verify the identity of the deponent. She said that it is not certain whether it is indeed the applicant's representative who signed the affidavit or it is some other person. Mrs. *Mabwe* averred that as such the affidavit is therefore fatally defective such that there is no application before the court.

Ms *Chivhanga* for the applicant argued that the affidavit was properly attested to as provided for by the Justice of Peace and Commissioner of Oaths Act [*Chapter 7:09*] as it was commissioned by a commissioner of oaths. She argued that the argument by the respondent that the affidavit is not original defies logic as it is apparent that the signatures of the deponent and the commissioner of oaths are originals and not photocopies. She said that the words, "Certified True and Correct Copy of the original" do not render the affidavit fatally defective.

It is my considered view that use of the stamp which is written "Certified True and Correct Copy of the Original" on the affidavit cannot render the application fatally defective for the following reasons. At the start of the affidavit the deponent said,

> "I Cyril K Muhwati in my capacity as the Managing Director of the plaintiff duly authorised thereto in terms of a company resolution attached hereto as Annexure E do hereby make oath and state that the under mentioned facts are true and correct to the best of my knowledge and beliefs. I have been personally assigned by plaintiff to deal with the defendant from the initial stages thus can swear positively to the facts set out therein."

At the end the affidavit reads:

> "Thus done and sworn at Harare this 19th Day of February 2015.
>
> Cyril Muhwati
>
> Before me Commissioner of Oaths."

Both Cyril Muhwati and the commissioner of oaths affixed their signatures and below the words 'Commissioner of Oaths' comes the stamp written, "Certified True and Correct Copy of the Original. Cannias Duri. Legal Practitioner. Commissioner of Oaths. Notary Public Zimbabwe."

The foregoing clearly shows that the affidavit was properly attested to. It is evident that the deponent took oath before the commissioner of oaths. The use of the stamp which is used for certifying documents thereby giving the impression that the commissioner of oaths had certified the affidavit to be a true and correct copy of some other original affidavit is not fatal. The signatures of the deponent and the commissioner of oaths are originals and not photocopies thereby showing that this is the original affidavit. It appears to me that Cannias Duri stamped the affidavit just to show that he is a commissioner of oaths for in terms of s 8 of the Justice of Peace and Commissioner of Oaths Act, a person who administers an oath ought to be either a justice of the peace or a commissioner of oaths. However, it was not necessary for him to authenticate the affidavit by stamping it as he did. Stating that he is a commissioner of oaths and affixing his signature on the affidavit alone would have sufficed. The relevant provision reads as follows,

> **"8 Power to administer oaths**
> A justice of the peace or commissioner of oaths may within the area for which he has been appointed administer an oath to any person:
> Provided that he shall not administer an oath—
> (*a*) in respect of any matter in relation to which he is in terms of any regulation made under section *eleven*, prohibited from administering an oath; or
> (*b*) if he has reason to believe that the person in question is unwilling to make an oath."

The above provision relates to affidavits that are locally commissioned. It does not make it a requirement that the justice of the peace or commissioner of oaths authenticate the affidavit by affixing thereto the seal or pressing thereon the stamp used by him in connection with his office. The need to authenticate only arises in affidavits that are commissioned outside Zimbabwe. This is in terms of s 9 which reads as follows:-

> **"9 Conferring powers as to oaths outside Zimbabwe**
> (1) The Minister may by statutory instrument, declare that the holder of any office in any country outside Zimbabwe shall in the country in which or at the place at which he holds such office have the powers conferred by section *eight* upon a commissioner of oaths and may in like manner withdraw or amend any such notice.
> (2) If any person referred to in subsection (1) administers an oath to any person he shall authenticate the affidavit in question by affixing thereto the seal or pressing thereon the stamp

> used by him in connection with his office or if he possesses no such seal or stamp he shall certify thereon to that effect." (my emphasis)

In view of the foregoing this point in *limine* is therefore dismissed.

The applicant also made a counter point in *limine* to the effect that the deponent to the respondent's opposing affidavit, Munyaradzi Chipato had not attached any proof which authorised him to represent the respondent in legal proceedings. It said that as such the application should be treated as unopposed as there is no opposing affidavit before the court. As correctly argued by the respondent, where a deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary. Where no such evidence is adduced the omission of a company resolution cannot be fatal to the application.[1] In *casu* no evidence was adduced by the applicant which shows that Munyaradzi Chipato, the respondent's Group Finance Manager was not authorised to depose to the opposing affidavit on behalf of the respondent. This is moreso considering that this Munyaradzi Chipato is the same person who signed the acknowledgment of debt on behalf of the respondent which acknowledgment of debt the applicant relied on in issuing summons against the respondent. So the applicant cannot blow hot and cold at the same time. It cannot, on one hand, say that the respondent is bound by that acknowledgement of debt which was signed by Mr. Chipato and then, on the other hand, say the same Mr. Chipato who acknowledged the debt on behalf of the respondent has no authority to represent it in the present application simply because he did not attach proof of authority. The argument is self-defeating. It is for these reasons that I dismiss the point in *limine*. I declare the opposing affidavit to be valid.

On the merits of the case the respondent argued that it has a *bona fide* defence to the plaintiff's claim. A *bona fide* defence is one which if proved would constitute an honest defence.[2] In *Jena* v *Nechipote* 1986 (1) ZLR 29 (SC) Gubbay J on p 30 said that the test on whether or not summary judgment should be dismissed is whether there is a mere possibility of success, whether the respondent has a plausible case, whether there is a triable issue and whether there is a reasonable possibility that an injustice may be done if summary judgment is granted. He said that if a *prima facie* defence is revealed the application should be dismissed.

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[1] *Banc ABC* v *PWC Motors (Pvt) Ltd & Others* HH 123-2013.
[2] *Majoni* v *Minister of Local Government* HH 240-93

In casu, in arguing that it has a *bona fide* defence to the applicant's claim the respondent raised three grounds. The first one was that the applicant failed to place it in *mora* when it allegedly defaulted in payment. It said that the applicant did not demand payment at that stage. The respondent averred that it did not breach the acknowledgement of debt as no deadline for the payments was ever agreed upon by the parties. It said that the applicant's legal claim is therefore premature and should be dismissed.

As correctly argued by the applicant, the acknowledgment of debt which the respondent does not dispute signing states in Clause 4 that the payment of the debt shall be made in 6 equal instalments of US$24 436.05 per month starting from 14 February 2014 and that payment shall be made on or before the last day of the month. This therefore means that the debt should have been paid up by July 2014. It is therefore incorrect for the respondent to say that the acknowledgment of debt had no time limit within which the debt should have been paid. In clause 6 of the acknowledgement of debt, it is stated that in the event that the respondent fails to pay any amount when it is due, the whole amount shall become immediately due and payable and the applicant shall have the right to institute proceedings against the respondent for the balance without notice to the respondent. As correctly submitted by the applicant, the averment by the respondent that it ought to have been placed in *mora* first is contrary to the acknowledgement of debt which binds it.

The second defence proffered by the respondent is that the applicant's claim is tainted with illegality, in that, the applicant failed to supply the respondent with the proof that the products sent to it were imported lawfully into Zimbabwe. It said that since the claim is based on the supply of goods and services, proof of lawful delivery is required. The respondent averred that it raised this issue at the time the delivery of the goods was made and when the obligation to pay arose, but the applicant never addressed that issue to date. The respondent said that it demanded bills of lading which were never provided by the applicant. The respondent further said that if it had been put to its defence it would have raised this in its plea.

I am in agreement with the applicant that this defence is not *bona fide* as the respondent does not explain why it went on to accept delivery of the goods and sign the acknowledgment of debt without having been furnished with the requisite documents of proof that the products were imported lawfully into Zimbabwe if at all this was ever an issue. The two invoices which gave

rise to the present claim were issued in 2011 and 2012 respectively, but the acknowledgement of debt was only signed in January 2014. If this defence was *bona fide* the respondent would not have gone on to acknowledge the debt 2 to 3 years later after the products had been supplied to it. It would have refused to acknowledge the debt. Furthermore, after signing the acknowledgement of debt, the respondent went on to make payments totaling US$26 700-00 between March 2014 and October 2014. The question is, if the issue that it had raised about whether the products had been lawfully imported into Zimbabwe had not been addressed, why did it go on to make payments subsquently?

The third defence raised by the respondent is that it is unlawful or incompetent for the applicant to be claiming both legal costs and collection commission. It said that a party cannot claim both, but must choose either of the two. The respondent made this argument despite having signed an acknowledgement of debt agreeing to pay both.

Citing the case of *Scotfin Ltd* v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 564, the applicant argued that in that case it was held that the plaintiff can recover both costs and collection commission where it has demonstrated that the defendant agreed to pay same prior. It also argued that in any event summary judgment cannot be dismissed merely on the claim for legal costs and collection commission as the court has a discretion to make an appropriate order on this issue. I am in agreement with the applicant that summary judgment cannot be denied solely because of the issue of costs and collection commission which is in dispute. This is purely a legal issue which can be decided on the papers. In the case of *Tselentis House (Pvt) Ltd v SA P & P House (Pvt) Ltd* 1995 (1) ZLR 56 (H) Malaba J said that on the issue of whether or not collection charges are payable after judgment, the authorities are divided. He said that on the one hand, there are decisions of the Cape Provincial Division followed by our courts to the effect that collection commission is not claimable on a judgment debt.[3] He said that on the other hand are decisions of the Natal Provincial Division that say collection commission is claimable on a

[3] *D & D H Fraser Ltd* v *Waller* 1916 AD 494; *von Zahn* v *Credit Corp of SA Ltd* 1963 (3) SA 554 (T); *Dan Perkins & Co (Pvt) Ltd* v *Mather* 1968 (1) RLR 60 (G); *UDC* v *Rhodesia Ltd* v *Ushewokunze* 1972 (2) RLR 97 (G) ; *Santam Bank Bpk* v *Kellerman*; *SEDCO* v *Guvheya* 1994 (2) ZLR 311 (H)

judgment debt, depending on the wording of the clause under which it is claimed and the provisions of the particular Law Society's By-Laws.[4]

Having looked at the authorities cited by Malaba J (as he then was) I am persuaded to take sides with the authorities that say collection commission is not payable after judgment even if the respondent had signed in an agreement, agreeing to pay both costs and collection commission. In the case of *UDC Rhodesia Ltd* v *Ushewokunze* 1972 (2) RLR 97 (G) @ 100-1 Davies J said,

> "Collection commission is essentially a charge made by an attorney or a commission agent when payment has been obtained through his services prior to judgment. If the matter has to proceed to judgment, then what is recovered is not recovered as a result of a collection by the attorney, but as a result of the judgment of the court and the process that follows thereafter."

The headnote in the case of *Tselentis House (Pvt) Ltd* v *SA P & P House (Pvt) Ltd* 1995 (1) ZLR 56 (H) reads as follows:-

> "After initially entering an appearance to defend a claim, the defendant had paid the principal sum and interest before judgment was granted, and was only disputing its liability to pay legal practitioner and client costs and collection commission. It had agreed to pay legal practitioner and client costs.
>
> Held, that the court should generally give effect to an agreement to pay legal practitioner and client costs. The defendant was unable to advance any argument why it should not do so in this case and the court ordered the payment of those costs.
>
> Held, further, that where the principal sum has been collected by a legal practitioner and the costs of collection are incurred before judgment, collection charges are claimable from the debtor regardless of service of summons. It is the judgment and not service of summons that is the determinant factor in such a case. The dictum in SEDCO v Guvheya 1994 H (2) ZLR 311 (H) on collection commission could not have been intended to have laid down that collection commission was not payable after service of summons and before judgment unless the debtor has agreed subsequent to the service of the summons to pay collection charges. All the cases where the courts have held that collection charges are not claimable involved situations where the principal sum had not been collected at the time of judgment and the applicant would be seeking the assistance of the court through judgment to collect the debt. (my emphasis). In the present case the debt had been collected by the legal practitioner and the collection commission was clearly payable."

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[4] *Claude Neon Lights (SA) Ltd* v *Schlemmer* 1974 (1) SA 143 (N); *Western Bank Ltd* v *Honeywill & Anor* 1973 (4) SA 697 (T); *Blaikie-Johnstone* v *D Nell Developments (Pvt) Ltd & Anor* 1978 (4) SA 883 (N).

In *casu,* I am not inclined to award collection commission because the principal sum or the debt was not collected by the applicant's legal practitioner before judgment. The applicant is actually seeking the assistance of the court through judgment to recover the debt. There is therefore no justification for the payment of collection commission since nothing was collected before judgment.

The applicant's claim as reflected in the acknowledgment of debt is clear and unassailable. On the other hand, the respondent has failed to prove that it has a *prima facie* or *bona fide* defence. In the result, the application for summary judgment is granted with costs on a legal practitioner and client scale.

Mabuye, Zvarevashe, applicant's legal practitioner
Dube Manikai & Hwacha, respondent's legal practitioners