MIDLANDS STATE UNIVERSITY
versus
ZIMBABWE INSURANCE BROKERS LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 22 June 2016

Summary Judgment

D.C Kufaruwenga, for the applicant
S. Mpofu, for the respondent

CHITAKUNYE J. The applicant is a body corporate capable of suing and being sued in its own name.

The respondent is a limited liability company incorporated in accordance with the laws of Zimbabwe.

In about 2001, the applicant and the respondent entered into an agreement, in terms of which the respondent would offer insurance Brokerage Services to the applicant.

During the course of fulfilling its contractual obligations to the applicant, the respondent's employee, Stanford Ngoya, acting within the course and scope of his employment, is alleged to have committed acts of fraud or theft by false pretences against the applicant, by inflating debit notes for premiums due, collecting premiums in cash and converting the cash to his own use and or failing to apply the cash collections to the purpose for which they had been collected.

Upon discovery of the above acts of dishonesty the two parties engaged each other. The applicant alleged it suffered a total prejudice of US$ 143 596.99.

The respondent, through its authorised representative, Costen Mutukwa, acknowledged in writing on 31 October 2013 being indebted to the applicant in the sum of US$ 143.596.99. The representative duly executed an acknowledgement of debt.

On 11 December 2013, the respondent through its aforementioned representative reiterated and fortified its acknowledgement of debt by writing a letter to the Vice - Chancellor of the applicant

In line with the acknowledgement of debt and its proposed payment plan, the respondent paid a total of US$ 36 310.94 leaving a balance of US$ 107 286.05.

On 22 September 2014 applicant issued summons for the recovery of the outstanding debt.

The summons was duly served on the respondent on 23 September 2014. In response thereto respondent entered appearance to defend on 25 September 2014.

The applicant has thus launched this application for summary judgment arguing that the respondent has entered appearance to defend for purpose of delay as it has no *bona fide* defence to the action. The applicant also sought costs on a higher scale.

The respondent opposed the application for summary judgment. In its opposition the respondent contended that the extent of the prejudice is still to be determined and proved as the employee in question is appearing before the criminal courts, the applicant contributed to the loss by paying cash and not paying through bank transfers for onward transmission to Nicoz Diamond, the case of the debt has not been proved and lastly that there was connivance between applicant's employee and respondent's employee.

Rule 64 of the High Court Rules, 1971 provides for applications for summary judgments. In subrule (1) the rule provides that a plaintiff may apply for summary judgment.

Subrule (2) then states that:-

> "A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no bona fide defence to the action."

In an application for summary judgment the applicant must show that its claim is clear and unanswerable and that respondent has no bona fide defence to the claim.

In *Pitchford Investments (Pvt) Ltd* v *Muzari* 2005(1) ZLR 1 at 3G-4A MAKARAU J (as she then was) aptly stated that:-

> "The unstated presumption in rr64 (1) and 66(b) cited above is that the plaintiff's claim on its own must be clear. It must not be susceptible to exceptions on the basis of vagueness and it must be such action as the court may grant judgment upon in the absence of a good and bona fide defence. It must reveal a clean and competent cause of action. Although the emphasis on the rule is on the defence proffered by the defendant, the rules must be read as requiring the plaintiff's claim itself to be unanswerable and based on a clear cause of action".

On the respondent's part, he must show that he has a *bona fide* defence to the claim. Such should not be mere assertion. It is not every assertion or fanciful explanation by defendant that would amount to a *bona fide* defence.

In *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451(S) the court held 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 into 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."

See also *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) at p 30D-E.

The statement of material facts respondent raises must be sufficiently full to persuade the court that what the defendant has alleged if proved at the trial will constitute a defence to the plaintiff's claim. Such defence must be one recognized at law.

In *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd & Another* 2010(1) ZLR 227(H) at p 230 D-E MAKARAU JP (as she then was) aptly put the test as:

> "The test to be applied in summary judgment applications is clear and settled in the authorities. The defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence. Obviously implied in this test but oft overlooked by legal practitioners is that the defendant must raise a defence. His facts must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating as they may be and which he may very well be able to prove at the trial of the matter do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted."

In *casu,* the issue is whether the defences raised if proved would meet the plaintiff's claim.

As already alluded to the plaintiff's claim is based on an acknowledgement of debt which respondent through its representative executed. That representative was none other than the respondent's Managing Director. That acknowledgment of debt arose from excess insurance charges fraudulently or dishonestly raised against plaintiff by respondent's employee.

The acknowledgement of debt recognizes Zimbabwe Insurance Brokers (ZIB) as the debtor and reads in part as follows:

> "Hereby acknowledge that ZIB is truly and legally indebted to MIDLANDS STATE UNIVERSITY (hereinafter referred to as the 'creditor')

> In the amount of US one hundred and forty three thousand, five hundred and ninety six dollars, ninety nine cents ($143,596.99) in respect of excess insurance charges for the years 2011, 2012 and 2013.
>
> The amount owed will be paid in the following manner:-
> (please refer to attached payment proposal dated 16/10/13)
> 1. I hereby agree to pay the said amount of US$ …… as follows: (state the manner in which you are going to pay MSU) by this date …… (insert last date of payment). Interest should be charged by the creditor should payment not be received on the due date.
> 2. I agree that should I, for any reason whatsoever, refuse or fail to pay any part of the stated sum as set out herein; the creditor shall have the right to make this agreement an order of the court without having to notify me first. I consent to the jurisdiction of the magistrates' court irrespective of the amount due in terms of this agreement."

It is dated 31 October 2013 and is duly signed by Costen Mutukwa and two witnesses. Attached to the acknowledgement of debt was a schedule of how the payments were to be made in installments until the entire sum of US$ 143 596.99 was paid in full.

It is pertinent to note that the acknowledgement of debt is unqualified, unequivocal and without any conditions. Further it is not suspensive or based upon the occurrence of any future event such as the verification of actual debt due or the conducting of a forensic audit. There is virtually no reservation on the respondent's indebtness.

On 11 December 2013 the respondent reiterated and fortified its acknowledgement of debt, through its authorised representative, by writing a letter to the plaintiff's Vice-Chancellor. In that letter the respondent, *inter alia*, stated that:-

> "The suspect Mr. Sternford Ngoya is presently on remand awaiting trial and confessed to the fraud and signed an acknowledgement of debt for the misappropriated amount.
> ZIB has signed an acknowledgement of debt of the full amount of $ 143 596.99 and made a down payment of $ 30 000. The balance will be made good through the monthly installment of $ 3 155.47. Any recoveries from Insurance and the culprit will be applied to make good the debt."

It is important to note that as with the acknowledgement of debt, this letter contains no suspensive conditions or reservations about respondent's indebtedness. Both documents are also clear as to how the debt arose. For instance in the letter of 11 December 2013 respondent stated, *inter alia*, that:

> "ZIB accepted liability based on the doctrine of vicarious liability where an employer is liable for inappropriate acts of their employees."

The unreserved nature of the respondent's acceptance of liability and acceptance of the prejudice stated makes it difficult for respondent to wriggle out of its obligation.

The question that arises is whether respondent has established any *bona fide* defence to the claim. An analysis of each of the purported defences shows that none is *bona fide*.

The contention that applicant has not established cause of the debt is without merit. It is common cause that the debt arose as a result of the fraudulent acts of respondent's employee. The acknowledgement of debt is clear on this. The respondent's own correspondence to applicant confirms this as well. Paragraph 4 of plaintiff's declaration reiterates the basis for the claim. It may also be said that the respondent having signed an acknowledgement of debt plaintiff had cause to sue on that. I am thus of the view that this purported defence is not bona fide at all.

The next defence raised was that the amount reflected on the acknowledgement of debt is not a true reflection of the debt, but that NICOZ would be engaged to ascertain the debt and a forensic audit would be conducted.

This is evidently clutching at a straw. The respondent in its wisdom acknowledged indebtedness to a specific sum. It offered a schedule within which to liquidate that specific sum. It may also be important to note that in the acknowledgement of debt respondent was specific on the sum involved. In the letter of 16 October 2013, before the signing of the acknowledgment of debt respondent's representative had unequivocally referred to the sum to be paid and made an offer of how the sum as stated then, not as will be ascertained later, will be paid. In the letter of 11 December 2013 the same representative reiterated the amount of the debt. As at the time of the acknowledgement of debt and the subsequent letter of 11 December 2013, there was no dispute on the sum involved. Respondent and applicant were clear as to how much was involved. This defence only surfaced after a letter of demand had been sent to respondent in March 2014, a period of about 5 months after the signing of the acknowledgement of debt. No explanation was proffered why such a defence was not raised from the onset or at any time before the letter of demand was issued.

Clearly this defence is an afterthought to delay the inevitable. Had the debt not been ascertained respondent would not have acknowledged a debt in a specific amount and made an offer of how it was to liquidate the amount. The $ 36 310.94 paid by respondent was towards the liquidation of that specific amount that it had acknowledged owing and not towards the liquidation of a sum yet to be determined.

The respondent contended that non renunciation of the *exceptio non causa debiti* in the acknowledgement of debt means that applicant had to prove that it is owed the sum in question. This applicant has not done and so the extent of the debt has not been established.

The *excepio non causa debiti* is a plea by a debtor that there was no just cause for the debt. It is alleged the principle obligation does not exist. The renunciation of the *excepio non causa debiti* does not debar the debtor from denying the existence of the principal obligation; it serves merely as a device to change the incidence of the onus. Thus whereas generally the creditor must allege and prove the principal obligation, upon renunciation the debtor must rebut this by undertaking the burden of proving that no cause of indebtedness exists. See *Venture Capital Co. of Zimbabwe Ltd* v *Chirovero Investment (Pvt) Ltd* 2000 (2) ZLR 30 @ 33

It is my view that in *casu* the non-renunciation of the *excepio non causa debiti* would not change the situation in that there is really no serious denial of the cause of action. The respondent's admission shows a clear appreciation of the cause of action and the indebtedness that arose as a result.

Clearly in this case respondent acknowledged the sum involved and offered to liquidate that sum. So clearly there was no need for further proof on the part of the plaintiff. Nothing has changed so as to require further proof of what had been admitted as owing.

The other defences of contributory negligence and connivance between applicant's employee and respondent's employee are, like the above defence, merely clutching at straws. The respondent accepted liability for the fraudulent acts of its employee and signed an acknowledgement of debt. This defence was clearly a fabrication after the issuance of a letter of demand.

Desperation is sometimes a source of creativity. Unfortunately what is created out of desperation rarely stands the appropriate test. In a desperate bid to avoid the inevitable respondent contended that the plaintiff approached the wrong court as in terms of the acknowledgement of debt parties had consented to the jurisdiction of the magistrate court.
Section 11(1) (c) of the Magistrates Court Act, [*Chapter 7:10*] states that:-

> "…….. if both parties agree by a memorandum signed by them or their respective legal practitioners that the court named in such memorandum shall have power to try such action, such court shall have jurisdiction to try the same."

In *casu*, there was no such memorandum signed by both parties granting the magistrates court jurisdiction to try this matter. It is only in the acknowledgement of debt were respondent consented to the jurisdiction of the magistrates court. The applicant/plaintiff was not part to that document and so did not sign it. Clearly there was no error in plaintiff suing in this court.

All in all I am of the view that the respondent has not established a *bona fide* defence.

The applicant sought costs on the higher scale. There is no doubt that counsel for both parties were alive to the fact that costs on a higher scale are not granted just at the asking. Such costs being punitive in nature must be justified. The lack of a *bona fide* defence *per se* would not be adequate to justify costs on the punitive scale. Court is expected to exercise its discretion on a case by case basis.

In *Nel* v *Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607 TINDALL JA aptly noted that:-

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

In *National University of Science and Technology* v *National University of Science and Technology Academic Staff & Others* 2006 (1) ZLR 107 (H) at 107G-H court held that:

> "Where an applicant's conduct and behaviour is one of dishonesty which causes unnecessary financial expense to the respondents, justice dictates that they should not be put out of pocket because of limitations inherent in the usual party and party costs. In such circumstances, it is appropriate to award costs against the applicant on the scale of attorney and client scale."

Further in *J L Robinson Agencies (Pvt) Ltd t/a Amalgamated Motor Corporation* v *Danford Chamwarura & Another* HH 322/2014 at page 7 MUREMBA J considered the issue of costs on a higher scale and concluded thus:

> "To register my disapproval and displeasure of both the first respondent and his legal practitioner's conduct throughout the proceedings, I granted the applicant's request for punitive costs. Litigants and their legal representatives ought to be candid with the courts. Deliberately making untruthful statements in affidavits should never be condoned. This is a case where if the applicant had asked for costs *de bonis propriis* against the first respondent's legal practitioner I would have granted them without any hesitation."

A perusal of various case authorities shows that the circumstances in which attorney and client costs may be awarded include where a litigant is found guilty of: persisting with frivolous and vexatious proceedings; dishonesty or fraud of litigant; reckless or malicious proceedings; deplorable attitude towards the court; and other circumstances the court may deem appropriate. The court must however exercise its discretion with circumspection and reluctance so as not to act as a hindrance to parties in the pursuit of justice. See *Wholesale*

Manufacturers and Overseas Trading Company (Pvt) Ltd v Rhodesian Barter and Export (Pvt) Ltd 1973(1) RLR 348.

The applicant's counsel argued that the respondent's conduct in this case is an abuse of court processes hence the need to penalise it. It had all along admitted its indebtedness and the basis thereof. It had gone on to undertake to pay the sum of $143 596.99 in installments. The respondent's conduct in entering the appearance to defend and opposing the application for summary judgment is thus improper and inexcusable. This borders on dishonesty and so respondent should be ordered to pay costs on attorney and client scale.

The respondent's counsel on the other hand contended that it was entitled to defend the claim as it believed it had a *bona fide* defence.

I am of the view that respondent's contention is without merit. As alluded to above, from the discovery of the fraudulent acts respondent accepted liability and tendered a payment schedule of the total sum specified in the claim. There was no ambiguity or uncertainty as to the amount respondent acknowledged indebtedness. The defences that respondent raised were spurious.

Costs will thus be awarded on the attorney and client scale.

Accordingly summary judgment be and is hereby granted in the sum of US$ 107 286.05 with interest thereon at the prescribed rate from 31 October 2013 to the date of full and final payment.

Respondent shall pay applicant's cost at the attorney and client scale.

Dzimba, Jaravaza and Associates, applicant's legal practitioners
Munangati & Associates, respondent's legal practitioners