AFRICAN CENTURY LIMITED
versus
PLUMTREE SALES & MARKETING DISTRIBUTORS
(PRIVATE) LIMITED
and
PETER MANDEBVU

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

Opposed application – Summary Judgment

H Mutasa, for the applicant
M. Hogwe, for the respondents

MUREMBA J: This is an application for summary judgment for the payment of $85 935.05, interest at the rate of 35% per annum on the stated amount and delivery of certain motor vehicles by the respondents. The claim is pursuant to a breach of a lease agreement which the applicant and the first respondent entered into and in which the second respondent signed as a guarantor. The application was filed after the respondents had filed an appearance to defend. The applicant averred that the respondents have no *bona fide* defence and that they entered an appearance to defend simply to delay the relief that it is seeking.

In opposing the application the respondents raised a point *in limine* to the effect that the deponent to the applicant's founding affidavit did not provide authority to show that the applicant authorised him to depose to the affidavit on its behalf. However, at the hearing Mr *Hogwe* indicated that the respondents were no longer pursuing the point *in limine*. It was a noble decision to abandon the point *in limine* because even if he had pursued it I would have dismissed it.

On the merits the respondents opposed the application on the grounds that the account balance or the amount of $85 935.05 is in dispute. They stated that according to the statement of account which was issued by the applicant as at 31 December 2014, which statement the respondents attached to their opposing affidavit as annexure B, the arrears stood at $54 127.74 yet the summons was issued on 3 December 2014 claiming US$85 935,05. The respondents further averred that it was not correct that the first respondent was in arrears.

They said that the payments were up to date when the summons was issued on 3 December 2014. They said that an email which came from the applicant shows that as at 14 January 2015 the first respondent was up to date with its payments as it stated that the next instalment was due on 15 January 2015 and made no mention of any arrears that were outstanding.

Mr *Mutasa* submitted that to prove its claim of US$85 935.05 the applicant had attached to the founding affidavit two account statements marked as annexure B and C both dated 18 August 2014. One was in respect of agreement no. LHU/HRE/1000229/00001 in respect of the hire of a Ford Ranger T6 3.2 484 D/CAB. This one has arrears of US$ 14 027.31 and a balance of US$14 027.31. The second statement is in respect of Agreement no. LHU/HRE/1000229/00002 in respect of the hire of trailers and horses. This one has arrears of US$ 39 241.10 and a balance of US$71 907.74. These balances were said to be as at 18 August 2014. He explained that the two statement balances of US$14 027.31 and US$71 907. 74 added together, add up to US$85 935.05. Mr. *Mutasa* submitted that since the first respondent had fallen into arrears of US$14 027.31 and US$39 2441.10, the whole rental amount of US$85 935.05 for the unexpired period of the lease agreement became due and payable. He said that that explains why when the summons was issued on 3 December 2014 a claim for US$85 935.05 was made.

During the hearing Mr. *Mutasa* submitted that the applicant was now claiming US$46 907.00 for the reason that after the application and the notice of opposition had been filed two payments of US$20 000.00 and US$5 000.00 were received by the applicant from GMB which deposited these amounts in the applicant's bank account. He submitted that the first respondent had given instructions to its debtors to make payments direct to the applicant for it knew that it owed the applicant. Mr. *Mutasa* submitted that these two payments had the effect of reducing the claim from US$85 935.05 to US$60 935.05. I found Mr. *Mutasa's* submissions on these payments acceptable for they were not disputed by Mr. *Hogwe*. In any case, the applicant in an application for summary judgment, is allowed to lead evidence which shows a reduction of its claim.[1]

Mr. *Mutasa* further submitted that the US$14 027.31 which was said to be due in respect of the Ford Ranger on 13 August 2014 had actually been paid up by 31 August 2014. He asked that that amount be further deducted from the initial claim of US$85 935.05. He said that this had the effect of further reducing the applicant's claim to US$46 907.00. In his

[1] Rule 67 (a) of the High Court Rules, 1971

submissions Mr. *Hogwe* took issue with this account of the Ford Ranger which Mr.*Mutasa* acknowledged was paid up as at 31 August 2014. Mr. *Hogwe* argued that if the Ford Ranger account was paid up as at 31 August 2014 what it means then is that when the applicant issued summons on 3 December 2014 the claim of US$85 935.05 was wrong because it included a claim of US$14 027.31 in respect of the Ford Ranger which had long been paid back which ought not to have been included in the summons. Mr. *Hogwe* correctly argued that in an application for summary judgment the applicant's claim should be clear and unassailable. Once the applicant seeks to make an amendment the application should not be granted because summary judgment is a drastic relief which denies the respondents the benefits of the fundamental principle of the *audi alterum partem* rule. [2]

In *Hoogstrate* v *James & Ors* HH 272-10 Makoni J said:

> "Summary Judgment is meant to be simple and straight forward. If parties were allowed to amend and or sever claims at summary judgment, it defeats the whole purpose of having the procedure in place. It is no wonder that an applicant is not allowed to file an answering affidavit in summary judgment proceedings".

In *Cabs* v *Ndahwi* HH18/10 Makarau JP (as she then was) said,

> "If in a summary judgment application the plaintiff's claim requires amendment for whatever reason, summary judgment cannot be granted. The claim should be unanswerable and beyond reproach."

Makarau JP (as she then was) further stated that a supplementary affidavit further verifying the claim cannot be filed. She said that such can only be filed for the purposes of dealing with issues raised in the opposing affidavit that have the effect of catching the plaintiff by surprise.

In *casu*, the two payments totalling US$25 000.00 which were made after the application had been made which have the effect of reducing the applicant's claim from US$85 935.05 cannot be said to amend the applicant's claim. However, the inclusion of a claim of US$14 027.31 for a motor vehicle which had already been paid up by August 2014 in the summons has the effect of amending the applicant's claim, for it is a claim which ought not to have been made in the first place when the summons was issued. In its declaration the applicant makes it clear that the summons had been necessitated by the breach of the lease agreement in respect of the hire in respect of the first agreement in respect of the Ford Ranger and the second agreement in respect of the horses and trailers. Mr. *Mutasa's* submission that the claim in respect of the Ford Ranger be disregarded is clearly an amendment of the

[2] Nedlaw Investments and Truth Corp Limited v Zimbabwe Development Bank S 5-2000

applicant's claim which he sought to make from the bar. That amendment which he sought to make disentitles the applicant's application for summary judgment for it shows that the claim is porous and not inarguable.

Paragraph 6 of the applicant's declaration to the summons which has been incorporated as part of this application causes further problems to the application for summary judgment in that it says,

> "The first defendant has failed to make payment in terms of the facility and the lease agreement accumulating arrears thereby in the sum of US$4, 362.35 as is fully detailed in copies of the statements attached hereto and marked Annexures B and C".

The balances on the statements that are marked annexure B and C are US$ 14 027.31 and US$71 907.74 and they add up to US$85 935.05. This figure of US$85 935.05 is irreconcilable with the arrears of US$4 362.35 that the applicant is referring to in paragraph 6 of its declaration. Mr. *Mutasa* was unable to explain the meaning of paragraph 6 and the arrears of US$4 362.35. There are figures in the applicant's claim which figures it cannot explain and which do not seem to make any sense at all. In that regard it cannot be said that the applicant's claim is clear and unambiguous. I am therefore not disposed to grant the application for summary judgment. This is despite the fact that the respondents did not provide evidence to prove that as at the time the applicant issued summons the first respondent was fully paid up in its instalments. The email that was sent to the first respondent by the applicant on 14 January 2015 reminding it of the next instalment which was due on 15 January 2015 and did not make any reference to outstanding arrears which the respondents seek to rely on is not proof that the first respondent was fully paid up at the time the summons was issued. This is because the email does not make any reference to arrears. It does not say there are arrears and neither does it say there are no arrears. In short it is not conclusive on the actual status of the account.

Considering that the applicant has not shown that its claim is clear and unambiguous the onus does not shift to the respondents to show that their defence is *bona fide*. Once the applicant fails to discharge its onus that is the end of the matter, there is no need to look at whether the respondent's defence is *bona fide* or not.

In the result, the application for summary judgment is dismissed with costs.

Gill, Godlonton, Gerrans, plaintiff's legal practitioners
Hogwe, Dzimirai & Partners, defendants' legal practitioners