WILLIAM NYANGA
versus
ZIMBABWE HOUSING PROJECTS TRUST

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 16 June 2016 & 24 January 2018

Opposed Application

T Musekiwa, for the applicant
C Takaendesa, for the respondent

HUNGWE J: Applicant seeks summary judgment in the following terms:

"(a) Payment of the sum of US$22 700-00 being outstanding balance in respect of fees for town planning consultancy services rendered to defendant at its specific request and instance;

(b) Interest thereon at 5% calculated from 12 September 2012 to date of payment in full;

(c) Costs of suit."

In his founding affidavit, the applicant avers as follows:

"5. The respondent, despite making a payment proposal attached to the summons, continued to deny its indebtedness as fully appears in its plea annexed hereto as annexure 'D'. I filed my replication to respondent's plea as more fully appears in annexure 'E' and proceeded to file the necessary pleadings to have the matter set down for pre-trial conference as appears more fully from annexures 'F' to 'J'.

6. The matter was set down for a pre-trial conference on 22 October 2013 before the Honourable Justice Takuva. At the pre-trial conference it was pointed out to respondent by the Honourable Judge that it had no defence at law and it was suggested to both parties that they file a Deed of Settlement with the Court. Pursuant to the Honourable Judge's wise counsel a Deed of Settlement was drafted and furnished to respondent's legal practitioners who wrote back saying they were awaiting further instructions from the respondent. In the same correspondence dated 27 March 2014 attached hereto as annexure 'N' the respondent's legal practitioners reiterated their client's commitment to settle the matter."

A perusal of the pleadings confirm that the applicant's averments are true and correct. As late as 27 March 2014 the respondent's legal practitioners were writing to the applicant's

confirming the respondent's desire and commitment to settling this matter in accordance with a draft Deed of Settlement agreed to between the parties. The respondent only made a volte face after the applicant's legal practitioners were pressing for a finalisation of the matter. Instructively, as late as July 2014, the respondent's legal practitioners were writing confirming payment towards the retirement of the debt.

The defendant's defence is captured in paragraph 3 of its plea in which the following is stated:

> "3. The parties agreed that the project was self-sustaining and upon completion of the drawings by the plaintiff and acceptance by the Department of Physical Planning, defendant would open offices and start selling stands whereupon would be paid 40% of his total invoice."

An application for summary judgment may be made at any time before a trial begins, even after the pleadings have been filed by both sides and the pre-trial conference between the parties has been held. Even under the former rules which prescribed a time limit, the court could entertain an application for summary judgment after closure of the pleadings. Further, if after the discovery of documents and the holding of the pre-trial conference, a document revealed that the defendant's defence was a sham, there is every reason why the plaintiff should be allowed to make application for summary judgment at that stage. *Standard Chartered Bank Zimbabwe Ltd* v *Matiza* 1994 (1) ZLR 186 (H). When a plaintiff for summary judgment in his affidavit states that the defendant has entered appearance solely for the purpose of delay he implies that it is his belief that the defendant has no bona fide defence to the action. *Beresford Land Plan (Pvt) Ltd* v *Urquhart* 1975 (1) ZLR 260 (AD); 1975 (3) SA 619 (RA).

The respondent raised a point *in limine* in its heads of argument. It is that the plaintiff ought to have cited the trustees in the defendant and that failure to do so rendered the summons and declaration fatally defective. It is true that summary procedure is the principal means by which unscupulous litigants, seeking only to delay a just claim by entering appearance to defence, are thwarted. It is thus of the greatest importance that the efficacy of the procedure should not be impared by technical formalism. However, this does not mean that one can ignore those requirements of the High Court Rules affecting the basic validity of a summons, which are a prerequisite for the granting of summary judgment, and claim the relief on the basis that too much formalism should not be allowed to defeat a just claim. *Bank of Credit & Commerce Zimbabwe Ltd* v *Jani Investments (Pvt) Ltd* 1983 (2) ZLR 317 (HC)

This very point was taken in *Women and Law in Southern African Research and Education Trust & Others* v *Dinah Mandaza & Others* HH-202-3 where this Court stated:

> "Mr *Matinenga* was correct in his submission that Mandaza's objection to the institution of the proceedings in the name of WILSA was not well founded. It is true, as the learned judge stated in HH 7/03 at p 8-9 that a trust is not a corporate body and therefore it cannot appear as a party. He correctly referred, as supportive of this proposition, to the decisions in *Commissioner for Inland Revenue* v *MacNeillie's Estate* 1961(3) SA 833(A) and *Crundall Bros (Pvt) Ltd* v *Lazarus N.O. &v Anor* 1990(1) ZLR 290 (H) also reported as an appeal decision in 1991(2) ZLR 125(S). But the High Court Rules 1971 as amended by the High Court of Zimbabwe (Amendment) Rules 1997 (No. 33), (S.I. 192 of 1997), introduced a procedure where associates may, in terms of r.8, sue or be sued in the name of their association. In terms of r.7 an association includes a trust and an associate, a trustee. The rules therefore permit a trust to be cited by name as a party to any proceedings. In this regard, and as submitted by Mr *Matinenga*, the learned judge should not, in my respectable view, have given credit to Mandaza's objection."

Consequently, I have no difficulty in dismissing the point *in limine* and proceed to consider whether on these papers the applicant is entitled to succeed.

The applicant relied on documentation which did not form part of the annexures to the Declaration. These are correspondences in which the respondent unequivocally admitted the debt and made part payments in its satisfaction. In opposition to the summary judgment, the respondent objected to reliance upon such correspondences on the basis that it was privileged. Clearly it was not. In any event, in an application for summary judgment, the applicant is not limited, in his supporting affidavit, to dealing with the allegations contained in his declaration. Documentary evidence is regarded as one of the best methods of verifying the truth, and there is nothing in the Rules of the High Court which suggests that the best method of verification is prohibited on pain of having the document struck out with costs. It is therefore permissible to attach supporting documents to the affidavit in support of the application for summary judgment, even if such documents were not annexed to the original declaration. *Manica Freight Services Zimbabwe Ltd* v *Zimbabwe Industrial Consultancy Co (Pvt) Ltd* 1988 (2) ZLR 239 (HC).

In an application for summary judgment the applicant must do more than simply assert that he has a good claim, that he believes that the defendant has no *bona fide* defence and that the defendant has entered an appearance to defend solely for the purpose of delay. The applicant is obliged by r 67 of the High Court Rules to adduce evidence in substantiation of its claim to summary judgment. That evidence must establish the facts upon which reliance is placed for the applicant's assertion that the applicant's claim is unimpeachable. The need to adduce such evidence is even stronger when the original summons lacks details of the claim against the defendant. A plaintiff seeking summary judgment must bring himself squarely within the ambit

of r 64(1) of the High Court Rules, which requires that the cause of action must be verified. It must be substantiated by proof and the supporting affidavit must contain evidence which establishes the facts upon which reliance is placed for the contention that the claim is unimpeachable. *Scropton Trading (Pvt) Ltd* v *Khumalo* 1998 (2) ZLR 313 (SC).

Where, as here, a plaintiff applies for summary judgment against the defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good *prima facie* defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence with sufficient clarity and in sufficient detail to allow the court to decide whether, if these facts are proved at the trial, this will constitute valid defence to the plaintiff's claim. It is not sufficient for the defendant to make vague generalisations or to provide bald and sketchy facts. *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (HC).

Presently, the respondent makes vague and bald generalizations regarding the terms of payment. It only raises these defences when sued on the debt not when demand is made on it to honour its obligations. The applicant has, in my view, met the requirement for the grant of the relief of summary judgment. Consequently, it is ordered as follows:

(a) Payment of the sum of US$22 700-00 being outstanding balance in respect of fees for town planning consultancy services rendered to defend at its specific instance and request;

(b) Interest thereon at 5% calculated from 12 September 2012 to date of payment in full;

(c) Costs of suit.

Matipano & Matimba, applicant’s legal practitioners

Charamba & Partners, respondent’s legal practitioners