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TAVENHAVE AND MACHINGAUTA LEGAL PRACTITIONERS
v
THE MESSENGER OF COURT

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE OCTOBER 14, 2013

T Mpofu, for the appellant

I Mureriwa, for the respondent

ZIYAMBI JA: After hearing argument in this matter we allowed the appeal and issued the order appearing at the end of this judgment. The following are our reasons for so doing.

On 23 January 2012, the respondent ("the Messenger of Court) issued summons in the High Court against the appellant, as first Defendant, and Manase & Manase as second Defendant, claiming payment of USD 9 643.20 due and owing to it as well as interest calculated from 21 September 2011 to date of final payment and costs.

The claim was set out in the declaration as follows:

"4. Sometime in September 2009 Mr Tavenhave who is currently practising with the 1st defendant as a partner but who then was practising under the employ of the 2nd

Defendant as a professional assistant, instructed the plaintiff to execute on some warrants for ejectment and execution against movable property in respect of two matters namely;

4.1. Mervyn Susman Trust v Ethanasia Court Residents, and

4.2. Ramson (Pvt) Ltd v Edgars Stores (Pvt) Ltd

5. The plaintiff raised invoices in respect of the services rendered in the two matters as follows;

5.1. Mervyn Susman Trust v Ethanasia Court Residents- invoiced USD15 532.20 against deposits of USD3 300.00 leaving an outstanding balance of USD12 232.20.

5.2. Ramson (Pvt) Ltd v Edgars Stores (Pvt) Ltd – invoiced USD6 093.00 against deposits of USD3 682.00 leaving an outstanding balance of USD2 411.00

5.3. The total outstanding therefore in respect of the two matters was USD14 643.20

6. Upon demand, the 1st defendant settled in part only and paid USD5 000.00 thereby leaving an effective outstanding balance of USD9 643.20 which amount is due and owing despite demand.

7. As instructions in respect of the above matters were issued from the 2nd defendant, the 2nd defendant is liable for settlement of the said outstanding amount.

8. Additionally and in the alternative, the plaintiff was advised that the practitioner who handled the matters left the practice of the 2nd defendant and now practices as a partner with the 1st defendant, and that he took the matters in respect of which the claim arises with him, the 1st defendant is also liable jointly and severally with the 2nd defendant in respect of the said outstanding amount.

WHEREFORE, the plaintiff claims against the defendants jointly and severally the one paying the other to be absolved;-

a) Payment of USD 9 643.20 due and owing the plaintiff.
b) Interest on the aforesaid amount at the prescribed rate calculated from the 21st of September 2011 to the date of full and final payment both dates inclusive.
c) Costs of suit.”

Both defendants entered appearance to defend. On 15 February 2012 the claim against the second defendant was withdrawn leaving the appellant as the only defendant. Thereafter, on 28 February 2012, the respondent applied for summary judgment.

THE APPLICATION FOR SUMMARY JUDGMENT

The respondent alleged that the claim was for services rendered to the appellant for which the appellant had, despite demand, refused to pay; that the appellant had no *bona fide* defence to the claim and had entered appearance solely for purposes of delay; that the debt arose when Mr Tavenhave was practising as a legal practitioner with Manase & Manase; that the appellant, in a letter dated 1 November 2011 had admitted liability to pay the balance outstanding on the debt and was now estopped from denying liability.

The letter read as follows:

"Dear Sir

RE: MERYVN SUSMAN TRUST & RANSEN HOLDINGS(PVT) LTD - BALANCE $9 643.00

Kindly be advised that our client is no longer resident in Zimbabwe and as such it is difficult to contact them, the last time they were in Zimbabwe was when they paid that US$5 000.00.

However they advised us through the email that they will be in the country on the 28th of November and promised to settle your account as they have already shown commitment by paying the initial deposit.

We heard that you are contemplating litigation, we urge you to wait until then so to (*sic*) avoid wastage of resources and time as our client is not denying liability."

The appellant averred in its defence that it had never engaged the services of the respondent in the matters involved and it had a *bona fide* defence to the claim in that the events

which led to the claim by the respondent took place in 2009 before the appellant came into existence on 1 January 2011.

It alleged further that at the time the debt claimed arose, Mr Tavenhave was working for Manase & Manase legal practitioners as a professional assistant; that the respondent did not raise the issue until three years had elapsed and then it sought to pursue the case against a totally different entity altogether, one which had no involvement whatsoever in the matter; that the respondent had sued the wrong defendant and that Mr Tavenhave had not accepted liability for the debt but had merely tried to assist the respondent in recovering what was due to him.

The argument advanced by the respondent found favour with the learned Judge. He granted the order for summary judgment against which the appellant has noted this appeal.

DETERMINATION

Summary judgment is a drastic remedy which will only be granted where it is clear that the defendant has no *bona fide* defence and has entered appearance to defend solely for purposes of delay. Because of the drastic nature of the remedy a court will not grant it if there is any possibility that the defence raised on the papers might succeed. Thus it has been held that a mere possibility of success will suffice to avoid an order for summary judgment and that:

> "all that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that "there is a mere possibility of his success"; "he has a plausible case"; "there is a triable issue"; or, "there is a reasonable possibility that an injustice may be done if summary judgment is granted". These tests have been laid down in many cases, typical of which in this country are *Davis v Terry* 1957 (4) SA 98 (SR); *Rex v E Rhodian Investments Trust (Pvt) Ltd* 1957 (4) SA 631 (SR); *Kassim Brothers (Pvt) Ltd v Kassim & Anor* 1964 (1) SA 651 (SR); *Shingadia v Shingadia* 1966 (3) SA 24 (SR); *Webb v Shell Zimbabwe (PvT) Ltd* 1982 (1) ZLR 102."

See *Jena v Nechipote* 1986 (1) ZLR 29 (SC). See also *Kingstons Limited v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458 F-G.

The defence raised in this matter is that the appellant is not the firm which contracted with the respondent for services seeing it was not seized with the matter at the time the debt was incurred because it only came into existence sometime after the debt to the respondent was incurred. This defence is certainly arguable bearing in mind the date of commencement of the (appellant's) partnership *vis a vis* the dates when the respondent was allegedly engaged to execute the judgment. Since the partnership was not then in existence it seems to me that the appellant raised a *bona fide* defence to the respondent's claim, namely, that no cause of action was disclosed against it.

In any event, the respondent alleged in paragraph 7 of the declaration that since instructions were given to him by Manase & Manase, that firm was liable for the settlement of the outstanding amount and the allegation in paragraph 8 of the declaration, apart from displaying great inelegance in pleading, does not advance the respondent's case against the appellant.

The letter written by Mr Tavenhave is not evidence that the appellant accepted liability to pay the debt in question. There is no such undertaking made by the appellant. If anything, the letter lends support to the appellant's averment that the legal practitioner was merely assisting the respondent in collecting its dues. The legal practitioner could simply have

referred the respondent to Manase & Manase since the appellant had not assumed agency for the client.

Mr Tavenhave was not sued in his personal capacity but even if he had been, the respondent would, it seems to me, have been hard put to prove a cause of action against him. It is open to the appellant to argue at the trial that whatever undertakings to pay were made by Mr Tavenhave, when employed as an associate at Manase & Manase and on behalf of that firm's clients, were made by Manase & Manase and not by him personally as he was merely an employee acting in the course of his employment with that firm.

Accordingly, the appellant clearly raised an arguable defence and summary judgment ought not to have been granted.

Consequently, at the conclusion of submissions on appeal the following order was issued:-

1. The appeal is allowed with costs.

2. The judgment of the court *a quo* is set aside and substituted with the following:

   "(i) The application is dismissed and leave is given to the defendant to defend the action.

   (ii) The costs of the application for summary judgment are reserved for determination by the trial court."

GARWE JA: I agree

PATEL JA: I agree

Tavenhave & Machingauta, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners