BULAWAYO CITY COUNCIL

Versus

TRISHUL PROPERTIES

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 25 JULY 2014 & 15 JANUARY 2015

R. Moyo-Majwabu for the applicant
M. Nzarayapenga for the respondent

Application for summary judgment

TAKUVA J: This is an application for summary judgment in terms of Order 10 Rule 64 of the High Court Rules 1971.

The applicant, a local authority is obliged by the law to provide certain services to residents of the City of Bulawayo which services include the provision of road maintenance, refuse collection and water and sewer services. The respondent is a resident of the City of Bulawayo and is the registered owner of a certain immovable property otherwise known as number 58A Robert Mugabe Way, Bulawayo. In fulfillment of its legal obligations, applicant provided the services stated above to the respondent and raised service charges amounting to US$20 126,40.

Respondent failed and or refused to pay the above mentioned service charges and applicant issued a summons on 10 December 2013 claiming:-

(a) Payment of $20 126,40 being the total service charge due and payable;
(b) Interest a *tempore morae*, at the prescribed rate from the 30th day of January, 2011 to the date of payment;
(c) Costs of suit.

The summons was served on the respondent on 13 December 2013 and it entered appearance to defend on 17 December 2013. On 10 January 2014, respondent's legal practitioners requested for further particulars as follows:-

"To enable the defendant to plead, plaintiff should supply the following particulars;

1. It is alleged in para 3 of plaintiff's declaration that it provided services to defendant and as such is entitled to levy; rates; road levy; water and other services of the $20 126,40, how much is for:
   (i) Rates
   (ii) Road levy
   (iii) Water; and
   (iv) Other services
2. The said sum is $20 126,40 is for which period (*sic*), a full itemized breakdown is requested.
3. The claimed sum is said to have a component of rates:
   (i) How much is the monthly rates in respective of the property;
   (ii) Since the rates are a percentage of the value of the property how much is the property valued at."

Applicant supplied its further particulars on 18 March 2014 as follows:

"Plaintiff replies to defendant's request for further particulars as follows:

1. Ad paragraph 1 thereof
   (i) The charges vary from month to month but charges are calculated as shown from Annexure "A" hereto which represent the charges for 30th November 2013 totalling $770,36 and for 31st December 2013 in the sum of $699,27.
   (ii) For the period 30th January 2011 to the 30th November 2013 amounting to $20 215,50. See Annexure "B" hereto."
2. Ad paragraph 2 thereof

See Annexure "B" hereto

3. Ad paragraph 3 thereof
   (i) $500,00 see Annexure "A" hereto
   (ii) Land valued at $393 500 and improvements valued at $65 000,00. See Annexure "A" hereto.

Respondent who was supposed to have filed his plea on or before 3 April 2014 in terms of the Rules of this Court failed to do so. Applicant applied for summary judgment on 17 April 2014 on the ground that respondent has no *bona fide* defence and that the appearance to defend and the request for further particulars were nothing more than ways of buying time.

The application was vigorously opposed on the following grounds:

1. Wilful disregard of the law

The submission here is that the present application ought to be dismissed for want of compliance with the peremptory provisions of section 279 and 281 of the Urban Councils Act (hereinafter called the Act). Section 281 reads:-

"Legal proceedings for recovery of rates

No legal proceedings for the recovery of rates shall be instituted against any person referred to –

(a) In subsection 2 of section two hundred and seventy-nine unless the council has complied with that subsection and the owner has failed within fourteen days to comply with the demand served on him in terms of that subsection requiring him to pay the amount stated therein; or
(b) In subsection (3) of section two hundred and seventy-nine unless he has failed within thirty-days to comply with the demand served on him in terms of that subsection requiring him to pay the amount stated therein, subject to the maximum amount provided for in that subsection."

Section 279 of the Act states:-

"Liability to pay rate

(1) The person who is the owner of any property on the date on which any rate fixed and levied by the council becomes due and payable shall be primarily liable for that rate.
(2) If on the date on which a rate becomes due and payable, the owner primarily liable has failed to pay that rate, a demand in writing may be served on him requiring him to pay the amount stated therein within fourteen days of the service of the demand.
(3) If the owner primarily liable for a rate fails to comply with the demand referred to in subsection (2) then any person who at any time during the period in respect of which such rate was fixed and levied –
    (a) is the occupier of the property concerned shall, if a demand in writing is served on him by the council, be liable for such rate together with any other unpaid rates in respect of such property, not exceeding the amount of any rent in respect of such property due by him but not yet paid at the time of the demand and shall thereafter continue to pay such rents to the council until the amount of the unpaid rates has been paid off;
    (b) as agent or otherwise, receives any rent in respect of such property, shall, if a demand in writing is served on him by the council, be liable for such rate, together with any other unpaid rates in respect of that property, not exceeding the amount of any such rent paid to him subsequent to that demand, subject to the deduction by the agent of commission due to him for the collection of that rent.
(4) The persons referred to in paragraphs (a) and (b) of subsection (3) shall be liable for the rates to the amount specified therein jointly and severally with each and with the owner primarily liable.
(5) …"

The crisp point made by the respondent is that in terms of these provisions, it was incumbent upon the applicant to serve respondent with a demand, in writing requiring it to settle

its dues within (14) fourteen days from the date of such demand. It was further contended that these provisions are peremptory in that the applicant cannot institute legal proceedings before serving the owner with the demand giving him fourteen (14) days to comply. *In casu* since such a demand has not been issued by the applicant, it has failed to comply with the law and the proceedings are a nullity, so the argument goes.

Respondent relied on:-

(a) Maxwell: *Interpretation of statutes* (7th ed) at p 316
(b) *Nkisimane & Others* v *Santam Insurance Co. Ltd* 1978 (2) SA 430 (A) at 434.

(2) Disregard of a Ministerial Directive

Respondent's contention here is that the ministerial directive does not give the applicant an option to institute legal proceedings against the respondent for rates and other charges that fall within the period covered by the directive. Respondent submitted that while it is required to pay its dues as a corporate, the applicant ought to have engaged the respondent and "endeavored to find mutually convenient solutions." This is mainly so because the directive states; "where they have challenges, viable arrangements shall be worked out with the relevant local authorities." Put differently, respondent's argument is that before resorting to litigation, applicant should have initiated some form of discussion to resolve the dispute.

(3) Fatal non-joinder

Respondent argued that a proper interpretation of sections 279 and 281 is that it is obligatory on the part of the applicant to sue any occupiers and agents if any together with the owner of the premises. *In casu,* it was submitted that applicant ought therefore to have joined Dawn Properties, the respondent's property managers or agents as 2nd respondent in this suit.

Before I deal with these grounds let me deal with a side issue, namely the application for leave to file a supplementary affidavit by the applicant. This application was made and argued by the parties on the day of the hearing of this matter. The applicant justified its application on the fact that respondent raised in its notice of opposition a whole range of points *in limine* not anticipated when it constructed the application. Applicant relied on Rule 67 (c) (1) of the High Court Rules 1971. Order 10 Rule 67 (c) (1) states:

> "67 Limitations as to evidence at hearing of application
>
> No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence *viva voce* or by affidavit;
>
> Provided that the court may do one or more of the following –
>
> (a) …
> (b) …
> (c) permit the plaintiff to supplement his affidavit with a further affidavit dealing with either or both of the following –
> (i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or
> (ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence."

It is common cause that after being served with further particulars that it had requested, respondent took no further action. It did not file a plea which naturally would have dealt with the defence extensively. From 19 March 2014 to 17 April 2014 respondent simply sat back and did nothing. It did not contact the applicant's legal practitioner to set in motion some sort of negotiations. It is only after applicant had applied for summary judgment that respondent woke up from its slumber and filed a notice of opposition raising numerous technical points referred to above.

In my view, the matters raised by the respondent in its notice of opposition are matters that the applicant could not reasonably be expected to have dealt with in its first affidavit. Why would applicant be expected to deal with a defence wherein a registered owner of immovable property within its jurisdiction who has been receiving and paying for services rendered in the past, suddenly claims not to be liable for the payment of such service? It is reasonable for applicant to expect a defence to the effect that the amount has been paid fully or partially.

In *Kingstons Ltd* v *D. Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (5) it was 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. … <u>The proviso to R 67 of the High Court Rules 1971 is therefore to be restrictively interpreted.</u>"

The restrictive interpretation is meant to prevent a plaintiff in summary proceedings to dispense with the provisions of the main rule itself which bars him from adducing evidence except through his original affidavit. The real purpose of the proviso is not to enable a plaintiff to proffer a reply to respondent's affidavit otherwise, summary judgment proceedings would degenerate into a court application.

However, in those limited circumstances listed in R 67 (c) (i) (ii), the use of an answering or supplementary affidavit is permissible.

For these reasons, I am of the view that *in casu* the use by applicant of the answering affidavit is permissible.

I shall now at this stage decide whether the applicant has made out a case for summary judgment. The principles are well settled in our jurisdiction. In *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) GUBBAY JA (as he then was) pointed out that in order to defeat an application for summary judgment, all the defendant has to establish "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." See also *Standard Chartered Bank Zimbabwe Ltd* v *Matiza* 1994 (1) ZLR 186 (H).

In *TIMNDA Truck Parts (Pvt) Ltd* v *Autolite Distributors (Pvt) Ltd* 1996 (1) ZLR 244 (H) CHATIKOBO J (as he then was) commented thus;

> "In an application for summary judgment, the applicant must do no 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 defence for the purpose of delay. The applicant is obliged by Rule 67 of the High Court Rules to adduce evidence in its 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."

Finally in *van Hoogstraten* v *James & Ors* 2010 (1) ZLR 608 (H) MAKONI J stated that:

> "The law of summary judgment is settled in our jurisdiction. It is a drastic remedy in which the plaintiff, whose belief is that the defence is not *bona fide* and entered solely for dilatory purposes, should be granted immediate relief without the expense and delay of a trial. It has far reaching consequences, as it effectively denies the defendant the benefits of the fundamental principle of the *audi alteram partem* rule. It can only be granted to the plaintiff when all proposed defences to the claim are clearly unarguable, both in fact

and in law. The defendant does not have to establish his defence on the probabilities. All he needs to do is to allege facts, which disclose a defence. These facts, if pleaded and accepted at the trial, must be sufficient to establish a defence."

See also *Chiadzwa* v *Paulkner* 1991 (2) ZLR 33 (S) and *Nedlaw Investments & Trust Corp Ltd* v *Zimbabwe Development Bank* S-5-00.

What the authorities state quite simply is that relief by way of summary judgment is of an unusual kind that is meant to grant a plaintiff with an apparent clear right a speedy means of relief against a delaying or recalcitrant debtor. The court therefore has a discretion whether or not it will enter summary judgment. That is a stringent power whose exercise must be watched, strictly in order to see that the plaintiff has brought himself to within the scope of the provisions of the rule. However, this does not mean that every unsubstantial technicality raised by the defendant must be given effect. Rather, the proper approach is that care must be taken to see that the plaintiff has, in accordance with the terms of the rule made out a cause of action to which the defendant can have no possible defence.

In the present case, the respondent's first proposed line of defence is that the applicant's messenger one Kevin Adams lied under oath that a letter required to be served upon the respondent in terms of section 279 and 281 of the Urban Councils Act was served on the respondent when in fact no such letter was served. It was further submitted that respondent has since filed a police report against the messenger for perjury. Respondent believed that the letter was prepared merely as an afterthought after the summons had already been issued and after applicant had realized that the failure to comply with the Act was fatal to its case. This fact, according to the respondent is supported by the fact that the letter is not signed and there is no acknowledgment of receipt by respondents.

Applicant's submission was that Kevin Adams did not lie at all and therefore the dirty hands principle does not apply. As regards the argument that Trishul does not exist, applicant submitted that this does not make sense because the Deputy Sheriff served a summons on 13 December 2013 at the same place on a manager called Trishul. After the summons was served

on Trishul respondent entered an appearance to defend. This means respondent saw the summons.

In my view, it is not a mere coincidence that Adams and the Deputy Sheriff would visit the same place on different dates and claim to have seen the same person if that person did not exist. Clearly, the Deputy Sheriff did not lie because the respondent acted on the document that was served on 13 December 2013. Earlier, on 14 November 2013, Adams had delivered a letter to a Mr Trishul at the same premises. For these reasons, l find that the dirty hands principle cannot be sustained as there is no evidence that Adams lied.

As regards the second line of defence, applicant submitted that it wrote and served Annexure C on the respondent. It was further contended that Annexure C complies with the provisions of section 279 of the Act in that it was written at the instructions of applicant and it is a letter of demand.

Annexure C is a letter of demand dated 13th November 2013 and addressed to the respondent's manager. It states:-

> "Re: Bulawayo City Council vs Trishul Properties A/C 31408503
>
> We act on behalf of the Bulawayo City Council which has instructed us that you owe it rates and water charges amounting to $20 126,40, which sum, despite demand you have failed and/or refused to pay.
>
> Our client has instructed us to demand from you as we hereby do, payment of the whole amount outstanding together with interest at the rate of 5% and legal costs.
>
> You are required to settle the debt by no later than the 30th November 2013 or to agree with us acceptable terms of payment by that date, failing which our instructions are that we should issue summons against you without further notice." (my emphasis)

The argument that applicant had no authority to delegate its power to a legal practitioner does not make sense at all. Section 281 (a) of the Act does not prohibit applicant from appointing an agent to act on its behalf. The letter that is Annexure C is as good as it had been written by applicant itself. Consequently I find that Annexure C is a "demand" as contemplated by section 281 of the Act. Therefore, that defence is devoid of merit.

The third proposed defence is bogus and bad in law. It demonstrates quite clearly applicant's lack of *bona fides*. I say so for the following reasons;

(a) the directive is meant to cushion individual rate payers from the severe effects of economic challenges experienced during the period in question.
(b) corporates (like respondent) are expressly excluded in paragraph 3 which states:-
"…Please note that corporates are expected to pay their obligations in full and where they have challenges viable arrangements shall be worked out with the relevant authorities." (my emphasis)
(c) the directive does not bar Councils from suing corporates where no viable arrangements have been worked out.
(d) in any case, Annexure C invited respondent to enter into payment arrangements but respondent ignored it.
(e) the tenor of the above quoted paragraph of the Directive shows that the onus is on corporates facing challenges to initiate efforts to arrange viable payment plans. It is naïve and absurd to suggest otherwise for it would be a sad day in our commercial law if a debtor is permitted to say to a creditor; I know I owe you so much but before I pay, you must get down to your knees and ask when and how I shall pay.

For these reasons this third line of defence is without merit.

The fourth and last line of defence relates to the alleged fatal non-joinder. Once more, I find the respondent's argument difficult to follow. Section 279 (1) of the Act is very clear in that it states that the person who is the owner "shall be primarily liable for that rate." In terms of subsection (2) of section 279, applicant is allowed to institute legal proceedings against the

landlord after 14 days notice to pay while in respect of tenants and agents a notice of 30 days has to be given. Quite clearly if it was intended that they be sued jointly, there would have been no need for the difference in the notice period. In any case, subsection (3) of section 279 makes it clear that occupiers and agents only become liable "if the owner primarily liable for a rate fails to comply with the demand referred to in subsection (2)." These provisions, if considered contextually do not mean that failure to sue the owner jointly with occupiers and or agents is fatal to the proceedings.

In any event, it would be unreasonable to expect the applicant to know that there were tenants occupying the building without being notified by the respondent of the presence of such tenants and what their particulars were. Equally so, how would applicant be expected to know that there was an agent who was receiving any rent in respect of the property, if respondent had not informed applicant of that fact? I find for these reasons that there was no mis-joinder in this case.

The respondent has not said anything on the merits apart from a vague and bold assertion that applicant has not taken into account amounts paid by the respondent. The opposing papers do not reveal any defence let alone a *bona fide* defence to the claim. The respondent has not raised any arguable or triable issues as I have demonstrated. Therefore, the applicant should not be subjected to the delay and expense of going to trial.

As regards costs, despite knowledge that its defences were bogus and bad at law, respondent proceeded to mount a spirited opposition to the application, forcing applicant to incur unnecessary expenses. Such conduct should be discouraged and the only way to do so is by an award of costs at a higher scale. Further, respondent's conduct is an abomination in that by refusing to pay its own fair share of expenses for service provision, it has forced the applicant to either supplement its own funds or let the rest of its rate payers suffer. Such selfish conduct is unacceptable. Accordingly, I make the following order:

1. Summary judgment be and is hereby granted to the applicant in the sum of $20 126,40 being the arrear service charges due and payable by respondent.

2. Respondent pays interest a *tempore morae* at the rate of 5% per annum reckoned from the 30th day of January 2011 to the date of payment.
3. Respondent shall pay costs of suit on client and attorney scale.

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners
Dube-Banda, Nzarayapenga & Partners, respondent's legal practitioners