ADMIRE TAKAWIRA
versus
ZIMBABWE IRON AND STEEL COMPANY LIMITED

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 20 FEBRUARY 2018 AND 1 MARCH 2018

Opposed Application

T Zishiri for the applicant
S Siziba for the respondent

MATHONSI J: This is a summary judgment application in which the applicant, a former employee of the respondent, initially sought an order for payment of $170 632-08 against the respondent together with interest at the prescribed rate from the date of summons to date of payment in full and costs of suit on a legal practitioner and client scale. At the hearing of the application Mr *Zishiri* who appeared for the applicant applied to amend the claim to $141 311 - 08, and I granted the application, in recognition of payments made by the respondent subsequent to the issue of the summons which have reduced the amount outstanding. Indeed Mr *Siziba* for the respondent acknowledged that the respondent has been making payments to the applicant in instalments of $5331-00 per month from November 2017 which instalments it unilaterally fixed without the consent of the applicant. Those payments have reduced the capital amount.

The brief background is that the applicant sued out a summons in HC 2383/17 against the respondent for payment aforesaid. He averred that he had previously been employed by the respondent as Company Secretary which employment was terminated on 31 August 2016 on which date the respondent acknowledged indebtedness to him in the sum of $170 632-08 being arrear salaries of $146 598-24 and terminal benefits of $24 033-84. As the respondent had not paid those sums the applicant sought a court order for payment.

When the respondent entered appearance to defend the applicant formed the opinion that such was for dilatory purposes and made this application for summary judgment. In his founding

affidavit the applicant stated that the respondent has not a *bona fide* defence given that on 31 August 2016 it had, through its Acting Human Resources Executive, penned a letter addressed to the applicant in which indebtedness was acknowledged. The letter in question is attached to the founding affidavit. It reads:

> "NOTICE OF TERMINATION OF EMPLOYMENT – 31ST AUGUST 2016
> This letter serves to confirm that following agreement to retrench all employees reached between the organization and your representatives at a Works Council meeting held on 30th August 2016, your employment with Ziscosteel terminates on 31st August 2016. Payments due to you are listed below:
>
> 1. 3 months notice Pay (Gross) $7542-00
> 2. Service Pay (One Month's (pay for every 2 years served) (Gross) $8698-44
> 3. Cash in lieu of leave (Gross) $7793-40
>
> Total **$24 033-84**
>
> Any amounts paid to you after the 31st August 2016, except salaries relating to the new contract, will be deducted from your outstanding salaries. All the grossed amounts indicated above are subject to tax. Both the net and gross figures are subject to audit. You shall be notified in due course on payment modalities once the debt assumption formalities by government are completed.
> Yours sincerely
>
> C. M. MACHONA
> ACTING HUMAN RESOURCES EXECUTIVE."

The applicant maintained that the acknowledgement of debt is clear and unambiguous. Therefore his claim against the respondent is unassailable and as such appearance to defend has been entered for purposes of delay and to frustrate his quest for justice.

The respondent opposed the application. In the opposing affidavit deposed to by its Company Secretary Mnashe Mabeza it stated that it has a valid defence to the claim because the letter relied upon by the applicant is not an acknowledgement of debt. Mabeza said at paragraph 6.2.1:

> "The document is nowhere near to an acknowledgment of debt. It was a mere document reflecting an agreement which had been made between respondent and applicant's representatives to the effect that applicant was entitled to certain payments but that such payments were subject to an audit and tax deductions. This clearly means that the figures stated in the documents are not final figures as they are to be subjected to an audit first to ascertain the correct and actual amounts which applicant is to be entitled to. The

> document states as follows: 'Both the net and gross figures are subject to audit.' Furthermore the document does not state the due date for payment as would be required in a valid acknowledgement of debt."

A heap of words jumbled together but meaning absolutely nothing. If I may try to find meaning in the alleged defence, the respondent is saying although it wrote a letter to the applicant in which it stated that he was entitled to certain payments, it is not liable in terms of that letter because the letter is not an acknowledgement of debt. Although the sums due to the applicant are set out they are not due because firstly the letter does not state the due date. Secondly the money is not due because the respondent's books have not been audited and thirdly tax deductions have not been made. The question is: Who has stopped the respondent from having an audit or from deducting tax. Those activities are within the purview of the respondent and cannot, by any stretch, constitute a defence in law.

The same applies to a due date. The respondent cannot say: I know I owe you money but I have not said when I will pay you? Its completely preposterous. In the absence of any agreement between the parties delaying due date of payment, an amount of money acknowledged as owing is due on the date of such acknowledgement.

I have no doubt that the letter relied upon by the applicant is a liquid document. That term was defined by this court for purposes of provisional sentence in *Sibanda* v *Mushapaidze* 2010 (1) ZLR 216 (H) at 218 E-F as:

> "The term liquid document is not defined in the rules. This court has however held that any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document. Thus, any letter, to the extent that it is clear, unequivocal and unambiguous and contains an acknowledgement of debt, can constitute a liquid document for the purposes of the rules on provisional sentence."

As I have said that pronouncement was made in the context of the requirements of rule 20 of this court's rules entitling a holder of a valid acknowledgment of debt, a liquid document, to issue summons claiming provisional sentence on that document. What is apparent is that the requirements for provisional sentence have a much higher threshhold than summary judgment which is provided for in rule 64. All that an applicant for summary judgment is required to do is set out in rule 64 (2) and (3) which provide:

"(2) 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.

(3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action."

What that means is that all an applicant of summary judgment is required to do is to depose to an affidavit verify the cause of action, the amount claimed and expressing the belief that there is no *bona fide* defence. There is no requirement that a summary judgment application should be made only where there is a valid acknowledgment of debt made by the defendant. It is not provisional sentence. Indeed an applicant may, in his or her discretion by virtue of the permissive word "may" attach documents which verify the cause of action. Subrule (3) of rule 64 does not say that such documents should be an acknowledgement of debt or liquid document as required by rule 20. The documents attached to an affidavit in support of a summary judgment application are auxiliary to the averments made in the affidavit. So the argument that the letter of 31 August 2016 does not meet the standard of an acknowledgment of debt is not gainsaid at all.

However, the letter in question supports the applicant's claim that the respondent does not have a *bona fide* defence and that appearance was entered for purposes of delay. Just what is it that the respondent, given the chance, would want to present at the trial as its defence to the claim? Mr *Siziba* who appeared for the respondent admitted that subsequent to the issue of summons the respondent has been paying sums of $5331-00 per month towards settlement of the debt. He submitted that although the respondent unilaterally fixed that amount by accepting payments the applicant compromised its case and cannot be allowed to then insist on payment of the balance at once. I am mindful of the fact that this is not the defence that the respondent raised in its opposing affidavit and appears to be evidence led by counsel from the bar. Clearly the respondent cannot be allowed to do that.

In any event, the existence of a compromise has not been established in this case. According to the learned author R.H Christe, *Business Law in Zimbabwe*, 2nd edition, Juta & Co Ltd, 1998 at p 108:

> "Compromise is the settlement by agreement of disputed obligations and is a form of novation, replacing the disputed obligations by the obligations created by the agreement of compromise."

There was never an agreement between the parties that the respondent would settle its liability by monthly instalments of $5 331-00. The respondent did that on its own. An agreement cannot be created by one party as there should be *consensus ad idem*, a meeting of the minds between the parties. It cannot be said that the acceptance of payment by the applicant, without more, created such agreement. A creditor is entitled to accept payment towards settlement of a debt and it is advisable that they do so in order to mitigate their loss. The creditor cannot then be tied down to a non-existent agreement for accepting a part payment.

The respondent's defence is that the admitted amount is not due because an audit has not been carried out and tax has not been deducted. It is a kind of defence that can be described as not only frivolous or vexatious but also acutely dishonest.

Summary judgment is a remedy which deliberately denies a *mala fide* defendant the benefit of the *audi alteram partem* rule because such a defendant would be wasting the court's time and abusing the process of the court. It is granted to a plaintiff whose case is unassailable and as such it is only when all the proposed defences to the claim are clearly unarguable both in fact and in law that the drastic remedy of summary judgment is available to the plaintiff. See *Chrisma* v *Stutchbury and Another* 1973 (1) RLR 277 (SR) at 279.

In order to succeed in defeating such an application the respondent must disclose a defence and material facts upon which that defence is based with sufficient clarity and completeness so as to persuade the court that if proved at the trial such facts will constitute a defence to the claim. See *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 239 A-B; *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458 F-H.

In the present case the respondent, out of its own volition, admitted liability in sums set out in its letter of 31 August 2016. All that has to be deducted from those sums are statutory taxes whose computation is set out by law and is known. Therefore to say that tax has not yet been factored in cannot possibly constitute a triable issue. To say that an audit has to be conducted is simply redherring. I would therefore enter summary judgment with the rider that where due, income tax should be deducted on the sums due to the applicant.

In the result it is ordered that;

1. Summary judgment be and is hereby entered in favour of the applicant as against the respondent in the sum of $141311-08 from which should be deducted for payment to Zimra income tax where it is due.
2. Interest shall be paid on all outstanding amounts from 5 September 2017 being the date of issue of the summons to date of payment.
3. The respondent shall bear the costs of suit on a legal practitioners and client scale.

Messrs Garikayi and Company C/o Moyo & Nyoni legal practitioners, applicant's legal practitioners
Zinyengere Rupapa, respondent's legal practitioners