FELIX MAPFUMO
versus
STAYSUN INVESTMENTS (PVT) LTD
and
CBZ LIFE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 8 July 2013 & 24 July 2013

Opposed Application

A. Masango for applicant
Ms *R. Nemaramba*, for 1st respondent
Non appearance for 2nd Respondent

CHIGUMBA J: This is an opposed application. The relief that is sought is that it be ordered that:

1. The first respondent shall pay the sum of USD$5 000,00 together with interest thereon at the prescribed rate per annum, calculated from the 19th of March 2012 to the date of payment in full.
2. The first respondent shall pay collection commission in the sum of USD$500, 00.
3. The first respondent shall pay costs of suit on a Legal Practitioner -Client scale.

At the hearing of the matter, I dismissed the application by upholding the point raised *in limine* which had been raised by the respondent. I indicated that my reasons for so doing would follow. These are the reasons.

The background to this matter is as follows:

The applicant was employed by the first respondent as a cook sometime in 2011. On 15 September 2011, the second respondent advertised its funeral cash plan policy to employees of the first respondent. The applicant joined the second respondent's funeral cash plan, under policy

number 5014061. On his application form, he indicated that the level of cover that he was applying for was USD$5 000, 00. He listed his wife as his immediate family, and his mother and mother in law, whose level of cover was specified to be USD$2000, 00 each.

It is common cause that the sum of USD$30, 80 was being deducted from applicant's earnings by the first respondent for onward transmission to the second respondent, being monthly premium contributions towards the funeral cash plan. It is also common cause that the first respondent stopped forwarding the monthly premiums to the second respondent without informing the applicant of that fact. On 19 March 2012 applicant's wife Teckla Munemo passed away. The applicant approached the second respondent, who declined to pay any money, on the basis that the claim had been suspended on 1 March 2012.

The applicant was dismissed from the first respondent's employ in February 2012. The first respondent was advised by the second respondent, on 1 March 2012, that the applicant's policy was suspended for the reason that the premiums were in arrears in the sum of USD$61,60, which represented two months worth of premiums. In its letter to the first respondent dated 1 March 2012, the second respondent advised that after three months of failing to pay the monthly premiums, the funeral policy would lapse.

The applicant submitted that he duly fulfilled his contractual obligation in terms of the funeral cash plan by allowing the monthly premiums to be deducted from his salary by the first respondent. He seeks compensation from the first respondent, in the sum of USD$5 000,00 the maximum insurance cover which he alleges he would have been entitled to had the first respondent not unilaterally stopped paying his insurance premiums. The applicant alleges that he accumulated debts from his wife's funeral, which he ought to pay using the money from his funeral cash policy.

The applicant did not file any certificates of service to enable the court to determine if both respondents were served with a copy of his application. The second respondent did not file any opposing papers. In the absence of proof of service of the application on it, the court cannot determine whether the second respondent is in default. The first respondent opposed the application and raised an objection *in limine,* that the applicant had used the wrong procedure for resolution of the dispute. It was contended that applicant could not prove a claim for damages on paper without a demonstration of the actual loss that it suffered through *viva voce* evidence. The

first respondent submitted that the funeral cash plan remained valid only for as long as the applicant was its employee, which is why the second respondent wrote to it and not directly to the applicant to advice that the policy had been suspended.

The first respondent denied that the applicant would have been entitled to the full maximum insurance cover of USD$5000, 00, and averred that applicant's loss was self created because as at 19 March 2012, the policy had not lapsed, it had merely been suspended. Payment of USD$60, 60 the outstanding premiums would have resulted in the policy being reinstated.

In its answering affidavit, applicant insisted that there were no disputes of fact which made this matter incapable of resolution on the papers. It was averred on his behalf that his claim was a liquidated one, and that the first respondent was responsible for the loss that he suffered because it failed to remit the premiums that it had deducted from his salary to the second respondent, without notifying him.

The issues that fall for determination by this court are:

1. Whether the applicant, in the circumstances of this case, is entitled to be compensated by the first respondent in the sum of $USD5000, 00.

2. Whether the applicant has proved that the first respondent caused him to lose his funeral cash cover.

3. Whether applicant ought to have mitigated his loss.

The applicant invited the court to be guided by the following: *Sofiantini* v *Mould* 1956 (4) SA 150, where it was held that:

> "…a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the court to conduct a preliminary examination…and to ascertain whether the denial is not fictitiously intended merely to delay the hearing".

And to: *Joosab & Ors* v *Shah* 1972 (l) RLR 137 (G); *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) where the court stated that:

> "in motion proceedings the court must not hesitate to decide an issue of fact on an affidavit merely because it may be difficult to do so. The court should endeavour to

resolve the dispute without the hearing of evidence if it is satisfied that this can be done without doing an injustice to either party".

In *Van Nierkerk* v *Van Nierkerk and Ors* 1999 (1) ZLR 421 (S) SANDURA JA stated that:

> "The approach to be adopted where there are disputes of fact on the papers has been set out in a number of cases. In *da Mata* v *Otto NO* 1972 (3) SA 858 (A*)* WESSELS JA*,* said the following at 882F-H:
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> > 'The crucial question is, therefore, whether there is a real dispute of fact which requires determination in order to decide whether the relief claimed should be granted or not. If such a dispute does arise, it is ordinarily undesirable to settle the issue solely on probabilities disclosed in contradictory affidavits, in disregard of the additional advantages of viva voce evidence. *(Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)).
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> In the preliminary enquiry, i.e., as to the question whether or not a real dispute of fact has arisen, it is important to bear in mind that, if a respondent intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of the applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavits must at least disclose that there are material issues in which there is a *bona fide* dispute of fact capable of being properly decided only after viva voce evidence has been heard."

That case was cited with approval by CORBETT JA (as he then was) in *Plascon-Evans Paints* v *van Riebeeck Paints* 1984 (3) SA 623 (A) at 634I.

More recently, in our jurisdiction GUBBAY JA (as he then was) said the following in *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) at 339C-D:

> "It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a bona fide and not merely an illusory dispute of fact."

The first respondent submitted that "…a claim for damages arising from an alleged breach of contract, unless the damages are preset and agreed to between the parties, should not be brought in an application procedure. A claim for damages, by its very nature, always puts in

dispute the quantum of damages that are due to the applicant, even where the defendant has not defended the matter. The assessment of damages for breach of contract involves an investigation by the court into the financial position the plaintiff is in on account of the breach and the position he would have been had there been proper performance of the contract". See *Ex Combatants Security Co* v *Midlands State University* 2006, (1) ZLR 531 @ 532A-B

The first respondent contended that the following disputes of fact are incapable of resolution on the papers filed of record:

1. The applicant has not shown that he was entitled to be paid the full USD$5 000, 00 cover as at 19 March 2012 or at any other date.

The funeral cash plan application form shows that applicant indeed applied for the maximum level of cover which is USD$5000, 00. He listed his wife as his immediate family, then his mother and his mother in law as his extended family dependants. Under level of cover for these other dependants, applicant listed USD$2 000, 00 each. For his wife, no level of cover is listed. From the papers filed of record, I am unable to determine whether applicant's wife was covered for the full USD$5 000, 00 or whether she was covered for only USD$1000, 00 which is what would be left over after the extended family members' cover of USD2000, 00 each.

2. The applicant has not shown the actual loss he suffered, he did not disclose the expenses incurred at his wife's funeral.

The actual terms of the funeral cash plan are not disclosed in the papers or alluded to in the founding affidavit. It is not clear whether the applicant himself is a beneficiary of the funeral cash plan, and if so the extent of his cover. It is not clear whether each of the three beneficiaries listed by applicant would have been entitled to the maximum cover in the event of death. It is not clear whether the maximum cover was USD$ 5 000, 00 for applicant's wife and USD$2000, 00 for the other beneficiaries. The applicant did not take the court into his confidence regarding the actual expenses incurred at his wife's funeral.

3. The applicant was only entitled to the funeral cover for as long as he was employed by the first respondent.

It is common cause that the first respondent failed or neglected to remit two premiums for January and February 2012 to the second respondent. The applicant was dismissed from employment in Februay 2012. He does not disclose the exact date of his dismissal in his founding affidavit. Clearly the first respondent was liable to remit the January premium. The terms of the employment contract between the parties were not disclosed to the court. The applicant did not tell us why, a month after leaving the first respondent's employ in March 2012, he still expected the first respondent to remit the February premium to the second respondent. We are not told whether the February premium was in actual fact deducted from his February salary after the termination of his employment.

4. Applicant ought to have mitigated his loss by paying the USD$60, 60 required to resuscitate the policy which, as at 1 March 2012 was only suspended, not lapsed.

The law that governs mitigation of damages stipulates that: "…a plaintiff should not be the author of his own loss…a plaintiff may have his damages cut down because his own conduct has constituted a failure to mitigate the damage which may be defined as a failure on the part of the plaintiff to take reasonable steps either to reduce the original loss or to avert further loss". See *Da Silva* v *Coulinho* 1971 (3) SA 123 (A) at 145 C-E.

Even if the court were to take a robust approach it would still be unable to determine this issue on the papers. Although the first respondent admits that it failed or neglected to remit some of the monthly premiums to the second respondent it not clear whether payment of those premiums to the second respondent on 19 March 2012 would have resulted in the policy being reinstated, and in a mitigation of damages.

I find that the applicant did not prove that he was entitled to recover the sum of USD$5000 00 from the first respondent or any other sum. The court is unable, to assess the quantum of damages because it cannot investigate applicant's financial position on the papers filed of record. The applicant did not prove the actual loss he suffered by showing the funeral expenses he incurred. He did not show the terms of the funeral cash plan with the second respondent which entitled him to claim the maximum level of cover for each of his beneficiaries at any point in time. He did not show how he mitigated his loss.

After considering each dispute of fact alluded to by the first respondent, I am of the view that

the disputes of fact are genuine and not illusory, and that a robust and common sense approach will not cure or resolve the disputes, on the papers filed of record. There is need for oral evidence to be led, to enable the court to assess the quantum of damages by investigating the applicant's financial position. There is need to determine the actual terms of the contract between the applicant and both respondents. There is need to determine whether the applicant ought to have mitigated his loss and if so how.

In my view the first respondent did not resort to bare denials of applicant's material averments. In fact it made admissions of material facts which may be considered detrimental to its defence. The applicant simply failed to discharge the onus on him in regards to his entitlement to damages and to the quantum of damages.

Accordingly, the point *in limine* raised is upheld and the application is dismissed with costs.

Musunga and Associates, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, 1st respondent's legal practitioners
2nd respondent, non appearance