HH 353-16
HC 2788/14

PROGRESS MARKETING (PVT) LTD
versus
MARANGE RESOURCES (PVT) LTD

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 19 AUGUST 2015 & 15 JUNE 2016

Opposed application for summary judgment

T.I. Gumbo, for the applicant
G. Gomwe, for the respondent

BERE J: After hearing argument in this matter I granted summary judgment in favour of the applicant. I have been asked to provide reasons for my decision. Here they are.

The applicant issued out process in this court against the respondent on 3 April 2014 claiming US$41 324,26 for goods sold and delivered at the latter's specific instance and request. Upon being served with summons the respondent filed a request for further particulars on 15 may 2014. Miffed by the attitude of the respondent, the applicant filed the instant application. In filing this summary judgment application, the applicant attached to it various delivery notes and fiscal tax invoices on which the delivery notes were reflected. The supplied or annexed documents bore the signatures of the individuals whom the applicant alleged signed to acknowledge receipt of the supplied goods on behalf of the respondent. The application for summary judgment was reasonably detailed and backed up by documentary evidence calculated to justify the amount of claim.

In dealing with the detailed application for summary judgment the respondent stated its defence as follows:

"7 AD para 4 to 6

7.1 It is common cause that the summons was issued for the recovery of the said amount.

7.2 However, what is disputed is the whether or not respondent owes, which it has denied in toto. Respondent has stated that it does not owe the applicant and that is the matter. Applicant was then required to demonstrate how respondent is indebted to it.

7.3 The invoices and documents that have been attached to the present application do not in any way establish a nexus between respondent and the claim that is before the court. Respondent denies any liability whatsoever.

8.1 …

8.2 Respondent has a *bona fide* defence. The defence is that it does not owe. That is the end of the matter. There cannot be a more *bona fide* defence than the fact that ne has nothing to do with the claim. He does not owe the applicant.

8.3 The claim that the respondent took delivery of any goods should not be stated as a fact. It is being contested. Applicant is challenged to prove if indeed respondent took delivery of any goods, if at all, and failed to pay. That is the whole essence and that is a matter of evidence which cannot be adduced in application proceedings. Only a trial can resolve the issues.

9.1 The claim that a reasonable time has lapsed without payment is misplaced and baseless to the extent no payment is due. Respondent does not owe. One cannot be expected to pay that which he does not owe.

9.2 There is no intention or will to delay the matter. Respondent simply wants applicant to prove its claims because it does not admit to same. It does not admit to same. It does not agree with the applicant. Wanting justice is not in any way seeking delay. Our courts are courts of evidence and respondent cannot be expected to rush to make payment merely upon someone say so.

9.3 There is no abuse of the court and its processes in this matter. If anything it is the applicant that is abusing the court and its processes. The request that is being made is premised on the Rules. Respondent simply wants applicant to prove its claims. Surely, that is perfectly permissible at law.

9.4 …" (my emphasis)

In essence, what I have quoted is what l deem to be the core of the respondent's defence to the application filed by the applicant.

I propose to briefly deal with the legal position on summary judgment as perceived. Summary judgment is a drastic civil remedy where a *mala fide* defendant is denied the tempting opportunity to defend the undefendable by allowing him the opportunity of going through the

motions of a fully fledged trial where the facts clearly show that he has no defence to the claim filed. This procedure is only sanctioned where there is not arguable defence to the applicant's claim. As BECK J (as he then was) puts it:

> "The special procedure of summary judgment was conceived so that a *mala fide* defendant might summarily be denied, except under onerous conditions, the benefit of the fundamental principle of *audi alteram partem*. So extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that is only when all the proposed defence to the plaintiff's claim are clearly unarguable, both in fact and in law, that this drastic relief will be afforded to a plaintiff."[1]

As MACDONALD, ACJ (as he then was) observed in *Beresford Land Plan (Private) Limited* v *Urquart*[2] summary judgment is a legal process that ensures that the legal process in civil cases is not abused by unscrupulous litigants who have no defence to the claim but may be tempted to delay its smooth conclusion on flimsy grounds.

In the instant case, counsel for the applicant put across the applicant's case in argument in very simple terms. Counsel did refer the court to the documentary exhibits in support of the applicant's case. It was further argued on behalf of the applicant that the respondent's notice of opposition did not take the respondent into the confidence of the court because it did not seem to have the conviction of its own defence as projected by its weak notice of opposition. I agree.

A simple perusal of the respondent's notice of opposition clearly shows the respondent's deliberate and well calculated attempt to scratch around for a possible defence by offering what I would call a bare denial of liability. Even when confronted by invoices and delivery notes the respondent could not even provide a convincing explanation.

The view that I take is that a bald denial of liability when one is confronted with real evidence is not what is anticipated to constitute a *bona fide* defence.

1. 1973 (1) RLR 277 at 279B-D
2. 1975 (1) RLR

During submissions, the respondent's counsel could not say anything more than merely stating that the applicant must prove its case in court. That persistent panting and puffing of the respondent's position is evident in the notice of opposition.

It was clear in submission made in court that the respondent was not able to raise any arguable or triable issue. The best that was said about it was that it was denying liability and that it wanted the applicant to prove it in court.

After carefully listening to and assessing the position taken by the respondent, I was left in no doubt that it represented the many unscrupulous litigants who are determined to deflate the smooth court process by employing every imaginable tactic to delay the inevitable. Such litigants must not be allowed to find refuge in our courts.

It was for these reasons that I granted summary judgment in this case.

Atherstone and Cook, applicant's legal practitioners
Mutamangira & Associates, respondent's legal practitioners