

BLESSING SCHOOL OF DRESSING (PVT) LTD
versus
TAYENGWA MUSKWE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 14 November & 6 December 2017

Opposed Application – Summary Judgment

Ms R Zimvumi, for the applicant
T D Muskwe, for the respondent

CHAREWA J: The applicant issued summons against the respondent for payment of \$29 400 being arrear rentals in terms of a lease agreement between the parties, eviction of the respondent and all those claiming through him, from no 3 Bodle Avenue, Eastlea, Harare, holding over damages at the rate of \$1 200 per month with effect 1 May 2017 to date of vacation, prescribed interest thereon and costs of suit on a legal practitioner and client scale. Respondent entered appearance to defend on 16 May 2017, whereupon the applicant applied for summary judgment on 17 May 2017.

The summary judgment was predicated on the basis that the respondent, having acknowledged his indebtedness and signed a Deed of Settlement on 13 February 2017, had no *bona fide* defence to applicant's claim but had entered appearance merely to delay proceedings.

At the hearing of the matter, applicant conceded that it had improperly filed an answering affidavit to respondent's opposing affidavit though it sought to be excused this error on the basis that respondent had brought in new information in his opposing affidavit which required to be answered.

The answering affidavit is thus expunged from the record. Further, the applicant abandoned its claim for collection commission as it is not borne out by the pleadings.

At the conclusion of the hearing I delivered an *ex tempore* judgment granting summary judgment with costs on the higher scale as prayed for by the applicant. The respondent has now requested for a written judgment for purposes of appeal.

The Law

It is trite that summary judgment proceedings are a drastic remedy largely designed to close the door against unscrupulous litigants with no good defence to a legitimate claim but who only seek to delay the finalisation of a clearly straight forward matter.¹ In that regard, the rules of procedure are designed to provide relief to an applicant who would otherwise suffer unnecessary injustice from long drawn out proceedings where he has an unassailable cause.²

Therefore, for a respondent to successfully oppose summary judgment, he must show, establish and prove that he has a good and *bona fide* defence, or furnish security, otherwise summary judgment will be entered against him.³

A good and *bona fide* defence has been defined as one which is plausible and valid, the consequences of which are the possibility of an injustice should summary judgment be granted.⁴ However, it is not every defence that will succeed to defeat summary judgment, but only a defence which is *bona fide*, plausible, with sufficient clarity and completeness and on facts which if established would enable the respondent to succeed.⁵

Analysis

Juxtaposing the trite points of law in summary judgment applications enunciated above, I was of the view that respondent had no *bona fide* defence.

Firstly, respondent sought to avert summary judgment by claiming that the deed of settlement between the parties was not “cast in stone” and was subject to “further interrogation”. However, it is clear on the face of it that when respondent entered into the deed of settlement he effectively admitted that he was in breach of his lease agreement and owed the applicant \$25 800 as at 31 January 2017. In addition, he undertook to vacate the premises by 30 April 2017, the period up to then thus giving rise to a claim for further rental payments agreed at \$1 200 per month to that date. As at 30 April 2017 therefore he owed the applicant \$29 400 as claimed in the summons.

¹ Beresford Land Plan (Pvt) Ltd v Urquhart 1975 (1) RLR 260 @ 265/272B

² See r64(1)(2)(3) of the High Court Rules

³ See r66 & 69 High Court Rules

⁴ See National railways of Zimbabwe Pension Fund v Verigy Enterprises (Pvt) Ltd + 3 Ors HB 13/17

⁵ Kingstons Limited v L D Ineson (Pvt) Ltd 2006 (1) ZLR 451(S)

There is no addendum or further interrogation to that deed of settlement admitting to any set off for whatever amounts may be due to him from other quarters that was submitted by the respondent. The deed of settlement is clear and unequivocal: respondent owed the applicant the amount stated and undertook to pay it, and to vacate the premises in terms thereof.

Contrarily, the respondent did not vacate the premises on 30 April 2017 in terms of the deed of settlement, nor did he vacate on 30 June 2017 despite having undertaken to do so in his plea. Clearly therefore, a claim for holding over damages with effect 1 May 2017 is indisputable.

I therefore find the applicant's cause to be clear and unassailable. Applicant is entitled to the arrear rentals up to 30 April 2017, and holding over damages from 1 May 2017 to date of vacation. Applicant is also entitled to vacant possession of its property since the parties had agreed that the lease agreement was terminated due to respondent's breach.

Respondent further sought to avoid summary judgment by claiming set off for fees allegedly owed to him by entities other than the applicant on the basis that they share the same director. (See proceedings in *Tayengwa Dugmore Muskwe t/a Muskwe and Associates v BRM Enterprises (Private) Limited* HC 4957/17 and *Tayengwa Dugmore Muskwe t/a Muskwe and Associates v Feelgreat Enterprises (Private) Limited* HC 18213/17).

However, firstly, the terms of the deed of settlement do not admit of any set off as claimed, nor do they leave any room for amendment as alleged by respondent when he states that they were not "cast in stone".

Secondly, respondent committed the cardinal error of failing to attach any proof of any nexus between applicant and respondent's other debtors in HC 4957/17 and HC 18213/17 that would allow set off of debts owed by one legal person against claims by another. Save to say that applicant and these other debtors of the respondent share the same director, the respondent provided no other basis for claiming set off, when he well knows or ought to know that in application procedures, one's claim or defence stands and falls on the affidavits filed of record and evidence attached thereto. In any event, sharing a director does not make two separate juristic persons one legal *persona*.

Thirdly, and with respect to *Tayengwa Dugmore Muskwe t/a Muskwe and Associates v Blessing School of Dressmaking (Private) Limited* HC 4796/27 which involves the parties to this suit, no application for consolidation has been made. Further that matter is in any case

proceeding independently and will be resolved upon its own merits. No justification therefore is made in respondent's founding affidavit as to why set off of a claim which is disputed and is proceeding independently of this matter should be made in this suit.

In any event, respondent will not suffer any prejudice if set off of his alleged fees is declined. He is still able to recover them through the suits he has already set in motion. He therefore stands to suffer no injustice if his defence of set off is denied as his claims for his fees are amply covered in proceedings he has instituted therefore. On the contrary, it is the applicant who will suffer great injustice if summary judgment is not granted as respondent will continue to occupy its property without paying any rent in circumstances where he is clearly in breach of the lease agreement.

Essentially, therefore, this a case where the "defence" being raised by respondent cannot stand. It can only be described as puerile since it is certainly not plausible or valid, particularly as it has not been pleaded with sufficient clarity and completeness. In my view, it falls into the class of those defences defined in *Kingstons Ltd v LD Ineson (supra)* as being unable to defeat summary judgment.

Consequently I find that this is a case where the justice of the matter cries out for summary judgment. And given that respondent has remained in occupation for more than six months beyond the date on which he ought to have given vacant possession, it is just and equitable that his immediate eviction be ordered.

Costs

The applicant sought costs on the higher scale on the basis that it has been unnecessarily put out of pocket by respondent's intransigence in failing to vacate its premises in terms of the deed of settlement or his own undertaking in his plea. Further, he remains in occupation to date in circumstances where he is not paying any rental and is unwarrantedly prolonging litigation on untenable grounds.

I cannot but agree with the applicant. Respondent's conduct is clearly reprehensible particularly given that he is a senior legal practitioner who ought to know the law and should not have wasted the court's time dragging this matter this far on frivolous and vexatious "defences". Clearly an injustice would be perpetrated on the applicant should it not recover its full costs in the circumstances.

Disposition

Consequently, it is ordered that:

1. The application for summary judgment be and is hereby granted.
2. The respondent shall pay the sum of \$29 400 being arrear rentals due and owing in terms of the lease agreement.
3. The respondent shall pay interest on the above sum in paragraph 2 above at the prescribed rate from date of summons to date of final payment.
4. The respondent and all those claiming occupation through him shall vacate Stand N.o 3 Bodle Avenue, Eastlea, Harare within 48 hours of this order, failing which the Sheriff of Zimbabwe or his lawful deputy is directed, authorised and empowered to take all such measures as may be necessary to achieve the eviction of the respondent and all those claiming occupation through him from Stand No. 3 Bodle Avenue Eastlea, Harare.
5. The respondent shall pay holding over damages at the rate of \$1 200 from 1 May 2017 to date of vacation from the premises.
6. The respondent shall pay costs of suit on a legal practitioner and client scale.

Ruth Zimvumi Legal Practice, applicant's legal practitioners
Muskwe and Associates, respondent's legal practitioners