ZIMBABWE ELECTRICITY TRANSMISSION AND
DISTRIBUTION COMPANY (PRIVATE) LIMITED
versus
DAVID CHAPFIKA

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 21 July 2017 & 6 December 2017

Opposed Matter

Mr *A. Demo*, for the plaintiff
Mr *Chingarande*, for the defendant

CHIWESHE JP: This is an application for summary judgment in terms of Rule 64 of the High Court Rules of 1971 which provides as follows:

> ***"64. Application for summary judgment***
> (1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pretrial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
>
> (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.
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> (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.
>
> (4) Order 32 shall apply to the form and service of an application in terms of this rule and to any opposition thereto."

The background facts are these. The plaintiff issued summons claiming against the defendant the payment of the sum of $307 622.37 owed to it in respect of electricity supplied to the defendant in terms of the running contract between the parties. The plaintiff further claimed interest at the prescribed rate from the date of payment, inclusive of both dates. The plaintiff's

declaration affirms the cause of action and tabulates the account numbers under which the debt was incurred, the place where power was supplied and the cost to the defendant of such supplies. The total amount reflected in the tabulation is $307 622.37.

The defendant entered appearance to defend on 7 December 2016 and filed its plea on 23 January 2017. In it the defendant avers that the plaintiff breached the agreement between the parties by unilaterally disconnecting electricity, an act that disabled the defendant to perform in terms of the contract. The defendant also disputes the plaintiff's entitlement to the relief sought and seeks its dismissal with costs.

Being of the view that defendant has no *bona fide* defence to its claim and that appearance to defend had been entered purely for purposes of delay, the plaintiff filed the present application for summary judgment to be entered against the defendant. The application is opposed.

The founding affidavit is sworn to by one Judith Tsamba, the plaintiff's Company Secretary. It is to the following effect. On 2 November 2016 the defendant acknowledged in writing his indebtedness to the plaintiff in the sum of $307 622.37. The acknowledgement of debt is filed of record. The plaintiff avers that the defendant has accordingly no defence to its claim and appearance to defend and plea have been filed for dilatory purposes. Further to the acknowledgment of debt, the defendant through his email dated 26 October 2016, admitted liability and went on to propose a payment plan which plan he has not honoured to date. It was for this reason that plaintiff disconnected the electricity supplies as it was entitled to do in the circumstances. The disconnection was effected after and not before the plaintiff's default. That essentially is the plaintiff's case.

In his opposing affidavit the defendant admits signing the acknowledgement of debt but states that he signed the document on the basis that plaintiff was going to continue supplying electricity to enable him to carry on with his business and pay the plaintiff in terms of the acknowledgment of debt. He believed on that basis that the plaintiff would hold on to the summons. He further states that notwithstanding that he disputed the bills relating to his different accounts, he nonetheless agreed to sign the acknowledgment of debt on the basis that he would not be cut off. To his surprise, barely twenty-four hours after appending his signature thereto, the plaintiff immediately issued summons and disconnected electricity in total disregard of the new

agreement as captured in the acknowledgment of debt. Indeed, summons was issued on 3 November 2016 and the acknowledgment of debt was executed on 2 November 2016.

In terms of the acknowledgment of debt the first instalment of $17 090.13 was to be paid in November 2016. No specific date was provided as the cut-off date in November 2016 or indeed in the subsequent months. One presumes that each instalment would have been due by the end of November 2016 and thereafter at the end of each subsequent month. The debt repayment plan was, according to the acknowledgment of debt, spread over a period of eighteen months, beginning November 2016. The defendant is adamant that the plaintiff's figures are inflated a fact which he raised in his email to the plaintiff dated 26 October 2016. This email preceded the signing of the acknowledgment of debt on 2 November 2016. The defendant insists that the understanding between the parties was that repayment of the debt would proceed in the manner stipulated in the acknowledgment of debt and that litigation would be put on hold for that reason.

He admits owing the plaintiff money but disputes that such would amount to the figure of $307 622.37 as claimed. In brief that is what the defendant offers as his defence to the claim.

In my view this application cannot succeed for the following reasons. The plaintiff is properly or otherwise relying in the main on the acknowledgment of debt signed on 2 November 2016. It is a comprehensive document which not only outlines in great detail the amounts owed in the various accounts operated by the defendant but provides for a payment plan in terms of which the defendant would extinguish the debt over a period of 18 months, beginning November 2016, at the rate of $17 090.13. To that extent the document is not only an admission of liability on the part of the defendant but a wider agreement on the manner in which the debt is to be repaid. The plaintiff agreed to those terms of payment and is as bound to that agreement as defendant is. The acknowledgment of debt constitutes a novation of the original contract of supply effective from the date of its signature and acceptance by the plaintiff.

From that date henceforth, the plaintiff could only sue in the event that the defendant breached the terms of the acknowledgment of debt. No such breach has been alleged to have occurred. Until there is such breach, the plaintiff has no cause of action. The plaintiff cannot blow hot and cold by entering into an agreement in which it accepts payment in instalments and then at the same time sue for the full amount a day after signing such an agreement and before even the

first instalment was due. It would have been different if this had been a mere acknowledgment of debt by the defendant without the payment terms incorporated therein.

The plaintiff's case will only be triggered by a breach on the part of the defendant of the terms of payment agreed to. There is no allegation of such breach in the summons, the declaration or indeed the founding affidavit. Having been filed a day after signature of the acknowledgment of debt, it is inconceivable that as at the date of summons, a breach would have occurred, given the wording of the payment plan that is incorporated into the document. The first instalment should have been paid on any date in November 2016. The summons was filed on 3 November 2016, twenty-seven days before the end of November 2016. The only reference to any breach is made from the bar under para 3.1 of the plaintiff's heads of argument which averment does not constitute evidence and in any event is being made well after the issuance of summons.

There is another hurdle in the plaintiff's way, namely that the acknowledgment of debt was never pleaded in the summons and cannot therefore be held to be part of the plaintiff's cause of action. To that extent therefore the plaintiff cannot, without leave of court, rely on an acknowledgment of debt which does not form part of its cause of action. See *Stanbic Bank v Dickie* 1998 (1) ZLR 205 H.

In the final analysis the defendant has shown that he has a *bona fide* defence to the claim in the following ways. Firstly, the acknowledgment of debt which plaintiff accepted and relies upon is a novation of the original contract of supply. It outlines the terms of payment and until such are breached no cause of action arises. Secondly, the acknowledgment of debt has not been incorporated into the summons and declaration. It cannot therefore be deemed to be part of the plaintiff's cause of action and for that reason the plaintiff cannot rely on it without leave of court. Thirdly, although admitting liability, the defendant disputes the quantum of that liability.

In the circumstances it cannot be said that the plaintiff's claim is unanswerable. On the other hand, the defendant has raised triable issues and shown that he has an arguable case which should be heard by a trial court.

In *Jena v Nechipote* 1986 (1) ZLR 29 (SC) it was held thus:

> "All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed 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."

In my view the defendant has satisfied that threshold. For that reason it is ordered that the application for summary judgment be and is hereby dismissed with costs.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners
GN Mlotshwa & Company, defendant's legal practitioners