

ZIMBABWE SECURITY GUARD'S UNION
versus
NATIONAL EYE SECURITY SERVICES (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 1, 4 and 15 December 2015 & 4 October 2017

Opposed Application – Summary Judgment

J Bamu, for the applicant

D Makoni, for the respondent

CHITAPI J: The plaintiff is described in the summons and declaration as a company incorporated in terms of the laws of Zimbabwe. The defendant did not take issue with the description of the plaintiff as a company. A reading of the subsequent filed pleadings clearly show that the plaintiff is a union. As such the plaintiff must be an unincorporated association since the citation does not include the references, “private limited” or “limited” as required in law where a company is involved. The correct reference is important as it informs the court of the plaintiff’s *locus standi* and legal standing to bring the action as well as the court’s jurisdiction. I will come back to the issue later in my judgment.

On the substance of the application, the applicant applies for summary judgment against the respondent for payment of its claim as set out in the summons. In the summons the applicant claimed payment of US\$13 433.44 with interest thereon at the prescribed rate from March 2012 to date of full payment, collection commission and costs on the legal practitioner and client scale. In the declaration the applicant pleaded that the defendant had between March 2012 and June 2014 collected subscription fees from the applicant’s “clients” in accordance with the “Collective

Bargaining Agreement for the Security Companies in the Security Industry” and failed to remit the fees as obligated. The declaration averred that the respondent remitted US\$5 999.90 out of a total of US\$17 433.44 leaving a balance of US\$13 433.44 (upon my calculation, the balance would be US\$13 433.54 and not US\$13 433.44. a variance of 10 cents). The declaration further averred that the respondent had “failed, refused or neglected to transfer ownership of the settlement property to the plaintiff,” hence the claim.

The defendant in its plea raised a jurisdictional objection to this court determining the case on the basis that the cause of action arose from the Labour Act and that the dispute was suited for the Labour Court. No further details were given in the plea for the ouster of the jurisdiction of this court.

On the merits the respondent denied the claim and put the applicant to the proof of the terms of the collection of the subscriptions, the details of the clients from whom the subscriptions were collected and the amount allegedly due. Without filing a replication, the applicant launched this application for summary judgment. Not surprisingly the respondent strenuously opposed it.

The application for summary judgment was initially set down on 1 December 2015. The parties’ legal practitioners advised that they were engaging their clients with a view to settling the dispute. I postponed the application to 4 December 2015 at the request of the parties. On 4 December 2015 I again postponed the application to 15 December 2015 as parties were reportedly still in engagement. On 15 December 2015, the legal practitioners advised that the parties were still in engagement. It was agreed that I reserve my judgment and give parties further time to conclude their engagement. It was also agreed that should it become necessary that I determine the matter in the event of failure of negotiations, I should rely on the papers filed of record and heads of argument.

I have to date not been advised of the outcome of the parties engagements. I have to dispose of the application as it has been on my desk for more than 18 months. I would have expected to be advised of the settlement of the matter or otherwise since the legal practitioners had undertaken to give me feedback.

Having considered the application and papers filed of record, I have reached the conclusion that there is no merit in the application and that it should be dismissed. The following are my brief reasons for dismissing the application.

I have already remarked that the summons and declaration do not inform the court as to the clear legal status of the applicant. The details of the claim are very scanty. It is not clear whether the claim is based in contract, in delict or upon a statutory duty. If based on a statutory duty, the details of the statute concerned, duties created and obligations it creates have not been pleaded.

Summary judgment procedure is designed to empower a court to expeditiously dispose of liquidated claims where the defendant seeks to delay relief to the plaintiff by defending an indefensible claim. The plaintiff does not however just obtain the relief of summary judgment as a matter of course. The plaintiff has to verify his or her claim on affidavit and attach such documents of evidence as will satisfy the court on a balance of probabilities that the claim is well grounded both in fact and law and that the defendant does not have a bona fide defence to it. In limited circumstances, as provided for in the *proviso* to r 67 of the High Court Rules, the court may permit the leading of evidence otherwise the application is as a general rule decided on the papers filed of record. I will not bother to list the instances when the court may allow the adduction of evidence because the parties were content to abide by the papers file of record. Recourse to the *proviso* did not arise.

Summary judgment cannot be divorced from the pleadings. Pleadings perform the purpose of ventilating the dispute between the parties as their primary objective. The declaration filed by the plaintiff is vague and does not comply with Order 17 r 109 which requires that the plaintiff be fully described and the capacity in which the plaintiff sues. The description of the plaintiff as a “company” in one word and “a union” on the other makes the summons vague as to the true identity of the plaintiff.

The relationship between the plaintiff and the defendant is not sufficiently particularised for the court to appreciate the legal relationship which gives rise to the plaintiff's claim against the defendant.

Poorly drafted pleadings by the plaintiff when pleading his or her claim become the first handicap in applying for summary judgment. The declaration is the pleading which amplifies what is claimed in the summons and a lot of care must be taken in preparing it. Where the declaration does not set out the cause of action clearly, then the shortcoming cannot be cured by an affidavit filed in the application for summary judgment. There have been recent judgments of this court underlining the need for pleadings to be meticulously drawn so that they bring out the party's case

or defence without including evidence see *Fungai Nhau v Memory Kupe & Anor* HH 73/15 and *Meikles Limited v Zimbabwe Stock Exchange & Alban Chirume* HH 66/16.

In summary judgment, the plaintiff verifies facts set out in the pleadings of claim and the amount claimed. A verification is an affirmation of what is set out. Once the plaintiff has failed to set out the facts which ground the cause of action, the affidavit cannot verify what is not stated. The affidavit in summary judgment procedure is different from the founding affidavit in application procedure because in the latter case, the founding affidavit founds the case and an applicant stands or falls on it.

The applicant's affidavit does not sufficiently address the respondent's grounds of denial of the claim as set out in the plea. The respondent put the applicant to the proof of the terms of the collection and details of the applicant's "clients" from whom collections were made. The other matters to which the respondent took issue were the justifications for the claims for collection commission and costs on the higher scale. The collections and costs issues are matters which would not be a bar to the grant of summary because costs are in the discretion of the court and collection commission arises as a matter of law whether its due or not.

I do not subscribe to the notion of undue formalism and believe that the core function of the judiciary is to deliver justice and not defeat the core-function by slavishly being a slave to formalism lest the rights of persons to access the courts and justice as guaranteed by s 16 A of the constitution is defeated. This does not however mean that courts should condone non observance of its rules because there has to be order and certainty on how matters should come before the courts and be adjudicated upon. By not slavishly adhering to formalism I mean that in a proper case, a court should lean towards determining the matter than throwing it out on a mere procedural technicality.

In *Maharaj v Barclays Bank National Bank Ltd* 1976 (1) SA 418 AD, CORBETT JA in dealing with summary judgment under r 32 of the Uniform Rules of court which is similar to r 64 of our court rules said at p 423 E-H:

“While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32, that in substance, the plaintiff should do what is required of him by the Rule. The extra-ordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasized The grant of the remedy is based upon a supposition that the Plaintiff's claim is unimpeachable and that the defendants defence is bogus or bad in law.”

I find the words of CORBETT JA to be persuasive and a good guide which should be followed in summary judgment applications. In other words despite my general comment that wherever possible, courts should not sacrifice justice on account of slavish adherence to undue formalism, summary judgment should be an exception and the rules relating to it must be followed to the letter because it is a summary remedy where a defendant stands to suffer prejudice due to the curtailment of his or her rights to a full hearing. Where a triable issue is raised by the defendant, then this should defeat an application for summary judgment.

In the case *Gulf Steel (Pty) Ltd v Rack Rite Bob (Pty) Ltd and Anor* 1998 (1) SA 679 (OPD), the court emphasized that there are two basic requirements that a plaintiff has to meet in summary judgment applications namely:

- ‘(i) a claim clearly established
- (ii) pleadings which are technically correct before the court.

If the two are lacking, summary judgment should not be granted. In fact, as I have already indicated there can be no valid verification or affirmation of a claim not properly established on the pleadings.

In *casu*, even if I were to be generous to the applicant and proceed to determine the matter without being formalistic and consider all the pleadings holistically and condone manifest errors on the basis that the respondent is not prejudiced, I would still refuse the application because the applicant did not depose to any facts linking the applicant and respondent. The applicant did not plead the law which gives rise to the claim. The evidential documents showing how the money claimed is made up were not attached. The applicant only attached, a schedule which in itself is of no evidential value unless it had been acknowledged as correct by the respondent. The claim by the plaintiff was therefore not verified.

Ex *abundata cautela* and for the avoidance of any doubt, I do not agree with the respondents’ assertion that this court has no jurisdiction to deal with this case on account of the case being a Labour matter. Apart from the applicant’s claim though poorly drawn being for payment of money which it says was collected on its behalf by the respondent and therefore not being a labour matter, it appears to be now settled that this court can in any event exercise parallel jurisdiction with the Labour Court over labour matters. This court will however be justified to

withhold its jurisdiction on the basis there is a labour mechanism and institutions specially created to deal with labour matters and there would have to be a good reason for a litigant to shun the specially created labour resolution mechanisms and institutions in choosing the forum of the High Court in the first instance

That said, it was for the reasons given above that I did not find merit in the summary judgment application. It is accordingly dismissed with costs.

Tamuka Moyo Attorneys, applicant's legal practitioners
Makoni Legal Practice, respondent's legal practitioners