CHARLES MIKE
versus
MAGGIO CENTRE (PVT) LTD

HIGH COURT OF ZIMBABWE
TSANGA J & MAXWELL J
HARARE, 27 JANUARY, 2022

Civil Appeal

T Nyakunika with *S Chikotora*, for the appellant
F Ndou, for the respondent

TSANGA J: On 18 November 2021, the appellant's appeal against eviction from property known as Stand No. 11740A Harare Road, Mbare was dismissed. The judgment was given *ex tempo*. The appellant has appealed to the Supreme Court against the dismissal of his appeal and has requested the full reasons for dismissal in writing. These are they.

The background facts

The respondent herein issued summons (as plaintiff) for the eviction of the appellant (the defendant in the court below) from property known as Stand No. 11740A Harare Road, Mbare where he had been contracted to provide security services over the property. Sometime in November 2015, one of the directors of the respondent was said to have written to appellant advising him that his security services were no longer needed and that he would be paid in full at the end of that month. The appellant is said to have refused to move out and instead had started using the property for his own benefit without the mandate of the respondent.

Having reported the matter to the police to no avail, the respondent thereupon issued summons for the eviction of the appellant, who entered an appearance to defend. The appellant also requested further particulars in June 2020, namely, the certificate of incorporation and proof of ownership of the premises. The respondent as plaintiff applied for summary judgment on basis that the appellant as defendant, had no real defence to the eviction claim. The respondent included the requested documents in the application for summary judgment.

At the hearing in the court below, the appellant had raised a point *in limine* that the application was improperly before the court because the applicant was a non-existent entity. He said he intended to file a special plea as the entity in question is known as Maggiocentre Pvt Ltd and not Maggio Centre (Pvt) Ltd and that therefore there was no proper application for summary judgment before the courts. He also stated that the failure to give particulars had resulted in failure to file his plea.

In the application for summary judgement, the respondent had attached to its founding affidavit documents showing ownership and registration. The respondent had therefore maintained that the appellant had not filed a plea because it had nothing to say and had no defence to the application for summary judgment. He had also argued in the court below that the technicality on the name does not even exist as it was clear that the respondent is the owner of the property in question.

The Magistrate found in favour of the respondent, herein arguing that the appellant had not even in the slightest way disclosed his defence to the claim. He had not denied occupation of the premises or the circumstances upon which he took occupation. Furthermore, the lower court found that the respondent had attached deed of transfer showing the owner as Maggiocentre and that the only difference in the name was the gap between Maggio and Centre. The argument on the name was therefore found to lack merit on the basis that the way the name is written did not render the court application defective. The lower court also highlighted that it was not clear how the furnishing of further particulars sought by the defendant (appellant), inhibited him from filing its defence. The court concluded that his opposition of the claim had been done solely for the purpose of delay.

The lower court granted the application for summary judgment and ordered that the appellant (as respondent to the summary judgment application) and all those claiming occupation through him vacate Stand No. 111740A, Salisbury Township, Mbare, Harare, within 5 days of the order. He was also ordered to pay costs on a legal practitioner and client scale.

The Grounds of appeal

The appellant's appeal to this court was on the following grounds:

1. The court erred in granting summary judgement when the appellant had demonstrated that he had a *bona fide* defence permissible in terms of the rules of the court *a quo*.

2. The court *a quo* erred in granting relief in favour of a non-existing entity.

The appellant had therefore sought that his appeal succeeds and that the judgment of the court *a quo* be set aside and substituted with an order dismissing the application for summary judgment.

The legal submissions on appeal.

The appellant argued that the respondent had jumped the gun in declaring that he had no *bona fide* defence as he wanted to file a special plea to the effect that there is no legal persona who goes by respondent's name and that therefore the matter ought to be dismissed. In essence, his argument was that he had taken issue with the citation of plaintiff in the court below. Thus, he had not delved into the merits for the reason that he awaited the particulars that he had requested with a view to filing a special plea on *locus standi*. He argued that the special plea of *locus standi* is a *bona fide* defence.

The respondent, on the other hand, argued that it had attached the CR 14 form as proof of incorporation and that the documents requested by the appellant had been supplied in the application for summary judgment. Furthermore, the respondent argued that if the appellant had intended to raise a special plea, then there was no need to ask for further particulars as he could simply have raised the special plea. Furthermore, the respondent argued that the appellant never produced any evidence to re-butt the evidence that the respondent is the owner. As such, the argument was that the appellant had no defence that warranted that the matter be referred to trial. The respondent also argued that the issue of the name had been dealt with adequately by the court below. He therefore sought that the appeal be dismissed with costs.

Analysis and findings

The appellant argued that the court erred in granting summary judgement when the appellant had demonstrated that he had a *bona fide* defence permissible in terms of the rules of the court *a quo*. Granted the appellant had sought further particulars and in terms of Order 12 of the Magistrates Court (Civil) Rules, 2019. Order 14 of these same rules provides that where further particulars have been requested, an exception may be filed within seven days after delivery of such documents or information.

However, what was before the lower court was an application for summary judgment. It was this that the magistrate was called upon to decide. In this regard Order 15 of the Magistrates Court rules provides as follows on summary judgment:

Order 15 Summary Judgment

"1. When application for summary judgment may be made
(1) **Where a defendant has entered an appearance to defend**, the plaintiff, whether in the main claim or counterclaim, may by application supported by a founding affidavit apply to the court for summary judgment on any claim in the summons which is only—
(a) on a liquid document; or
(b) for a liquidated amount in money; or
(c) for the delivery of specified movable property; or
(d) **for ejectment;** or
(e) for any two or more such matters as are described in paragraph (*a*),(*b*),(*c*) or(*d*);
in addition to costs.
(2) An application in terms of subrule (1) **shall be made at any time before the holding of a pre-trial conference, upon seven days' notice,** and the plaintiff shall deliver with such notice—
(*a*) if the claim is illiquid, a copy of an affidavit, made by himself or herself or by any other person who can swear positively to the facts—
(i) verifying the cause of action and the amount claimed, if any; and
(ii) stating that in his or her belief there is not a *bona fide* defence to the action and that appearance has been entered solely for the purpose of delay;
(*b*) if the claim is liquid, a copy of the liquid document on which the claim is founded, supported by an affidavit."

Of significance from the above is that summary judgment can be applied for once an appearance to defend has been entered, upon seven days' notice to the other party and at any time before the pre-trial conference. It is the entrance of an appearance to defend which can trigger an application by the plaintiff for summary judgment where the plaintiff is of the view that the appearance to defend has no merit. The fact that no plea was filed is neither here nor there as what is important is that the claim must be clear and unanswerable. The argument by the appellant that he was awaiting further particulars in order to file a special plea was neither here nor there as that in itself was not a bar to an application for summary judgment by the respondent as plaintiff. The important point is that the appellant had no defence to the actual merits of the claim and as such the lower court did not err when it made this finding that there was no defence, even *prima facie,* proffered on the merits.

The issue that the court *a quo* erred in granting relief in favour of a non-existing entity was adequately analysed by the court below in its reasons for judgment when it found that point lacking in merit because the only difference in the name was the gap between Maggio and Centre. As the lower court reasoned in dismissing the point *in limine*:

> "However, I believe the argument raised has no merit. The gap left between the word Maggio & Centre does not make him different entities. The same parties have appeared in court before on a different matter. According to an order attached by the Applicant the same parties appeared in court under case number 29839/18 where in the applicant got an order for an Interdict against

> the Respondent. I do not believe the way the name of the Applicant has been written on the summons renders the curt application defective. It cannot be said that the Applicant is non-existent simply because when the name was written, a gap was created between Maggio & Centre when it is clear that in some processes it is written as a single word. Even with that gap being there, the name is still pronounced and sounds the same. The point *in limine* is hereby dismissed."

Indeed as stated in the case of *Masuku* v *Delta Beverages* HB 172/12, even where there has been an inaccuracy in the identification of a party cited, if a party is nevertheless pointed out with sufficient accuracy to enable it to be correctly identified, that process is valid. In that case, *Delta Beverages (Pvt) Ltd* had been cited as *Delta Beverages*. The court stated as follows:

> "In other words *Delta Beverages* is known here and beyond. To me, applicant may have technically erred in her description, but, has described respondent with sufficient clarity to an extent of eliminating any mistake either legal or factual of respondent's identity. Applicant sufficiently described respondent."

That court also relied on the case of In *Van Vuuren Braun and Summers* 1910 TPD 950 where WESSELS J at 955 stated;

> "Now in order to bring a defendant legally into court a summons is required. In order that summons may be valid it must comply with the requirements of r6. It must purport to be a summons, a mere request or letter to the effect that the defendant is kindly requesting to appear in court on a certain day is an invalid citation. Next the summons must specify the defendant. It is true that it will not be described as accurately as he should be. If a man is baptised 'George Smith' it is no defect to call him "John Smith" because the individual is pointed out with sufficient accuracy. But if there were no mention of the defendant at all the summons would be a wholly worthless document and could not be amended by inverting the defendant's name in court."

The magistrate in the lower court therefore did not err at all in finding that placing of a simple space in the plaintiff's name, Maggiocentre was not an issue. It had no bearing on the application for summary judgment or even the intended special plea.

We dismissed this appeal for the reasons that it lacked merit as there was no error on the part of the court below in granting summary judgment where there was no defence to the claim. Summary judgment was procedurally applied for and properly granted as the appellant lacked a defence. Our finding was equally that the appeal had been brought for the purposes of delay and accordingly dismissed it with costs.

MAXWELL J…….AGREES

Jarvis Palframan, appellant's legal practitioners
Mabundu Ndhlovu Law Chambers, respondent's legal practitioners