NATIONAL EMPLOYMENT COUNCIL FOR TOURISM INDUSTRY
versus
ANTELOPE PARK (PVT) LTD

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 2 & 9 November 2022

Opposed Application

P Makuwaza, for the applicant
DC Kufaruwenga, for the respondent

TAGU J: This is a Court Application for Summary Judgment being made in terms of Rule 30 (1) of the High Court Rules, 2021.

The facts are that on 4 May 2022 the respondent acknowledged its indebtedness to the applicant in the sum of ZWL$5 830 703.22 (Five Million Eight Hundred and Thirty Thousand Seven Hundred and Three Zimbabwean Dollars and twenty-two cents) being unremitted levies up to March 2022. On the same acknowledgment of debt, the respondent undertook to service the debt as follows:

a) May 2022 ZWL$ 1 685 174.34
b) June 2022 ZWL$ 1 685 174.34
c) May 2022 ZWL$ 400 000.00
d) June 2022 ZWL$ 400 000.00
e) July 2022 ZWL$ 400 000.00
f) August 2022 ZWL$ 400 000.00
g) September 2022 ZWL$ 400 000.00
h) October 2022 ZWL$ 460 354.54

The respondent failed or neglected to hounour these terms of the acknowledgement of debt by failing to pay as undertaken and acknowledged and thus the total debt became due and payable to the applicant. Consequently, the applicant issued summons on 12 July 2022 under case number

HC 4579/22 against the respondent claiming ZWL$5 830 703.22 and costs of suit. The respondent entered appearance to defend. Feeling that the respondent does not have a *bona fide* defence to the claim the applicant filed the present court application for summary judgment.

The respondent raised a point *in limine* whether applicant is entitled to proceed with the application for summary judgment against Antelope Park (Private) limited which is not a legal entity. The respondent said applicant should have withdrawn its summons and file a proper summons with correct names. This was opposed by the applicant which argued that the respondent used the cited name when dealing with the applicant, hence they cannot distance themselves from the debt.

In the present case the respondent presented itself to the applicant as Antelope Park (Pvt) Limited. The acknowledgement of debt prepared and signed by the respondent's General Manager and Human Resources Officer dated 4 May 2022 well before the applicant issued its summons on the 12 July 2022 exposes the degree of respondent's dishonesty. The acknowledgment of debt reads as follows:

> "ACKNOWLEDGMENT OF DEBT
> **Antelope Park (Pvt) Ltd** acknowledges that it owes the National Employment Council for the Tourism Industry a debt of $5 830 703.22 being unremitted levies up to March 2022 and proposes to repay the debt as follows….." (my emphasis)

Clearly, the respondent traded in this name. Section 29 of the Companies and Other Business Entities Act [*Chapter 24:31*] allows companies to use other names other than their registered names for use in conducting business in Zimbabwe. With respect respondent cannot distance itself from liability on account that it has been sued in its trading name not registered name. Put differently, the respondent cannot be allowed to trade in a certain name, accrues debts in that name then when sued in that name then distances itself from such name. That the law cannot accept.

This court gave a stern warning to litigants who adopt the stance taken by the respondent. The case of *The Sheriff of the High Court* v *Antony William Mackingtosh & Ors* HH 330/18 is instructive. This is what MATHONSI J (as he then was) had to say:

> "I conclude therefore that the judgment creditor was entitled to sue the second claimant in its trading name or style, what Mr Tanyanyiwa chose to call "a brand." Clearly the second claimant presented itself to the transacting public as Harare Kawasaki. In fact, the passage in the contract of the parties which I cited above even refers to Harare Kawasaki as "a company incorporated in Zimbabwe." While admitting that it employed the judgment creditor, the second claimant wants to

> dissociate itself from the judgment taken against it in its trading name, a trading name it elected to use in the consultancy agreement, a real case of hiding behind the proverbial finger. It cannot succeed.
> To me it is dishonest in the extreme for the second claimant to attempt to evade liability in terms of the judgment taken against it in the name or style in which it related to the public. What belongs to Harare Kawasaki clearly belongs to the second claimant. It would appear that the second claimant uses the 2 names interchangeably in order to confound creditors. Therefore the claim made by the second claimant has no merit."

In the present case the respondent presented itself to the applicant as Antelope Park (Private) Limited. The acknowledgment of debt as I said earlier bears the testimony also the letter head had Antelope Park (Pvt) Limited. This exposes respondent's dishonesty and this court must show its displeasure with an award of costs on a punitive scale. I therefore dismiss the point *in limine.*

Coming to the merit it is trite that in an application of this nature the applicant has to establish and prove that it has a clear and an unanswerable claim against the respondent and that the respondent has no defence to the claim and has entered appearance to defend for the sole purpose of delaying the applicant's claim. It is common cause that the applicant is in possession of a valid acknowledgment of debt drafted by the respondent which is on p 7 of the record. There is also a second Acknowledgement of Debt drafted by the respondent later which bears a lower amount owed to the applicant. The applicant's counsel submitted that he has been always the counsel for the applicant and is not aware, and was never shown the second Acknowledgment of Debt. The counsel for the respondent disowned both Acknowledgments of Debit as not showing the true position as regards the debt. This is surprising given the fact that these two acknowledgments of debt were crafted by the respondent itself and not by the applicant.

It is not disputed that the applicant has a liquid document in the form of an acknowledgement of debt. The respondent while admitting it signed the two documents, submitted that exceptions to the *caveat subscripto* doctrine apply. However, it did not show any form of fraud, misrepresentation nor duress. The respondent simply does not have a *bona fide* defence to the applicant's claim. In the case of *Larfage Cement (Zimbabwe) Limited* v *Mugove Chatizembwa* HH 413-18 the court held that:

> "It is also settled that not every defence raised by the defendant will succeed in defeating a plaintiff's claim for summary judgement. It must be *bona fide* defence stated with sufficient clarity and completeness to allow the court to determine whether the opposing affidavit discloses a *bona fide* defence…Summary judgment is an extra – ordinary and indeed a drastic remedy in the sense

that it negates the right of a litigant who has expressed a willingness to access the court and to defend an action to do so. It is however a deliberate remedy designed to deny a *mala fide* defendant the benefit of the *audi alterum* partem rule simply because the plaintiff's claim would be unassailable. Therefore where the proposed defences of the defendant to the claim are clearly unarguable both in fact and in law, the drastic remedy of summary judgment is availed to the plaintiff."

I associate myself with the above sentiments.

IT IS ORDERED THAT:

a) Summary Judgment be and is hereby entered against the respondent.

b) The respondent shall pay the applicant the sum of ZWL$5 830 703.22 (Five Million Eight Hundred and Thirty Thousand Seven Hundred and Three Zimbabwean Dollars and twenty-two cents).

c) The respondent to pay interest on the above amount at the prescribed rate calculated from the date of the application to the date of full and final payment.

d) The respondent pays the applicant's costs of suit on a higher scale.

Makuwaza & Magogo Attorneys, applicant's legal practitioners
Messrs Jumo Mashoko & Partners, respondent's legal practitioners