STEPHEN HUDSON
versus
JOSEPH V. SITHOLE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 3 June & 21 July 2010

Mr *Chidziva*, for applicant
F. Piki, for respondent

MTSHIYA J; Order 10 r 64 of the High Court Rules, 1971 (r 64) provides as follows:

"(1) Where the defendant has entered appearance to a summons, the plaintiff may 'at any time before a pre-trial 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"

This application for summary judgment is premised on the above rule and the applicant prays for the following order:-

"Summary judgment with costs be and is hereby granted in favour of the applicant against the respondent in the sum of US$13 145,98 together with interest on that sum at the prescribed rate reckoned from the date of service of summons to date of payment in full, plus collection commission".

The relief sought is in line with the claim in the summons issued on 20 January 2010 and served on the respondent on 28 January 2010. The respondent entered appearance on 11 February 2010 and, convinced that the defendant had no *bona fide* defence to his claim, the applicant filed this application on 2 March 2010.

The applicant's declaration reveals that the claim is based on an acknowledgement of debt singed by the respondent on 9 September 2009. The acknowledgment of debt reads as follows:-:

"I, Joseph V Sithole, ID number 70-041987T13 of 66 McChlery Avenue Eastlea, Harare, hereby acknowledge indebtedness of US$11 000 as capital to Steven Hudson of Skinners Autobody Repairs, Manchester Road Southerton Harare, Over and above that, an interest accrual of US$2145-98 was levied as at October 2009.

I undertake to liquidate part of the said by October 15 2009 with the balance having to be negotiated for a future date to settle.

This acknowledgment of debt is covered under the jurisdiction and laws of Zimbabwe"

The claim in the summons states that the amount claimed is in respect of "services rendered to the respondent by the applicant at the respondent's special instance and request". The founding affidavit and the acknowledgement of debt are, however, silent on how the debt originated. However, in his opposing affidavit the respondent acknowledges the rendering of services in the following terms:-

> "The applicant runs a panel beating workshop. I had a vehicle, a Mercedes Benz which was involved in an accident. The applicant and I agreed that the applicant would effect the repairs. The applicant even advised that he was going to import some of the materials to be used on effecting repairs on my vehicle. However the applicant never showed me the receipts and the invoices to substantiate his claim".
>
> The above is in line with the wording of the claim in the summons.

The respondent then declares that he refused to honour the acknowledgement of debt because the amount claimed was not correct. He goes onto say he had only signed the document under duress because the applicant:-

"1. …….. caused a scene at my workplace in barricading my vehicle so that I could not go home.

2. ……. declined to get out of my office to an extend (*sic*) that I signed the 'paper' to let the applicant get out off (*sic*) my offices".

The respondent also says:- "I further paid the applicant Rands equivalent to US$1000-00. I also gave the applicant a sizeable volume of fuel which will meaningfully reduce the amount owned to the applicant".

The above, in my view, sums up the respondent's defence.

The applicant submitted that there was no evidence of threats or intimidation to show that the respondent signed the acknowledgement of debt under duress. There was nothing to show for the respondent's reaction to the alleged coercion. Furthermore there was also no evidence of payment of US$1000-00 and fuel. Apart from arguing that he was not issued with receipts in respect of imported spares the respondent does not deny that he owes the applicant some money for services rendered. That money, according to the applicant, is what appears in the summons. The appearance to defend was, in the view of the applicant, entered for delaying purposes.

On his part, the respondent argued that there were triable issues because there was a dispute relating to the issue of whether or not the applicant imported the spare parts for the respondent's vehicle. Furthermore the respondent had raised the defence of duress.

Relying on *Hughes v Lotleit* 1985(2) ZLR 179 HC, the respondent correctly quoted the following:-

> "Summary judgment will only be granted where the plaintiff has made out a cause of action to which the defendant has no possible defence"

The defendant went on to quote from *Hughes v Donenek Investments (Pvt) Ltd* 1998(2) ZLR (H) where it was said:-

> "All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that **"there is a mere possibility of success"**, he has a plausible case, there is a real possibility that an injustice may be done if summary judgment is granted".

I agree with the above.

Given the import of r 64 and the principles of law enunciated in the above two cases, what remains for me to do is to determine whether or not there is a possible defence to the applicant's claim for me to deny him the relief he seeks.

A proper reading of the papers before me leads to the conclusion that there is nothing to disable me from granting the applicant the relief he seeks. This application conforms with the requirements of r 64.

The respondent has, without convincing reasons, tried to disown the acknowledgement of debt. The alleged coercion/duress would, in my view, have called for the need on the part of the respondent to report the matter to the police immediately as the alleged act of the applicant would amount to extortion. There is nothing in the papers before me to show that the respondent took any steps to ensure that the truth (i.e. alleged coercion) about the acknowledgment of debt signed on 9 September 2009 was known. This application was filed on 2 March 2010 and only on 8 March 2010 did the respondent then find it necessary to tell the world that on 9 September 2010 he was forced to sign a "piece of paper".

Furthermore the respondent, without proof, then goes on to say he paid US$1000-00 and gave the applicant a sizeable volume of fuel. There are no receipts and dates mentioned for those transactions. A rejection of the alleged defence by the respondent leads me to accepting the applicant's case as presented. In so deciding I also derive comfort from the fact that the respondent accepts that he owes the applicant some money for services rendered.

In dealing with an application for summary judgment in *Central Africa Building Society v Ephison Simbarashe Ndahwi* HH 18-2010, MAKARAU J, as she then was, observed:-

> "However, summary judgment proceedings demand different considerations. This is so because summary judgment as a procedure is extraordinary in that it takes away from the defendant some of the safeguards that are guaranteed by a full trial. It is a drastic remedy that is based on the supposition that the plaintiff's claim is beyond impeachment on any material basis and that the plaintiff is merely being held back from getting judgment by the rigors of a full trial which are then curtailed to his or her advantage. For the plaintiff to gain such an unusual advantage over the defendant, he or she must meet certain very stringent requirements as set out by the rules. It has thus been held time and again that the plaintiff's wishing to use the speedy procedure of summary judgment must bring themselves squarely within the provisions of the rules"

I fully agree that the above clearly sets out the principles to be considered in granting summary judgment. Having taken the outlined principles into consideration, I am, *in casu*, fully convinced that the respondent has filed an appearance to defend merely to delay the inevitable. My finding therefore, on a balance of probabilities, is that the respondent has no *bona fide* defence to the action. The claim is accepted but the respondent merely wants to avoid payment. There is therefore no reason for me to deny the applicant the relief he has prayed for.

It is accordingly ordered as follows:-

1. That summary judgment with costs be and is hereby granted in favour of the applicant against the respondent in the sum of US$13 145-98 together with interest on that sum at the prescribed rate from 28 January 2010 to date of payment in full; and

2. That the respondent shall pay costs of suit.

Kantor & Immerman, applicant's legal practitioners
E G Musimbe & Partners, respondent's legal practitioners