BARBRA CHANAIWA
versus
VIOLA NGOTA

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 19 November 2010 & 30 June 2011

M Nkomo, for applicant
Respondent in Person

Opposed Court Application

GOWORA J: This is an application for summary judgment wherein the applicant seeks the following relief:-

(a) An order evicting the respondent from premises known as 36 Miranzi Road, Kambanji, Harare.

(b) Payment of arrear rentals in the sum of US$16 00 for the months of July 2009 to December 2009.

(c) Holding over damages at the rate of US$300 monthly from January 2010 up to the time the respondent vacates or is enacted from the premises, and

(d) Costs of suit.

The applicant's claim is premised on an agreement of lease concluded between the parties on 30 June 2008 in terms of which the applicant leased to the respondent the premises described above. The rental for the leased premises was, after Zimbabwe adopted a multi currency system set at US$300 per month. The applicant contends that in July 2009 the respondent only paid US$200, leaving a balance of US$200 and that she has not paid any rentals from August 2009 until December 2009 when summons was issued. Demand for the rentals has been made and respondent has not paid and has been given notice to vacate the premises but has not done so.

In answer to the summons and declaration, the respondent has filed a plea. In the plea, the respondent admits that the rental was agreed at US$300-00 but that there was no agreement as to when it had to be paid. She avers that she paid rentals for August 2009 and denies being liable to the applicant for the sum of US$1600-00. She admits being liable in the sum of US$1200-00. She avers that she would have paid had it not been for the funerals of her father

and father-in-law. It is the view of the applicant that the respondent does not have any defence to claim for eviction and arrear rentals. The applicant avers in her affidavit that the plea that the respondent would have paid had it not been for the funerals does not constitute a defence and that in the circumstances an order that summary judgment is justified. I agree. The respondent has filed an opposing affidavit in which she takes issue with the applicant for having failed to lay a basis for the application due to failure on her part to attach the summons plea and other documents to the application.

What is required in a founding affidavit and in an application for summary judgment was set out by GUBBAY CJ in *Chiadzwa v Paulkner* 1991(2) ZLR 33 (SC) R 64 of the High Court Rules require the plaintiff to file an affidavit made by himself on by any other person who can smear positively to the facts verifying the cause of action and the amount claimed if any, and stating that in his opinion there is no *bona fide* defence to the action.

The affidavit attached to this application complies fully with the requirements of r 64. It has been deposed to by BMW Kahari who was given General Power of Attorney by the applicant in 1993 to handle her affairs. The cause of action has been verified and confirms that the respondent has not paid rentals for the period stated. She also disputes that the respondent paid rentals for August and alleges that the respondent had not furnished proof for the payment of the August 2009 rentals.

The respondent disputes that she owes $1600 but admits owing $1200. She then goes on to say that she has been advised that legally she can only be compelled to discover proof of payment during the discovery stage at the trial and that therefore the insistence by the applicant that she exhibits proof of such payment at this juncture is unfounded.

A defendant in an application for summary judgment has an onus to satisfy the court that he has a good *prima facie* defence to the plaintiff's claim. This has often been interpreted as requiring the defendant to allege facts which if he is able to establish them at the trial would entitle him to succeed at such trial. Therefore all that a defendant has to establish in order to defeat a claim for summary judgment brought against him is that there is a mere possibility of him succeeding at the trial. He must just show that he has a plausible case and that there is a possibility that an in justice would be done if summary judgment were granted against him.

It goes without saying therefore that when one speaks of possibilities the burden placed to upon the defendant is not onerous and can be discharged easily. He is not required to adduce

proof but is given leeway to allege facts pointing to a plausible defence. See *Jena v Nechipole* 1986(1) ZLR 29.

In *casu*, the respondent has accepted that she owes an amount of $1 200-00. She disputes the sum of $1800-00 but it is not clear where that sum emanates from as the arrear rentals claimed on the summons total $1600. She says she has paid some of the money being alleged that she owes. She omits however in her opposing affidavit to allege facts that would entitle her to succeed if the matter were to go for trial for instance she should have stated which months she has paid rentals in respect of, the amounts paid the dates upon which the amounts were paid and the person to whom such payments were made. Instead she states that she has a valid defence to the claim, the previous contract and a "debtness plan which is currently in place". I could not make head or tail of the last phrase. She states that she agreed with the plaintiff on a new payment plan. She does take the count into her confidence on the circumstances surrounding the indebtedness and payment as to when it was negotiated and with whom and what was agreed. She simply makes a bald averment that there was a novation between the parties and leaves it at that.

In *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* SC 139/86 McNALLY stated:

> "……. the statement of material facts (must) be sufficiently full to persuade the court that what the defendant has alleged, if proved at the trial will constitute a defence to the plaintiff's claim …. If the defence is averred in a manner which appears in all circumstances needlessly bald, vague, sketchy that will constitute material for the court to consider in relation to the requirement of *bona fides* (*Breitenbach v Fiat SA Bplc* 1976(2) SA 226").

A defendant must as a consequence take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities. In *casu* the respondent has been content to make bald allegations which are sketchy to say the list. Her *bona fides* of necessity comes under scrutiny and it is fair to say that her opposition, to the application in the absence of any factual allegations on her part as a basis for a defence, is therefore *mala fide*.

I find that she has not placed a *prime facie* defence to the application for summary judgment.

In the premises the application succeeds and there will be an order in terms of the draft.

Donsa-Nkomo & Mutangi, applicant's legal practitioners