METHODIST CHURCH IN ZIMBABWE

versus

ARNOLD MAJURU CHIURA

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 12 October 2012 and 17 October 2012

*N. Magaya* for the Applicant

*N. Chikono* for the Respondent

**Opposed Application**

 MATHONSI J: The Applicant instituted summons action against the Respondent for payment of sums of US$18 968-92; ZAR 19 492-95; BWP 1 037-12 and GBP 128,55 together with attorney and client costs, in respect of its funds which went missing while under the custody of the Respondent who was the church Treasurer for its Parktown congregation.

 On 29 March 2010, the Respondent had signed an acknowledgement of debt in terms of which he admitted owing the various sums set out above. The said acknowledgement of debt reads in pertinent part as follows;-

 “The parties agree as follows:-

1. That the Treasurer owes the church,

US$18 968,92 ……………………..

ZAR 19492,95……………………..

BWP 1 037,12 ……………………..

GBP 128,55 ………………………..

Being church funds that he converted to own use without the authority of the church.

1. The above debt may change upon presentation of acceptable proof of payment or income.
2. The Treasurer agrees to repay the Church all funds owing and without prejudicing the church.
3. All the funds owing in 1. above shall be repaid on, or before 31st December 2010.
4. The Treasurer hereby authorises the church to take legal proceedings against him in the event that he is in default of this agreement.”

When the Respondent failed to settle the debt in terms of the agreement, the Applicant issued summons aforesaid. Whereupon, the Respondent entered appearance and filed a plea in the following:-

 “BE PLEASED TO TAKE NOTICE that the Defendant pleads to the Plaintiff’s claim as

 follows;-

 *IN LIMINE*

 The Defendant avers that the matter is *res judicata* as there is a restitution order granted

 by the criminal courts which has the effect of a civil judgment.

 ON THE MERITS

1. Ad paragraph 1,2 and 3: These are admitted.
2. Ad paragraph 4: the amounts are estimate figures and were subject to forensic audit. Further at the criminal courts the Plaintiff said that the prejudice was $15 000-00.
3. Ad paragraph 5: This is not denied but the Defendant avers that the amount is disputed.
4. Ad paragraph 6: This is admitted but the Defendant avers that the figures were subject to verification through an audit.
5. Ad paragraph 7: Admitted. The Defendant is not appealing against payment of restitution but the sentence which is harsh.
6. Ad paragraph 8: The Defendant avers that there is already a court order which he is prepared to fulfil in the form of a restitution order.

The order is in the sum of $1 500-00 and not the amounts claimed. The Defendant therefore is not liable to pay the figures claimed.” (The underlining is mine).

 It is not clear what amount of restitution was ordered by the criminal court because the Respondent makes reference to $15 000-00 and $1 500-00. What is clear though is that whatever restitution was ordered it was not the sums claimed by the Applicant as contained in the acknowledgement of debt.

 The Applicant has made an application for summary judgment on the ground that the Respondent does not have a *bona fide* defence and that appearance has been entered for dilatory purposes. The application is opposed by the Respondent who, while conceding signing the acknowledgement of debt, submits that the figures captured in that document were to be subjected to forensic auditing in order to verify them. In support of that claim he purports to attach a copy of minutes. Unfortunately no such minutes were attached to the opposing affidavit.

 Whichever way, the acknowledgement of debt signed by the Applicant is completely silent on any audit and makes no reference what so ever to such condition being attached to repayment of the debt. It is noteworthy that nowhere in his papers does the Respondent suggest either that he did not sign the acknowledgement of debt or that it was signed under any form of duress. Indeed, other than the reference to an audit, he does not impugn the document of debt at all. I therefore conclude that he signed it freely and voluntarily and that it represents what he admitted as owing to the Applicant.

 Regarding the defence of *res judicata*, it is not easy to follow the Respondent’s argument. The requisites of a plea of *res judicata* were set out by the learned authors Hebstein and Van Winsen in *The Civil Practice of the Superior Courts in South Africa*, 3rd Edition, *Juta & Company Ltd* at page 270 where they stated:-

 “……………the two actions must have been between the same parties or their successors

 in title, concerning the same subject matter and founded upon the same complainant.”

 The Respondent was tried in the Criminal court and convicted. He was ordered to make restitution to the Applicant in the sum of $15 000-00 or $1 500-00 depending on which figure is correct. It is true that in terms of section 365 (1) of the Criminal Procedure & Evidence Act [*Cap 9:07*] a criminal court may order restitution. That section must however be read with section 368 (1) which provides that;-

 “A court shall not make an award or order in terms of this part unless the injured party or

 the prosecutor acting on the instructions of the injured party applies for such an award or

 order.”

 See also section 372 which provides that such an award or order shall only have the same effect as a civil lodgment of the court upon judgment with the registrar or clerk of the court. It is common cause that no application for restitution was made and that the Respondent has appealed against that sentence.

 *In casu,* it is difficult to say that the criminal proceedings involved the same parties when such proceedings are between the state and an accused person or that they contained the same subject matter. By the Respondent’s own admission those proceedings concerned a sum of $15 000-00 (paragraph 2 of the Defendant’s plea). It cannot be said that the two matters concerned the same complaint. Indeed the papers do not even show that the order for restitution includes any figure set out in the acknowledgement of debt, or any part of it.

 More importantly, it has not been suggested that the Applicant applied for restitution or that the award had been lodged with the clerk or registrar of court for it to become a civil judgment. Therefore it has not been shown that section 374 came into effect. I am therefore not persuaded that the requisites of *res judicata* have been satisfied in this matter.

 In order to succeed in contesting a summary judgment application the Respondent must disclose his defence and material facts upon which it is based with sufficient clarity and completeness as to persuade the court that if proved at the trial such facts will constitute a defence to the Applicant’s claim*. Hales v Doverick Investments (Pvt*) *Ltd* 1998 (2) ZLR 235 (H) 239A-B.

 In my view the Respondent has badly failed to do so. For its part, the Applicant relies on an unequivocal acknowledgement of indebtedness which has not been impugned by the Respondent. It has shown that it should be protected from the trouble of going through a trial because its case is unassailable.

 It should have been apparent to the Respondent from start to finish, especially with the benefit of legal counsel, that it stood no chance of success. He did not even begin to present an arguable case. There can be no other conclusion to be made from his conduct of taking the matter all the way except that he was abusing the process of the court in order to buy time and frustrate a legitimate claim. Such conduct must be discouraged by an award of costs on a punitive scale as a seal of the court’s disapproval.

Accordingly it is ordered that;-

1. Summary judgment be and is hereby granted in the sums of;-
2. US$18 968,92 (eighteen thousand nine hundred and sixty eight dollars ninety two cents)
3. ZAR 19 492,95 (nineteen thousand four hundred and ninety two rands ninety five cents)
4. BWP 1037,12 (one thousand and ninety seven pula twelve thebe)
5. GBP 128,55 (one hundred and twenty eight pounds fifty five shillings)
6. The Respondent shall pay the costs of suit on a legal practitioner and client scale.

*Coghlan, Welsh & Guest*, applicant’s legal practitioners

*Ngarava, Moyo & Chikono*, respondent’s legal practitioners