EDWARD K. SHAMUTETE
versus
MYCROFT ENGINEERING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 13 March 2014 and 7 May 2014

Opposed application

Advocate *F. Giruch*, for the applicant
C. Kwirira, for the respondent

MATANDA-MOYO J: This is an application for summary judgement. The plaintiff issued summons against the defendant on 26 April 2012 for the payment of $94 465-00, for maize allegedly supplied at the instance of the defendant. In its declaration, plaintiff alleged that defendant and a Zambia company by the name Linking Africa entered into an agreement whereby Linking Africa would supply white maize to the defendant at a price of $210-00 per metric tonne. Linking Africa initially supplied defendant with 402 metric tonnes of white maize at a price of $84 420-00. Defendant paid a total of $81 935-33 leaving a balance of $2 484-67.

Linking Africa made a further supply of 438 metric tonnes of white maize valued at $91 980-00. No payment has been made to date for that consignment. On or about 31 December 2010 Linking Africa ceded or assigned its rights to the agreement with defendant to the plaintiff. Plaintiff then issued summons against defendant. Defendant entered an appearance to defend and subsequently filed its plea on 31 August 2012 prompting plaintiff to file for summary judgement.

Defendant opposed the application for summary judgement. Defendant denied having received the second consignment of 438 tonnes. Defendant alleged it received 150 tonnes. Of the 150 tonnes maize valued at $9 660-00 was rotten. Defendant alleges he paid $1 515-33 for that consignment leaving a balance of $20 325-00. Defendant does not oppose summary

judgement being granted against it in the sum of $20 325-00. Defendant alleges to have paid the full amount for the first consignment.

For applicant to succeed in an application of this nature, he must show that he has a clear and definitive claim against the respondent. Applicant must show the defendant has no valid defence to his claim. Once plaintiff has discharged that onus, the onus shifts to the defendant to show that he has *a bona fide* defence to the claim.

However the procedure for summary judgement is clear. Applicant files his affidavit, respondent files its opposing affidavits. Once that is done no further supplementary affidavits can be filed without leave of court. In total disregard of the rules applicant herein filed an answering affidavit. There is no room for filing an answering affidavit in an application for summary judgement. Rule 67 (c) of the High Court Rules 1971 is instructive on this point. It provides,

> "No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, ---------- provided that the court may do one or more of the following-

a) .
b) .
   (i)
   (ii)

c) Permit the plaintiff to supplement his affidavit with a further or both of the following:-

   (i) Any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with on his first affidavit; and

   (ii) The question whether, at the time the application was instituted. The plaintiff was or should have been aware of the defence."

Applicant after receiving respondent's opposing affidavit proceeded to file an answering affidavit. It is clear applicant was treating an application for summary judgement as any other normal application. It was only after reading the objection by the respondent that the applicant as an afterthought decided to make an oral application for permission to file a further affidavit. At the time of filing, such answering affidavit was not accompanied by an application for leave to file that affidavit. The affidavit was filed without leave of court in breach of r 67(c) above.

The applicant did not explain why he failed to file an affidavit in support of his application to file a further affidavit. In coming to my conclusion, I have considered that summary judgement results in a final judgement against a party without affording that party a right to be heard at trial. For this reason alone the courts must ensure compliance with the rules. The defendant must not be taken by surprise at the date of hearing. The defendant herein came to court ready to raise a preliminary point to exclude plaintiff's answering affidavit. Defendant was taken by surprise when the plaintiff indicated he intended to make an oral application for the affidavit to be admitted. I fully subscribe to the words of STYDOM JP (as he then was) in the case of *Kelnic Construction (Pvt) Ltd v Cadilu Fishing* (Pvt) Ltd 1988 NR 198 at p 201 c-f that;

> "There can be no doubt that summary judgement is an extra ordinary remedy, which does result in a final judgement against a party without affording the party the opportunity to be heard at trial. For this reason courts have required strict compliance with the rules and only granted summary judgements in instance where the applicant's claim is unanswerable."

On the other hand a court has generally a "discretion which is inherent to the just performance of its decision-reaching process, to grant that relief which is necessary to enable a party to make full representation of his true case. Amplification and rectification should be equally accessible in summary judgement proceedings." See *Juntgen T/A Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (w).

However the courts should exercise such discretion judiciously. Applicant in an application to file further affidavit must explain why such evidence was not filed when he filed his initial affidavit. Applicant submitted that defendant raised new issues in his opposition which applicant had not contemplated at the time of filing his initial affidavit. I have perused the 'answering affidavit' and I have come to the conclusion that indeed it raises pertinent issues raised by defendant in his opposition. Plaintiff cannot be said to have had such information when he filed his summary judgement application. It is clear that an injustice would be caused if I do not give plaintiff leave to supplement his affidavit in response to Sindisiwe's issue. For the first time in its opposition respondent made the allegation that it paid $4 000-00 to one Sindisiwe Ndlovu. It became necessary for the plaintiff to supplement its affidavit to deal with that issue. I have thus condoned plaintiff's filing of the affidavit as it relates to payment of $4 000-00 only without leave of court and

admit such part of the affidavit. However should applicant win its case it is not entitled to costs for that application.

The other contents and attachments are not admitted as applicant had such information at the time of filing the application.

For this application to succeed applicant must show that he has a good indefensible claim against the respondent. He must show that defendant opposed the claim merely to delay payment. See *Timda Truck Parts (Pvt) Ltd v Autolite Distributors (Pvt) Ltd* 1996 (1) ZLR 244 HC. Defendant acknowledges receiving the first consignment. Defendant averred that the balance was paid to Sindisiwe Ndlovu. Defendant alleged it paid $4000-00 and defendant did not explain why it would pay $ 400-00 when only $2 484-67 was outstanding. I admitted the affidavit of Sindisiwe Ndlovu so that this court would deal fairly with that point. Sindisiwe denies receiving $4000-00 from the defendant. Defendant has no *bona fide* defence against the plaintiff in relation to the balance outstanding on the first consignment. Applicant is entitled to summary judgement of that amount.

On the second consignment plaintiff alleged that he delivered to defendant 438 tonnes of white maize valued at $91 980-00. No proof of delivery has been attached to the application despite plaintiff having received defendant's plea that it only received 150 tonnes of maize. See para 7 of defendant's plea;

> "7. ---------- Linking Africa delivered 150 tonnes of maize only. The plaintiff is challenged to produce proof of delivery which he has refused to furnish the defendant with-------.
>
> 8. the 150 tonnes delivered were not from Linking Africa hence were of poor quality and some tonnes were rotten.----------"

In his application for summary judgement plaintiff failed to show that he has an unanswerable claim against the defendant. Plaintiff attempted to do so via the answering affidavit which part I have ruled to be improperly before me. Defendant has shown that it has a bona fide defence against the plaintiff on the second consignment. Defendant referred me to the case of *Chrisnar (Pvt) Ltd v Statchbery* 1973 (1) ZLR 277 GD where BECK J said at 297 D,

> "------ it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly measurable, both in fact and in law, that this drastic relief will be afforded to a plaintiff."

I am satisfied that the defendant has raised material facts which if proved disclose a *bond fide* defence. See *Standard Bank of SA Ltd v Panagiotic* 2009 (3) SA 363, *Mahsaj* v *Barclays National Bank Ltd* 1976 (1) SA 418 (A) and *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd and Anor* 2010 (1) ZLR 227(H).

However defendant acknowledges owing $20 325-00 for the second consignment and I see no reason not to enter judgement for that amount at this stage.

In the result summary judgement is entered in favour of the applicant in the following;

1) That respondent be and is hereby ordered to pay to the applicant the balance of $2 484-64 for the first consignment.
2) That respondent pays to the applicant the sum of $20 325-00, being the admitted amount for the second consignment.
3) That respondent pays interest at the rate of 5% from date of demand to date of payment.
4) That the applicant proceeds to trial on the disputed amounts.
5) That each party pays its own costs of suit.

Dube, Manikai and Hwacha, applicant's legal practitioners
Magwaliba and Kwirira, respondent's legal practitioners