MIDLANDS STATE UNIVERSITY
versus
R McDIARMID (PVT) LTD
and
DERRICK McDIARMID
and
KENNETH McDIARMID
and
CHARLES CANNINGS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 18 July 2018 & 16 November 2018

Opposed Application.

O Kondongwe, for the applicant
T Tabana, for the respondent

MANGOTA J: I dealt with this application on 18 July, 2018. I entered judgment for the applicant on an *ex' tempore* basis. I ordered the first respondent to pay to it:

(a) the sum of $242 900.01

(b) interest thereon at the prescribed rate - and

(c) costs of suit.

On 24 August, 2018 the High Court Registrar wrote advising that the first respondent appealed my decision. He requested for reasons for my decision for purposes of the appeal. These are they:

The application is one for summary judgment. It has its genesis in a contract which the applicant and the first respondent concluded in October, 2016.

In terms of the contract, the first respondent agreed to supply, deliver and install five thousand, 5 000, auditorium chairs at the applicant's premises. The negotiated value of the chairs was $461 250. The applicant paid a deposit of $276 750. The paid sum was 60% of the total amount which it was to pay for the chairs. It was the parties' agreement that the chairs would be delivered

to the applicant's premises within five (5) weeks from the date that the applicant paid the deposit of $276 750.

The first respondent received the deposit of $276 790. It, however, did not deliver the chairs within the stipulated period of five weeks. Nor did it do so todate.

On 13 October, 2017 the applicant sued the first respondent together with the second to fourth respondents who are its directors. It sued those in terms of s 318 of the Companies Act [*Chapter 24:03*]. It sought to recover, from the four respondents, the deposit which it paid to the first respondent less $33 849.01 which it owed to the first respondent in terms of the parties' other agreements. It, therefore, sought to recover the sum of $242 900.01.

The respondents entered appearance to defend. They raised a special plea. They insisted that the applicant did not have a cause of action against the second, third and fourth respondents. They acknowledged that:

(i) the applicant concluded the contract with the first respondent;

(ii) the first respondent received the deposit of $276 750 from the applicant-and

(iii) the first respondent did not supply, deliver and install the chairs within the five-week period which the parties had agreed upon.

They stated, in their plea to the claim, that:

(a) the applicant delayed in paying the deposit;

(b) there were changes in specifications;

(c) there were challenges in accessing foreign currency from the Reserves Bank of Zimbabwe - and

(d) the guest of honour who was the former President of Zimbabwe changed the dates for the ceremony for which the chairs were being manufactured.

They denied that the first respondent committed any breach of contract. They averred that the applicant cancelled the contract upon a realisation that the project was not well thought through given that the chairs which had been ordered were not suitable for the multi-purpose hall. They stated that the applicant was not entitled to any refund in circumstances where the first respondent procured the material for use and the applicant reneged.

The position which the respondents took, as gleaned from their plea, precipitated the application for summary judgment. The application was filed against the first respondent only. The

applicant's papers state as much. Paragraph 9 of the founding affidavit is relevant in the mentioned regard. It appears at p 4 of the record. It reads:

> "9. This is an application for summary judgment against the 1st respondent in terms of Order 10 Rule 64 of the High Court Rules, 1971". (emphasis added).

That the application was against the first respondent only is also evident from a reading of para (2) of the applicant's draft order. This appears at p 31 of the record. It reads:

> "The 1st respondent be and is hereby ordered to pay ……". (emphasis added).

In its opposition to the application, the first respondent stated that there was no cause of action against the second, third and fourth respondents. It insisted that the application should be dismissed as against the mentioned three respondents. It did not explain why it refrained from dealing with the merits of the application for summary judgment. All it said, on that matter, was that, if the court dismissed its *in limine* matter in regard to the applicant's suit of the second, third and fourth respondents, it would seek leave of the court to respond to the merits. It did not seek such leave of court when the matter was heard and determined.

It is evident that the first respondent does not have a *bona fide* defence to the applicant's claim. If it did, it would have stated the same in its notice of opposition. It wasted a lot of time and effort dealing with a matter which was not before the court. The second, third and fourth respondents were not before the court when the application for summary judgment was heard. The application had nothing to do with them. It had everything to do with it as the only respondent.

The first respondent was ably legally represented in the application. It cannot, therefore, be suggested that it did not appreciate the meaning and import of the application. It knew that the same related to no one else but to it. It, for reasons which are known to itself, chose not to deal with the same. Its statement which was to the effect that it would deal with the merits of the application after the issue which related to the three respondents had been disposed of was misplaced.

The applicant informed it in clear and categorical terms that it was not dealing with its directors. It said it was proceeding against no one else but itself. Why it chose to avoid the issue which pertained to it under the pretext of dealing with an unnecessary preliminary matter stretches the mind of the court.

It is trite that what is not denied in affidavits is taken as having been admitted (See *Fawcett Security Operations* v *Director of Customs & Excise*, 1993 (2) (SC), DD *Transport (Pvt) Ltd* v *Abbot*, 1988 (2) ZLR 92 and In *Remo Investment Brokers (Pvt) Ltd* v *Securities Commission of Zimbabwe*, SC 13/13).

The applicant made averments which the first respondent does not deny. It is for the mentioned reason, if for no other, that it insists that the first respondent entered appearance to defend only for the purpose of delaying the inevitable. It states, and l agree, that the first respondent does not have a *bona fide* defence to its claim.

The application, in my view, stands unopposed. The first respondent does not have any defence to the applicant's claim. It is for the mentioned reason that it refrained from dealing with the merits of the application. It has nothing to say on that.

Annexure 5 which the applicant attached to its application is relevant. It appears at page 29 of the record. The annexure constitutes the first respondent's acknowledgment of its indebtedness to the applicant. It is on the basis of the same that it requested the applicant to set off the sum of $33 849.01 from the sum of $276 750 which the latter is claiming from it.

The statements which the first respondent made in its plea are neither here nor there. It made them as a way of running away from paying to the applicant what it owes to it. If the same held, nothing prevented it from repeating them in the application for summary judgment wherein it was cited alone.

The applicant proved its case on a balance of probabilities. The application is, in the premise, granted as prayed in the draft order.

Dube Manikai and Hwacha, applicant's legal practitioners
Rubaya Chatambudza, respondent's legal practitioners