HH 210/21
CIV "A" 98/20

ZIMBABWE INSTITUTE OF LEGAL STUDIES
versus
DMA ARCHITECTURAL AND PLANNING CONSULTANTS

HIGH COURT OF ZIMBABWE
MAFUSIRE J & MUSITHU J
HARARE, 23 March 2021

Civil appeal

Date of *ex tempore* judgment: 23 March 2021
Date of written judgment: 28 April 2021

Adv *J.J. Chirambwe,* for the appellant
Mr *A. Muchandiona*, for the respondent

MAFUSIRE J

[1] This is an appeal from the magistrate's court. It is against an order of summary judgment granted in favour of the respondent against the appellant. At the end of the hearing we dismissed the appeal with costs for lack of merit and delivered our judgment *ex tempore*. The appellant has appealed to the Supreme Court. Written reasons are now required.

[2] In the court below, the respondent issued summons against the appellant for payment of an amount in Zimbabwe dollars equivalent to USD5 730-00. The amount was said to represent the outstanding balance of fees due and payable by the appellant in respect of certain architectural services rendered by the respondent to the appellant at the appellant's instance and request. The amount was itemised on an invoice submitted by the respondent to the appellant. The respondent is a firm of architects. The appellant is an educational institution. The summons averred that the architectural services were rendered in or about June 2019. It further averred that in breach of the agreement between the parties, and despite several demands, the appellant failed or neglected or refused to settle the amount.

[3] The appellant entered an appearance to defend. The respondent applied for summary judgment, verifying the cause of action and stating that its claim was unanswerable and that an appearance to defend had been entered solely to delay the inevitable.

[4] The appellant filed a notice of opposition. It disputed the amount claimed, essentially on the basis that it was overstated. Summary judgment was granted in default of appearance by the appellant or its legal practitioner. The appellant applied for rescission of judgment, alleging that it had not been in wilful default. It alleged that its legal practitioners had had a tyre puncture on her way to court and that efforts to have it mended in time for the court appearance had not succeeded. It also alleged that it had a *bona fide* defence to the claim in that it had raised a triable issue in regards to the quantum.

[5] The respondent opposed the application for rescission of judgment. It alleged that the appellant had been in wilful default because its legal practitioner had simply forgotten about the court date, an aspect she had allegedly confessed about on the telephone to the respondent's legal practitioner. The respondent also alleged that the appellant had no *bona fide* defence to the claim and argued, among other things, that upon receipt of the letter of demand, not only had the appellant responded quite late, but also that in that response it had effectively admitted its indebtedness.

[6] It appears the appellant's application for rescission was eventually granted. It is not clear from the record how it was granted or on what basis or on what terms. The record from the court *a quo* does not show. In fact, it is not quite in order. Among other things, the documents inside are thoroughly mixed up. However, we deduced that rescission had been granted because the court had gone on to pass judgment on the merits of the application for summary judgment.

[7] The appellant appealed to this court. Four grounds of appeal are listed. Some of them are broken down into two or more sub-grounds. But in substance, there is only one ground of appeal. Appellant's counsel concedes as much. The grounds are merely repetitive, the same thing being stated and restated over and over again, albeit in different ways. The one issue raised by the appeal is that the court *a quo* erred in granting summary judgment when it should have seen that the amount claimed had been overstated and that the claim was neither a liquidated amount or based on a liquid document.

[8] At the commencement of the hearing, counsel for the appellant applied for a postponement on the basis that he had just recently been briefed and that he wanted to file supplementary heads of argument, essentially to cite some foreign case authorities that would shed light on the international practice of architects and the levying of charges for architectural

services rendered. Finding the reasons rather maladroit, we dismissed the request for an postponement and directed that the hearing should proceed, but with the concession that counsel was free to refer to any such foreign case authority as, in his view, might be helpful.

[9] The appeal was argued. As said already, we dismissed it soon after argument. It was our considered view that the appellant was merely out to buy time. It was using court process to avoid or stave off the day of reckoning. From the onset, liability had never been in issue. Even quantum. The appellant insists it has raised a triable issue in regards to quantum and that for that reason the matter should be referred to trial.

[10] The summary judgment application procedure is a well-trodden path. The same arguments are recycled case in case out. Very little else that is really new rarely emerges. Counsel for the appellant referred to a case from Uganda. But it said nothing novel. They are the same principles as traversed in the various case authorities locally. In the present case, we have examined the facts closely but failed to see what it is the appellant wants to say at the trial that it cannot say now.

[11] The facts are largely common cause. There was an agreement between the parties. That is not in issue. The agreement was for the respondent to render architectural services, particularly drawings or designs for the expansion work or extensions to the appellant's college building. That is not in issue. The respondent did carry out its mandate. That is not in issue. It submitted an invoice to the appellant. It is dated 17 June 2019. The appellant does not challenge it. It does not say anything at all about it at the relevant time. The invoice itemises what work was done; by who, and at what cost. The total shown is USD 6 250-00. It even shows that the appellant indeed had made a part payment in the sum of USD520-00, to leave the outstanding balance at USD 5 730-00. The appellant does not dispute anything about it or its contents. But it does not pay either.

[12] The respondent waits. In September 2019 it decides to sue. But before it does, its principal sends an e-mail to the appellant's principal on 17 September 2019, attaching a final demand and a copy of the invoice. There is no immediate response by the appellant. The respondent's legal practitioners issue another letter of demand on 23 September 2019. Again there is no immediate response from the appellant until 28 October 2019 when a letter from the appellant's legal practitioners, curiously dated 1 October 2019, is received by the respondent's legal practitioners. At that time the appellant's legal practitioners were operating from Milton

Park, a suburb in Harare, very close to the city centre [they could still be there]. The respondent's legal practitioners were operating from the Harare central business district. We are not being finicky by supplying these details. There has been no explanation why the response by the appellant's legal practitioners took so long to reach its destination, given that the respondent wanted its money and had been waiting since June 2019, and also given that the letter of demand from its legal practitioners gave seven days for payment. In their subsequent response, the respondent's legal practitioners do raise the point about this inordinate delay.

[13] The letter from the appellant's legal practitioners is quite telling. It practically gives the game away. It raises no genuine dispute worthy of a trail. It virtually admits the liability. Only for the first time is an attempt made to challenge quantum. The material portion of that letter reads:

> "Our client, the **Zimbabwe Institute of Legal Studies** (ZILS) has referred to us your letter dated 23 September 2019 refers (*sic*).
> Our client advises us that your demand in the sum of $65 895-00 is grossly overstated and not therefore due and payable.
>
> Our client advises that its principal Director has a personal relationship with yours and they had agreed on a deferred payment.
>
> We therefore suggest that the parties hold a meeting to discuss this matter."

[14] The letter is telling because it was plainly and reasonably incumbent upon the appellant to mention unequivocally in what way the amount, which it had been aware of for the preceding four months, and had made part payment towards thereto, had been overstated. It did not. That the amount was overstated has been the mainstay of the appellant's defence throughout the application for summary judgment and in this appeal. But the law says, in order to avoid summary judgment, a defendant has to take the court into his confidence. He must provide sufficient information to enable the court to assess the defence. He must not contend himself with vague generalities and conclusory allegations not substantiated by solid facts: see *District Bank Ltd* v *Hoosain & Ors* (4) SA 544 at 547G – H. He must set out the material facts upon which his defence is based in a manner that is not inherently or seriously unconvincing: see *Hales v Doverick Investments (Private) Limited* 1998 (2) ZLR 235 (H), at 238F-239B.

[15] Counsel's attention is fixated on that paragraph claiming that the amount is overstated. He urges us to concentrate on it too. But that is not how cases are adjudged. The court looks at all the surrounding circumstances. That paragraph must be read in context. We have already narrated that context. The surrounding circumstances include the rest of that letter. One of the

paragraphs refers to the personal relationship between the principal directors of the parties and the agreement on a deferred payment. How on earth could the parties have gone on to talk of a deferred payment before they had reached agreement on such a basic and elementary aspect as quantum? It does not add up.

[16] Furthermore, when the appellant paid USD520-00, what was the quantum of the debt towards which that payment would be applied? A reasonable court asks these questions. A reasonable court weighs the preponderances of probabilities. A trial in a civil case, or motion court proceedings, involve the making of findings or inferences of facts by balancing the probabilities and selecting a conclusion which seems to be the more natural or plausible from several other conceivable ones, even though that conclusion may not be the only reasonable one: see *Joel Melamed and Hurwitz v Cleverland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz* v *Vorner Investments (Pty) Ltd* 1984 (3) SA 155.

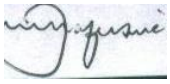
[17] Summary judgment is a drastic remedy. It may amount to a violation of the sacred *audi alteram partem* rule of natural justice. It may not be granted where, among other things, the issue raised involves delving into difficult questions of law or of fact. It may not be granted where the defendant raises an issue which, if proved, will amount to a defence. It is granted only to a plaintiff with an unassailable case: see *Roscoe* v *Stewart* 1937 CPD 138; *Shingadia* v *Shingadia* 1966 RLR 785; *Chrismar (Pvt) Ltd v Stutchbury & Anor* 1973 (4) RLR 123; *Jena* v *Nechipote* 1986 (1) ZLR 29 (SC) and *Hales* above.

[18] However, that summary judgment is a drastic remedy that is not lightly granted is not the end of the matter. It is just the one side of the coin. The flip side is that a plaintiff who has an unanswerable case should not be saddled with the costs associated with a trial and the attendant delays where the defence is bogus. The quintessence or efficacy of summary judgment should not be hampered by procedural trickery. Thus, at the end of the day, it is a matter of balancing the competing interests in any given situation.

[19] We were satisfied that the appellant's quest to go to trial was motivated not by any genuine desire to raise a defence or to have a triable issue tested, but plainly to generate more delay. The appeal has just been a stratagem or device to achieve that objective. There can be no issue whether or not the amount of the respondent's claim is based on a liquid document. The respondent never said that. It is the appellant that keeps harping on the term 'liquid document'. The respondent's claim is plainly a liquidated amount. It has tacitly been

acknowledged. There is no reason why the respondent should continue to be kept out of its money. It is upon these reasons that we dismissed the appeal with costs.

28 April 2021



Musithu J: I agree _____

Date _____

Kamdefwere Law Chambers, appellant's legal practitioners
Danziger & Partners, respondent**'s** legal practitioners