DESTINATION TIMBER (PVT) LTD
and
JOHN GADZIKWA
versus
GUEST AND TANNER REAL ESTATE (PVT) LTD

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 5 July & 24 August 2022

Civil Appeal

P Kawonde, for the appellant
V C Chidzanga, for the respondent

TSANGA J: This is an appeal against the granting of an application for summary judgment against the appellant by the court below. Having issued summons against the now appellant as the defendant, and an appearance to defend having been entered, the respondent herein applied for summary judgment claiming arrear rentals in the sum of US$8 800.00 or its equivalent in Zimbabwean dollars at the prevailing bank rate for the lease of No 18 Harrow Road Masasa, Harare. Also sought was the cancellation of the lease agreement and an eviction of the appellant and all those claiming occupation through them from No 18 Harrow Road Masasa Harare.

Apart from the US$8 800.00 arrear rentals for 18 Harrow Rd, the sum of ZW$297 000 was said to be also owing for late payment of rent and a further ZW$163 200.00 being arrear rentals in respect of Bay 3, 18 Harrow Road Masasa. The summons was issued against the backdrop of an acknowledgement of debt for all the above amounts which had been signed by the second appellant, John Gadzikwa as the Director of the first appellant herein on the 18th of October 2021.

The acknowledgment of debt read in part as follows:

> "I, the undersigned JOHN GADZIKWA 1D NUMBER 085333579-D-26 being the managing Director of Destination Timber PL do hereby acknowledge that I am indebted to the creditor GUEST & TURNER REAL ESTATE PVT LTD in the sum of US$8 000.00 (Eight Thousand United States Dollars) for the year 2020 plus ZWD$163 200.00 (One hundred and sixty three thousand two hundred Zimbabwean Dollars) in respect of unpaid rentals for rented premises at Bay 3, 18 Harrow, Masasa HARARE, plus late payment penalties amounting to ZWD$297.00 (Two hundred and Ninety Seven Thousand Zimbabwean Dollars only)."

The appellant had entered an appearance to defend whereupon summary judgment had been applied for.

In the court below the opposition to the summary judgment *in limine* was essentially that it had not been stated whether the lease agreement was written or oral and that the lease should have been attached as the rentals must be authenticated by provisions of the lease agreement. On the merits, the appellants admitted to having leased Bay 3, 18 Harrow Road for the sum of ZW$163 200.00 but denied that that there was ever an agreement to pay US$800.00 per month for 18 Harrow Road. They admitted that ZW$163 000.00 fell into arrears due to supervening impossibility due to Covid lock downs.

Acknowledging the drastic nature of summary judgment and that it will only be granted where a defence has merely been entered for purposes of delaying the inevitable, the lower court reasoned that John Gadzikwa had signed the acknowledgement of debt which included the sum of ZW$163 200 as well as the amount of US8 000.00 for the properties in question. The court rejected the argument that John Gadzikwa had not shown the acknowledgment of debt to the appellant's managing director since he had in fact signed as the Managing Director. The court therefore found the acknowledgement of debt to be binding on both appellants as respondents to the application for summary judgment since it confirmed there were arrear rentals with respect to the properties in question. It found no triable issues and the applicant's claim (respondent herein) to be unassailable and granted summary judgment. Dissatisfied with these findings the grounds of appeal herein are as follows:

1. The court *a quo* erred in failing to deal with the three points *in limine* raised by the appellant namely
    a. The respondent lacked capacity to sue
    b. That the summons did not establish which between No 18 Harrow Road Masasa and Bay No 3 Harrow Road Masasa was the property leased by the 1st Appellant in respect of which the claim is related.
    c. That the summons did not establish what was the lessee amount in respect to which the claim is related

2. The court *a quo* misdirected itself by failing to make a distinction between the 1st appellant, a juristic person and the 2nd appellant an actual person. As a result of such misdirection was unable to separate denials in pleadings by the 1st Appellant as opposed to admissions made by the 2nd appellant.
3. The court *a quo* made a gross misdirection of fact which amounts to a misdirection in law in holding that the acknowledgement of debt signed by the 2nd Appellant was for a period similar to that disclosed in the summons.
4. The court made a gross misdirection in holding that the acknowledgment of debt signed by the 2nd appellant was binding on the 1st appellant, a party which was not a signatory to it.
5. The court misdirected itself in failing to decide the point as to whether the defence of supervening impossibility raised by the 1st respondent constituted a triable issue in the circumstances.

The appellant seeks that the appeal succeeds with costs and that the judgment of the court *a quo* be set aside and substituted with an order that the application for summary judgment is dismissed with costs on a legal practitioner and client scale.

The respondent argued in response to these grounds of appeal and appellants averments in support of them, that in the face of an acknowledgment of debt there was no dispute and that the appeal was a waste of the court's time. *Selex ES PA v SPB & Ors* SC 45/2016, Denial of allegations were also said not to constitute a defence. *Kingston Ltd* v *LD Ineson (Pvt) Ltd* 2006 (1) ZLR 451(S). Respondent also submitted that the appellant would not have signed an acknowledgment of debt with the respondent if the latter had no capacity to sue it. Moreover the rental statements were said to have been uncontested which show that rent was charged by the appellant. The rental statements on record were also said to indicate the exact premises which they relate to and that if the summons were unclear as to the premises they relate to, the appellants should have filed an exception as they had ample time to do so within the time limits provided by the rules. Further submitted was that the appellant in any event had acknowledged owing rentals in the s um of ZW$163 200.00 and were therefore liable for eviction from the said premises.

Regarding the second ground of appeal the respondent submitted that the court's reasoning was based on *caveat subscriptor* as the basis for finding the director bound by his signature making the real issue the 2nd appellant undertaking to pay. As for the third ground of appeal that the error

was in holding that the amount in the summons was similar to that in the acknowledgment of debt, the submission was that the respondent had proved that the appellant signed the acknowledgment of debt and that the appellant had not produced any proof to show that he had paid that debt as acknowledged. As such the court was said to have been correct in finding that the acknowledgement of debt confirmed that that there were sums owed for rentals for the property in question. In other words, the incorrect capturing of the date as 2020 instead of 2021 did not detract from the fact that there were indeed sums owed for rentals. Basis of the cause of action had been laid out. *Patel* v *Controller of Customs and Excise* 1982 (2) ZLR (HC). Having signed the acknowledgment of debt, the fourth ground of appeal on the denying its binding nature of first appellant was argued to be taking the court for granted. As for the fifth ground on supervening impossibility, this was also argued to be irrelevant as the moratorium on rent payments did not extend to business premises. In any case the appellant was said not to have proven the impossibility with evidence as required where this defence is raised. *Masango* v *Sibanda* HH 702/21.

Law and Analysis

Regarding the first ground of appeal on points not addressed *in limine*, suffice it to note that points *in limine* must be such that they go to the root of the matter and dispose of the matter. They cannot simply be raised as a matter of fashion more so when they deviate from the root of the real thrust of the matter before the court. See *Telecel Zimbabwe Pvt Ltd* v *Portraz & Ors* HH 446/18 where the court had occasion to address the issue of points *in limine* that are motivated by the desire to avoid addressing the real issue of at hand. In this instance the magistrate certainly acknowledged the points raised on the lease agreement but rightly zeroed in on the acknowledgment of debt as being the basis of the claim for summary judgment being that which was said to make the claim unassailable.

On capacity to sue, the appellants themselves had pointed out in raising that point that they had indeed dealt with Guest and Turner. As such there was nothing there for the magistrate to decide on who could be sued.

On the failure of the summons to state which of the two properties between 18 Harrow Rd and Bay 3 the claim was related to, the claim for summary judgment as an unassailable claim was based on the acknowledgement of debt which clearly stated what was being owed and for what. In

any event, as the respondent rightly submitted, the invoices for rentals owing indicated what was owed for which property and these had not been challenged.

The first ground of appeal is therefore simply dilatory and was certainly raised more as a matter of fashion to deflect from the real issue that was before the lower court, namely the acknowledgment of debt. The ground of appeal is therefore dismissed.

The second ground of appeal is that the court failed to distinguish between appellant as a juristic person and John Gadzikwa who signed the acknowledgement of debt as an actual person. He signed in his capacity as Managing Director of the appellant. An acknowledgment of debt is freely entered into as a binding contract between the parties and as such the second appellant cannot seek to turn his back on what he freely and voluntarily undertook to pay on behalf of the appellant.

Regarding the third ground that the error was in holding that the acknowledgement of debt signed by the 2nd Appellant was for a period similar to that disclosed in the summons, the summons were issued on the 6th of December 2021 claiming the above stated amounts as being arrears accumulated from January 2021 to the date of summons. In other words, whilst the acknowledgement of debt stated the date of the sums owing as being from 2020, the summons had put 2021 as the date instead. In the absence of any proof or allegations that the amounts had been paid with respect to the sums claimed whether for 2020 or 2021, there was no defence which would have merited rejection of summary judgment. The reference in the summons to rentals said to have been accumulated in 2021 as compared to the acknowledgement of debt which stated in 2020 could not have affected the application for summary judgment since the grounding of the debt were the rentals whose sums had been acknowledged but had not been paid and remained unpaid up to the time of summons.

The fourth ground of appeal being that misdirection was in holding that the acknowledgment of debt signed by the 2nd appellant was binding on the 1st appellant, a party which was not a signatory to it; this ground of appeal is linked to the second ground of appeal on failure to distinguish a juristic person and John Gadzikwa. It is answered in the same vein that John Gadzikwa freely bound the first appellant as its director through the signing of the acknowledgement of debt in which the rentals owing were clearly spelt out. The ground of appeal equally lacks merit and needs no labouring. .

On the final ground of appeal being that the misdirection was in failing to decide the point as to whether the defence of supervening impossibility raised by the 1st respondent constituted a triable issue in the circumstances; this court is inclined to agree with the respondent that the moratorium on rent payments was for residential tenants. Even if the court is wrong in this respect, rentals were in any event not written off entirely due to Covid. The impossibility was also not elaborated other than alluding to the Covid lock down. In the final analysis the magistrate did not err for the reasons elucidated in reaching the conclusion that this was indeed a case where summary judgment could be granted.

Costs have been sought on a higher scale. It is true that such costs should be sparingly awarded unless there is evidence of proceedings being frivolous and vexatious; dishonest, reckless or malicious or a result of deplorable attitude towards the court. Issues relating to appeals for failure to pay rent especially where there is an acknowledgment of debt clearly fall within the category of litigation that is often pursued frivolously and vexatiously particularly where a litigant is fully aware that the rentals are owed and that they signed the acknowledgment of debt. The party pursuing what is rightly as such put to unnecessary costs. This is one such instance where even though the courts are often reluctant to award such costs, the respondent has been put through unnecessary expense using attempts at technical avoidance. Accordingly:

The appeal is dismissed with costs on the higher scale.

MAXWELL J, agrees: …….

Kawonde Legal Services, appellant's legal practitioners
Moyo & Jera, respondent's legal practitioners