INTERMARKET STOCK BROKERS (PVT) LTD
versus
EDWARD CHIKONYORA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 24 & 30 May 2007

Opposed Application

Advocate Machaya, for applicant
Mr Biti, for the defendant

CHATUKUTA J: This is an application for summary judgment. The background to the matter is that on 28 November 2005, the applicant (then the plaintiff) issued summons under case number HC 6208/05. The applicant claimed payment of the sum of $10 208 059-35 (revalued) owing in terms of an acknowledgement of debt dated 16 November 2005, interest at the prescribed rate from 11 November 2005 to date of receipt of payment and costs of suit. On 6 February 2006, the respondent (then the defendant) entered an appearance to defend. After having requested for further particulars, and further and better particulars which were duly provided, the respondent filed his plea on 19 June 2006 denying owing the applicant the amount claimed.

In support for its prayer of summary judgment, the applicant filed the acknowledgement of debt dated 16 November 2005 in which the respondent acknowledged that it owed the applicant $10 208 059-35. The debt arose from Barclays Bank securities that had been procured by the applicant on behalf of the respondent and which the respondent had failed to pay for. The applicant further filed a letter dated 6 February 2006 from Messrs Mbidzo, Muchadehama & Makoni (respondent's legal practitioners) to Messrs Honey & Blanckenberg (applicant's legal practitioners). In that letter, Messrs Mbidzo, Muchadehama & Makoni were tendering payment of the full amount owing in terms of the acknowledgment debt. The letter reads:

> "We refer to the above matter and in particular to our notice to defend dated 6th February, 2006.

> Our client is offering to pay the full $10 284 619 797-73 (*sic)* inclusive of interest within the next few days. The above amount will only be released to you upon receipt of the share certificates. We have made arrangements to release the money to you as soon as the share certificates are at hand.
>
> Revert to us shortly as our client will not be responsible for payment of any interest after the 11th of February 2006, the last date we included in our interest calculations".

It was therefore, applicant's contention that, in view of the acknowledgement of debt and the letter on 6 February 2006, the respondent had acknowledged its indebtedness and the respondent's defence was not *bona fide*.

The respondent did not, in the opposing affidavit, deny any indebtedness to the applicant. He however averred that the summons did not reflect the respondent's actual indebtedness to the applicant. The respondent averred that by 28 November 2005, the applicant had disposed of a significant number of the respondent's shares which effectively reduced the indebtedness. In support thereof, the respondent referred me to the Further and Better Particulars filed by the applicant on 10 May 2006. The Particulars indicate that the applicant disposed of respondent's sizeable number of shares between 15 November 2005 and 19 January 2006. It was the respondent's contention that the summons should have reflected the reduced amount. The respondent further averred that as at 19 January 2006, the indebtedness had been extinguished save for the sum of $172 787-00 in interest. The respondent averred that the applicant did not amend the summons as to reflect respondent's exact indebtedness after the sale of his other shares. The respondent contended that on this basis alone, he had a *bona fide* defence and the application should be dismissed.

The respondent contended that his plea, and the counter-claim he was to file, raised triable issues. The respondent flatly denied in his plea being indebted to the applicant in the sum of $10 208 059-35, being the sum in the Acknowledgement of Debt or the reduced sum of $172 787-00, being interest. The respondent further, contended that the applicant contravened s 57 of the Stock Exchange Act [*Chapter 24:18*] in that it failed

to sell the respondent's other listed shares as soon as possible after the respondent failed to pay the purchase price of the securities in issue.

The respondent further averred that the applicant was required by s 57 (3) of the Stock Exchange Act to dispose of the securities in issue first in order to reduce any indebtedness and then proceed to disposes of any other listed shares the respondent may have had. The respondent contended that the applicant disposed of other securities first before disposing of the Barclays Bank securities. As a result, the respondent suffered damages and he would be filing a counter-claim.

It is trite, as submitted by *Advocate Machaya*, for the respondent, that the respondent need only raise a triable issue in an application for summary judgment. This test has been laid down in many cases both within our jurisdiction and in other jurisdictions. (See *Jena* v *Nechipote* 1986 (1) ZLR 29 (SC), *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 238D-239B and *Mercantile Bank Ltd* v *Star Power CC and Anor* 2003 (3) SA 309 (T)). In *Jena v Nechipote* , *supra* at 30D-E, GUBBAY JA (as he was then) stated:

> "All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that 'there is a mere possibility of his success'; 'he has a plausible case'; 'there is a triable issue'; or, 'there is a reasonable possibility that an injustice may be done if summary judgement is granted'".

In *Mercantile Bank Ltd* v *Star Power CC and Anor* 2003 (3) SA 309 (T) 2003 (3) SA p 309 Patel J observed as follows:

> "When the defendant gives notice of intention to defend such a claim, the plaintiff's application for summary judgment challenges the defendant to set out his defence in an affidavit with such a degree of candour and particularity as will enable the Court to apply its mind to the bona fides of the person or persons setting out the defence. It is only because the plaintiff has a claim of a kind which is ordinarily susceptible of quick adjudication with a high degree of certainty that the summary judgment procedure enables the plaintiff to challenge the defendant to 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'. Disclosure must be made in such a manner as to demonstrate the apparent bona fides of the defence. The procedure assumes that the plaintiff's allegations are sufficiently proven by the affidavit confirming the defendant's indebtedness on the cause of action set out in the summons and that the defendant

> must therefore be condemned to pay the plaintiff's claim, unless the defendant can show the existence of a triable issue based upon a dispute which is bona fide in nature and which could therefore be seen not to have been contrived for the purpose of temporising. The procedure casts upon the defendant the onus of disclosing a defence which is sound in law and which is based on apparently *bona fide* propositions of fact".

The procedure of summary judgment constitutes an extraordinary and very stringent remedy. It permits final judgment to be given against a defendant without a trial. It should be resorted to and accorded only where the plaintiff can establish his claim clearly. Therefore the applicant's case must be unassailable before the onus to prove a triable issue is shifted to the respondent. (See *Hales Eisenbergs* v *OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O) at 1054; *Breitenbach* v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227D - H.) GUBBAY CJ (as he was then) had this to say in *Scropton Trading (Pvt) Ltd* v *Khumalo* 1998 (2) 313, at 315E:

> "In *casu*, there were two fatal defects. The first related to the requirement that the cause of action must be verified. It must be substantiated by proof. The supporting affidavit must contain such evidence which establishes the facts upon which reliance is placed for the contention that the claim made is unimpeachable".

It is my view that the applicant raised a triable issue in disputing the amount due to the applicant. Mr *Biti*, for the applicant, did not dispute that the applicant sold some of the respondent's shares resulting in the reduction of the latter's indebtedness to the applicant. He submitted that he could not seek any order for an amount less than that claimed in the summons. It was his submission that the question of the reduction of the indebtedness would arise at the time of execution of the judgment. I am inclined to agree with *Advocate Machaya*'s submissions that it was not right for the applicant to seek summary judgment for an amount that it was fully aware had been reduced. Execution of such a judgment would be prejudicial to the respondent. The plaintiff's further and better particulars indicate that as at 28 November 2005, the day the applicant issued summons, the applicant had disposed a sizable number of shares thereby reducing the respondent's indebtedness.

The summons did not reflect the reduced amount but reflected the amount on the Acknowledgement of Debt. It is also apparent from the same particulars that between the issuance of summons and the filing of the application for summary judgement, a further number of shares had been sold. The founding affidavit does not reflect the reduction before and after the issuance of summons. All this was not challenged by the applicant. If the money realised from the disposal of the shares was retained by the applicant and not remitted to the respondent, surely, the amount reflected as owing in the Acknowledgement of Debt cannot remain the same. It therefore follows that applicant's claim cannot be said to be unimpeachable.

I have noted the submissions by the applicant that the cause of action is the Acknowledgement of Debt which is supported by the letter from the respondent's legal practitioners, Messrs Mbidzo, Muchadehama & Makoni. However, I cannot ignore the averments of the respondent that challenge the veracity of the summons, thus raising a triable issue. As stated by McNALLY JA (as he then was) in *Dube* v *Medical Services International Ltd* 1989 (2) ZLR 280 (SC) at 286E, citing BECK J in *Chrismar (Pvt) Ltd* v *Stutchbury* 1973 (1) ZLR 277 (GD) at 279D:

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

I am of view that the respondent's defence on the debt due is arguable. I have therefore not considered it necessary to determine the respondent's other defences, that is, whether or not the applicant violated the provisions of the Stock Exchange Act and whether or not he has a *bone fide* counter-claim.

In the result, it is ordered that, the application is dismissed with costs.

Honey Blanckenberg, applicant's legal practitioners

Mbidzo, Muchadehama & Makoni, respondent's legal practitioners