MEDCLINIC MEDFORUM HOSPITAL (PTY) LIMITED
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 29 October 2019 & 6 November 2019

Opposed Matter

S. Mzondiwa for the applicant
R. C. Muchenje for the respondent

DUBE-BANDA J: Applicant is a company incorporated in the Republic of South Africa, it operates a specialist medical institution in that country. Respondent is a local authority established in terms of the Urban Councils Act [*Chapter 29:15*].

This is an application for summary judgment wherein applicant is seeking an order in the sum of ZAR 918 549 27, together with interest therefrom at the prescribed rate calculated from the 23rd May 2018 to date of payment and costs of suit. In support of the application, applicant filed an affidavit deposed to by one Inchien Chamisa, a Zimbabwean resident in South Africa. He is a specialist General Surgeon and a Director and shareholder of applicant. Attached to the founding affidavit are a number of documents, mainly correspondence between the parties and their respective legal practitioners. The application is opposed.

Background

The background facts of this matter are common cause or rather, not seriously disputed. In or about October 2016, two fire-fighters employed by the respondent were involved in a fire accident and suffered serious injuries. Respondent sought and obtained specialist treatment of its two injured employees from applicant. The two were admitted at the hospital on the 18th of October 2016 and they received specialist medical care and treatment. Both recovered from their injuries and were discharged in January and March 2017, respectively. Respondent guaranteed payment for fees and costs due and payable to the applicant arising from the care and treatment of the two injured employees. After their discharge respondent made certain payment leaving an outstanding balance. The last payment was made on the 20th July 2017,

and no subsequent payments were made thereafter. It is the outstanding balance that is at the heart of this application.

The law

What an applicant for summary judgment is required to do is set out in rule 64 of the High Court Rules, 1971 (Rules), which provide that:-

> "(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
>
> (2) A court application in terms of sub-rule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action.
>
> (3) A deponent may attach to his affidavit filed in terms of sub-rule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action." (My emphasis).

Summary judgment is a procedure that protects a plaintiff against an ill-disposed defendant who defends the matter purely in order to delay its finalization. It is a remedy that may be deployed to prevent an abuse of the court procedure by a recalcitrant defendant. See *Meek* v *Kruger* 1958 (3) SA 154 (T) @ 158C. The remedy is extraordinary and drastic; it makes inroads on a defendant's procedural right to have its case heard in the ordinary course of events, in that it permits the granting of a final order in a defendant action without a trial.

It is clear that the application for summary judgment may be used only where the merits of the claim are easily ascertainable without the necessity of holding a trial with evidence and cross-examination. It is granted on the supposition that the plaintiff's claim is unimpeachable because the defendant has no *bona fide* defence to the claim. Courts are reluctant to grant summary judgment unless satisfied that the plaintiff has an unanswerable case, and even where it is established that the case is unanswerable, the court nevertheless retains discretion to refuse to accede to the application.

To succeed in an application for summary judgment, applicant must verify the cause of action and the amount claimed. The claim must appear from the documents placed before court. The attached documents must speak to the cause of action and the amount claimed. Against this background it is clear why applications for summary judgment may be brought where the claim is based on a liquid document or for a liquidated amount of money. A liquid document is a document which on the face of it, and without the need for leading of further evidence, indicates that the signatory is indebted to the creditor in a stipulated amount of money and

that such amount has become due and payable . See *Harrowsmith* v *Ceres Flats Ltd* 1979 (2) SA 722 (T). The concept of a "liquidated amount in money" is used to indicate an amount that is fixed and certain. In other words, it is an agreed amount in money or an amount that has been precisely quantified or that is readily capable of accurate determination and that is not in dispute. See *Lester Investments (Pty) Ltd* v *Narshi* 1951 (2) SA 464 (C), *Fatti's Engineering Co (Pty) Ltd* v *Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T).

Rule 64 (3) of the Rules does not demand that documents attached in support of an application for summary judgment be an acknowledgment of debt or a liquid document. See *Dennis Ndebele* v *Local Authority Pension Fund* HB 162 / 18. However, unless there is an acknowledgment of debt, a liquid document, or a liquidated sum of money in support of the application, an application for summary judgment may be refused.

No *onus*, no evidential burden and no obligation rests on the defendant to satisfy the court that the facts set out by him are true or that the balance of probabilities in the case lies in his favour. See *Arend & another* v *Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C). The only question on which the court is called upon to decide is whether the defendant has disclosed a *bona fide* defence which if proved at the trial, would constitute a complete defence to the plaintiff's claim. See *Breitenbach* v *Fiat* SA 1976 (2) SA 226 (T). The defendant need not set out his defence in the affidavit with the precision that will subsequently be necessary in his plea if the application for summary judgment fails and he is given leave to defend the action. See *Wright* v *Van Zyl* (3) SA 488 (C) @ 492. He must nevertheless formulate the defence sufficiently clearly to place the court in a position to determine whether the defence, if true, will constitute a real defence to the claim.

The court must guard against an injustice of expecting the defendant to satisfy the court that he has a *bona fide* defence without the benefit of further particulars, discovery and examination. The defendant must only establish a *prima facie* defence and must allege facts which if he can succeed in establishing them at trial would entitle him to succeed in his defence at trial. See *Rex* v *Rhodian Limited* 195 R & N 723.

Once the applicant has established an unanswerable case, verified the cause of action and the amount claimed, for respondent to succeed in defeating such a claim it must disclose facts upon which its defence is based with sufficient clarity and completeness so as to persuade the court that if proved at the trial, will constitute a *bona fide* defence to the claim. See *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 239 A-B. In *Kingstons Ltd* v *L D*

Ineson (Pvt) Ltd 2006 (1) ZLR 451 (S) at 458 F-G. ZIYAMBI JA made the important point which is apposite:

> "Not every defence raised by a defendant will succeed in defeating a plaintiff's claim for summary judgment. Thus what the defendant must do is to raise a *bona fide* defence – a 'plausible case' – with 'sufficient clarity and completeness' to enable the court to determine whether the affidavit discloses a *bona fide* defence. He must allege facts which, if established 'would entitle him to succeed.' See *Jena v Nechipote* 1986 (1) ZLR 29 (S); *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86; *Rex* v *Rhodian Investments Trust (Pvt) Ltd* 1957 R&N 723 (SR)."

The first enquiry is to establish, from the affidavit and the attached documents, whether applicant has verified the cause of action and the amount claimed. The requirements to verify the cause of action has been considered in a number of cases. In *Scropton Trading (Pvt) Ltd* v *Khumalo* 1998 (2) ZLR 313 at 315 E-F GUBBAY CJ had this to say:-

> "… the cause of action must be verified. It must be established by proof. The supporting affidavit must contain evidence which establish the facts upon which reliance is placed for the contention that the claim made is unimpeachable." (My emphasis).

The law and the facts

In opposing this application for summary judgment, respondent says applicant has not bothered to attach the invoices that it raised in the name of the respondent. Respondent does not admit the sum claimed in the summons. Respondent questions why applicant has not stated the total amount raised as the medical bill. It says for it to pay the amount claimed must be justified and supported. Respondent disputes that it owes the amount claimed in the summons. It says it has not received invoices. Respondent denies that it acknowledged indebtedness in the sum of ZAR 957 430. 33. According to the respondent the round table conference was an attempt to settle the matter out of court, however the parties failed to reach a settlement.

In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine and *bona fide* dispute of fact. In some instances, the allegations or denials of the respondent may be so far-fetched or clearly untenable that a court is justified in rejecting them merely on the papers. In such an instance the court may grant the order sought on the papers. In *casu* it is clear that the amount claimed by applicant is disputed by the respondent .However, in this instance the issues raised by the respondent go to the root of the correctness of the amount claimed.

What is required in a summary judgment application is documentary proof, to verify the amount claimed. Applicant is an institution, it should not encounter any difficulties in producing documentary evidence to verify the amount claimed. No invoices or some

documentary proof has been produced to show the court the total bill, the amount paid and the outstanding amount. The court cannot rely on the *ipso dicta* of the applicant, particularly were the respondent puts in issue the correctness of the amount claimed. Applicant has been content in attaching correspondence exchanged between the parties, which do not verify the figure of ZAR 918 549. 27. No correspondence emanating from the defendant, or written at its instance speaks to the exact figure of ZAR 918 549. 27. The email dated 11 August 2017, relied on by the applicant, speaks to the "verification" to facilitate payment. It can only be the verification of the amount claimed. Granting summary judgment in such circumstances will result in an injustice to the respondent. This is a drastic remedy which permits a final order in a defendant action without a trial. It can only be granted where applicant meets all the jurisprudential requirements required by the Rules and established by precedent.

It cannot be said, on the facts of this case that the appearance to defend has been entered for the sole purpose of delay. If at the trial, defendant proves that it does not owe the sum of ZAR 918 549. 27, it would be a plausible defence that could succeed. An application for summary judgment may be used only where the merits of the claim are easily ascertainable without the necessity of holding a trial. The claim must appear from the documents placed before court and the amount claimed must be fixed, certain and speak to the documents filed in support of the claim. In this instance an invoice showing the total bill, the amount paid and the shortfall would have easily verified the amount claimed. The court could have ascertained, *ex facie* the document, precisely what amount is due and payable to the applicant. There is nothing on record, which the court might even by a simple mathematical calculation ascertain the amount claimed. A court cannot grant summary judgment on the mere say so of a litigant, without documentary support, where such could have been availed by the applicant. The non - availability of such proof amounts to a big debit entry to applicant's case, which is sufficient to have summary judgment refused.

The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable or rather, a sustainable defence of her/his day in court. A defendant with a triable issue should not be shut out. On the factual matrix of this case, it cannot be said that the applicant has verified the amount claimed. The court cannot order respondent to pay an amount of money that has not been verified. The correspondence referred to by Mr *Mzondiwa*, applicant's counsel does not verify the amount claimed it does not pass the claim as a liquidated amount of money. In the circumstances of this case, the application for summary judgment cannot succeed.

Costs

It is a general rule that costs are in the discretion of the court. To be exercised judicially in the light of the circumstances of the case. In a summary judgment, the ordinary course followed by the court is to order costs to be in the cause or to be decided by the trial court. In the instant matter, I am of the view that although the respondent has succeeded in starving off the application for summary judgment, there should be no order as to costs. In arriving at this conclusion, I factor in the rather peculiar facts of this case. There is really no dispute that respondent is indebted in some amount to the applicant, the court refused summary judgment on the view that the amount claimed has not been verified, it is not a liquidated amount of money. Respondent's counsel, Ms *Muchenje* conceded that even in the event the application is dismissed it would be an injustice to saddle applicant with costs of suit.

Disposition

In the result, the following order is issued:

The application for summary judgment is dismissed with no order as to costs.

Atherstone & Cook, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, respondent's legal practitioners