FANUEL KUDZANAI CHIGOVANYIKA
versus
MUNYARADZI BIPIRO
and
IGNATIOUS MUNENGWA

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 26 July, 2024 and 11 October 2024

Opposed Application

Adv *R Mabwe*, for the applicant
Mr *J Dondo*, for the 2nd respondent
No appearance for the 1st Respondent

DEME J: On 26 July 2024, I delivered an order dismissing the application for summary judgment with costs. The applicant applied for leave to appeal against the decision of this court which I granted on the same day. Thus, this judgment seeks to provide the reasons for the dismissal of the application for summary judgment.

The applicant approached this court by way of an action seeking, through summons, the claim for:

> "(a) Return of motor vehicle Mercedes Benz C200 with Reg: AEX 8962."
>
> In the Plaintiff's declaration, the Applicant prayed for an order that:
>
> "(a) The 2nd Defendant to return the vehicle; Mercedes Benz AEX 8962 to the Plaintiff
> (b) Any alternative relief of sought.
> (c) 1st and 2nd Defendants to pay cost of suit."

The applicant's case as presented in the pleadings, in brief, is that around 25 July 2022, he agreed with the first respondent that he would bring his car, Mercedes Benz, Registration number AEX 8962 (hereinafter called "the vehicle") to the first respondent's garage for repairs. The applicant further alleged that he intended to sell the vehicle after repairs. The applicant further alleges that he did not authorise the first respondent to sell the vehicle. It is the applicant's case that he agreed with the first respondent that the vehicle would be repaired within three days.

The applicant also claimed that he discovered that the first respondent had given the vehicle to the second respondent who wanted to buy it. The second respondent, according to the applicant, had taken the vehicle for a test drive. The applicant maintained that he no longer harboured an intention to sell the vehicle. The applicant further asserted that he advised the first respondent that the second respondent was supposed to return his vehicle. However, the second respondent, according to the applicant, claimed that he was only dealing with the first respondent. Numerous police reports then ensued but these did not yield any result, according to the applicant.

The second respondent entered appearance to defend and also filed the plea. The Applicant filed replication which was then followed by the filing of the application of summary judgment.

In the application for summary judgment, the applicant prayed for an order that:

> "The application for Summary Judgment be and is hereby entered in for (sic) Applicant as set out in the summons in the main matter. Accordingly, 1st and 2nd respondents shall jointly and severally;
>
> 1. Return of vehicle called Mercedes Benz C200 Registration Number AEX 8962 to the Applicant, within fourty-eight hours of receipt of this order, failure which the Sheriff of the High Court of Zimbabwe or his lawful deputy be authorised to seize it.
> 2. Pay holding over damages in the amount of US$5 000 (five thousand United States Dollars) or the equivalent ZWL at prevailing bank rate.
> 3. Pay costs of this application and the main matter on a higher scale.
> 4. This application shall charge 1st and 2nd Respondents for any future work to be done in respect of this matter."

The application was opposed by the second respondent who insisted that the defence which he raised is pregnant with triable issues. According to the second respondent, he purchased the vehicle following the representation by the first respondent that he acted as the agent of the applicant at the material time. This was vehemently opposed by the applicant.

The sole issue for determination is whether the 2nd Respondent's defence raises any triable issue.

In his defence, as captured in the plea filed on behalf of the second respondent, the second respondent insisted that the first respondent acted as the agent of the applicant at the material time and hence, according to the second respondent, the applicant must be bound by

the acts of the first respondent. In Para 3 of the second respondent's plea, the second respondent averred as follows:

> "Defendants is not aware of the allegations herein and will put Plaintiff to the proof of his allegations.
>
> Defendant would however, aver that 1st Defendant and Defendant some time in August 2022 entered into a Sale Agreement in terms of which 1st Defendant sold the vehicle to Defendant for an agreed amount of US$ 8 500.
>
> The terms of the agreement were that Defendant swapped his motor vehicle namely BMW Registration Number AFA 1161 valued at US$4 300 and was to top up by paying the balance in the amount of US$ 4 200.
>
> Defendant would aver that the relationship between the Plaintiff and 1st Defendant is that of Agent and Principal with the result that Plaintiff is at law bound by whatever steps the 1st Defendant took with regards to the purchase of the Motor Vehicle that Plaintiff claimed to be his."

In response, to the plea filed, the applicant filed a general replication and chose not to respond to specific issues raised by the second respondent. In particular, the applicant's replication is as follows:

> "Save for admissions made therein, Plaintiff denies each and every allegation of fact and conclusion of law in the 2nd Defendant's plea and joins issues thereon and persists with its (sic) claim and costs of suit as prayed in the summons."

In my view, this leaves the issue of whether or not the first respondent acted as the agent of the applicant unresolved. This cannot be considered to be the *mala fide* defence. In my opinion, this issue can only be resolved through trial. I am unable to make a determination of whether or not the first respondent acted as the agent of the applicant without hearing oral evidence. For this reason, this issue is a triable issue.

Further, Para 9 of the plaintiff's declaration and Para 6C of the founding affidavit contradict each other. In Para9 of the plaintiff's declaration, the applicant averred as follows:

> "Upon hearing this, the Plaintiff clearly told the 1st Defendant that he no longer had intentions to sell the car, instead, he wanted to keep it. When the 1st Defendant was told about the Plaintiff's intentions, he stated that he had told the 2nd Defendant to bring back the car."

In Para 6C of the founding affidavit, the Applicant stated that:

> "On the agreed date of the vehicle collection, the 1st Respondent informed me of his intentions to sell my vehicle to the 2nd Respondent, to whom he had already given the vehicle for a test drive, without my knowledge and consent. I clearly and vehemently informed the 1st Respondent that I did not intend to sell my vehicle and it was for personal use. On that very day, the 1st Respondent promised to retrieve the vehicle from the 2nd Respondent."

The case of the applicant as captured in Para 9 of the Plaintiff's declaration is that of a person who, at one moment, contemplated selling his vehicle. It creates an impression or likelihood that the intention to sell the vehicle was communicated to the first respondent. What is not clear is the context in which such communication was made to the first respondent.

Paragraph 6C of the founding affidavit establishes a case of a person who never entertained any plan to sell the vehicle. The sense created in terms of Para 6C of the founding affidavit is that the applicant wanted to retain the vehicle for personal use. This is alien to the facts pleaded in the summons and declaration.

It is apparent that the case founded in terms of Para 9 of the plaintiff's declaration is parallel to the testimony outlined in Para 6C of the founding affidavit. In light of these diametrically differing versions, this would lead to an inescapable conclusion that the defence by the second respondent raises triable issues.

Additionally, the applicant chose to make a new claim in the application for summary judgment which was not pleaded in the summons and the plaintiff's declaration. Reference is made to para 2 and 4 of the draft order. In para 2 of the draft order, the applicant was now claiming holding over damages which were never claimed in the summons and declaration. It is an established jurisprudential principle in our jurisdiction that holding over damages must always be proved. The application before me did not prove such damages. Hence, the application was marred with a serious defect. In para 4 of the draft order, the applicant claimed an order that:

> "this application shall charge 1st and 2nd Respondents for any future work to be done in respect of this matter."

Not only is this paragraph unclear, but this is a new claim smuggled through the application for summary judgment. This is a clear sign of the applicant who does not know the nature of the claim which is before the court.

In my view, para(s) 2 and 4 make the present application one of the best examples of a bad application for summary judgment due to the extent of the defects arising from these paragraphs. The counsel for the applicant only managed to identify these irregularities upon interaction with the court. Upon being questioned on the relevance of the paragraphs concerned, Adv Mabwe prayed for the amendment of the draft order through the deletion of para(s) 2 to 4 of the draft order. Mr. Dondo did not respond to the application for amendment

of the draft order I considered this gesture to be tantamount to admitting to the application for the amendment of the draft order.

Even after the amendment, I found it difficult to grant the application in terms of remaining portions of the draft order. The applicant prayed for an order in terms of summons. Clearly, summons must be read together with the plaintiff's declaration. In para (b) of the applicant's prayer in the declaration, the applicant prayed for:

"Any alternative relief of sought."

Again, this paragraph suffers the defect of lacking exactitude in terms of meaning. Granting the application for summary judgment based on this unclear prayer as propounded in the declaration would be tantamount to granting an order that is not capable of being enforced. Without amendment of para (b) of the prayer in the plaintiff's declaration, it is impossible for this court to grant an order for summary judgment in terms of summons and declaration.

Further, the applicant alleges that he left his vehicle with the first respondent for purposes of repair. There is no evidence which was placed before the court to substantiate this allegation. In para 4 of the founding affidavit, the applicant alleged that the agreement to have the vehicle repaired was verbal in nature. The applicant did not disclose how much was charged by the first respondent for the alleged repairs. The reason for the non-disclosure for price is not clear. This further puts a dent on the credibility of the applicant's case. In the absence of further evidence of the transaction between the applicant and the first respondent, it would be difficult for this court to grant summary judgment based on a verbal contract. Only the leading of oral evidence through trial would unpack and demystify the applicant's case.

The second respondent's version is that the applicant left the vehicle in the custody of the first respondent for purposes of selling the vehicle as, according to the second respondent, the first respondent is a car dealer. It is not disputed that the first respondent has a car sale garage. The lack of proof of the relationship between the first respondent and the applicant makes the second respondent's defence a triable issue.

According to the applicant, this matter was referred to numerous police stations including Borrowdale Police Station, Milton Park Police Station, Morris Deport Police Station and Vehicle Theft Squad. If the applicant's case is as stated in the founding affidavit, one would wonder why the police did not take action against the respondents. I am convinced

that the police officers, from multiple police stations, with their training saw a reasonably arguable case which ought to be resolved through civil procedure and not criminal procedure. In Paragraph 4G of the opposing affidavit, the second respondent's explanation for the failure of police to institute criminal proceedings against him is as follows:

> "I refused to surrender the vehicle for I have paid for it by way of swapping my motor vehicle A BMW Reg No AFA1161 valued at US$4,300.00 and a top up of US$2,000.00 living a balance of US$2,200.00 which I offered to pay 1st Defendant once this issue is resolved."

In the second paragraph of Paragraph 4E, the 2nd Respondent also further explained as follows:

> "Applicant improperly tried to use the Police to resolve what essentially a civil dispute is. I have lodged a complaint against the Police Officers involved and the matter is still under investigations on why the Police Officers attempted to unlawfully force me to surrender the motor vehicle in favour of the Applicant."

This further makes the second respondent's defence reasonably arguable. It is difficult for me to discredit such a defence by way of evidence led through affidavits where parties rely on the word of mouth as their main source of evidence. Only the apparatuses for trial will unravel and interrogate the issues between the parties.

The applicant filed the answering affidavit to the opposing affidavit contrary to the provisions of Rule 30 (7) of the High Court Rules, 2021 which provides as follows:

> "No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence viva voce or by affidavit:
>
> Provided that the court may do one or more of the following—
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> (a) Permit evidence to be led in respect of any reduction of the plaintiff's claim;
>
> (b) Put to any person who gives oral evidence questions—
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> (i) To elucidate what the defence is; or
>
> (ii) To determine whether, at the time the application was instituted, the plaintiff was or ought to have been aware of the defence;
>
> (c) Permit the plaintiff to supplement his or her affidavit with a further affidavit dealing with either or both of the following—
>
> (i) any matter arising by the defendant which the plaintiff could not reasonably be expected to have dealt with in his or her first affidavit; or
>
> (ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence."

I did not raise the issue of the answering affidavit with the counsel for the applicant during the hearing of the present application. Hence, I did not proceed to expunge the answering affidavit from the record for flying against the provisions of the Rules. Expunging the answering affidavit without inviting the parties to make representations would militate against the applicant's right to be heard. The issue that the answering affidavit was filed contrary to the Rules was not raised by the counsel for the second respondent. However, it deserves special mentioning that the filing of the answering affidavit by the Applicant is a sure sign that there are triable issues which warranted the applicant's response through the answering affidavit. Even after going through the answering affidavit, the question of whether or not the first respondent acted as the agent of the applicant was not resolved especially in light of the fact that the applicant alleged that the agreement between himself and the first respondent was verbal in nature. The applicant simply made bald denials which cannot be resolved by way of affidavits. Faced with those bare denials, I was left with no option except to dismiss the application for summary judgment paving way for the leading of oral evidence through trial.

The second respondent in the opposing affidavit argued that the applicant ought to have proceeded against the first respondent through application for default judgment and not in terms of application for summary judgment. More particularly, the second respondent, in Paragraph 4F of the opposing affidavit stated that:

> "I do not know why 1st Respondent did not defend action. I do not know why Applicant is applying for Summary Judgment as against the 1st Respondent when Applicant should have applied for default Judgment in the absence of Notice of Appearance to defend filed by 1st Respondent. What I know is that 1st Respondent presented to me as Applicant's agent with a proper mandate to sell the motor vehicle to me."

The applicant did not explain why default judgment was not pursued against the first respondent. Proceeding against the first respondent through application for summary judgment was inappropriate, therefore, in the absence of an explanation from the applicant. Granting application for summary judgment under such circumstances would be improper and misplaced.

It is established in our jurisdiction that summary judgment is an extraordinary remedy which can only be available upon exceptional circumstances being established by the applicant. Courts are reluctant to grant such remedy where triable issues have been established. Therefore, courts ordinarily employ a high degree of circumspection before

granting such remedy as granting it may have the effect of negating the right to fair trial established in terms of s 69 of the Zimbabwe's 2013 Constitution which is a non-derogable right in terms of s 86(3) of the same Constitution. The applicant for summary judgment must establish that the case as pleaded in the summons and declaration is an unassailable one. In the case of *Lafarge Cement (Zimbabwe) Limited* v *Chatizembwa*[1], the court superbly remarked as follows:

> "Summary judgment is an extra-ordinary and indeed drastic remedy in the sense that it negates the right of a litigant who has expressed a willingness to access the court and defend an action to do so. It is however a deliberate remedy designed to deny a *mala fide* defendant the benefit of the *audi alteram partem* rule simply because the plaintiff's claim would be unassailable. Therefore, where the proposed defences of the defendant to the claim are clearly unarguable both in fact and in law, the drastic remedy of summary judgment is availed to the plaintiff. See *Chrisma* v *Stutchbury and Anor* 1973 (1) RLR 277 (SR) at 279.
>
> It is settled that in order to defeat a summary judgment application the respondent must disclose facts upon which his or her defence is based with sufficient clarity and completeness so as to persuade the court that if proved at the trial, will constitute a defence to the claim. It is also settled that not every defence raised by a defendant will succeed in defeating a plaintiff's claim for summary judgment. It must be a *bona fide* defence stated with sufficient clarity and completeness to allow the court to determine whether the opposing affidavit discloses a *bona fide* defence. See *Kingston Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458 F-G."

Adv *Mabwe* argued that the law of agency does not apply in the circumstances where the second respondent fails to show that the applicant authorised the agreement. She also argued that the second respondent was not a party to the agreement between the applicant and the first respondent and hence he cannot enforce such agreement. More particularly, Adv *Mabwe* maintained that the second respondent's defence is defeated by the principles of privity of contract. In my view, the argument based on privity of contract is baseless. applicant's counsel chose to argue the matter for her client within the realm of the contract law while the second respondent's defence fell within the law of agency. Law of agency and contract law have differing principles and hence the second respondent's defence remains a *bona fide* defence in my view. It has to be tested through trial. The defence proffered by the second respondent is sufficiently clear and complete, in my view in accordance with the dictates of *Lafarge Cement (Zimbabwe) Limited* v *Chatizembwa* (supra). If proved at trial, the second respondent's defence will defeat the applicant's claim. I was not able to reach a conclusion that the applicant's case is an unassailable one under such circumstances. Without clear proof that the first respondent did not act as the agent of the applicant, I was not able to grant the application for summary judgment in the circumstances. Only tools for trial including cross-examination will unveil the correct position of whether the first respondent acted as the agent of the applicant at the material time. The question of whether the applicant authorised the first respondent to sell the vehicle can only be resolved through trial.

[1] HH413/18

Mr *Dondo* argued that the absence of the first respondent's response further complicates the matter. I do agree with his submissions. The first respondent's testimony may have the effect of clarifying certain issues which remain shrouded in secrecy. This further makes the defence raised by the second respondent a triable issue.

It was foreseeable from the onset that the second respondent raised triable issues through the plea. The applicant, through the replication, only made a bare denial to the issues pleaded by the second respondent. The applicant chose to ignore such triable issues and instead mounted new claims in the application for summary judgment in para(s) 2 and 4 of the draft order. In my view, such behaviour of abuse of court processes cannot be tolerated. Hence, an order of costs against the applicant was appropriate in the premises.

In the result, I was motivated by the aforesaid multiple reasons to make the decision for the dismissal of the application for summary judgment.

DEME J:……..

Messrs Macheyo Law Chambers, applicant's legal practitioners
Dondo and Partners, second respondent's legal practitioners