PATIENCE KANDLELA

Versus

TYSON GORE

HIGH COURT OF ZIMBABWE
CHAREWA J & ZISENGWE J
MASVINGO 2 OCTOBER 2024
Written reasons provided on 18 February 2024

Civil Appeal

A Mutatu, for the applicant
D. Sanhanga, for the respondent

ZISENGWE J: On 2 October 2024 we delivered a brief *ex tempore* judgment dismissing the appeal against the decision of the Magistrate Court sitting at Kwekwe ("the court *a quo*") granting the respondent's application for summary judgment. We now provide written reasons for our decision at the behest of the appellant who made a formal request for the same.

The background facts

The respondent sued out summons from the court *a quo* seeking to recover the sum of US$14 000 (fourteen thousand United States dollars), being money, he lent and advanced to the appellant, which according to him the latter failed or neglected to pay back. In his particulars of claim the respondent averred that on 30 September 2023 at the appellant's specific instance and request he had advanced the said sum of money to the latter. He further averred that the appellant duly acknowledged her indebtedness to him in writing, but had failed, refused or neglected to pay despite lawful demand. The appellant entered appearance to defend soon thereafter requested the respondent to furnish her with further particulars. She sought the respondent to supply her with

details relating to how much of the borrowed amount she (i.e. appellant) had since paid back to the respondent.

It was then that the respondent filed an application for summary judgment in terms of Order 15 of the Magistrates Court (civil) rules, 2019 ("the rules"). His application was therefore based on O15 r (1) (a) of the rules which permits the plaintiff whose claim is founded on a liquid document to bring such an application for summary judgment. In his founding affidavit he averred that the appellant had no *bona fide* defence and that appearance to defend had been made solely for purposes of delay. This, according to him, was particularly so given that the appellant had acknowledged her indebtedness *via* an affidavit which she had signed. He attached a copy of the affidavit in question. It reads:

> "I Patience Kandlela [ID No]58-213747423 residing at 296-2 Mbizo, Kwekwe do hereby solemnly and sincerely swear/declare the following; I have borrowed fourteen thousand United States dollars only ($14 000 USD) from Tyson Gore ID No. 58-271724E8 to be returned on the 30th of October 2023 without failure to result in only legal action against me. I make the above statement contentiously believing the same to the true.'

The affidavit shows ex facie that it signed before a commissioner of oaths on 30 September 2023.

The application for summary judgment was opposed by the appellant, the thrust of whose argument was that she had since paid back the respondent. In fact, according for her she had overpaid the respondent. She enumerated the following payments which she claimed to have made to the respondent: $4000 on 30 October 2023, $4000 in November 2023, and $14 700 paid through one Anna Taruvinga at the respondent's instructions on 20 January 2024.

She claimed that she overpaid the respondent by virtue of the respondent having insisted that the first two payments of $4 000 each had only gone towards the payment of interest and penalties. This according to her was ostensibly on the basis that her debt was overdue. She further claimed that the respondent kept demanding further payments but she flatly refused.

She attached an affidavit by the said Catherine Taruvinga who deposed as follows:

> "I Catherine Taruvinga [ID No given] residing at 243/3 Mbizo, Kwekwe do hereby solemnly swear declare the following:
>
> "Acknowledge that under Tyson Gore instruction I received the following payment on behalf of Tyson Gore from Patience Kandhlela [ID No given] first payment of 13 000

> USD, thirteen thousand United States dollars on the 20th of January 2024 and 1700 USD One thousand seven hundred dollars only on the 29th of February 2024.

In addition, the appellant attached to her opposing affidavit Annexure "A" being a schedule of payments she claims to have made via Catherine Taruvinga as captured by the latter. The schedule appears to have been recorded on a page torn out of a diary. It reads:

> Paid Tyson Gore
> $12 500 USD (Twelve thousand five Hundred dollars)
> Paid by Patience Kandlela 58-213747L23
> Received by Taruvinga ID No. 25 078507W25
>
> Paid Tyson Gore 20-01-24
> $500 Five hundred dollars only
> Paid by Patience Kandhlela 58 58-213747 L23
> Received by Taruvinga ID No. 25078507W25
>
> Paid Tyso Gore 29-02- 2024
> $1700 One Thousand seven hundred dollars only
> Paid by Patience Kandhlela 58-213747l23
> Received by Taruvinga ID No. 25078507W 25

In his answering affidavit the respondent categorically denied that the appellant had repaid any amounts at all. He asked the rhetorical question as to why the appellant would pay him US$ 22 700, an amount well in excess of the amount he had lent her. I briefly interpose here to observe that ordinarily the plaintiff in an application for summary judgment is not permitted to file an answering affidavit save in instances where leave is granted by the court in deserving cases. However, in the current case the appellant did not raise the question of the propriety of the answering affidavit either in the proceedings a quo or in this appeal hence it was not an issue before the court.

Be that as it may, the respondent completely denied ever having charged the appellant any interest on the sum advanced and pointed out that the agreement never referred to any interest at all. He averred that should the appellant have paid him back as she alleged, he would have acknowledged receipt of any amount so paid in writing. Needless to say, he completely denied

ever having authorised Catherine Taruvinga to receive payments on his behalf and questioned the logic of doing so. He asserted that if the appellant had given the money to Catherine Taruvinga as alleged, then she, (i.e., appellant) was supposed to recover that money from her. He dismissed Taruvinga's affidavit describing it as a worthless "rehearsed" piece of evidence. He pointed out that in any event it carries no probative value as it is undated.

The parties submitted heads of argument in support of their respective positions. The respondent reiterated that the appellant's defence of having paid back the money was false. He pointed out that it was incredible that the appellant would claim to have paid back the money through a third party particularly without any evidence of such an arrangement having been authorised by him. He further pointed out that the affidavit by Taruvinga purporting to acknowledge receipt of the money was only signed in April 2024 well after the respondent had issued summons against the appellant. He therefore dismissed the said affidavit as being contrived between the respondent and Taruvinga designedly to unjustifiably thwart his claim.

He further scoffed at suggestions that the appellant would pay more than what was advanced to her. He therefore argued that the appellant had no *bona fide* defence to his claim and appearance to defend was entered solely to buy time. He relied on the cases of *CABS* v *Magodo* HH-331-15; *Lafarge Cement (Zimbabwe) Ltd* v *Chatizembwa* HH 413-18 and *Nyanyoni* v *Mungwazi* HH-29-24.

For her part, the appellant maintained that she had managed to place before the court material facts upon which she relied. She exhorted the court to be mindful of the fact that a respondent in an application for summary judgment is not required to deal with his case exhaustively and to prove his defence and that all he needs to do is place before the court a plausible defence with sufficient clarity and completeness to enable the court to assess the *bona fides* of his defence, which in this case she claims to have managed to do. Several cases were cited in support of her preposition; *Jena* v *Nechipote* 1986 (1) ZLR 29 (S); *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86; *Kingstons Ltd* v *Ineson* (Pvt) Ltd 2006 (1) ZLR 451 (S) at 458 *J and Stationery Box (Pvt) Ltd* v *Nation (Pvt) Ltd* 2010 (1) ZLR 277.

Ultimately, therefore, according to her, her assertions that she had paid back the money in the sums and manner described in her opposing affidavit constituted a plausible defence in the circumstances justifying the dismissal of the application for summary judgment.

The Judgment of the court *a quo*

In its judgment, the court *a quo* set out the facts leading to the dispute. It particularly noted that although the appellant questioned the affidavit constituting the written acknowledgement of the debt, she had nevertheless admitted having received the amount in question (US$14 000) from the respondent. The court also duly noted the appellant's proposed defence as outlined earlier as well as the legal principles applicable.

In granting the application for summary judgment the court *a quo* found the appellant's defence to the claim implausible for several reasons. It found that the appellant had failed to advance a reasonable explanation why the appellant would choose to settle such a substantial sum of money through a third party. It also questioned the wisdom of paying interest first before settling the capital debt.

Most importantly, however, the court *a quo* observed glaring internal contractions in the evidence produced by the appellant in her bid to defeat the application for summary judgment. It also noted that Catherine Taruvinga who had supposedly received the money in question had not deposed to a supporting affidavit confirming what appears in her acknowledgment of the receipt of money from appellants.

Disgruntled by that outcome the appellant mounted the current appeal. Her grounds of appeal are couched in the following terms:

Grounds of appeal

1. The learned court *a quo* erred by granting summary judgment when it is clear that the appellant had a defence to the Respondent's claim in that she paid the debt through one Catherine Taruvinga who deposed an affidavit confirming that she indeed received the money on behalf of Respondent
2. The court *a quo* erred in granting summary judgment when there are several material disputes of fact which could only be resolved through a full trial thereby denying the appellant the rights to be heard before a decision was made against her.
3. The court *a quo* erred by granting summary judgment when it is clear that what the appellant raised was a solid defence to the extent that there are several issues that could only be resolved when the matter was referred to trial in that the circumstances surrounding the payment of the debt to Catherine Taruvinga aiming other triable issues.

She therefore sought an order setting aside the decision of the court *a quo* and substituting it with one dismissing the application for summary judgment. In heads of argument filed in support

of the appeal, the appellant reiterated that she had laid a firm and plausible defence to the claim. The respondent contended contrariwise.

As correctly submitted by the parties the remedy of summary judgment is a drastic one as it effectively abridges a party's right to be heard. It is however a useful tool available to a party with an unassailable claim to expeditiously dispose of bogus defences. In *Christmar (Pvt) Ltd* v *Stutchbury & Anor* 1973 (1) RLR 277 the following was said about the nature of the summary judgment:

> "The special procedure of summary judgment was conceived so that a mala fide defence might be summarily denied except under onerous conditions. The benefit of the fundamental principle of *audi alteram partem.* So extraordinary an invasion of a basic tenet of natural justice will not likely be resorted to, and 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 the plaintiff."

The test in an application for summary judgment is whether the defendant is *bona fide* in advancing the defence and whether the defence can succeed. If there is a possibility of it succeeding, the court is not required to consider whether such success is unlikely or likely. See *Davis* v *Terry* 1957 (4) SA 48 (R); *Shingadia* v *Shingadia* 1966 (3) SA 24 (R); *Hughes* v *Lotriet* 1985 (2); *Tavenhave & Machingauta Legal practitioners* v *The Messenger of Court* SC-53-14. Finally, it is to be borne in mind that applications for summary judgment are not decided on balance of probabilities, however strong, unless the court is satisfied that the plaintiff's case is unanswerable, it is not entitled to grant summary judgment. see *Oak Holdings (Pvt) Ltd* v Newman *Chiadzwa* SC 50/86; *Jena* v *Nechipote* 1986 (1) ZLR 29

In the present case we could not find fault in the court *a quo's* finding that the appellant's defence was so replete with glaring internal contradictions that it could not be regarded as *bona fide*. It was clearly contrived. The court *a quo's* observations are apt. The learned magistrate wrote:

> "However, of particular importance is the fact that on Annexure A, respondent and Catherine Taruvinga attested to the fact that on the 20th of January 2024, Catherine Taruvinga received US$500, from respondent for and on behalf of applicant. Then on Annexure B, the affidavit, the same parties attested the fact that the same Catherine Taruvinga received US$ 13 000 from respondent for and on behalf of applicant. Again, on Annexure A, respondent and Catherine Taruvinga on an unknown date. However, on the affidavit annexure B, Catherine deposed to the effect that on 20 January she received the

> sum of US$13 000 on behalf of the applicant. There is no mention of US$12 500. These glaring inconsistencies make this court believe applicant's assertion that these two annexures are cooked up documents which [have] got no probative value at all. In fact, may sealed respondent's case. It then leaves the court wondering as to how much respondent paid to Catherine Taruvinga. Was it US$12 500 or US$13 000. Exercise of caution should not replace of common sense."

We could not find any fault with the court *a quo's* reasoning. Although the threshold for thwarting an application for summary judgment is very low, with the respondent thereto needing only to set forth an arguable case or a triable issue, it however does not mean if he puts forward a defence, any defence, whatsoever, no matter how incredible, farfetched or self-contradictory, it would succeed.

In the present case, as correctly observed by the court *a quo*, the appellant put forward a self-contradictory defence leaving everyone having to second guess precisely which position constitutes the triable issue.

We are constrained, at the risk of repetition, to point out that the appellant averred in one breath that on 20 January 2024 she gave Catherine Taruvinga the sum of US$14 700 for onward transmission to the respondent. She relied in Annexure A as and B as proof of such payment which documents were at variance with each other. Therefore, not only does Annexure B contradict Annexure A, but also those documents contradict the averments contained on the appellant's own opposing affidavit. If Catherine Taruvinga received US$13 000 from the respondent on 20 January 2024 why does the appellant say she paid a total of US$14 700 on January 2024 as stated in paragraph 6(ii) of her opposing affidavit?

When we pointed out those glaring discrepancies to Mr Mutatu during oral arguments in court and asked him which of the versions constituted the real factual basis of the defence, he was unable to provide any comprehensible response other than to say such inconsistences were for the trial court to resolve. What probably eluded him was that a *bona fide* defence is one which can possibly succeed (the question of whether or not such a defence is likely to succeed not arising at this stage). A defence replete with internal contradictions is not one which can possibly succeed.

It is not up to the court seized with an application for summary judgment to sift through and make sense of the various versions put forward and decide which one carries the possibility of success. Put differently as was stated in *Kingstons Ltd* v *Ineson* (Pvt) Ltd (*supra*):

> "In summary judgment proceedings, not every defence raised by the defendant will succeed in defeating a plaintiff. What the defendant must do is to raise a bona fide, or plausible defence, with *sufficient clarity* and *completeness* to enable the court to determine whether the affidavit discloses a bona fide defence." (my italicization for emphasis)

Similarly in *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd & Farai Ndemera* HH-64-10 MAKARAU JP (as she then was) had this to say about the applicable test in summary judgment proceedings:

> "The test to be applied in summary judgment applications is clear and settled on the authorities. The defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence. Obviously implied in this test but oft overlooked by legal practitioners is that the defendant must raise a defence. His, facts, must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating as they may be and which he may very well be able to prove at the trial of the matter do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted."

The defence *in casu*, falls far short of the critical criteria set out above. It is an implausible defence because it has internal irreconcilable contradictions. For the same reason it cannot be said to be endowed with "sufficient clarity". It is the very opposite.

There are, of course several other features of the defence, as correctly noted by the court *a quo* which renders it implausible. The suggestion that she paid almost twice the amount she borrowed, without a proper explanation as to why she would do so, the fact that respondent would supposedly authorise his tenant to receive such a substantial sum of money on his behalf, the fact that the affidavit by Catherine Taruvinga is dated April 2024 well after the filing of the summons by the respondent being some of them.

Before concluding a word needs to be said about the incidence of proof in civil proceedings. In assessing whether the appellant's defence carries the possibility of success, therefore one has to bear in mind the question of burden of proof in civil matters.

Although the general position is that the onus lies on the plaintiff to prove his claim against the defendant on a balance of probabilities, there are instances where the onus is placed on the defendant to prove his defence.

In Schwikkard & Van der Merwe, *"Principles of Evidence"* 3rd ed at page 572-73 the following was stated:

"Where the incidence of the burden of proof in relation to a particular rule of law has not been authoritatively settled it necessary to refer the following general approaches set out in *Pillay v Krishna and Anor* 1946 AD 946 at 951 -2

> "If one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it. But there is a second principle which must always be read with it : where the person against whom the claim is made is not content with a mere denial of the claim, but sets out a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he is entitled it succeed on it : HC who asserts, proves and not the one who denies, since a denial of a fact cannot naturally be proved provided it is fact that is denial is absolute……The onus is on the person who alleges something and not his opponent who merely denies it."

The learned authors, Schwikkard & Van der Merwe, *op cit,* further give an example quite relevant for current purposes, they posit at page 618 as follows:

> "Thus, in a claim for recovery of a loan it is for the plaintiff to prove that the loan was made, but a defendant who alleges that the loan was repaid bears the burden of proving that fact in order for the defence to succeed. If at the end of the trial it is established that the loan was made, but it is unclear whether it was repaid, the plaintiff will succeed"

This is precisely the position the parties find themselves in *in casu*. it is common cause that the respondent advanced the amount in question to the appellant. The appellant therefore needed to put forward a version consistent with her having paid back the amount bearing in mind not only that the onus would be on her, but also that should it be found that it was unclear whether she had paid back the loan, the respondent would succeed. A defence which right from the outset is riddled with internal contradictions is not one imbued with any possibility of success.

We were therefore convinced that the court *a quo* did not err in its conclusion that the defence was lacked *bona fides* and that it was contrived to buy time. It was on that basis that we dismissed the appeal with costs.

Mutatu & Partners; Appellants legal Practitioners
Mavhiringidze & Mashanyare; Respondents legal Practitioners