

DENNIS NDEBELE
versus
LOCAL AUTHORITY PENSION FUND

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 6 JUNE 2018 AND 21 JUNE 2018

Opposed Application

K Ngwenya for the applicant
O Mutero for the respondent

MATHONSI J: This summary judgment application has brought the worst out of the respondent which, whilst clutching and hanging precariously at straws, it has put up a very serious face full of determination to disown a clear and unequivocal document which it voluntarily penned, in terms of which it acknowledged indebtedness to the applicant in a specific sum of \$50 670-17 and a monthly pension payment of \$844-78. In that document the respondent only complained of cash flow challenges but undertook to effect payment when it got the funds.

The respondent failed to honour its undertaking forcing the applicant to sue. In a summons action instituted on 13 December 2017 under case number HC 3251/17 the applicant sought payment from the respondent in the sum of \$44 756-71, interest on that sum at the prescribed rate from the date of issue of the summons, payment of pension arrears of \$13 516-48 which accrued from 1 August 2016 to 31 December 2017 at the monthly rate of \$844-78, payment of a monthly pension of the same amount from 1 January 2018 and costs of suit on the scale of attorney and client. The applicant's entire claim is premised on a letter written to him by the applicant on 14 July 2017 in terms of which indebtedness in those sums was acknowledged. The contents are:

“RETIREMENT PENSION BENEFIT

We have been informed that you retired from the service of Ingwebu Breweries on 31 July 2016 and have pleasure in giving the full details of your pension as follows:

One Third Commutation (Lump Sum)	\$44 756-71
Add: Pension Arrears for the period 1 August to 28 February 2017	<u>\$ 5 913-46</u>
Total Amount Payable	<u>\$50 670-17</u>

Due to cashflow challenges currently being faced by the Fund your retirement benefit together with your monthly pension of US\$844.78 will be paid as and when the Fund gets the requisite cash resources. Your monthly pension is guaranteed for seven years and thereafter for life. The fund requires the submission of a Life Certification form which will be sent to you during the last quarter of each year for completion and return to the Fund. If you require any further information regarding your pension arrangements, please do not hesitate to contact our Customer Liaison Officer.

Yours faithfully

O Pazvakawambwa
PENSIONS ADMINISTRATION EXECUTIVE”

Nowhere in that letter does the respondent make reference to the payments to be made to the applicant being subject to or dependant upon Ingwebu Breweries remitting the funds to the respondent for onward transmission to the applicant. In fact the only reference in the body of that letter to Ingwebu Breweries is in the opening sentence to the effect that the applicant had retired from its service on 31 July 2016. I make early reference to that because it is the defence which the respondent is now relying upon in contesting the applicant’s claim. It is however common cause that the applicant was employed by Ingwebu Breweries for 46 years until his retirement on 31 July 2016.

The applicant’s case is that during the tenure of his employment he made pension contributions to the respondent which were duly remitted to the latter by Ingwebu Breweries for payment to him on certain terms upon his retirement. Indeed upon such retirement the respondent was notified as a result of which it made a commitment to pay contained in the letter of 14 July 2017 which I have reproduced above. The respondent having failed or neglected to pay, the applicant craved the grant of an order for payment aforesaid.

The respondent entered appearance to defend the claim and filed a plea which significantly departs from the commitment to pay made in its letter of 14 July 2017. I again reproduce the pertinent parts of that plea below:

“2. Ad Paragraphs 3, 4, 5, 6, & 7

The contents of these paragraphs are inaccurate and denied. Defendant avers that:

- (a) Plaintiff was employed by Ingwebu Breweries (Private) Limited, an entity owned by the Bulawayo City Council.
- (b) Ingwebu Breweries is a subscriber and participant --- to defendant's Pension Fund and as such, plaintiff was a member of defendant's principal pension scheme through Ingwebu Breweries.
- (c) At the material time, Ingwebu Breweries were obliged to deduct plaintiff's pension contributions monthly from his remuneration and to remit them to defendant. Ingwebu breweries were plaintiff's agents for purpose of paying pension contributions to defendant.
- (d) Ingwebu Breweries deducted plaintiff's pension contributions from his remuneration but did not forward them to defendant. Effectively, plaintiff was not contributing to defendant's pension scheme.
- (e) Defendant's liability to pay pension to plaintiff was and is conditional on remittal of pension contributions to defendant by Ingwebu Breweries.
- (f) Acting on Ingwebu Breweries' instructions and undertaking that plaintiff's pension contributions were to be immediately remitted to defendant, defendant computed and advised plaintiff of the amount which was to be payable to him as pension. This does not constitute an acknowledgment of debt.
- (g) Ingwebu Breweries reneged on its undertaking and to date has not remitted any of plaintiff's contributions to defendant.
- (h) Consequently, defendant is not liable for payment of any amount to plaintiff until Ingwebu Breweries has remitted plaintiff's pension contributions to it.
- (i) Plaintiff should look up to Ingwebu Breweries for payment. Infact, he should have joined them as a party to these proceedings.
- (j) There is no basis on which an order for costs on a higher scale should be made against defendant.
In the circumstances, defendant prays for the dismissal of plaintiff's claim with costs."
(The underlining is mine)

Quite a long story indeed which the respondent would want to take to trial. It is however not contained in the letter of 14 July 2017 forming the basis of the applicant's claim. The applicant has therefore made this application for summary judgment holding the respondent to the terms of its acknowledgment of debt, believing that appearance to defend has been entered for purposes of delay as the respondent does not have a *bona fide* defence to the claim. The application has been opposed by the respondent through an opposing affidavit sworn to by the very same Ostern Pazvakawambwa, the respondent's Pensions Administration Executive, who penned the letter of 14 July 2017.

The deponent has added to the plea filed by the respondent that upon the applicant's retirement from the employ of Ingwebu Breweries, the employer's human resources manager

made a verbal request for the respondent to compute the amount payable to the applicant as pension and undertook to remit the applicant's pension contributions to the respondent within a month of computation. He stated that what the respondent meant in the letter was that it "would settle upon receipt of applicant's contributions from Ingwebu Breweries." He did not say how the respondent was able to compute the pension benefits if contributions were never remitted to it in the first place.

Mr Ngwenya for the applicant submitted that the applicant has a clear and unassailable claim against the respondent based on the letter of 14 July 2017 in which the latter admitted liability. As this is an application made in terms of rule 64 (2) of the High Court Rules, 1971, all that the applicant is required to do is to verify the cause of action and state that in his belief there is no *bona fide* defence to the action. As required by subrule (3) of rule 64 the applicant has attached a document which verifies his cause of action, a letter in which the respondent admitted liability. *Mr Mutero* for the respondent submitted that behind every perceived acknowledgment of debt is a story. This court should therefore go behind the letter to find out the reason why it was written which, in this case, is that Ingwebu Breweries made a verbal promise to remit to the respondent the pension contributions of the applicant thereby motivating the respondent to commit itself to paying the applicant the way it did. He relied on the authority of *Allied Holdings Ltd v Myerson* 1948 (2) SA 961 (W) at 968 in which is stated the principle that a liquid document which, on the face of it speaks unequivocally, must have the story of the transaction behind it as an investigation into the story may show that the defendant is not liable in terms of the liquid document.

In my view, reference to a liquid document is woefully misleading when dealing with a summary judgment application made in terms of rule 64. What an applicant for summary judgment is required to do is set out in rule 64 (2) and (3) which provide:

- “(2) A court application in terms of subrule (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 subrule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action.”

That is what an applicant for summary judgment does. There is no requirement that a summary judgment application should be made on the strength of a valid acknowledgment of debt made by the defendant. See *Takawira v Zimbabwe Iron and Steel Company Ltd* HB 42-18. An applicant for summary judgment may attach documents which verify the cause of action. Subrule (3) does not require such documents to be an acknowledgment of debt or a liquid document.

It should be appreciated that summary judgment is different from provisional sentence provided for in rule 20 of the High Court Rules. It is rule 20 which entitles the holder of a valid acknowledgment in writing of a debt, which it refers to as a liquid document, to issue summons claiming provisional sentence. The requirements for provisional sentence have a higher threshold than summary judgment, which is a remedy which deliberately denies a *mala fide* defendant the benefit of the *audi alteram partem* rule because the claim of the plaintiff would be unassailable.

Indeed where the proposed defences to the claim are clearly unarguable both in fact and in law the drastic remedy of summary judgment is available to the plaintiff. See *Chrisma v Stutchbury and Another* 1973 (1) ZLR 277 (SR) at 279.

For the respondent to succeed in defeating an application for summary judgment 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 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).”

In my view the defence relied upon by the respondent cannot defeat the application. This is an institution which administers a Pension Fund for Local Government authorities. The City

of Bulawayo which owns Ingwebu Breweries is one such local authority. As an employee of Ingwebu Breweries the applicant made pension contributions throughout his lengthy period of service and is therefore entitled to pension benefits. At his retirement, and quite unsolicited by the applicant, the respondent volunteered a letter written to the applicant setting out what is owed to him and making an undertaking to pay. In that letter the respondent made no reference whatsoever to Ingwebu Breweries and certainly did not make its commitment to pay dependant upon Ingwebu Breweries placing it in funds. In any event, what kind of a pension fund waits for the retirement of a pension contributor before demanding contributions from the employer? It is untenable.

Whatever case the respondent may have against Ingwebu Breweries has nothing to do with the applicant, the recipient of an unqualified commitment to pay. It cannot be seriously argued either that, because no time frame for payment was fixed in the letter of 14 July 2017, then the applicant should wait *ad infinitum* for his pension. Or that the money is not due when the applicant retired on 31 July 2016, almost two years ago. I am satisfied that this is a case where the extra ordinary remedy of summary judgment should be granted.

In the result, it is ordered that:

1. Summary judgment be and is hereby granted in favour of the applicant as against the respondent for payment of the following:
 - (a) The sum of US\$44756-71 being the one third lump sum pension commutation.
 - (b) Interest on the sum of US\$44 756, 71 calculated at the prescribed rate of 5% per annum from 13 December 2017 to date of payment in full.
 - (c) The sum of US\$13516, 48 being pension arrears from 1 August 2016 to 31 December 2017 at the rate of \$844,78 per month.
 - (d) Interest on the sum of US\$13516, 48 at the prescribed rate of 5% per annum from 13 December 2017 to date of payment in full.
 - (e) The monthly pension of US\$844-78 with effect from 1 January 2018.
2. The respondent shall bear the costs of suit.

T J Mabhikwa and Partners, applicant's legal practitioners

Sawyer and Mkushi C/o Dube-Tachiona & Tsvangirai, respondent's legal practitioners