Judgment No. HB 3/2004
Case No. HC 2653/02
X-Ref: HC 2207/02

EDGARS STORES LTD

Versus

DOLEM INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 MARCH 2003 AND 29 JANUARY 2004

J Dhlamini for the applicant
T M Ndebele for the respondent

Judgment

NDOU J: This is an application for summary judgment to be entered against the respondent (as defendant in the main action) instituted against it by the applicant (as plaintiff in the main action in HC 2207/02).

The action is for payment of $1 680 000,00 being an amount paid by the applicant to the respondent as a purchase price of a motor vehicle. The contract was cancelled by mutual agreement but the respondent has not refunded the money. The respondent has entered an appearance to defend the action and the applicant claims that the respondent has no *bona fide* defence. The respondent has elected under the provisions of order 10, rule 66(1)(b) to "satisfy the court by affidavit … that (it) has a good *prima facie* defence to the action."

The respondent filed an opposing affidavit. Because of the issues raised in the opposing affidavit, the applicant felt obliged and indeed filed an answering affidavit without prior leave of the court. The respondent has taken a point in *limine* arising out of this. The long and short of it is that the respondent prays that the answering affidavit be struck out as it falls foul of rule 67. Rule 67 of the High Court Rules 1971 provides that in an application for summary judgment no evidence may be

adduced by the plaintiff other than by way of the founding affidavit. The proviso to rule 67 provides that the court may permit further evidence in certain circumstances. In terms of paragraph (c)(I) of the proviso the court may permit the plaintiff to supplement his affidavit with a further affidavit dealing with any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit. In this regard, in *In Vogue (Pvt) Ltd* v *El Bulke* HH-82-93, at pages 2 to 3, SMITH J said –

> "Mr *Chirambasukwa* submitted that the replying affidavit should not have been filed without the prior permission of the court. I do not agree with him. I do not think that a replying affidavit should be, as it were, held in reserve and then produced at the hearing of the application. That would be most unfair to the respondent and to the judge hearing the application, I consider that any replying affidavit in an application for summary judgment should be filed as though it were an answering affidavit and then at the hearing the applicant should seek the court's permission in terms of paragraph (c) of the proviso to rule 67."

In light of this I do not think that the applicant was wrong in filing the answering affidavit and then seek this court's indulgence at the hearing. Coming to merits of the application I find what GILLESPIE J said in *Omarchah* v *Kasara* 1996(1) ZLR 584 (H) instructive. At page 587A-D the learned judge said –

> "The first issue to address is an application by the plaintiff for leave to adduce a further affidavit in response to the notice and affidavit of opposition. By rule 67 of the Rules of this court no evidence may be led in support of an application for summary judgment otherwise than by the founding affidavit. The opportunity which is afforded by paragraph (c) of the proviso to this rule, namely, the filing with leave of an affidavit to traverse new matter raised in the opposition, is one which is expressly limited to the circumstances where the opposing papers advance matter which could not reasonable have been anticipated at the time of the application. In *Lincoln Court (Pvt) Ltd* v *Axis International (Pvt) Ltd* HH-54-94 it has been explained that the purpose of this provision is not to enable a reply in the usual sense to opposing affidavit. It remains the policy to limit the evidence adduced for the plaintiff to that which is in the founding affidavit. The purpose of this is to maintain the distinction properly drawn between summary judgment and other opposed proceedings on application. The latter frequently permit of a robust approach which is

> anathema to the concept of summary relief given only to an unanswerable claim. The deponent of this affidavit is expected, given his awareness of the facts and of correspondence between the parties relating to the issue, to anticipate in his application the defence that is relied upon and to show why it is untenable. Only where the opposition contains a departure which could not have been reasonably expected is he entitled to seek leave to respond. It is in addition axiomatic that leave is only to be given where it is necessarily to file further papers."

In *casu*, I have to determine whether the opposing affidavit raises novel matters which the applicant could not reasonably be expected to have dealt with in his first affidavit. The respondent raised the issue of the signatures in the opposing affidavit. It is the applicant's case that they did not reasonable foresee that the issue of signatures on documents. Annexure "D" writing on the respondent's letterheads was not signed, annexure "F" was also written on the respondent's letterheads but signed by someone on behalf of the deponent.

In essence, the deponent on behalf of the respondent admits only those letters that he personally signed and not the rest. Most of the facts are common cause and the applicants seek to give context to the disputed letters. I hold the view that the answering affidavit is dealing with matters raised by the respondent which the applicant could not reasonably be expected to have dealt with in the first affidavit.

I accordingly, permit the admission of the applicant's answering affidavit.

Calderwood, Bryce Hendrie & Partners applicant's legal practitioners
Lazarus & Sarif respondent's legal practitioners