

MANUEL SABRINO DE ANDRADE
t/a MSA WHOLESALERS

Versus

ISSAC WILSON MUUNGANI
t/a SAURSTOWN SUPERETTE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 29 NOVEMBER 2002 AND 29 JANUARY 2004

T Khumalo for the applicant
S Siziba for the respondent

NDOU J: The applicant seeks an order for summary judgment. The salient facts are that the respondent purchased goods from the applicant for the sum of \$74 230,00. This part is common cause. In purported payment of the \$74 230,00 the defendant issued four post dated cheques for \$2 435,50 dated 5 February 2001, \$28 171,70 dated 5 May 2001, \$17 780,00 dated 20 April 2001 and \$19 144,90 dated 30 April 2001. It is common cause that all these four cheques were dishonoured on presentation. The applicant as a result caused summons to be issued claiming the \$74 230,00 and ancillary relief in HC 2072/01.

The respondent entered an appearance to defend. The applicant then made this application for summary judgment on the basis that the respondent has no defence and merely entered appearance for the sake of delaying the applicant's claim. On the one hand summary is an unusual and drastic remedy accorded only where an applicant has established his case clearly. However, on the other hand the legal process should not be abused simply in order to delay just claims – *Jena v Nechipota* SC –15-86; *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* SC-139-886; *Tanhira v Makoni* SC-18-88; *In Vogue (Pvt) Ltd v E L Bulle* HH-82-93; *Faust Products (Pvt)*

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Ltd v Continental Fashions (Pvt) Ltd 1987 (1) ZLR 45 (HC) and *Omarshah v Karasa* 1996 (1) ZLR 584 (H).

In *Mbayiwa v Eastern Highlands Motel, supra*, McNALLY JA at p 4 and 5 stated the defendant's obligations as being-

“... to set up a bona fide defence and to raise a fairly triable and arguable issue ... while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and the material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence ...

...sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. If it is needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides ... He must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts ...”

In *casu*, these post-dated cheques were introduced by a letter addressed by the respondent to the applicant dated 12 December 2000. The letter is in the respondent's handwriting in his company letterhead reads in part-

“Dear Supplier (MSA)

Please kindly receive my post-dated cheques as part of my payment to offset my balance as per our agreement.

I kindly thank you in advance.

Faithfully

(Signed)
I S Muungani”

In his opposing affidavit the respondent states in paragraph 5-

“Applicant acknowledged these cheques but maliciously deposited them on the same day as appears in annexure G. Applicant therefore has to be frank and truthful, and not mislead the court as to why the cheques were

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dishonoured. The simple reason is that the cheques were not supposed to be deposited on the day but on their respective dates so as to be honoured accordingly. Applicant therefore subjected himself into a situation of having his cheques dishonoured.”

The respondent later made an attempt to challenge the same indebtedness that he intended to liquidate through three of these dishonoured cheques. From his papers, the respondent has given a vague defence. He has made vague generalities and conclusory allegations which are not substantiated by solid facts and contradict his own letter and inconsistent with his own conduct of making the cheque payments. In view of the discrepancies in the defence raised by the respondent I do not consider that he has raised a *bona fide* defence. The defence that he raised is characterised by untruths. In *Tanhira v Makoni supra*, at page 7 of the cyclostyled judgment MANYARARA JA said-

“If the defence is untruthful, it cannot be a good *prima facie* defence, despite the silence of our High Court rules on *bona fide* in the assessment of a defence to a claim for summary judgment. It would make nonsense of the law if the position were otherwise.”

In the circumstances the application is granted. Summary judgment with costs is granted to the applicant against the respondent in the sum of \$74 230,00 with interest thereon at the prescribed rate calculated from 17 June 2001 to date of payment in full.

James, Moyo-Majwabu & Nyoni applicant’s legal practitioners
Cheda & Partners respondent’s legal practitioners