Judgment No. HB 27/11
Case No. HC 1963/10
X REF 1521/10

NATIONAL SOCIAL SECURITY AUTHORITY

Versus

PARKHAM ENTERPRISES (PVT) LTD
t/a RUBBER PRODUCTS

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 16 FEBRUARY 2011 AND 24 FEBRUARY 2011

J. James, for the applicant
M. Ndlovu, for the respondent

OPPOSED APPLICATION

MATHONSI J: The applicant instituted proceedings against the Respondent in Case No. HC 1521/10 for payment of the sum of US$43 085-00 on the basis that the Respondent, being a registered employer, was obliged in terms of the National Social Security Act, Chapter 17:04 to remit to it, national pension scheme contributions and workers compensation fund premiums on a monthly basis but had failed to do so from May 2009 to March 2010.

The Respondent caused an appearance to defend to be entered and filed a plea. That plea reads as follows:

''Defendant pleads to the Plaintiff's summons and declaration as follows:-

1. Ad paragraph 2
This is not denied.

2. Ad paragraph 3-4
This is denied. The amount of US$43 085-00 is disputed. The percentage of 8% and the interest charged is unlawful. The plaintiff is put to strict proof the roof.

3. Ad paragraph 4
This denied (sic). Even if it is admitted that the Defendant is indebtedness (sic) in the said amount, though it is denied, the Plaintiff should consider practical implications of making the contributions. Defendant cannot make contributions at the expense of paying salaries and other operating costs.

WHEREFORE, Defendant prays for the dismissal of Plaintiff's claim.''

Believing that the Respondent had not a *bona fide* defence and that appearance had been entered for purposes of delay, the Applicant filed this application for summary judgment.

It turns out that when applicant demanded payment from the Respondent in July 2010, the Respondent, then unrepresented, had written a letter dated 19 July 2010 in the following:

''RE: PAYMENT PLAN PROPOSAL

We hereby propose to make a payment of $5500-00 (Five thousand and five hundred dollars) per month plus monthly NSSA contributions on the 10th day of each month starting in August 2010.
Through your honourable office we do hereby apply for the waiver of interest and penalty charges on the outstanding amount. At the moment the company is grappling with serious financial constraints to the extend (sic) that we are failing to pay salaries, Zimra and other statutory payments on time. We have applied to the Commissioner of pensions to be exempted from paying pension for the next six (6) months until December 2010. We have stopped 28 employees since January 2010.
Hence the above payment plan is based on the current company performance. As management we hope our performance is going to improve as the economy stabilises.
Yours faithfully
J. Mudangwe
Finance Manager.''

The Respondent wrote another letter to applicant's legal practitioners on 30 July 2010 which reads in part as follows:

''RE: Deferment of payment

This letter serves to notify your respected office that due to serious defaults by our debtors we are not able to pay NSSA dues. We hereby promise to pay the agreed amount by 2 August 2010. Sorry for the convenience (sic) caused.
Regards
Joe Mudangwe.''

When no payment was made as promised on 2 August 2010, the Respondent, through its present legal practitioners, submitted in a letter to the Applicant's legal practitioners that reconciliations had been made which showed that ''what is owed to yours is US$28 584, 14,'' and went on to say ''it is not by design that our client is not paying, but its the unfortunate challenges experienced in the nation ----.''

Of course, the Respondent did not elaborate on how its reconciliation had reduced the amount owed and how the figure of US$28 584, 14 was arrived at. Most importantly up to that time there was no denial of liability. In fact much earlier than that on 3 February 2010, the

Respondent had, through J. Mudangwe, signed an inspection sheet admitting liability for the period from April 2009 to December 2009 in the sum of US$32 469-68. One assumes that monthly contributions continued to accrue and were added to that agreed figure until the time the summons was issued.

How and when this clear and unconditional admission of liability metamorphosed to a defence to the claim is not apparent from the papers. There is however a good case for holding that it seemed to coincide with the issuance of summons against the Respondent. In light of that, can it be said that there is a bona fide defence especially as the Respondent made an unconditional payment of US$2 000-00 well after the summons was served?

The applicant's claim is fairly straight forward and clear. What the Respondent has to do in order to repel a summary judgment application has been stated in numerous authorities. In *Hales v Doverick Investments (Pvt) Ltd* 1998(2) ZLR 235 (H) at 238 D-F Malaba J (as he then was) stated:

> ''The test to be applied to the defendant's affidavit is clear on the authorities. In *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723. 1957 (4) SA 631 (SR) the phrase 'good *prima facie* defence to the action' in r 66(1)(b) of the Rules of Court 1971, was interpreted by Murray C J at p 633 G to mean:
>
> > 'that the defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence at the trial.'
>
> In *Jena v Nechipote* 1986 (1) ZLR 29 (S) GUBBAY JA (as he then was) said at p30 D-E.
>
> > 'All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that 'there is a mere possibility of success'; 'he has a plausible case'; there is a real possibility that an injustice may be done if summary judgment is granted'
>
> The defendant's affidavit should not only disclose the nature of the defence relied upon to resist plaintiff's claim for ejectment, but must set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing.''

The learned Judge went on to refer to the judgment of McNally JA in *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S 139-86 at pp 4-5 where he stated:

> ''--- 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 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 --- the statement of material facts (must) be 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.''

In *casu*, in its plea the Respondent merely challenges the interest rate and the contributions due by the employer as unlawful without more. It then argues that it cannot be made to pay the statutory dues ahead of salaries and other operating costs. The latter is simply

not a legal argument as it appeals to equity or charity. The same applies to the opposing affidavit.

Mr Ndlovu for the Respondent occupied himself in the heads of argument with trying to challenge the admissibility of 2 letters he had written to the Applicant's legal practitioners marked ''without prejudice.'' I do not consider it necessary to decide the admissibility of those letters because the Respondent had long admitted liability before the letters were written.

He then sought to argue that the percentage of the contributions made to the applicant cannot be legal because that was determined before dollarization. I did not hear Mr Ndlovu to say there was no statutory provision for those deductions but merely that they are unfair. That cannot be a defence at all. This is particularly so in view of the fact that the Respondent has always admitted liability. I conclude therefore that raising these issues was an afterthought and excuse to buy time.

On the issue of costs, I am persuaded by Mr James' submission that instead of assisting the Respondent resolve the dispute without undue delay, the legal practitioner appears to have been a stumbling block. It is only after his involvement that the Respondent started reneging from its earlier promises and conjured frivolous defences. Mr Ndlovu maintained that stance right up to the end even as it appeared pretty obvious he had no sustainable case. Such conduct on the part of legal practitioners is unacceptable because, as officers of the court, they are expected to assist the court resolve disputes.

While the extent of Mr Ndlovu's aberration does not call for costs to be ordered *de bonis propriis*, legal practitioners should be warned of the risk of such awards should they persist in frivolous and vexatious defences at the expense of not only genuine claims but valuable court time. This is a case which calls for costs to be awarded on a higher scale.

In my view the applicant's claim is unanswerable. Accordingly I make the following order:

1. Summary judgment be and is hereby entered in favour of the Applicant against the Respondent in the sum of US$41 085-00 together with interest thereon at the prescribed rate from 11 April 2010 to date of payment.

2. The Respondent shall bear the costs of suit on an attorney and client scale.

James ,Moyo-Majwabu and Nyoni, Applicant's Legal Practitioners
Messrs Mlweli Ndlovu and Associates, Respondent's Legal Practitioners