

BULAWAYO CITY COUNCIL
versus
CHURCH YABABA JOHANE WEMASOWE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 JUNE 2016 AND 16 JUNE 2016

Opposed Application

R. Ndlovu for the applicant
P. Matika for the respondent

MATHONSI J: This is a summary judgment application in which the applicant, the municipal authority in charge of the City of Bulawayo, seeks payment of the sum of \$64 166-83 due to it by the respondent in respect of stand 15001 Donnington West Bulawayo, for water, rates and other levies.

In HC 2559/14 the applicant sued out a summons against the respondent for payment of that sum. It averred that during the period extending from November 2011 to September 2014, it had provided utility services, including water, to the respondent in respect of its property and submitted bills to the church which failed or neglected to pay in full thereby accumulating arrears of \$64 166-83.

The respondent entered appearance to defend and requested an array of further particulars. Believing that the respondent had not a *bona fide* defence and that appearance had been entered for dilatory purposes, the applicant filed this application for summary judgment. In the founding affidavit deposed to by its chamber secretary, Sikhangele Zhou, the applicant stated that after sending a letter of demand on 27 February 2014 to the respondent, it had responded by an undated letter acknowledging indebtedness and making a payment plan. For that reason, the respondent cannot possibly have a defence to the claim once it breached its payment plan. As such, summary judgment is well deserved.

The acknowledgement of indebtedness written by three of the respondent's officials including its secretary Patrick Matika who appeared before me representing the respondent, reads in pertinent part:

"Re request for credit payment

Church YaBaba Johane Wemasowe hereby request City Council to accept their payment plan towards clearance of arrears which is as follows:

- A. \$1500 per month towards arrears.
- B. Rates and timeously (*sic*)

This amount will be increased if resources permit. Please bear with us as we try by all means to settle our arrears. The issue has been extended to all branches scattered around to play their part. Once again the matter will be tabled at the church's synod to be held soon. All efforts will be towards arrears clearance."

When the respondent's officials made that approach to the applicant they were on bended knees. As to when and indeed how that unqualified admission of liability metamorphosed to something else as to inform the appearance to defend and request for particulars filed is not clear. Samuel Muchuchu, its chairman who deposed to the opposing affidavit, did not say. He was only happy to deny that the respondent neglected to pay its debt when the evidence pointed to the contrary.

At the same time the respondent "acknowledged being in arrears" but challenged the applicant on the amount being claimed and demanded that the applicant commissions an audit to look into the question of its liability. It was not explained why an audit was necessary and why the respondent occupied a special position different from other rate payers as to be entitled to an audit.

What it means therefore is that summary judgment is resisted, not because there are any discernible triable issues, but because of the fanciful challenge of the quantum which the respondent earlier on admitted as owing, that a request for further particulars has not been responded to and that the applicant should commission an audit before it can claim.

This is the kind of defence for which the procedure for summary judgment was invented. So that a party whose claim is unassailable, should not be delayed as a result of the fulminations of a debtor who is ducking and diving to avoid paying a debt but has nothing meaningful to say,

a debtor who believes he or she can say anything and in the process succeed to delay the day of reckoning as much as possible. Such a party should be allowed to take judgment through the procedure for summary judgment without delay and a debtor in the position of the respondent should be summarily denied an opportunity to continue playing games with the court.

The test to be applied to the respondent's opposing affidavit has been stated in a number of authorities as being that it has to allege facts which if established at the trial would entitle it to succeed in its defence: *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723. The respondent has to establish that there is a mere possibility of success, that there is a plausible case and that there is a real possibility of an injustice occurring if summary judgment is granted: *Jena v Nechipote* 1986 (1) ZLR 29 (S) 30 D-E.

The affidavit in opposition must also set out material facts on which that defence is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence: *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) 426 D; *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) 238G; 239A.

The opposing affidavit in the present case dismally fails the test. In fact there is no doubt that the applicant's case is unassailable. The respondent admitted liability in writing even before the summons was issued and made a payment plan. It has not honored that plan leaving it still liable. There is therefore nothing the respondent can say at the trial to change that.

In the result, it is ordered that:

1. Summary judgment be and is hereby entered against the respondent in the sum of US\$64166,83 together with interest at the rate of 6% per annum from 1 October 2014 to date of payment in full.
2. The respondent shall bear the costs of suit on the scale of legal practitioner and client.

R. Ndlovu and Company, applicant's legal practitioners