HB 245-16
HC 21-15
XREF HC 3080-13

BULAWAYO CITY COUNCIL
versus
DICKS AUTO PARTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 23 SEPTEMBER AND 29 SEPTEMBER 2016

Opposed Application

R Moyo-Majwabu for the applicant
S Chamunorwa for the respondent

MATHONSI J: The applicant, a municipal authority constituted in terms of the Urban Councils Act [Chapter 29:15] and charged with the running of the City of Bulawayo, instituted proceedings against the respondent, an incorporation owning property located within the jurisdiction of the applicant, for payment of the sum of $16 596-40 for arrear water and rates charges.

It averred in its declaration that although the respondent is a property owner within its municipal jurisdiction and as such has been levied the sum of $16596-40, it has refused or failed to pay. The applicant then craved for payment of that amount together with prescribed interest from 30 July 2011 and costs of suit. The summons was served upon the respondent on 13 December 2013 whereupon it entered appearance.

In due course the respondent filed a plea in the following:

"The defendant hereby pleads to the plaintiff's summons and declaration as follows:

1. The defendant disputes that it is indebted to the plaintiff in the sum of $16 596-40 in respect of water and rates charges and puts the plaintiff to the strict proof thereof.
2. The defendant disputes that the plaintiff is in any event entitled to claim interest on the sum of $16 596-40 with effect from 30 July 2011 and avers that the plaintiff is only entitled to claim interest with effect from the date each sum became due and remained unpaid.
3. The defendant disputes that the plaintiff is entitled to costs of suit at an attorney and client scale."

It is that plea which prompted the applicant to file this summary judgment application on the ground that the respondent has not a *bona fide* defence and that appearance was entered for dilatory purposes. In the founding affidavit of Spekiwa Guta, its legal officer, the applicant verified the cause of action attaching a statement for account number 8148015 held by the respondent showing entries dating back to 31 August 2010.

The account history in question is significant mainly because it shows that the respondent has always had a running account with the applicant which has never really been up to date. However the respondent was depositing varying amounts towards settlement of the date the last one of which was the sum of $400-00 paid by bank transfer on 3 October 2013. Prior to that the respondent had made a direct bank payment of $200-00 on 6 December 2011. I mention these payments which are strewn all over the statement because *Mr Chamunorwa* who appeared for the respondent tried to raise the issue of prescription as a defence. I shall return to that issue later.

For now let me state that the application for summary judgment left the respondent unmoved notwithstanding that on 28 July 2014 well after the issue of summons and the filing of the plea I have quoted above, the respondent addressed to the Financial Director of the applicant what was clearly an acknowledgement of indebtedness. On bended knees it pleaded for an extension of time to pay. The letter states:

> "RE: Application for extension to the Incentive Period, Account No. 8149015.
> We refer to the above and in pursuance of our visit to your office on 27th June 2014, we write to request for an extension to the incentive period to the 30th September 2014, at which time we are positive that we will have received our funds from South Africa. We attach hereto a copy of a confidential letter from our South African Lawyers, which states the period of when we are likely to receive payment. It is our hope that you will accept our request under these difficult times.
>
> Yours faithfully
>
> J N Dicks
> Managing Director."

I have said that the respondent was down on its knees at that very late stage pleading for an indulgence in respect of account number 8148015. It was even prepared to disclose what was a confidential letter from its lawyers. Rocket science is certainly not required to tell that it was

negotiating time to pay the debt and for Mr *Chamunorwa* to submit that it is unknown what the parties discussed during the meeting of 27 June 2014 is, in my view, to trifle with the court.

Despite those developments the respondent still opposed the summary judgment application. Other than the two points taken *in limine*, namely that the letter I have cited above should be expunged from the record because it was written after the issue of summons and therefore could not be relied upon to support the application and that some of the claims contained in the statement of account are prescribed, the opposing affidavit is very brief indeed in respect of the merits of the application.

On the merits the respondent stated that the applicant did not provide satisfactory services to the respondent as services "have been erratic and poor such that at times refuse is not collected, roads are not fixed" and maintenance work is not carried out timeously. For that reason the applicant is not entitled to payment. The respondent also queried interest which was included in the breakdown.

Happily Mr *Chamunorwa* did not persist with the argument that the letter of 28 July 2014 should be expunged. This is because there is no legal foundation for such argument. Surely it cannot be said that where a litigant admits liability after the issue of summons such admission is inadmissible. Nothing more needs to be said about that issue which is clearly not supported by law.

At the hearing of the application Mr *Chamunorwa* again took two points *in limine*. Firstly he submitted that the answering affidavit smuggled into the record by the applicant on 29 January 2015 should be expunged because an applicant for summary judgment is not entitled as of right to file an answering affidavit. Secondly, Mr *Chamunorwa* submitted that some of the claims are prescribed in terms of the Prescription Act [Chapter 8:11] as payment was due as far back as 2010 when the summons was only served on 13 December 2013. He did not specify which of the claims or what amount is prescribed.

I upheld the first point *in limine* and deferred determination of the second one relating to the issue of prescription as I was of the view that prescription could not be raised as a point *in limine* in an application for summary judgment. To my mind determination of that issue would fall under the merits of the matter, that is, whether there are triable issues.

Regarding the answering affidavit, I expunged it from the record because it was filed in breach of r67 of the High Court Rules. Rule 67 provides:

> "No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence *viva voce* or by affidavit:
>
> Provided that the court may do anyone or more of the following—
>
> (a) permit evidence to be led in respect of any reduction of the plaintiff's claim;
> (b) -----
> (c) permit the plaintiff to supplement his affidavit with a further affidavit dealing with either or both of the following –
> (i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or
> (ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence."

Clearly therefore the applicant is not entitled as of right to file further affidavits. Where the respondent has raised new issues which the applicant could not have expected when the founding affidavit was filed, the applicant must first seek permission from the court and be granted such permission before additional affidavits may be filed.

I do not agree with Mr *Majwabu* for the applicant that the applicant "is entitled" to file an answering affidavit, and then apply orally at the hearing for its admission into the record. Any additional affidavit can only be filed after permission is given by the court. There is no doubt that permission must precede the filing of the affidavit. Anything else would offend the provisions of r67. It is for those reasons that I expunged the answering affidavit from the record.

Summary judgment is indeed an extra ordinary remedy which denies a party who has shown an inclination to defend a claim, the opportunity to do so. It is a procedure conceived so that a *mala fide* defendant might be summarily denied; except under onerous conditions, the benefit of the *audi alteram partem* principle. This occurs because all the proposed defences to the claim are unarguable both in fact and in law. See *Chrisma* v *Stutchberry* 1973 (1) RLR 277.

The applicant is a municipality which, by operation of law, is entitled to levy rates and charge for water supplied to property owners. In fact rates are a statutory obligation. Having levied the charges the property owner like the respondent is obliged to pay. Respondent says

that it was not obliged to pay because at times refuse was not collected and there were delays in maintaining roads.

We therefore have to examine the defence raised by the respondent using the lenses provided by the law. In order to defeat a summary judgment application the respondent must set out a *bona fide* defence by alleging facts which, if established at the trial, would entitle it to succeed. The defence must be stated with sufficient clarity and completeness to enable the court to determine whether the opposing affidavit discloses a *bona fide* defence. See *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451(S) 458 F-G.

As stated in *Maharaj* v *Barclays National Bank Ltd* 1976 (1) SA 418 (A) 426D (quoted with approval by MALABA J (as he now is not) in *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) 238H, 239 A;

> "--- 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--- if the defence is averred in a manner which appears in all the circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirements of *bona fides* (*Breitenbach* v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 at 228 D – E)"

Unfortunately that is what the respondent has done. To say that services entitling the municipality to rates were not rendered in a satisfactory manner, or that at times (not specified) refuse was not collected and that at times (again not specified) there were delays in road maintenance is inherently vague, needlessly bald and indeed sketchy. It puts to question the *bona fides* of the defence.

The same could be said about the claim that some of the money being claimed is prescribed. Mr *Chamunorwa* could not even do the elemental arithmetics of what amount is prescribed.

Even if he had, the defence of prescription would still not survive the test for another reason. In terms of s18 (1) of the Prescription Act [Chapter 8:11] the running of prescription may be expressly or tacitly interrupted by an acknowledgement of indebtedness. It was stated in *FM Zimbabwe Ltd* v *Fortress Industries Investment (Pvt) Ltd and Another* 2000 (1) ZLR 221 (S) 224 G-H; 225 A that:

> "Section 18(1) of the Act, like its counterpart in s14 (1) of the South African Prescription Act 68 of 1969, does not provide examples of conduct constituting an acknowledgment of liability (compare s6(1) (a) of the former South African Prescription Act 1943). Acknowledgement may therefore take the form of part payment of the debt or payment of interest thereon (see *Cape Town Municipality* v *Allie* 1981 (2) SA 1 (C)) ---; or, the giving of security for payment of the debt (see *Markham* v *South African Finance and Industrial Co Ltd supra* at 676E). And an acknowledgement of partial liability for the debt interrupts prescription in respect of the entire indebtedness. The use by the legislature of the word 'tacit' in s18(1) is important. It signifies that the debtor's words and conduct should be taken into account."

Mr *Majwabu* submitted that throughout the period of indebtedness the respondent was making insignificant payments towards the indebtedness which interrupted the running of prescription. Mr *Chamunorwa* did not address that issue at all. It is however clear that the statement of account is full of such payments made by the respondents to the applicant. I have already made reference to those payments above. They did interrupt prescription and from the last payment of $400-00 made on 3 October 2013 to the date of service of summons on 13 December 2013 when prescription was finally interrupted by service of summons, a period of 3 years had not lapsed. Between 3 October 2013 and 6 December 2011 when payment had last been made again 3 years had not lapsed. Therefore no claim prescribed in terms of the Act.

Having said that the matter is indeed resolved. The applicant's claim is unassailable and appearance was entered for dilatory purposes as the respondent has not a *bona fide* defence. I am however not persuaded that the applicant is entitled to punitive costs. In fact no case for such costs has been made at all.

In the result, it is ordered that:

1. Summary judgment be and is hereby entered in favour of the applicant as against the respondent in the sum of $16596-40 together with interest at the prescribed rate from the date of summons to date of payment.
2. The respondent shall bear the costs of suit on an ordinary scale.

James Moyo-Majwabu and Nyoni, applicant's legal practitioners
Calderwood, Bryce Hendrie & partners, respondent's legal practitioners