KALAHARI PETROLEUM (PRIVATE) LIMITED
versus
WEBSTER NGWARU
and
CONFUELS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 19 November and 1 December 2010

Opposed Court Application

A Moyo, for the applicant
O Takaindisa, for the respondents

GOWORA J: On 7 April 2010 the plaintiff herein issued summons against the defendants, jointly and severally claiming an amount of USD$364 434-00. The defendants duly entered appearance to defend the summons and filed a plea in their defence. The plaintiff has now approached this court for an order for summary judgment in the amount claimed on the basis that the defendants do not have a defence to the claim and that they have merely entered appearance for purposes of delay.

It is contended on behalf of the plaintiff that its claim is clearly unarguable both in law and in fact and that consequently summary judgment should be granted as prayed. It is a correct statement of the law as argued by counsel for the plaintiff that the court will grant summary judgment in cases where the applicant's claim is clearly unanswerable and the defendant has no *bona fide* defence and his entry of appearance to defend is for purposes of delay.

However, in order to defeat a claim for summary judgment, all a defendant has to show is that there is a mere possibility of his defence succeeding or that there is a reasonable possibility that an injustice may occasion if summary judgment were granted against him.

As to the plaintiff's claim, in the declaration it is averred that during December 2009, the plaintiff appointed the first and second defendants as its agents to market and sell bulk petroleum products on its behalf to various customers. In terms of the agency agreement, the defendants would source for the customers and would then request the plaintiff to effect delivery to the specified customers. The defendants would in turn request the customers to pay

the full purchase price into the plaintiff's account within fourteen (14) days of delivery of the produce. Upon receipt of the purchase price the plaintiff would pay to the defendants commission in terms of the agreement. During December 2009 to March 2010 the defendants effected sales of petroleum products totalling USD635 102-60. This much is admitted by the defendants in their plea filed of record on 14 May 2010. What is at issue is the contention by the plaintiff in the declaration that the defendants were paid or collected the sum of USD635 102-60 from customers and have failed to account for the same and further that they have, in the process, converted the sum of USD364 434-00 to their own use.

The defendants have filed a plea and an opposing affidavit in which they set out their defence to the claim for payment of USD364 434 by the plaintiff. A warned and cautioned statement obtained by the police from the first defendant in answer to an allegation of fraud paid against him by the plaintiff arsing out of the agency agreement is also part of this record.

In their plea, the defendants deny that they collected various sums of money from the customers as alleged by the plaintiff. They allege in the plea that all the customers deposited money into the plaintiff's account as was required by the agency agreement between the parties. They therefore deny in the plea being indebted to the plaintiff in the sum of USD364 434-00.

In the opposing affidavit filed in answer to the application for summary judgment the defendants have adopted the following position. They admit that the claim arises from an agency agreement. They admit that in terms of the agency agreement they undertook to mistrust and cause the customers to pay into the plaintiff's account the full purchase price within fourteen days of delivery of the products. They admit further that upon receipt of the full payment the plaintiff would pay a commission. They admit as well that between 28 December 2009 and 18 March 2010 they effected sales to various customers and more importantly they admit that the total amount due for sales is USD364 434-00.

They, however, deny that they collected USD 364 434-00 from customers and converted it to their own use. They aver that the customers did not place them in funds in respect of the sum of USD 364 434-00. They state that the said sum was due and owing to the plaintiff upon the customers having remitted the sums to themselves. They admit that the plaintiff made demand of the said sum and that a letter was then addressed to the plaintiff's legal practitioners by their own legal practitioners on their instruction. They said that when the letter was written it was their anticipation that at least USD 125000 would have been remitted

by various customers as at 31 March 2010. They further contend that efforts to recover the money from those customers were then abated by the instigation of the claim by the plaintiff and that the customers did not want to pay money until the legal wrangle had been concluded for fear of being entangled therein.

In the warned and cautioned statement, the first defendant departed from the agency agreement. He claimed that he was the Managing Director of Conview and that his company had never sold fuel on behalf of the plaintiff. He stated that the plaintiff had supplied Conview with fuel, which the latter, in turn sold to its own clients. He stated that Conview owed money to the plaintiff and that the plaintiff would be paid once Conview received payment from its clients. The amount mentioned in the preamble to the warned cautioned statement and which therefore the first defendant was owing was the sum of USD 364 434-81.

Lastly I come to the letter I referred to above. The letter dated 24 March 2010 was addressed to the plaintiff's legal practitioners by the defendant's current legal practitioners. The pertinent portion of the letter reads as follows:-

> "We refer to the meeting between the writer and your Mr Moyo this morning (24 March 2010)
>
> Our client refutes your clients' claim that ours is indebted to yours in the sum of US$364 434-00 but however, insists that it is liable to remit US$334 259-00 to your client broken down as follows:-
>
> | | | |
> |---|---|---|
> | Outstanding amount | | 364 434-00 |
> | Commission @ 0,025/litre for 1000 000 litres sold | 25 000-00 | |
> | local fuel transportation | 1 500-00 | |
> | charge for 6 loads storage and security for 110 000 litresat Red Oil and Graniteside | 1 100-00 | |
> | Pumping costs for 26 trucks | 2 600-00 | |
> | Less total expenses | | (30 175-00) |
> | Amount outstanding | | 334 259-00 |
>
> We are instructed that a payment in he sum of US$125 000 will be remitted to your offices on or before close of business on 1 April 2010.
>
> As regards security for the debt our client is identifying suitable property that is commensurate with the balance upon the initial remittance of US$125 000.
>
> In light of the negotiations *bona fide* at hand, we kindly request you to impress upon your client to hold in abeyance any intended criminal prosecution for the recovery of the debt. Further, we will be obliged if your client may duly dispel any misapprehensions that our client's customers may now have against it, bearing in mind

> the conduct of your client liasing with several of our client's customers in a negative manner"

The plaintiff has submitted that in order to succeed in defeating the claim for summary judgment a defendant should aver facts which if proved at the trial would entitle him to succeed in this defence or at the very least put before the court a *prima facie* defence. The defendants should raise what is normally termed a 'triable issue'. In *Brietenbach v Fiat* SA (EDms) Bpk 1976(2) SA 226 the *onus* and degree of particularity required of a defendant in an application for summary were defined as follows:-

> "A literal reading of that requirement would impose upon a defendant the duty of setting out in his affidavit the full details of all the evidence that he proposes to rely upon in resisting the plaintiff's claim at trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree, subject to one addition, with the suggestion by MILLER J, in Shepstone v Shepstone 1974 (2) SA 462 (N) at pp 466-467, that the word 'fully' should not be given its literal meaning in Rule 32 (3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the court that what the defendant has alleged if proved at the trial will constitute a defence to the plaintiff's claim. What I would add, however, is that if defence is averred in a manner which appears in all the circumstances to be needlessly bald vague or sketchy that will constitute material for the Court to consider in relation to the requirement of *bona fides*[1]

The defendants have contended that the plaintiff's claim is not unanswerable. In *Pildifond Investment P/L v Muzani* 2005(1) ZLR 1 at 3G-4A MAKARAU J (as she then was) stated:

> "The unstated presumption in rr 64(1) and 66(b) cited above, is that the plaintiff's claim on its own must be clear. It must not be susceptible to exceptions on the basis of vagueness and it must be such action as the court may grant judgment upon in the absence of a good and *bona fide* defence. It must reveal a clean and competent cause of action. Although the emphasis on the rule is on the defence proffered by the defendant the rules must be read as requiring the plaintiff's claim itself to be unanswerable and based on a clean cause of action".

Does the plaintiff's claim *in casu* meet the requirements set out in the authority referred to above? The plaintiff has claimed the sum of USD364 434 based on an agency agreement. The defendants agree that an agency agreement exists between the parties. They admit that they sold fuel in terms of the agency agreement. They agree that an amount of USD364 434 was not remitted to the plaintiff. The reasons for the non payment will be

[1] at 228 D-F

considered by me when I deal with the defence being proffered by the defendants. Despite the attempt by the defendants to qualify the contents thereof in the opposing affidavit, it is clear that the defendants unequivocally accepted that the amount in dispute had not been remitted to the plaintiff. The defendants undertook to remit this amount to the plaintiff less an amount being claimed by them for commission and costs of delivery and pump costs. I accept the submission by counsel for the plaintiff that the plea filed of record is so unreliable that it cannot and should not be taken as a proper plea. Given the contents of the letter, the plea, the opposing affidavit and the warned and cautioned statement, it is in my view an abuse of court process for the defendants to seek to even argue that this application should be dismissed on the grounds that the plaintiff's claim is not clear and unanswerable. It is clear and it is unanswerable.

On the other hand, the defendants have been inconsistent in their defence. In the plea they deny that they collected the money. They said it was yet to be paid by their customers. In terms of the agency agreement the defendants were obliged to require the customers to deposit the monies into the plaintiff's account. In the letter they do not deny that the money is owing to the plaintiff and actually commit themselves to paying a portion to the plaintiff by the 1st of April 2010. The letter in my view constitutes a clear and unequivocal admission of liability on their part to remit to the plaintiff the sum of $334 259-00.

They have in my view failed to place facts before the court that establish a possibility of success of their defence at the trial. Given the circumstances obtaining in this case, it would be difficult if not impossible for them to place before the court facts showing that they have a plausible defence to the plaintiff's claim. They have not shown that there are facts that would lead me to conclude that there is a triable issue. In the event I find that the plaintiff's claim is clear and unanswerable.

Mr Takaindisa who did not settle the heads of argument, properly in my view conceded that there was no defence to the plaintiff's claim for summary judgment. He conceded that admissions had been made and I think the concessions were properly made. Counsel for the defendants also, conceded properly that the plaintiff had put forward a case which the defendants had not been able to oppose.

It remains for me to deal with the issue regarding the retention by the defendants of monies constituting commission and operating costs. It is common cause that they defendants were the plaintiff's agents for the sale of the fuel and that for acting and as such they were

entitled to a commission. The plaintiff has contended that they are not entitled to receive a commission as they breached the terms of the agency agreement between the parties.

The terms of the contract were set out clearly in the declaration. The defendants would cause the customers to deposit the purchase price of the fuels into the plaintiff's account and the defendant, upon receiving full payment would then pay out a commission to the defendants. It seems that the defendants have attempted in these proceedings, to alter the terms upon which the parties were conducting business with each other.

The plaintiff on the other hand has in heads of argument filed in these proceedings submitted that the defendants are no longer entitled to claim a commission from the contract. As authority for this Mr *Moyo* referred to *Duffet v Lurie Bros* 1923 C.P.D 473. At p 475 BENJAMIN J said:

> "It is well established that where an agent has acted improperly in the performance of his duty towards his principal he shall forfeit any remuneration or commission to which he would otherwise have been entitled if his improper conduct is in connection with the duty he had to perform".

As this issue arose for the first time in the heads of argument, there are no facts on the record as to what improper conduct is being attributed to the defendants. When the plaintiff issued summons for the payment to it of sums due under the contract it was aware that the defendants had not performed in terms of the contract. It should at that juncture have as part of its claim included an order for the denial to the defendants of any sums that may have been due by way of commission. It chose not to do so. Equally, when it applied for summary it could have in the order, sought that the defendant be deprived of the commission on the basis of the alleged breach. Again it chose not to do so. The plaintiff has now prayed in the heads of argument that I find that the defendants have acted improperly in the conduct of their agency duty to their principal. To give effect to that prayer would require me to make a factual finding as to what that improper conduct was and yet no facts have been placed before me to that effect. It appears to me that the plaintiff is attempting to establish a cause of action in its heads of argument. Clearly that would be un-procedural. Added to this is the fact that the defendants themselves were never called upon to answer to a charge of improper conduct on their part as to disentitle them to the commission. I must refuse to accede to this request.

The claim for summary judgment succeeds and I make an order in the following terms:

IT IS ORDERED THAT

1. Summary judgment be and is hereby granted in favour of the plaintiff
2 The defendants shall, jointly and severally, the one paying, the other to be absolved, pay to the plaintiff the sum of US$364 434 together with interest thereon at the prescribed rate with effect from 19 May 2010 to date of payment in full
3. The defendants shall pay, jointly and severally, the one paying the other to be absolved, the plaintiff's costs of suit.

Kantor & Immerman, plaintiff's legal practitioners
Musarira Law Chambers, defendants' legal practitioners