

KENIAS MUTYASIRA  
Versus  
ESTATE LATE MUCHINERIPI RISHONI GONYORA  
(represented by BARBARA GONYORA in her capacity  
as Executor Dative)  
And  
THE MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE  
GOWORA J  
HARARE, 24 June and 12 October 2011

### **Opposed Court Application**

GOWORA J: This is an application for summary judgment in the sum of US \$160 788.98. On 5 January 2011 the plaintiff issued summons for payment of US\$160 788.98. In his declaration the plaintiff avers that he was appointed Curator Bonis of the estate of the late Muchineripi Rishoni Gonyora by the third defendant herein, the Master of the High Court. In that capacity he rendered professional services on behalf of the estate. On 3 March 2010 at a taxation hearing conducted by the second defendant he was awarded fees for the duties he had carried out. The award of fees was subsequently confirmed by this court in a judgment of my brother CHITAKUNYE J on 28 October 2010. Despite demand however, the first defendant has refused to pay to the plaintiff the fees so awarded.

In his founding affidavit the plaintiff stated that he had instituted proceedings against the first defendant for the payment of his fees and the defendant had after the service of summons entered an appearance to defend the claim. He averred that the entry of appearance to defend was not backed by a bona fide defence to the claim. He states that the fees were properly awarded by a taxing officer under the administration of the second defendant and that the award was subsequently confirmed by an order of this court. That judgment was not appealed against. It was his view that the defendant entered appearance merely to delay payment of what is lawfully due to the plaintiff.

In her opposing affidavit the defendant averred that the plaintiff had launched these proceedings before the defendant could file a plea. It was stated by the defendant that the plaintiff had disposed of an immovable property belonging to the estate without the proper consent of any of the beneficiaries to the estate and a consent supposedly issued by the second defendant, which consent, the first defendant contends was issued on the basis of fraudulent documents. The second defendant also avers that the plaintiff had sold shares belonging to the estate again based on a fraudulent consent from the Master and without the consent of any of the beneficiaries to the estate.

The second defendant avers that there are currently proceedings of a criminal nature pending against the plaintiff in the Magistrates Court arising out of the conduct of the plaintiff on allegations of fraud.

According to the first defendant the immovable property was still being assessed to ascertain its market value and that the process of doing so was proving difficult because of the attitude of the purchaser who is in occupation as a result of the sale by the plaintiff. Tentative appraisals had however placed the value of the property at US\$120 000 which value was, it was suggested, in excess of the plaintiff's claim against the estate. It was suggested that this presented a full shield to the plaintiff's claim and that therefore the defendant had established a prima facie defence to the plaintiff's claim.

At the hearing the plaintiff sought leave to file an answering affidavit on the basis that the defendant had in her opposing affidavit raised the issue of set-off. The defendant did not oppose the application and the plaintiff's answering affidavit was admitted by consent. In turn the defendant sought leave to file a supplementary affidavit which was filed with the consent of the plaintiff.

In the answering affidavit the plaintiff sought to respond not just to the issue of set-off but also the allegations in the opposing affidavit that there were proceedings pending in the Magistrates Court where he was being charged with fraud in connection with his handling of the shares and the immovable property.

The supplementary affidavit sought to introduce into the record the valuation reports for the shares and the immovable property allegedly disposed of by the plaintiff during his tenure as curator bonis to the estate.

It is not in dispute that the plaintiff herein was removed from his office as curator bonis by this honourable court on 19 May 2006 on the premise that his appointment had been irregular.

The defendant has submitted that she has a valid defence to the claim. Although she has not yet filed a plea her contention is that she intends to claim the values of the properties disposed of by the plaintiff during his tenure. The issue of set-off is dealt with by Van Winsen, Ekstein & Cilliers as follows in their book *The Civil Practice of the Superior Courts in South Africa*<sup>1</sup>:

“...if by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such sum, the plaintiff’s claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be postponed unless the court, on application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as to it seems meet... The courts have in the past even before the present sub-rule was promulgated and in appropriate circumstances been prepared to delay delivery of judgment in convention until the counter-claim has been adjudicated upon. This rule also gives a defendant with a claim in reconvention certain protection where he has no option but to confess the claim. Judgment on the claim is postponed until judgment on the counter-claim is given. The amounts of the two judgments are then set off against each other.”

It is trite that at common law set-off is a method by which mutual debts which are liquidated and due are extinguished. If the debts are equal both are extinguished. If they are unequal the smaller is discharged and the larger remains in force only in respect of the balance or the excess.

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In an application for summary judgment a defendant has an onus to satisfy the court that he has a prima facie defence. The defendant must allege facts, which if he succeeds in establishing at the trial, would entitle him to succeed in his defence. The affidavit should not only disclose the nature of the defence he intends to raise, the material facts on which such defence is premised must also be set out. It is not sufficient for the defendant to make bald allegations which are not backed up by detail.

In *casu*, the defence raised is not premised on a liquid claim. It would appear that what the defendant claims is a set-off in fact amounts to a claim for damages. The valuation report attached to the supplementary affidavit filed by the defendant puts the value of the property at US\$200 000.00 which is a sum in excess of the fees being claimed by the plaintiff. The values for the shares disposed of by the plaintiff are reflected in a total sum of US\$19 044.93.

It seems to me that the plaintiff has the obligation to account to the estate for the proceeds of the properties that he disposed of during his tenure as curator bonis. He cannot lawfully seek to be paid for duties that he claims he performed when there are allegations that he had committed fraud in his execution of the same duties.

In the premises I am of the view that the second defendant has established that she has a prima facie defence to the application for summary judgment. She is entitled to defend the plaintiff's claim and the dispute between the parties should be decided through trial. In the result the application is hereby dismissed with costs.

*Chikumbirike & Associates*, 2<sup>nd</sup> defendant's legal practitioners