JETZONE CONSULTANCY (PVT) LTD
t/a DESIGN TECHNOLOGIES BUSINESS SOLUTIONS
versus
TWENTY THIRD CENTURY SYSTEMS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 22 November 2016 and 12 January 2017

Opposed matter

Ms *S. Evans*, for the applicant
M.E. Zvobgo, for the respondent

CHIWESHE JP: This is an application for summary judgment in terms of rule 64 which provides:

> "(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
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> (2) A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action.
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> (3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action.
>
> (4) Order 32 shall apply to the form and service of an application in terms of this rule and to any opposition thereto."

The plaintiff issued summons against the defendant in which it claimed the sum of $1 793 009.65 for "consultancy services rendered to defendant's clients in partnership with defendant at defendant's behest" together with interest thereon at the prescribed rate from 01 August 2015 to date of full payment and costs of suit on the legal practitioner and client scale. The defendant entered appearance to defend and thereafter requested for further

particulars to enable it to plead. Further particulars were furnished but the defendant requested for further and better particulars as it felt the information provided thus far was not sufficient. It was at that stage that the plaintiff filed the present application for summary judgment on the grounds that the defendant has no *bona fide* defence to its claim and that appearance to defend had been entered solely for purposes of delay.

The applicant's version of events is as follows. Both parties are in the business information technology. In March 2012 the parties entered into a project partnership agreement in terms of which the parties were to work together to exploit "in sales, developments and support the SAP market" in Zimbabwe. The parties worked together very well until 2013 when the defendant received payments for the e-Government project but failed to transmit the plaintiff's *pro rata* share of the proceeds in the sum of US$946 956.52. Subsequently the defendant acknowledged its indebtedness to the plaintiff in the above sum. The defendant also proffered a payment plan to extinguish this debt. According to the acknowledgement of debt and payment plan, the defendant ought to have paid the sum of $400 000.00 together with 25% of all payments generated by the e-government plan by the 30th June 2014. Thereafter the parties were to meet in July 2014 and agree on a further payment plan to clear the balance within the next six months.

In the meantime, and in terms of its contractual obligations, the plaintiff completed the rest of the work as envisaged by the agreement. This further work earned it the sum of $636 953-13, bringing the total of its claim to the sum of $1 793 009.65. Prior to the present proceedings, the defendant had paid the sum of $15 000.00 towards clearing the debt. No further payments have since been made. The plaintiff avers on the basis of the acknowledgment of debt that its claim is based, at least in part, on a liquid document and is therefore unassailable. The relief of summary judgment is available to a plaintiff who proves that he has a clear and assailable case and should not therefore be subjected to the delay and expense of a trial. See *Pitchford Investments Pvt Ltd vs Muzariri* 2005 (1) ZLR (H) 1.

In *Majoni v Ministry of Local Government and National Housing* 2001 (1) ZLR 143 (S) the Supreme Court stated thus:

> "The principles applicable in a summary judgment application have been well documented. The quientessence of this drastic remedy is that the plaintiff, whose belief it is that the defence is not bona fide and entered solely for dilatory purposes, should be granted immediate relief without the expenses and delay of trial."

Does the plaintiff have a clear and unassailable case entitling it to the relief sought? I am inclined to agree with the defendant that the plaintiff's case does not meet the requirements for summary judgment. The defendant has raised a number of triable issues which, if proved, would constitute a valid and *bona fide* defence to the plaintiff's claim.

In *Jena v Nechipote 1986* (1) ZLR 29 (S) it was held that "all that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that "there is a mere possibility of his success", "he has a plausible case", "there is a reasonable possibility that an injustice maybe done if summary judgment is granted."

See also *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* SC 139-86.

In my view the defendant has raised a number of triable issues chief among which is whether there is in existence an acknowledgment of debt in the sum of $946 956.52 as alleged by the plaintiff. At para 11 of its opposing affidavit, the defendant states:

> "11. Ad Paragraph 9
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> The email I sent to plaintiff's representative is referred to entirely out of context, again to deliberately give the wrong impression about this matter.
>
> 11.1 I was not referring to a debt for either work due under this contract or work already done, but simply an agreement on the change management services and what plaintiff would be paid and intervals for payment subject to performance. It actually included payment, partially upfront, for work to be done. This following a specific discussion Mr Chikumbu and I had and is entirely unrelated to this matter.
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> 11.2 Just to stress the point, the court will notice a string of emails indicates that Plaintiff had earlier on prepared an acknowledgment of debt, which defendant refused to sign, precisely because it created this wrong impression that defendant actually owed money for work already done. This was not so;
>
> 11.3 The parties were then to enter into an agreement in order to set out the specific terms of this transaction. This agreement would include the issue of performance. The agreement was then not finalised and entered into because plaintiff, soon after this issued summons in the Magistrates Court seeking judgment in respect of the US$946 956.52 in full. It is therefore untrue that the email was an out and out acknowledgment of work done under this contract, or that payment was due for this."

The defendant further avers that the plaintiff has not done any work in terms of that part of the contract relating to sales or project management under which summons has been issued. The plaintiff, according to the defendant, was contracted to perform that part of the

agreement relating change management services under which it rendered little or no work at all!!

In the circumstances I am satisfied that summary judgment should not be granted in this case because the defendant has raised triable issues which ought to be fully ventilated in a trial. I am convinced that an injustice may be done if the present application were to succeed.

Accordingly the application for summary judgment is hereby dismissed with costs.

Mabuye, Zvarevashe, applicant's legal practitioners
Dube Manikai & Hwacha, respondent's legal practitioners