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Judgment No S.C. 53\2002

Civil Appeal No 295\2000

IGNATIUS PAMIRE v UDC LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA AJA
HARARE MAY 28 , 2002

*C. Seremani*, for the appellant

*G. Mbidzo*, for the respondent

GWAUNZA AJA: This is an appeal against the judgment of the High Court, which dismissed an appeal by the appellant against a decision of the Magistrate's Court, Harare.

It should be noted that although the appeal in the High Court had been filed by PP and I Agencies (Pvt) Ltd as the appellant, PP and I Agencies was substituted with Ignatius Pamire with the consent of the respondent and the leave of the court. Therefore, as correctly pointed out, *in limine*, by the respondent in this matter, Ignatius Pamire and not PP and I Agencies, is the appellant in the matter before this Court.

The pertinent facts of this matter are that between April and June 1993

the respondent advanced certain monies to PP and I Agencies following the signing of hire purchase agreements between the parties. The appellant and his brother, one Peter Pamire, bound themselves as surety *in solidum* and as co-principal debtors with the PP & I agencies for the due payment of all sums advanced to the latter.

PP and I Agencies having defaulted in its repayments, the respondent issued summons against all three debtors, in four cases in the Magistrate's Court, ie, cases 18780/96, 18781/96, 18782/96 and 20954/96 for recovery of the amounts due, including interest and other related charges.

After none of the defendants in those cases had entered appearance to defend the action, the respondent applied for and obtained default judgment in the amounts sought. Upon failure of the appellant and his co-debtors to pay the amounts ordered against them by the court, the respondent sought to have the property of the appellant attached and sold in execution. The appellant then filed an urgent application in the Magistrate's Court for a stay of execution in relation to all the judgments pending the submission to the court and to him of what he referred to as a "detailed reconciliation statement reflecting the correct amount outstanding to date."

In support of that application, the appellant challenged the amounts indicated on the warrants of execution as the amounts owing by him to the respondent. The magistrate dismissed the application leading to the appellant filing an appeal against that decision to the High Court.

The court *a quo* found that there was no merit in the appeal and dismissed it with costs. It noted on the last page of the judgment:-

> "… The appellant has made sweeping allegations (of having effected certain payments) but they are not substantiated by any concrete documentary evidence. In my view the magistrate had no option but to dismiss the application as it was not supported by facts and figures."

The appellant then appealed to this Court[1], giving the following grounds of appeal:-

[1] It should be noted that contrary to the respondent's assertion that this appeal is only in respect of Case No 18782/96, the appeal to the High Court and that to this Court related to all the four judgments of the Magistrate's Court

> "The learned Judge erred by holding that there are no irreconcilable discrepancies in accounts 95090557/9509445,9509278 and 9509326 of the Respondent when in reality there are serious discrepancies regarding the correct amounts due inclusive of interest as well as the overall amounts of money paid by the Appellants.
>
> That as shown by the annexed schedule Respondent's overall capital claim for the 4 loan accounts is the sum of $375 611,34 and the interest accruals regard being had to *in duplum* rule totals the sum of $375 611.34 making a total of $751 212.68.

That the learned Judges erred by failing to hold that if Appellant have paid a total of $269 965.82 then the Respondent's balance claim should for all intents and purposes correctly be the sum of $481 256.82 and not $749 942.23 being claimed by the Respondent.

> That the learned Judge erred by holding that Respondent is entitled to proceed with the claim of $1 019 908.05 when in truth and fact the overall claim amounts to $751 212.68 less the sum of $269 965.82 which finding contravenes the *in duplum* rule, amounts to unjust enrichment and further disregards all the payments made by Appellants towards the liquidation of the indebtedness in the sum of $269 965.82."

It is contended for the respondent that the appellant has furnished no details of the irreconcilable differences that he alleged existed between his computations and those of the respondent concerning the payments made and due. It is contended further that the appellant "lumped together" unexplained documents purporting to be proof of various payments made by him, without indicating how the payments are broken down nor whether, and if so to what extent, interest on the amounts owing had been factored in. Finally it is contended for the respondent that the appellant, who did not deny that receipts were issued to him on each occasion payment was made, should have produced and relied on these rather than on correspondence of a varied nature, (some of it letters from his legal practitioner) in his attempt to prove that he had effected the payments alleged.

I find merit in these contentions. The appellant does, indeed,

concede he had not furnished the court with proper proof of the payments he alleged to have made, saying in paragraph 6 of his Founding Affidavit:-

> ”Surely I cannot recover all my receipts but I genuinely believe that the amount I have paid to date towards the liquidation of the overall liability is far much in excess of the above amount of $221 692.32 …”

Not only did the appellant fail to prove the payments he alleged to have made after judgment on the four cases was entered against him, he also, as is apparent from what is quoted above, showed an inability to distinguish between the judgment debt and the total amounts calculated as owing after judgment was entered.

It is trite that the *onus* of proving payment made by a debtor rests on the debtor himself[2]. Therefore as long as the appellant, in *casu*, has failed to prove the payments he alleges to have made, in particular, those paid after the default judgments of the Magistrate's Court, he has not proved a case for the relief that he now seeks. This is particularly so when the respondent has on the other hand furnished the court with a detailed account of the various amounts owed by the appellant, the payments made, and the balances outstanding. The amounts do not match the figures (some not proved) that the appellant claims he paid.

It hardly needs mentioning that if the appellant disputed the amounts claimed by the respondent, the proper course of action for him to take would have been to enter appearance to defend the actions, and to file his defence. That way the discrepancies that he alleges would have been properly investigated. It is futile for

[2] Christie’s Law of Contract in South Africa” 2 ed at page 518 is cited by the respondent as authority in this respect

him to attempt to raise the issue of these discrepancies as well as other defences at this late stage in the proceedings. In fact he cannot do so as long as the default judgments have not been set aside. He did not apply for rescission of the judgments in question.

When all is considered, I find the judgment of the court *a quo* to be sound and unassailable.

Even though the respondent has claimed costs against the appellant on a legal practitioner and client scale, I am not satisfied a case for such an order has been made.

It was for these reasons that, after hearing argument, we dismissed the appeal with costs.

SANDURA JA: I agree

CHEDA JA: I agree

*Ziweni & Company Attorneys*, appellant's legal practitioners

*Mbidzo Muchadehama & Makoni*, respondent's legal practitioners