REPORTABLE ZLR (52)

Judgment No. SC 60/06
Civil Appeal No. 297/05

(1) BUBYE MINERALS (PRIVATE) LIMITED (2) ATHLONE INVESTMENTS (PRIVATE) LIMITED

v

RANI INTERNATIONAL LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE, OCTOBER 17, 2006 & JANUARY 18, 2007

E W Morris, for the appellants

E T Matinenga, for the respondent

CHEDA JA: The first and second appellants are both companies duly incorporated according to the laws of Zimbabwe. The respondent is also a company duly incorporated according to the laws of Zimbabwe.

On 18 November 2004 the respondent issued summons against the appellants claiming as follows –

(a) Payment in the sum of US30 000,00 in respect of monies lent and advanced to the defendant in or about September 2001 at the defendant's instance and request and which amount despite demand the defendant has failed or neglected to pay;

(b) Interest on the sum of US$30 000,00 at the rate of 7,5% per annum calculated from 10 October 2002 to date of payment in full; and

(c) Costs of suit.

The appellants entered appearance to defend this claim.

In December 2004 the respondent applied for summary judgment against the appellants. On 14 September 2005 the High Court granted the application for summary judgment. The appellants have now appealed against that judgment.

At the hearing of the application for summary judgment the appellants raised as one of their points of opposition to the application the fact that the deponent to the applicants founding affidavit could not swear positively to the facts as he was never party to the negotiations leading to the agreement on which the claim was based.

Unfortunately the court, in its judgment, dealt with the other points raised and proceeded to grant summary judgment. This particular point was only referred to but not dealt with or determined by the Court.

The appellants have now raised this point *in limine* in their appeal in addition to other grounds. I now proceed to deal with the point *in limine* to establish its effect on the case before this Court.

Applications for summary judgment are regulated by order 10 r 64 of the Rules of the High Court ("the Rules". The rule provides as follows:

"Summary judgment

64. Applications for summary judgment

(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.

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."

In this case one George Kantsouris, (herein after referred to as "Kantsouris") deposed to the founding affidavit. He stated as follows:

> "I am the Chairman's Personal Assistant/Majority Shareholders' Representative and in the employ of Rani International Limited and as such I am authorised to make this affidavit and the facts stated herein are within my personal knowledge." (my underlining)

The opposing affidavit was sworn to by one Adele Farquhar (herein after referred to as "Farquhar") on behalf of the then respondents. She said she was

a director of the first and second defendants (in the application) and was authorised to depose to the affidavit.

She said she had had occasion to question Kantsouris' knowledge of the facts that he professed to have and could safely say that he had no knowledge of any of the pertinent facts as he was not employed in any capacity by the plaintiff when the events giving rise to this case arose and did not know what he was talking about. She detailed the nature of her dealings on the matter with a Mr McCann and not Kantsouris, sometime in October 2001. This was a clear challenge to the claim by Kantsouris that he had personal knowledge of the facts of the matter.

On appeal, the respondent did not deal with this point in detail but simply dismissed it as irrelevant. It was argued on behalf of the respondent that Kantsouris had access to the records of the respondent and had full consultations with its employees. While that may be correct, it is certainly not enough.

In *Mowschenson and Mouchenson v Mercantile Acceptance Corporation of South Africa Ltd* 1958 (3) SA 362 one Henry Barton Myers who was an attorney was authorised to institute action against the defendant and proceed to the final end and determination thereof. His authority to swear to the founding affidavit was challenged as follows:

> "I further deny that the said Myers has any personal knowledge of the facts deposed to and/or verified by him and further state that the defendant company has had no dealings with the said Myers in regard to the transaction on which summons was based, nor was the said Myers party thereto.

> I submit that such information or knowledge as the said Myers may have can only be hearsay.
>
> I further respectfully submit that the said Myers is in no position to form any opinion as to the *bona fides* of the defendant's defence to the action nor as to the purpose for which appearance has been entered to defend the action."

The Court stated that:

> "The verifying affidavit goes to the question of the court's jurisdiction. If the affidavit does not comply with the requirement of the Rules (which in England is substantially the same as ours) the court would have no jurisdiction to grant summary judgment. If material allegations in the affidavit are hearsay, the affidavit is defective and the application is bad."

The court also stated that it was open to a respondent in summary judgment proceedings to attack the validity of the application on any aspect, including the admissibility of evidence tendered in the verifying affidavit. If Myers, who was an attorney for the applicant, and who had been properly instructed, was not within the category of persons who could swear to the founding affidavit and verify the facts, then Kantsouris couldn't be either. The facts known to him were not based on personal knowledge but from records and correspondence of the company.

In *Newman Chiadzwa v Herbert Paulerer* SC 116/91 the Court held that a relative of the applicant, who was not present at the negotiations of the sale of property but gained knowledge of facts from an agreement of sale and letters written by the parties and what he was told by the plaintiff, was not shown to be a person who had personal knowledge of the facts. It was pointed out also that a useful test would be to ask whether the deponent to the affidavit would be a competent *viva voce* witness to the facts were he to be called to testify.

I now turn to compare the affidavit of Kantsouris with the cases I have referred to. Myers was an attorney for the applicant. He had been given detailed instructions, obviously in order to initiate action. He had all the facts on which the case was based. He was, however, disqualified from deposing to the affidavit.

Kantsouris is an employee of the applicant. It was not disputed that at the time of the transactions he was not in the employ of the applicant. It was submitted on appeal that he had access to the records of the company and also consulted the company's employees. Clearly what knowledge he got was obtained as a result was hearsay.

Rule 67 of the Rules says:

> "No evidence may be adduced by the plaintiff otherwise than by the affidavit a copy of which was delivered with the notice nor may either party cross-examine any person who gives evidence *viva voce* or by affidavit."

This clearly shows that the evidence on the affidavit of the applicant should be based on personal knowledge and not on hearsay.

It follows that the affidavit of Kantsouris was not based on personal knowledge but on hearsay.

The effect is that there was no proper affidavit founding the application and therefore no valid application before the court.

Accordingly, the decision of the court *a quo* is set aside and substituted with the following:

"The application for summary judgment is dismissed with costs."

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Joel Pincus Konson & Wolhuter, appellants' legal practitioners

Costa & Madzonga, respondent's legal practitioners