ECONET WIRELESS (PRIVATE) LIMITED
versus
FELIX KARIWO

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 08 July 2020 and 27 April 2021

Opposed Matter

J Ndlovu, for the applicant
Respondent in person

CHIWESHE JP: This is an application for summary judgment made in terms of r 64 of the High Court Rules, 1971, which provides as follows:

> ***"64. Application for summary judgment***
> (1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pretrial 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.
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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"

The background facts of the matter are these. On 4 November 2018 the applicant issued out summons against the respondent for payment of the sum of US$32 050.00 with interest at the prime overdraft rate charged by Steward Bank together with collection commission and costs on the higher scale. The applicant's claim is based on an acknowledgment of debt signed by the respondent on 31 May 2018. In terms thereof the respondent undertook to pay the sum of $33 050.00. The amount owed arose from a series of transactions made by the respondent using the applicant's swipe into Ecocash Service, transferring money from the respondents'

Nedbank (MBCA) account through to Ecocash wallets using Nedbank card number 639136200013557. However, the respondent's Nedbank (MBCA) account was not debited to fund the wallets as should have been the case, but instead the applicant's account was debited to fund these transfers. As a result, the applicant was prejudiced in the sum of US$33 050.00. Of this amount the respondent has paid the sum of US$1000.00 leaving the balance of $32 050.00 claimed in the summons.

In terms of the acknowledgement of debt the respondent undertook to pay the debt within two months from the date of signature. He did not do so prompting the applicant's legal practitioners to write to him advising him to honour his agreement. On 11 September 2018 the respondent wrote a letter to applicant's legal practitioners confirming and acknowledging the existence of the acknowledgment of debt. He felt that its material terms needed him to consult his bank for correspondences on the transactions in question before signing the acknowledgement of debt. The respondent's letter goes on to state that he signed the acknowledgment of debt "without the full knowledge of the later consequences on legal grounds". He opined that "considering the current economic conditions, it is not possible for a debt of US$32 050.00 to be settled in full in a period of 2 months." He proposed a meeting of the parties to discuss further "on the debt acknowledged before". His proposals were rejected.

The respondent has entered appearance to defend the applicant's claim. The applicant is of the view that the respondent has no *bona fide* defence to its claim and that appearance has only been filed for the sole purpose of delaying the finalisation of the matter. It is for that reason that the applicant has filed the present application for summary judgment.

The respondent's opposing affidavit is to the following effect. His letter to the applicant's legal practitioners dated 11 September 2018 was both a response to the applicant's letter dated 31 August 2018 as well as a protest. He had indicated that he needed to check with Nedbank (MBCA) his bankers as to the veracity of the transactions as alleged by the applicant. He further submits that the applicant should have cited Nedbank and several other Ecocash users including one Alexio Gunda and Ernest Nhamo. Further he alleges that he has signed the acknowledgment of debt under duress in that he was threatened with economic pressures such as blacklisting. He submits that he had not had the benefit of legal advice and accordingly he had not appreciated the legal implications of signing the acknowledgment of debt. He did so at the applicant's 'intimidating offices" at Msasa where he succumbed to pressure and signed

the acknowledgment of debt. His request for the applicant to check with his bank and other Ecocash users was rejected.

He further avers that the applicant is recovering the same debt from both himself and other Ecocash subscribers. These other subscribers have, according to the respondent, paid the sum of US$1055.00. The mobile numbers are 0772 330 178 for Alexio Gunda and 0772 776 483 for Ernest Nhamo. The respondent reiterates that at all relevant times the applicant never gave him the opportunity to be legally represented. He maintains that he has a valid defence to the applicant's claim and that same is a *bona fide* defence.

The law with regards applications of this nature is well traversed in *Pitchford Investments Pvt Ltd v Muzariri* 2005 (1) ZLR it was held that summary judgment may be granted when the plaintiff proves that it has a clear and unassailable case against the defendant and that the defence raised, if any, is without substance in law and in fact.

In *Jena v Nechipote* 1986 (1) ZLR 29 (S) on the other hand the Supreme Court laid down what must be established by the defendant in order to dispose of a claim for summary judgement. It was stated thus:

> "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 possibly of his success", "he has a plausible case", "there is a triable issue", or "there is a reasonable possibility that an injustice may be done if summary judgment is granted."

In the case of *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* SC 139-86 McNALLY JA had this to say as to the obligation of a defendant in an application for summary judgement:

> "While the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence."

In *Rex v Rhodian Investments Trusts (Pvt) Ltd* it was held that in order for the defendant to succeed in an application for summary judgment, he must allege such facts which, if established at trial, would entitle him to succeed in his defence.

The defence raised by the respondent in the main is that he signed the acknowledgment of debt under duress. He alleges that he was called to the head office of the applicant where he was threatened that he would be blacklisted and excluded from using the applicant's various facilities if he did not sign the acknowledgment of debt. It is argued that this posture by the

applicant amounts to economic duress, whose requirements were outlined in *International Trading Export Company v Edmore Taperesu Mazambani* HC 3117/15.
Reliance has also been placed on the case of *David Tendai Matipano v Gold Driven Investments (Pvt) Ltd* SC 225/17.

The respondent's second line of defence is that the amount alleged to be owed by him is also being retired from other subscribers namely Alexio Gunda, mobile number 0772 330 178 and Ernest Nhamo, mobile number 0772 776 483. The respondent did not file the Debt Recovery Schedule he refers to in his opposing affidavit as Annexure A. He however produced a document from the bar showing a list of subscribers and how much each has been billed.

The respondent also avers that he was not given the opportunity to verify the transactions with his bank and that at any rate, the applicant should have cited the bank and the other subscribers he alleges would be relevant in the resolution of the matter.

Do any of these submissions by the respondent amount to a *bona fide* defence with substance in law and in fact? The respondent alleges that Econet duress was brought to bear upon him thereby forcing him to sign the acknowledgment of debt without his consent. Is this a defence recognisable at law? The answer must be in the affirmative. In *International Trading Export Company v Edmore Taperesu Mazambani* HC 3117/15 DUBE J outlined the requirements for the defence of duress to succeed. These are:

"1. The fear must be a reasonable one.
2. It must be caused by the threat of some considerable evil to the person concerned or his family.
3. It must be the threat of an imminent or an inevitable evil.
4. The threat or intimidation must be unlawful or *contra bonos mores.*
5. The moral pressure must have caused damage".

The only way that the respondent can satisfy such requirements is by adducing evidence before a trial court.

The applicant denies exerting any pressure or duress upon the respondent, insisting that the respondent's signature was appended voluntarily. That to me is a triable issue which can only be resolved by a trial court. It cannot be resolve summarily as prayed by the applicant. It must be borne in mind that a remedy so drastic as summary judgment cannot be lightly granted. It deprives the respondent the opportunity to ventilate his case in a trial, to his prejudice.

The respondent alleges that the same debt was being recovered from other subscribers. The factual basis for that allegation has not been properly canvassed. I am unable to make head or tail of this defence. All I have is a list of subscribers and the monies being recovered

from them. No link has been established between these debtors and the debt disclosed in the acknowledgment of debt.

The respondent avers that the applicant should have cited these debtors and his bank. Given the nature of his defence it would have been prudent to cite the respondent's bank, to shed light on the transactions complained of, in particular the fact that monies would be credited to the respondent's ecocash and then, for some reason, a reverse transaction would occur, to the applicant's detriment. No explanation as to how this anomaly could occur has been given by the applicant. That aspect of the applicant's case remains blurred. It requires ventilation before a trial court.

The authors Herbstein and Van Winsen in their work, "The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa", 5th ed, Volume 1 at p 517 state as follows:

> "The courts have in innumerable decisions stressed the fact that the remedy provided by this rule is of an 'extraordinary and drastic nature' which is 'very stringent' in that it closes the door to the defendant, and that 'the grant of the remedy is based on the supposition that the plaintiff's case is unimpeachable and that the defendant's case is bogus or bad in law'. The court must also guard against an injustice to the defendant who is called upon at short notice and without the benefit of further particulars, discovery or examination, to satisfy the court that he has a bona fide defence. This remedy will thus be accorded only to a plaintiff who has in effect an unanswerable case. Some of the decisions come close to limiting a plaintiff's resort to this remedy to cases in which the defendant's conduct in giving notice of intention to defend is equivalent to an abuse of the process of the court."

In the main I hold that the respondent has raised a bona fide defence of duress, recognisable in law and on the facts as alleged. The respondent must have his day in court. The applicant's case is not unanswerable.

For these reasons the application is dismissed. Costs to be in the cause.

Mtetwa & Nyambirai, applicant's legal practitioners
Pundu & Company, respondent's legal practitioners