GARNET INDUSTRIES LTD v DAVID RICHARD EVERSON (1987) Z.R. 104 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
20TH JANUARY, AND 13TH FEBRUARY, 1987.
(S.C.Z. JUDGMENT NO. 1 OF 1987)

Flynote
Civil Procedure - Counterclaim vague - Summary judgment - Whether appropriate.

Headnote
The Plaintiff applied for summary judgment on his claim for money due under a contract of employment. The defendant did not deny the claim but raised a counter claim for an unspecified secret profit made by the plaintiff for "unknown services". The Deputy Registrar gave the defendant leave to defend. A Judge reversed that decision and gave judgment to the plaintiff. The defendant appealed.

Held:
The Court may disallow raising of a counter claim in a plaintiff's action in which event the defendant must commence his own independent action if he is minded to pursue such cross-claim. In this case the counterclaim referred to "unknown services" and was singularly lacking in visible merit. The court found this to be an appropriate case to disallow it.

Case cited:
(1) Miles v Bull [1969] 1 Q.B. 258

For the appellant: H. H .Ndhlovu, H.H. Ndhlovu and Associates .
For the respondent: S. Sikota, Chigaga and Co.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the court.

On 20th January last we dismissed this appeal with costs and said then that we would give our reasons later, this we now do. For convenience, we will refer to the respondent as the plaintiff and the appellant as the defendant which is what they were in the action. The brief facts and history of the case can be shortly stated: The plaintiff issued a specially endorsed writ claiming the sum of K26,334.18n as money due to him from the defendant under a contract of service which had determined. After the defendant had entered appearance, the plaintiff took out a summons under Order 13. Affidavits were filed and, for reasons which will become obvious, it is necessary to set out certain portions of such affidavits. Paragraphs 7, 8 and 9 of the plaintiff's affidavit in support read as follows:

"7. That on 14th October, 1985 I gave the defendant 3 months' notice of my intention to resign in accordance with the Provisions of my contract. There is now produced to the and marked

exhibit "DRE 2" a true copy of my letter of resignation.

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8. That on the 16th October, 1985 the defendant purported to terminate my services with immediate effect in contravention of my contract of service.
9. That the defendant owes the following payments arising from the contract:

(a)	September 1985 salary	K1,475.00	
(b)	16 days salary for October 1985	K 735.00	
(c)	3 months salary in lieu of notice	K4,425.00	
(d)	4 months gratuity at 25% of K1,125.00 per month	K1,125.00	
(e)	8 months and 18 days gratuity at 25% of K1,475.00 per month	K3,534.32	
(f)	28 leave days pay	K1,332.26	
(g)	Value of 3 Air tickets to the United Kingdom	K13,707.60	
	Total		K26,334.18"

There then followed the usual averment, as required by Order 13 rule 1, that in his belief there was no defence to the action. The defendant's affidavit in opposition was sworn by its managing director and paragraphs 5 to 9 thereof were in the following terms:

"5. That I have read the affidavit of the plaintiff filed herein and in reply would say that the defendant has counter claims against the plaintiff as follows.
6. That the plaintiff purchased a motor vehicle from Mr Ramesh Patel of Lilongwe in Malawi at the sum of Malawi kwacha 9,500.00 to be paid for out of remittances of the plaintiffs salary with the defendant. The repayments were guaranteed by the defendant and since August, 1985 when the said vehicle was purchased no payments have been made to the seller and the defendant may as guarantor be called upon to make good the plaintiffs default.
7. That prior to the plaintiffs arrival in Zambia, he obtained the total sum of 950 pounds sterling from the defendant's associates in the U.K. These sums were guaranteed by the defendant and the plaintiff has not paid the money back from his remittance as earlier on agreed.

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8. That during the course of his employment with the defendant the plaintiff provided unknown services to Zambezi Auto and Marine Services Limited and was paid the sum of K10,000 for which no account has been made to the defendant and which account the defendant claims.
9. That the plaintiff obtained advances totalling K2,394.47 from the defendant and its associate companies which sum is still due and owing and the defendant will apply that the same be set off .

The learned deputy registrar determined that on the affidavits triable issues had been raised - without saying what these were - and gave the defendant unconditional leave to defend. At the rehearing on appeal by the plaintiff to a high court commissioner at chambers, the learned deputy registrar's decision was reversed and the plaintiff granted leave to enter summary judgment on the ground that, in the opinion of the learned appellate High Court commissioner, the defendant had not raised any defence on the meets. The learned high court commissioner was in agreement with the submissions made on behalf of the plaintiff to the effect that, the indebtedness not having been disputed by the defendant, there was no defence to the claims and that the counter claims raised were in any case untenable. It is against such determination that the defendant has appealed to this court.

On be half of the defendant, Mr Ndhlovu advanced two grounds of appeal which are closely related to each other. The first ground was that the learned commissioner erred in both law and fact in finding in there was no defence to the plaintiff's action and in finding that there was no triable issue to allow the defendant leave to defend the action. The second ground was that the learned commissioner erred in law and fact in finding that there was no triable issue because the defendant did not specifically deny owing the money. Mr Ndhlovu had an ingenious argument under these grounds. While accepting that there was nothing us the defendant's affidavit which could be regarded as a specific defence to the plaintiff's claims, he nevertheless argued that there was an implied defence, or at any rate a triable issue, which could discerned from the affidavits. It was his submission that, since the plaintiff himself had disclosed, under paragraph 8 of his affidavit in support, mat the defendant had scaly terminated his services, and since there was an allegation in the counter - claims that the plaintiff had secretly earned a sum of K10,000 in circumstances prohibited by a clause in the contract - which the plaintiff exhibited - the court a *quo* should have apprehended that the plaintiff must have been summarily dismissed on disciplinary grounds. That being the case, so that submission went, the plaintiff would not be entitled to, and the defendant had a defence to, the claim for salary in lieu of notice and those portions of the claims for gravity and leave pay as were based on the period of three months notice not given.

As Mr Sikota for the plaintiff lightly pointed out, the defendant was raising the defence of dismissal for the first time in this appeal. In this regard Mr Ndhlovu was, in effect, inviting this court to make a number of assumptions in his client's favour, and adverse to the plaintiff, and to assume that the plaintiff had in fact been summarily dismissed on disciplinary grounds and that the consequences of such dismissal were as suggested by him.

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We must decline Mr Ndhlovu's invitation. In the first place, we must point out that under Order 13 a plaintiff will be spared the cost and inconvenience of going to trial to establish a claim to which there is no bona fide defence. In the second place, Order 13 Rule 1 requires the court to grant leave to the plaintiff to enter summary judgment unless the defendant by affidavit, by his own *viva voce* evidence or otherwise satisfies the court that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend. The defendant must show cause against the plaintiffs application for summary judgment and when this is sought to be done through an affidavit in opposition, as it usually is, such affidavit should deal specifically with the

plaintiff s claim an affidavit; it should state clearly and concisely what the defence is and what facts are relied on to support it. It was significant, in our judgment, that the defendant made neither comment nor submission upon the plaintiff's claim and yet the defendant expected the court a *quo* to have detected, by assumption and implication, some sort of defence. The defence contended for in this case is, in our opinion, decidedly nebulous and shadowy and we are therefore unable to say that any such defence of dismissal arose so as to entitle the defendant to leave to defend on that score.

It was Mr Ndhlovu's further submission that the defendants' affidavit in opposition was badly drafted but that this factor should not have disentitled the defendant to leave to defend the action. In his submission the contract and the letters referred to in the plaintiff's own affidavit indicated that further inquiry at a trial, was required in this case. He relied on *Miles v Bull* (1), where it was suggested that it sometimes happens that the defendant may not be able to pin - point any precise issue or question in dispute which ought to be tried but that leave to defend should be given if it is apparent that, for some other reason, there ought to be a trial. Our Order 13 Rule 1 is still couched in terms similar to the former Order 14 Rule 1 of the English Rules: See 1985 White Book Order 143 - 49. Our Order 13 Rule 1 requires the defendant at the very least to disclose such facts as may be deemed sufficient to entitle him to defend generally. The new terms in the English order have introduced he element that leave to defend should be given if the defendant satisfies the court "that there ought for some other reason to be a trial". A number of examples of "some other reasons" are given by the White Book, none of which arise in this case. In *Miles v Bull* (1), which has been cited, a wife in possession of a matrimonial home obtained leave to defend an action for possession by a purchaser who bought the house from the husband under a contract which acknowledged that she was in possession and may have certain rights. In that case, a further inquiry was found to be necessary to ascertain whether the sale was a sham intended to deprive her of possession so that, even if she had no arguable defence against the purchaser's action, there "ought for some other reason to be atria!". In the said case the wife had specifically raised the question of the sale being a sham which, under the appropriate statute, would afford her a ground for relief. The defendant in our case neither disclosed any facts which could be deemed sufficient to entitle them to defend nor put forward "some other reason" within the English rule. The arguments in this regard could not, in our considered judgment, be entertained.

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This brings us to the counterclaims. Mr Ndhlovu informed the court, quite properly so in our view, that the only counterclaim which appeared to have some merit in it, and which he was pursuing, concerned the alleged secret receipt of a sum of K10,000 "for unknown services", allegedly rendered by the plaintiff to a third party. This allegation was denied by both the plaintiff and the third party on affidavit. It is common ground that, in terms of our Order 28, as read with the English Orders 14 and 15, a counterclaim would entitle a defendant to either a stay of the plaintiff s judgment or leave to defend to the extent only of such counterclaim pending its trial. In a suitable case, the court is at liberty to disallow the raising of a counterclaim in the plaintiff's action in which event the defendant must commence his own independent action if he is minded to pursue such cross - claim. In this case, Mr Sikota has argued that the defendant did not raise a valid counter-claim when reference was made to unspecified and "unknown services" both the rendering of, and the payment for, which were denied at first hand by the plaintiff and the third party. We agree that

the counterclaim was singularly lacking in visible merit. For that reason, we had no difficulty in coming to the conclusion that it should be disallowed under the plaintiffs action, leaving it to the defendant to commence his own action if he feels able to improve upon its presentation to the courts as a viable cause of action.

It was for the foregoing reasons that we dismissed the appeal, with costs to be taxed in default of agreement.

Appeal dismissed

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