MILGREE INVESTMENTS
versus
SHAYLET ESPINAH NGUBO
and
JOHANNES RUSHWAYA
and
TINO JESMIEL RUSHWAYA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 16 July & 30 September 2013 & 6 November 2013

Oppossed matter

H.P. Ingebire, for the applicant
B. Chideme, for the respondents

TAKUVA J: This is an application for summary judgment in terms of r 64(1) of the High Court Rules, 1971. The rule states;

> "(1) Where the defendant has entered appearance to a summon, 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 subr (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.
> (3) A deponent may attach to his affidavit filed in terms of sub r (2) documents which verify the plaintiff's cause of action or his belief that there is no bona fide defence to the action.
> (4) ----------"

The basis of the application is to be obtained from the applicant's founding affidavit. In summary it is as follows;

On 30 November 2011, applicant issued summons against the respondents claiming payment in the sum of US$81 715-00. Summons were served on respondents who through their legal practitioners filed an appearance to defend on 14 December, 2011. The cause of action as verified by the applicant in the summons and declaration is that on 15 December, 2010, applicant

and first respondent entered into an agreement in terms of which the applicant advanced to the first respondent a loan to finance working capital requirements in the sum of US$18 000-00.

The material terms were *inter alia:*

1. that the applicant would advance first respondent a loan in the sum of US$18 000-00
2. that the repayment period would be one (1) calendar month
3. that the rate of interest would be 15% per month
4. that the principal balance, interest and charges accruing thereon would be paid in full by 14 January, 2011.
5. that the loan would be secured by the cession of the ownership and the right to dispose certain immovable property known as Stand351 Midland Township 3 of uplands of subdivision A of Waterfalls.
6. that any interest and principle that remains outstanding on maturity of the loan will capitalize at 2% per day.
7. that in the event of applicant initiating proceedings for the recovery of its money all legal costs incurred in pursuance there to shall, together with collection commission be borne by first respondent on a legal practitioner client scale.

On 14 December 2010, the second respondent in writing bound himself as surety and co-principal debtor with the first respondent for the due and punctual performance by first respondent of all her obligations under the agreement. The Deed of Suretyship is on page 6 of the record. Third respondent also bound himself as surety and co-principal debtor with the first respondent by executing a power of attorney in favor of second respondent and in terms of which second respondent was able to offer stand number 351 Midlands Township of uplands of subdivision A of Waterfalls as security for first respondent's indebtedness to applicant. The special power of attorney appears on page7 of the record.

The parties novated their agreement and agreed to pay a capital debt in the sum of US42 048-00 and interest in the sum of US$39 667-00. First respondent undertook to repay on or before 11 November 2011. This is captured in the first paragraph of the ACKNOWLEDGEMENT OF DEBT signed by the first respondent on the 12th day of October 2011. In the same document the applicant acknowledged that; "Further, I agree that the production of this acknowledgement of debt and in the absence of any documentary evidence of

payment produced by myself shall entitle MILGREE INVESTMENTS to summary judgment against me" (my emphasis).

The respondents did not meet their end of the bargain and applicant instituted these proceedings arguing that although the respondents have entered an appearance to defend the claim, they do not have a *bona fide* defence to it. This submission is based on the following factors;

(i) it is common cause that applicant advanced a loan to the respondents who acknowledged their indebtedness in writing.

(ii) it is also common cause that the respondents have not paid back what they owe applicant,

(iii) the debt is clear and unanswerable in terms of the acknowledgement of debt and

(iv) the respondents are only delaying relief to the applicant as the notice of appearance to defend has been entered solely to frustrate and delay the due process of the law.

In *Timnda Truck Parts (Pvt) Ltd* v *Auto Lite Distributors (Pvt) Ltd* 1996 (1) ZLR244(H) it was held per CHATIKOBO J that

> "In an application for summary judgment the applicant must do more than simply assert that he has a good claim, that he believes that the defendant has no bona fide defence and that the defendant has entered an appearance to defend for the purpose of delay. The applicant is obliged by r67 of the High Court Rules to adduce evidence in substantiation of its claim to summary judgment. That evidence must establish the facts upon which reliance is placed for the applicant's assertion that the applicant's claim is unimpeachable. The need to adduce such evidence is even stronger when the original summons lacks details of the claim against the defendant."

In *casu*, the cause of action has been verified by the following documentary evidence:

(a) the acknowledgement of debt by the first defendant

(b) deed of suretyship by the second defendant and

(c) the special power of attorney executed by the second defendant.

Further the plaintiff's declaration attached to the summons and the Founding Affidavit contain facts relied upon that support the assertion that the applicant's claim is unimpeachable.

As regards what is required of a defendant in an application for summary judgment, the following passage by ZIYAMBI JA in *Kingstons Ltd* v L.*D. Inenson (Pvt) Ltd* 2006 (1) ZLR 451 is instructive; "in summary judgment proceedings, not every defence raised by a defendant will succeed in defeating a plaintiff's claim. What the defendant must do is to raise a *bona fide*

defence, or a plausible case, with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. The defendant must allege facts which if established, would enable him to succeed. If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides. The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts."

In *casu* the defendant's opposing affidavit shows that liability is denied on the following grounds ;

(a) that the deponent to the applicant's founding affidavit has not tendered proof of authority to represent the applicant.
(b) that the applicant has not exhibited proof of its licensing as a money lender.
(c) that the interest charged is usurious and violates the in *duplum rule*.
(d) that there is no mortgage bond registered over stand 35 Midlands Township of 3 uplands of subdivision A of Waterfalls to render it especially executable,
(e) that the loan agreement and the acknowledgement of debt are invalid
(f) that the deed of suretyship and power of attorney are not valid

The first ground has no merit in that the applicant has provided the company resolution authorizing the proceedings see p 4 of the record. As regards the second ground, I find that it is not only vexatious but lacks the *bona fides* in that the applicant's Money Lenders License is filed of record- see p50 of the record of proceedings. The complaint that applicant charged usurious rates does not disentitle the lender from recovering the debt plus lawful interest – see *Niri* v *Coleman & Ors* 2002 (2) ZLR.

In *casu*, it cannot conclusively be said that applicant used usurious rates in that firstly, the respondents' counsel's calculation of interest is mathematically incorrect in that 15% of $42 048,00 multiplied by one month is not $12 614.40. Secondly, the period for which interest was payable is from 15 December 2010 to 11 November 2011, that is approximately 10 months. This means that if the rate of 15% per month is to be used, the interest would certainly be more than the capital amount. The figure claimed by applicant is less than the capital amount. Thirdly, the

first defendant signed an acknowledgement of debt on 12 October 2011 wherein she admitted owing plaintiff the "amount of $42 048-00 together with interest calculated at a rate of 15% per month of $39 607-00."

Paragraph 4 of the same acknowledgement of debt reads in part "Further, I agree that the production of this acknowledgement of debt and in the absence of any documentary evidence of payment produced by myself shall entitle Migree Investments to summary judgment against me"

The *in duplum* rule was not violated *in casu* in that the accrued interest is less than the amount of capital which is $42 048-00 and not $18 000-00. In *Commercial Bank of Zimbabwe* v *M.M. Builders and Suppliers (Pvt) Limited* 1997(2) SA 285, the *in duplum* rule was formulated as follows;

> "interest, whether it accrues as simple or compound interest ceases to accumulate upon any amount of capital owing once the accrued equals the amount of capital outstanding ----"

It is not a *bona fide* defence for the respondents to allege that there is no mortgage bond because the original deed of transfer was surrendered to applicant together with all accompanying documents as a condition for the loan. In fact it is dishonestly at its best to argue otherwise. However I am of the view that applicant's claim to have the property in question declared especially executable is superflous. I would dismiss it for that reason.

As regards first respondent's claim that the acknowledgement of debt is a fraud I am of the view that this is a bald and vague defence in that it has not been shown how first respondent was coerced and or influenced to sign the document. The denial of first respondent's signature is being made tongue in cheek in my view.

The first respondent was doing business with the applicant. She admits receiving $18 000-00 but does not say how much she has since paid back. If indeed the acknowledgement of debt is a forgery then first respondent would have confronted this issue with the seriousness it deserves. One might ask why first respondent failed to report the fraud to the relevant authorities?

In my view this defence is not *bona fide* at all in that first respondent has openly displayed her *mala fides* by failing to repay even a cent after spending applicant's money.

The second respondent equally put up a hopeless and *malafide* defence. It is highly improbable that a mature literate adult may walk into a money lender's office and sign a blank

form. This defence is childish to say the least. The second respondent in my view is hiding the truth about this transaction. This defence is clearly not genuine in that it lacks clarity and completeness.

The third respondent has given a bald denial that it granted second respondent authority to alleviate stand 351 Midlands T/ship of 3 uplands of subdivision of Waterfalls to the applicant. It has not been explained why third respondent is denying signing the power of attorney. In *Kingstons Ltd* v *LG INESON (Pvt) Ltd* SC8-2006, it was held that in order for a defendant to prove a good *prima facie* defence, the defence must not be needlessly bald, vague or sketchy. In *casu*, the denial is generalized and concensory in nature. But differently it is unsubstantiated. All in all I find respondent's defences seemingly genuine but dishonest in that they do not raise any genuine triableness.

The law requires that before summary judgment can be granted, the applicant must adduce evidence in substantiation of the application - see In *Timnda Truck Parts (Pvt) Ltd* v *Auto Lite Distributors (Pvt) Ltd* 1996 (1) ZLR244(H) supra

In *casu*, can it be said that the applicant's case is doubtful? The answer in my view is in the negative. I say so for the following reasons

(a) the first respondent admits receiving $18 000-00 from the applicant.
(b) the first respondent admits that this amount remains unpaid.
(c) on the 12th October 2011, the first respondent signed an acknowledgement of debt in the amount of $81 715 – 00 which is the amount claimed in the summons – see p2 of the record
(d) the second respondent signed a deed of suretyship on 14 December 2010 wherein he bound himself as "surety and co-principal debtor IN SOLIDIUM for the repayment on demand of all sums of money which the CLIENT may now from time to time hereafter owe or be indebted to the MONEY LENDER,……" See annexure A on page 26 of the record.
(e) The third respondent signed a SPECIAL POWER OF ATTORNEY granting second respondent power to sign all documents to effect any transfer in respect of stand No. 351 Midlands Township 3 of Uplands of subdivision A of Waterfalls.

For these reasons, I conclude that the applicant's claim has been substantiated by documentary proof and is unimpeachable.

In the result is ordered as follows;

(i) the applicant is granted judgment in the sum of US$81 715-00

(ii) that respondents be and are hereby ordered to pay Collection Commission jointly and severally the one paying the others to be absolved.

(iii) that respondents pay costs of suit on the legal practitioner and client scale jointly and severally the one paying the others to be absolved.

Muchengeti & Company, applicant's legal practitioners
Messrs Mavhunga & Sigauke, respondents legal practitioners