TIAN ZE TOBACCO COMPANY (PRIVATE) LIMITED
versus
ANXIOUS JONGWE MASUKA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 28 July and 28 September 2022

Opposed Application

B Machekana, for applicant,
S R Pasvani, for respondent

TAGU J: This is an application for summary judgment in terms of Rule 30 subrule (1) of the High Court Rules, 2021. It is trite that an application of this nature may be made where the defendant has no *bona fide* defence to the plaintiff's claim or based on a liquid claim such as an Acknowledgement of Debt duly entered into by and between the applicant and the respondent.

In the case of *CABS* v *Ndahwi* HH 18/10, MAKARAU JP (as she then was) stated:

> "Summary judgment proceedings demand different considerations. This is so because summary judgment is extraordinary in that it takes away from the defendant some of the safeguards that are guaranteed by a full trial. It is a drastic remedy that is based on the supposition that the plaintiff's claim is beyond impeachment on any material basis and that the plaintiff is merely being held back from getting judgment by the rigors of a full trial which are then curtailed to his or her advantage. For the plaintiff to gain such an unusual advantage over the defendant, he or she must meet certain very stringent requirements as set out by the rules. It has thus been held time and again that plaintiffs wishing to use the speedy procedure of summary judgment must bring themselves squarely within the provision of the Rules."

The same sentiments were also expressed by EBRAHIM JA in *Nedlaw Investments and Trust Corporation Limited* v *Zimbabwe Development Bank* SC 5/2000, in the following terms:

> "The quintessence of this drastic remedy is that a plaintiff whose belief is that a defendant's defence is not *bona fide* and is entered solely for dilatory purposes, should be granted immediate relief without the expense and delay of a trial."

The law is therefore clear, Summary Judgment is allowed to a plaintiff who establishes a clear case and consequently should not be subjected to the expense and delay of going through a trial.

The facts of this matter are clear and straight forward. Applicant and respondent entered into a tobacco farming contract wherein the applicant would advance United States dollars denominated tobacco inputs to the respondent. Applicant sought and obtained foreign exchange approval authority in compliance with the country's financial regulations from the Reserve Bank of Zimbabwe in terms of which applicant sourced foreign currency in United States of America dollars and respondent was advanced United States dollars denominated tobacco inputs repayable in terms of the tobacco farming contract. Despite receiving United States dollars denominated tobacco farming inputs, respondent failed to pay applicant for the tobacco farming inputs in terms of the tobacco farming contract. Consequently, the respondent on 20 January 2017 acknowledged his indebtedness to the applicant on the capital debt of US$93 914.89 (Ninety Three Thousand, Nine Hundred and Fourteen and Eighty Nine cents. In that acknowledgment of debt the respondent undertook to pay the debt in full on or before October 2019. Further, on 20 February 2017, with his own handwriting, the respondent acknowledged being indebted to the applicant. From 13th January 2020 to the 18th May 2021 respondent made ridiculous low payments amounting to US$1 762.21 (One Thousand Seven Hundred and Seventy dollars and Twenty one cents United States dollars), leaving an outstanding balance of USD$ 83 937.52 (Eighty Three Thousand Nine Hundred and thirty Seven dollars and Fifty two cents United States dollars.)

On 4 October 2021 applicant issued summons for payment of USD$ 83 937.52 to respondent due and owing to applicant in terms of the Acknowledgment of debt. Upon receipt of the Summons, the respondent entered an appearance to defend. Among other things the defendant's defence is basically that he has since paid the debt in full. He said he had been advised by his legal practitioners that Finance Act No. 2 of 2019 had the effect of making all assets and liabilities that were valued and expressed in United States Dollars to be valued in RTGS dollars at a rate of 1:1 to the United States Dollar. He said the loan he was given by the applicant not being a foreign loan, does not fall into the exceptions provided for in section 44C of the Reserve Bank of Zimbabwe Act. Therefore, he paid the debt in full in local currency.

In this matter the respondent raised three *points in limine*. The first one being that the applicant is approaching the court with dirty hands. The respondent submitted that the applicant filed summons in the magistrate's court and tendered wasted costs. By filing this present application the applicant is approaching the court with dirty hands. The applicant denied the fact that they are approaching the court with dirty hands.

The applicant simply withdrew its case from the magistrate's court and filed same in the High Court. That matter was not litigated to finality. The reason why the matter was withdrawn was because of currency then being claimed. The applicant decided to reinstitute the same matter in the High Court with a clearer relief being claimed. I do not seem to see where the issue of dirty hands is. This point is dismissed.

The second point *in limine* is that applicant is forum shopping having firstly brought the same matter before the magistrate's court, withdrew it and file same in the High Court hoping to get a favourable outcome. The applicant maintained that by withdrawing case in the magistrate court and taking same to High Court is not forum shopping.

As I indicate elsewhere above, the applicant withdrew its case from the magistrates court where the Summons was not clear as to the currency and having attended to that issue filed a similar case in the High Court. In my view there is no evidence of forum shopping.

The third point *in limine* was that application is *res judicata*. The contention by the respondent being that applicant caused summons to be issued against the respondent in the magistrate court under Case No. Com 1231/19. The action was based on the same facts and same cause of action as in this case. After filing his plea, applicant applied for Summary Judgment which was dismissed and ordered to go to trial. Applicant then filed the present application. The applicant submitted that the principle of *res judicata* only applies to a case that has been dealt with to finality. *In casu*, applicant said the matter at the magistrate court was withdrawn on the basis of currency then claimed which was not enforceable.

Indeed the applicant filed summons in the magistrate's court under Case No. Com 1231/19 but later withdrew it on the basis of the currency then claimed which was not enforceable. The question to be decided is whether or not, on the basis of that this application is *res judicata*? The principle of *res judicata* precludes the court from re-opening a case that has been litigated to

finality. The principle was aptly defined in the case of *Custom Credit Corporation (Pty) Ltd* v *Shembe* 1972 (3) SA 462 (A) at 472 A-B. The South African Appellate Division had this to say:

> "If a cause of action has been finally litigated between the parties, then a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*."

For one to plead *res judicata* they mean that the same matter has been decided in another court of competent jurisdiction and may not be pursued further by parties. The matter would have been judged on the merits and as such may not be re-litigated. There should be judgment in the matter and the judgment must be a final and definitive judgment. In the present matter before this Honourable Court was withdrawn before dealing with the case on the merits. As clearly pointed out by the respondent the magistrate ordered the matter to proceed to trial. The magistrate's court only dismissed the summary judgment application before it for the reason that as of when the Summons were filed, there was parity between the United States Dollars and the RTGS so it was not clear as to what currency the order would be made and then referred the matter to proceed by way of trial. Since the matter was not determined to finality on the merits, the point of *res judicata* does not hold water and is dismissed.

On the merits the defence raised by the respondent is that he has since paid the debt in full in local currency. The applicant is saying the payment should have been in United States Dollars. In proving its case the applicant submitted that the amount due and owing by the respondent is payable in United States Dollars in terms of Section 2 of the Exchange Control Circular No. 7 of 2019 which stipulates that-

> "2.2 where tobacco growers receive USD$ denominated input loans, repayments to the tobacco merchant shall be in foreign currency in order to protect the tobacco merchant's investment."

Further, it was submitted, that Section 44 (c) (2) of the Reserve Bank Act as amended by Statutory 33 of 2019 reads-

> "(2) the issuance of any electronic currency shall not affect or apply in respect of
>
> (a) ……
> (b) foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

In this case it is not in dispute that the applicant sought and obtained foreign exchange approval from the Reserve Bank of Zimbabwe and would distribute to tobacco growers USD$

denominated inputs. It is also not in dispute that the respondent is a beneficiary of the same funds. Repayment of the same to applicant ought to have been done in the currency the grower would have received it in terms of the regulations. The position was affirmed by the Supreme Court of Zimbabwe in *Valentine Masharara* v *Zimbabwe Leaf Tobacco (Private) Limited* SC 108/20 where it ruled that tobacco merchants such as applicant who distribute foreign currency denominated (USD$) inputs are entitled to invoke the provisions of Section 44 (c) (2) of the Reserve Bank Act to protect its rights to the repayment of the offshore funds advanced to tobacco growers. It is also a fact that respondent would also sell his tobacco in foreign currency.

In my view the respondent has no *bona fide* defence to the claim and has entered an appearance to defend and a plea for the sole purpose of delaying the day of reckoning. The respondent's defence to the effect that the debt is payable in local currency is devoid of merit as the High Court and the Supreme Court have already pronounced judgments to the effect that tobacco merchants are entitled to receive payment in foreign currency for tobacco inputs supplied in foreign currency. Respondent received United States Dollars denominated tobacco inputs and he should pay back in the currency in which he was advanced the tobacco inputs converted to the local currency equivalent at the prevailing official exchange rate.

The applicant applied that the respondent be made to pay costs on a higher scale because he is raising frivolous defences to the claim before it regardless of being aware of the Courts' pronouncements on repayment of foreign denominated inputs forwarded to tobacco growers. I am in agreement with that.

IT IS ORDERED THAT

1. The application for Summary judgment is hereby granted.
2. Respondent shall pay the sum of USD $83 937.52 (Eighty Three Thousand, Nine Hundred and Thirty Seven and Fifty Two cents United States Dollars) or its equivalent amount in local currency ZWL $ at the prevailing official exchange rate on the day of payment due and owing to plaintiff in terms of the Acknowledgement of debt.
3. Interest on the above amount at the prescribed rate of interest per annum from the date of summons to date of full and final payment.
4. Cost of suit on an attorney client scale.

AB & David, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, respondent's legal practitioners.