AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED
versus
SUNJET DEVELOPMENT HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 25 October 2012 and 30 April 2014

Opposed application

T Mpofu, for the applicant
T. Magwaliba, for the respondent

MAKONI J: At the hearing of this matter, I granted the order for summary judgement and advised the parties that written reasons will be supplied upon request. Such a request has been made and these are they.

I can do no better than by starting with a quotation by MATHONSI J in a summary judgement application involving the present applicant *viz African Banking Corporation of Zimbabwe Limited Ltd* v *PWC Motors (Pvt) Ltd and 2 Others* HH 123/2013.

This summary judgment application graphically illustrates that a trend is fast developing among business people in this country to borrow huge sums of money from financial institutions and when the time to pay comes, to pay as little as possible or better still, not to pay at all. A pattern is manifesting itself where business people will stop at nothing in avoiding to pay legitimate claims and in the process play havoc to investor confidence.

BARTLETT J put it very succinctly in *Industrial Equity Ltd v Walker*1996 (1) ZLR 269 (H) 308C when he said:-

> "Things that go round come round. Walker has had a merry dance. But he would, to my mind, be well advised to realise that the music has stopped and the time has come to pay the piper. Although with Walker's determination to divest himself of all things executable, I fear that the dance is not yet over – and that it won't be long before the pipes are calling again and the last waltz begins."

On 9 January 2012, the applicant issued summons out of this court claiming payment of the sum of $154 922-00 on together with interest on the sum at the rate of 50% per annum from 1 January 2012 up to the date of payment in full and costs and commission. They also

sought an order that defendant's immovable property being Stand 410, Bulawayo Township Lands held under Deed of Transfer No 980/2006 be declared executable. The claim was based on an acknowledgement of debt signed by the respondent accepting liability in the amount claimed together with interest. The respondent entered appearance to defend. The applicant then filed the present application on the basis that it was its belief that the respondent has no defence and had filed the present application for purposes of delaying finality in the matter.

The respondent, in its opposing papers, do not put in issue the capital amount being claimed as acknowledged in the Acknowledgement of Debt. They however take issue with the rate of interest on the basis that it is oppressive, unfair and prejudicial to the respondent particularly the fact that it contravenes the provisions of the Consumer Contracts Act [*Cap 8:03*].

The respondent also took issue with the second paragraph of the Draft Order on the basis that the property in issue does not belong to the respondent but to a third party and that the third party had not been cited.

Before the hearing, the applicant filed what it termed a "Notice of Amendment" seeking to delete para 3 of the Particulars of Claim and by the deletion of para (b).

I will first of all deal with the claim in para 2 of the Draft Order. Mr *Mpofu* submitted that the court in terms of r 73 leave the claim in para 2.

Rule 73 provides

> "If on the hearing of an application made under this order it appears-
> (a) -----; or
> (b) that a defendant is entitled to leave to defend as to part of the claim;
> the court may-
> (i) ------; or
> (ii) Give leave to defend to the defendant as to such part of the claim, and enter judgement against the defendant as to the balance of the claim; or make both orders mentioned in (i) and (ii)."

The rule envisages a situation in which the court can, in summary judgement proceedings, relate only to part of the relief claimed and grant it. What this means is that if there is a real argument on whether the property is executable then that part can be referred to trial. However at the hearing Mr *Mpofu*, indicated to the court that the purported "Notice of Amendment" should have been a Notice of Withdrawal. He then advised the court that the applicant was abandoning the claim in para 2 of the Draft Order. This leaves the part of the claim which relate to the Acknowledgment of Debt.

In summary judgement proceedings, the defendant must only establish a *prime facie* defence and must allege facts which if he can succeed in establishing them at trial, would entitle him to succeed in his defence at trial. See *Rex* v *Rhodian Investment Pvt Ltd* 1957 R&N 723. This principle was recently stated in *Kingstones Ltd* v *L.D. Treson (Pvt) Ltd* 2006 (1) ZLR 51 (S) at 458 F-H and 459 A by ZIYAMBI J follows.

> "Not every defence raised by a defendant will succeed in defeating a plaintiff's claim for summary judgment. Thus what the defendant must do is to raise a *bona fide* defence – a 'plausible case' – with 'sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a bona fide defence'. He must allege facts which, if established 'would entitle him to succeed.' See *Jena v Nechipore* 1986 (1) ZLR 29(S); *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd S* – 139-86; *Rex v Rhodian Investments Trust (Pvt) Ltd*, 1975 R & N 723 (SR).
>
> If the defence is averred in a manner which appears in all circumstances needlessly bad, vague or sketchy that will constitute material for the court to consider in relation to the requirement of *bona fides*. See *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228D-E

The respondent in its Heads of Argument makes a bold statement that the interest rates and penalties of 50% charged by the applicant "are oppressive, unfair and prejudicial to the respondent as it contrary to common accepted standard of fair dealing in the supply of banking services". It abandoned the claim that the interest rate contravened the provisions of the Consumer Contracts Act *[Cap 8:03*] Act. In its submissions, on the day of hearing Mr *Magwaliba* submitted that what the applicant purports to be an Acknowledgement of Debt is unusual. It is an agreement between the parties. At the end of the document, there are signatures by both parties. He submitted that an Acknowledgement of Debt is a singular document. The document attached by the applicant to its founding papers is a contract. There is no averment in the summons that it had been breached by the respondent.

My view is the applicant has managed to establish a clear case which entitles it to a summary judgment.

On the issue of interest, I associate myself with the remarks by MATHONSI J in African Bank Corporation of Zimbabwe Ltd *supra* where he stated at p 5 of the cyclostyled judgement

> "The respondents signed an agreement allowing the applicant to charge the interest that is being claimed. Without disputing the terms of the instrument of debt, the respondents want the interest rate to be referred to trial. They do not show why they should not be bound by what they agreed."

In casu, the respondent signed the document where what it terms "oppressive, unfair and prejudicial" interest rate is provided for. They did not provide a basis why they now put that rate in issue at the stage where payment is now due.

As regards the Acknowledgement of Debt, whether it is termed an Acknowledgment of Debt or contract is neither here nor there. What matters is the fact that the respondent, in that document, acknowledges that it is indebted to the applicant in the sum claimed.

From the above, it is quite clear that the respondent has failed to establish facts which if it were to establish at trial would entitle it to succeed. The defences raised are solely being raised for the purposes of delaying the day of reckoning.

In the result, I will make the following order;

1) Summary judgement be and is hereby entered in favour of the applicant against the respondent in the following:
    a) The sum of US$154.922-00 plus interest thereon at 50% per annum from 1 January 2012 to date of payment in full.
    b) Costs of suit, for this application and the main matter, on a scale of legal practitioner client scale and collection commission calculated in terms of the Law Society of Zimbabwe By-Laws.

Messrs Gill Godlonton & Gerrans, applicant's legal practitioners
IEG Musimbe & Partners, respondent's legal practitioners