

ZIMBABWE PHOSPHATE INDUSTRIES LIMITED
versus
WINDMILL (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 29 January 2015 & 25 March 2015

Opposed application

T Mpofu, for applicant
R. Chingwena, for respondent

MUREMBA J: This is an opposed application for summary judgment. In October 2011 the parties entered into a written credit agreement. The parties agreed that the applicant would supply the respondent with phosphate products on credit.

The terms of the agreement were that the repayment period by the defendant from the date of invoice (after receiving supply of the product) varied from 60 days, 90 days, to 120 days depending on the season of the year. For February to August season it was 120 days. For September it was 90 days. For October to January it was 60 days. The interest rate was 15% per annum on all invoices that were over the credit terms.

The respondent breached the contract by failing to make payments as and when they became due. Consequently, the applicant issued summons on 15 April 2013 in order to recover its money. The applicant was claiming US\$ 4 912, 267.00 and interest at 15% per annum from the date of summons to the date of payment in full. The amount of US\$ 4 912 .00 was inclusive of capital and interest. The summons was served on the respondent on 2 May 2013. On 19 July 2013 the respondent entered an appearance to defend. The respondent went on to request for further particulars. The applicant did not furnish the respondent with further particulars, but proceeded to make the present application on 27 March 2014 stating that the respondent had no *bona fide* defence to the action. It averred that the respondent only entered an appearance to defend for the purposes of delaying and frustrating the applicant from recovering its money.

In the application for summary judgment, the applicant had reduced its claim to US\$

1,172,492.86 stating that the respondent had since made some payments towards the reduction of the debt. The applicant was still claiming interest at 15% per annum on the outstanding amount from 29 February 2014 to date of payment in full. To the applicant, the payments that had been made by the respondent towards its debt after summons had been issued were an acknowledgement of its indebtedness to the applicant. The other basis for making the summary judgment application was that in a letter dated 11 June 2013 (Annexure H), the respondent's legal practitioners wrote to the applicant's legal practitioners acknowledging their client's indebtedness to the applicant in the sum of US\$1 344,312 .25 in respect of the principal sum and US\$ 1 246 368 .39 in respect of interest. In that same letter it was said that the respondent had also paid US\$ 1 802, 493 .90 as set off to ZIMRA for amounts owed to ZIMRA by the applicant.

What prompted the writing of the letter of 11 June 2013 by the respondent's legal practitioners making the above acknowledgment was that the respondent was barred for failure to enter an appearance to defend. The applicant had had the matter postponed to 12 June 2013 on the unopposed roll with a prayer for a default judgment. On the other hand the respondent had filed a chamber application for the upliftment of the bar. Consequently, the respondent's legal practitioners wrote this letter asking the applicant to withdraw the matter from the unopposed roll pending the hearing of the chamber application. Other than acknowledging indebtedness in the above amounts, the respondent's legal practitioners in that same letter said, "Our client however wishes to enter into negotiations in respect of the interest component of the sum."

After the bar against the respondent had been uplifted, its legal practitioners wrote another letter on 7 August 2013 proposing to settle the matter amicably with interest being charged at the rate of 5% per annum. The applicant did not accept the proposed rate of interest.

In opposing the application for summary judgment the respondent in its opposing papers stated that it has a *prima facie* defence to the applicant's claim in that it has since paid the whole capital amount it owed to the applicant. It stated that the dispute remains on the amount of interest which must be paid. It said that the interest rate of 15% per annum which was agreed upon by the parties in respect of the first credit agreement which was signed in October 2011 did not apply to later transactions. The respondent said that out of the US\$ 4

912, 267.00 which was claimed by the applicant in its summons it was not clear which amount constituted the capital amount and which amount constituted the interest since the respondent was disputing the interest rate in respect of later transactions.

The respondent averred that the applicant is not entitled to interest of 15% per annum in terms of the law. It stated that the interest rate is excessive, oppressive, exploitative and contrary to public policy. The respondent averred that in terms of s 4 of the Contractual Penalties Act [*Chapter 8:04*] this court can reduce the penalty stipulation to the extent it considers equitable if it appears to it that it is out of proportion to any prejudice suffered by the creditor. It said that the fact that it signed an acknowledgment of debt was beside the point.

After the respondent had filed its notice of opposition and the opposing affidavit to the summary judgment application on 11 April 2014, the applicant on 27 June 2014, went on to file a supplementary affidavit in terms of r 67 (c) of the High Court Rules, 1971. In the supplementary affidavit the applicant indicated that it was aware that in order to file a supplementary affidavit in terms of r 67 (c) it needed to obtain the court's leave first. So in that regard it was making an application for the admission of the supplementary affidavit. The supplementary affidavit was served on the respondent. In turn the respondent filed a notice of opposition and opposing affidavit to the supplementary affidavit. Thereafter the parties filed heads of argument wherein they both started by addressing the issue of the supplementary affidavit.

At the hearing I therefore had two applications to deal with. The first one was the applicant's application for the court's leave to file the supplementary affidavit. The second one was the application for summary judgment. I do not see any anomaly in the procedure that was adopted by the counsels of choosing to deal with the two applications at once. I found it expedient.

A. The application to file a supplementary affidavit in terms of rule 67 (c)

The facts

The supplementary affidavit that the applicant is seeking to have admitted states that on 15 January 2014 it wrote to the respondent seeking confirmation of the balance on the respondent's account according to the respondent's records. In that letter the applicant stated

that as at 31 December 2013 its records showed that the respondent had a balance of US\$ 1 132 521 .51. In its response dated 31 January 2014, the respondent said, “The account shown above is correct as of the date indicated, except for our balance is \$1 130 702-65. See attached reconciliation.” This response was endorsed on the same letter that the applicant had written to the respondent as the applicant had requested. The letter is attached as annexure A to the supplementary affidavit.

The applicant argued that when it the applied for summary judgment on 27 March 2014 it did not know that the respondent would falsely contest liability in view of the 15th and 31st January 2014 correspondence that had exchanged hands between the parties. The applicant argued that this correspondence serves to show that the respondent’s defence that it does not owe the applicant is bogus, insincere and meant to mislead the court.

The other issue that is included in the supplementary affidavit is the issue of the interest rate which the respondent said was out of proportion with its default. The applicant said that the respondent had never queried the legality of the interest of 15% per annum before, so this defence came as a surprise to the applicant. The applicant stated that financial institutions were charging interest rates of 25%, 28%, 35%, 38%, 43%, 45% and 50% per annum. It attached some documents showing that it had borrowed money from some financial institutions and had been charged such high interest rates. The applicant stated that it had to borrow in order to plug the gap created by respondent’s default. The applicant stated that the interest it charged on the respondent is modest and not disproportionate to the prejudice that the applicant suffered as a result of defendant’s default. The applicant said that it was even entitled to claim interest at the rate of 45% per annum for any balance which was outstanding as at 29 June 2012 or on any sales that exceeded the 120 day limit.

The applicant argued that it could not have reasonably anticipated these two issues at the time of making the application for summary judgment.

In opposing this application the respondent argued that the applicant already had the correspondence of 15 and 31 January 2014 when it made its application for summary judgment on 27 March 2014. Therefore it should have included it in its application. It argued that there was no justification for the applicant to seek its admission now. The respondent also stated that that correspondence was made for accounting purposes only otherwise the applicant had always been aware that the quantum of the debt owed was being contested on

the basis of the interest rate which was being disputed.

On the issue of interest the respondent stated that the applicant was aware from the time the respondent made a chamber application for the upliftment of the bar in 2013 that it was querying the rate of interest of 15% per annum. The respondent argued that the applicant cannot seek to raise that issue now in the supplementary affidavit.

The law

In terms of rule 67,

“No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence viva voce or by affidavit:

Provided that the court may do one or more of the following—

(a)

(b)

(c) **permit the plaintiff to supplement his affidavit with a further affidavit** dealing with either or both of the following—

(i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or

(ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence.”

In *Cabs v Ndahwi* HH 18/10 Makarau JP (as she then was) stated that a plaintiff resorting to summary judgment must have an unanswerable claim as pleaded in his summons and declaration and as verified in the affidavit that must be filed in terms of the rules. If the plaintiff's claim requires amendment for whatever reason, summary judgment cannot be granted. The claim should be beyond reproach. It was also held that a supplementary affidavit further verifying the claim cannot be filed. However, a supplementary affidavit can be filed for the purpose of dealing with issues raised in the opposing affidavit that have the effect of catching the plaintiff by surprise.

In *Timnda Truck Parts (Pvt) Ltd v Autolite Distributors (Pvt) Ltd* 1996 (1) ZLR 244 @ 246 (HC) Chatikobo J had this to say,

“The court has power in terms of r 67(c) to permit the plaintiff to supplement his affidavit with a further affidavit dealing with (i) any matter raised by the defendant which the plaintiff could not have been expected to have dealt with in his first affidavit or (ii) the question whether at the time of applying for summary judgment he was aware of the defence put forward by the defendant. This can only mean that there is an obligation on an applicant for

summary judgment to adduce evidence in his initial affidavit dealing with all relevant matters which are within his knowledge. Failure to do so would make it difficult for him to apply for leave to introduce a supplementary affidavit.”

I found the following cases that the applicant’s counsel referred me to very useful. In the case of *Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd* 1973 (3) SA 575 (R) the filing of such an affidavit was allowed because it showed the respondent’s defence to be mala fide and not seriously held. In *Scotfin Ltd v Afri Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 (HC) it was held that a party who surprisingly denies liability opens room for the admission of an answering affidavit. In the cases of *National Railways of Zimbabwe Contributory Pension Fund v KD Systems International (PVT) Ltd* HH-153-90 and *Chinaire v Ednewnam (Pvt) Ltd* HH-493-87 the filing of supplementary affidavits was allowed because the respondents were being deliberately untruthful.

Application of the law to the facts

It is clear that the applicant is not seeking to amend or verify its claim, but to deal with issues that were raised by the respondent in the opposing affidavit. These are issues that the applicant could not have expected the respondent to raise as defences. In the letter dated 31 January 2014 the respondent stated that its records showed that it still owed the applicant \$1 130 702-65 as at that date. With that acknowledgment there is no way the applicant could have been expected to anticipate that the respondent was going to turn around and deny liability, let alone challenge the legality of the interest rate of 15% which had never been challenged all along. A perusal of the main action record shows that the issue of the legality of the interest was never raised before. To begin with, in the request for further particulars the respondent simply asked the applicant to give a breakdown of the US\$ 4 912, 267.00 that the applicant was claiming. The respondent wanted to know how much of this amount constituted interest. In the chamber application for the upliftment of the bar the respondent was denying owing applicant interest at the rate of 15% per annum. It averred that the parties were disagreed on the rate of interest, but it never raised the issue of the legality of the interest rate of 15%.

As correctly argued by the applicant’s counsel these two issues took the applicant by surprise when they were raised by the respondent in the opposing affidavit to the application for summary judgment. For this reason I will grant the applicant’s application to file the

supplementary affidavit.

B. The application for summary judgment

The facts of the application are already stated above.

The law

In an application for summary judgment the applicant's claim should be unanswerable and based on a clear cause of action. See rule 64 of the High Court Rules, *Pitchford Investments (Pvt) Ltd v Muzariri* 2005 (1) ZLR 1 and *Cabs v Ndahwi* HH 18/10. The claim must be substantiated by proof and the supporting affidavit must contain evidence which establishes the claim: *Scorpton Trading (Pvt) Ltd v Khumalo* 1998 (2) ZLR 313 (S).

A respondent wishing to resist an application for summary judgment must satisfy the court that he has a good *prima facie* defence to the action. See r 66 (1) of the High Court Rules, 1971. He must raise a *bona fide* defence. In raising the defence he does not have to prove it, but he must allege facts which if established would entitle him to succeed at trial. See *Kingstones Ltd v LD Ineson (PVT) Ltd* 2006 (1) ZLR 451 (S), *Jena v Nechipote* 1986 (1) ZLR 29 (S), *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd*-136-86, *Stationery Box (Pvt) Ltd v Natcon (Pvt) ltd & Another* HH64-10, *Hales v Daverick Investments (Pvt) Ltd* 1998 (2) ZLR 234 (H). A question of law can amount to a good *prima facie* defence: *Shingadia v Shingadia* 1966 RLR 285.

In *casu* it is my finding that the defence being raised by the respondent is not *bona fide*. From the time before the summons was issued the respondent had always acknowledged its indebtedness to the applicant and in so doing it also acknowledged the rate of interest of 15% and 45% for any amounts that were overdue. To begin with, on 6 October 2011, the respondent signed the credit supply agreement which stipulated the interest rate to be 15% for all the credit supplies it was going to receive from the applicant. On 24 December 2012 the respondent wrote an acknowledgment of debt to the applicant in the sum of US\$ 9, 530, 919 .40 as the capital amount. In that acknowledgment of debt the respondent said, "Creditor reserves its right to charge interest accrued between February and April at 15% per annum on the amount owed, and from May onwards at 45% per annum from the due date for payment to the date of payment in full."

It went on to give a breakdown of how that debt was going to be extinguished including the interest rates involved. The breakdown was as follows:

1. Collection commission in the sum of US\$ 50 000.00 by Wednesday 29 February 2012;
2. Payment of US\$2 750 000 .00 plus 15% per annum interest by Wednesday 29 February 2012;
3. Payment of US\$2 750 000 .00 plus 15% per annum interest by Friday 30 March 2012;
4. Payment of US\$2 000 000 .00 plus 15% per annum interest by Monday 30 April 2012;
5. Payment of US\$2 080 919 .40 plus 45% per annum interest by Thursday 31 May 2012;
6. Payment of any balance outstanding plus 45% per annum interest by Friday 29 June 2012;

The respondent went on to say that this acknowledgement of debt was subject to it being accepted by the creditor.

Before issuing summons the applicant's legal practitioners wrote a letter of demand on 10 April 2013. The respondent only responded to that letter on 3 May 2013 after summons had already been issued. However, in the response the respondent acknowledged owing the applicant and went on to say "**The interest claimed will be negotiated.**"

When the summons was issued on 15 April 2013 the respondent had not extinguished the debt of US\$9, 530, 919 .40. US\$ 4 912, 267.00 was still outstanding. Between July 2012 and March 2013 the applicant had sold further goods to the defendant on credit. This was despite the fact that the plaintiff had proposed that as from 1 December 2011 it would cease to supply goods to the respondent in terms of the signed credit agreement and would instead be operating on a cash upfront basis.

When the respondent failed to enter an appearance to defend on time it sought to have the bar uplifted. In so doing it wrote a letter to the applicant on 11 June 2013. In that letter it again acknowledged its indebtedness to the applicant. It did not dispute the amount that the applicant had claimed in the summons. It said that it owed the applicant US\$1 344,312 .25 in respect of the principal sum and US\$ 1 246 368 .39 in respect of interest. In that same letter it was said that the respondent had also paid US\$ 1 802, 493 .90 as set off to ZIMRA for amounts owed to ZIMRA by the applicant. It is pertinent to note that this amount of interest that the respondent acknowledged was calculated at the rate of 15% per annum. In that same letter the respondent's legal practitioners went on to say, "**Our client however wishes to**

enter into negotiations in respect of the interest component of the sum.....kindly consult your client and revert to us with its position.”

It was only in the chamber application for the upliftment of the bar that the respondent started saying that the parties had not agreed on the interest rate of 15% per annum. In making this averment the respondent attached the letter it wrote to the applicant on 3 May 2013, which letter I have already alluded to above, in which the respondent said, **“The interest claimed will be negotiated.”**

What is pertinent is that all along the respondent had acknowledged interest rates of 15% and 45% on its own. It was only after summons had been issued as shown by the above letters, that the applicant sought to enter into negotiations on the rate of interest. Even in a letter dated 7 August 2013 the respondent’s legal practitioners wrote to the applicant’s legal practitioners saying,

“Our client accordingly proposes to settle the matter on the following basis;
(a) Payment of interest to your client at the rate of 5% per annum
(b)
(c)”

The foregoing shows that the interest rate of 15% had been agreed upon, but it is just that the respondent later realised it to be too heavy on it and subsequently sought for its reduction. When the request was turned down that is when it started saying that the parties never agreed on the rate of 15% per annum in respect of credit transactions that happened after 1 December 2011. If that was the case the respondent would not have written and signed an acknowledgement of debt on 24 February 2012 alluding to interest rates of 15% and 45% per annum.

After summons had been issued the respondent never raised the issue of the legality of the interest rate of 15% per annum. After the summons had been issued on 15 April 2013 and before the application for summary judgment had been made on 27 March 2014, the applicant on 15 January 2014 asked the respondent to state the amount that it still owed the applicant. On 31 January 2014, the respondent acknowledged owing US\$1 130 702 .65 and even attached its reconciliation statement which showed how that figure had been arrived at. What is interesting to note is that in its letter of 15 January 2014 the applicant had indicated to the respondent that as at 31 December 2013 its books showed that the respondent’s account showed a balance of US\$1 132 521.51. The difference between the two figures is US\$1,818

.86 and is slight. It can even be attributed to the fact that the applicant's balance was as at 31 December 2014 while the respondent's balance was as at 31 January 2014. These balances show that the parties were making their calculations using the same rate of interest of 15% per annum. In making the chamber application for the upliftment of the bar the respondent never raised the issue of legality of the interest rate as its defence to the applicant's claim.

If the issue of the legality of the interest rate was a *bona fide* defence the respondent ought to have raised it in its chamber application for the upliftment of the bar on 7 June 2013, but it never did. While the legality of the interest rate can be a defence at law in terms of the Contractual Penalties Act [*Chapter 8:04*] it should be raised as a *bona fide* defence. In the present case it is not being raised in good faith. It only cropped up belatedly in the application for summary judgment.

The argument that the signing of the acknowledgements of debt was neither here nor there is without merit. The respondent cannot be allowed to blow hot and cold as and when things suit it. When the summons was issued the amount that was outstanding was US\$ 4 912, 267.00. By the time the application for summary judgment was made the respondent had reduced that amount to US\$ 1,172,492.86. It made payments without raising the issue of the legality of the interest rate. If it wanted to raise this as a defence it should not have gone on to make payments as it did. Over and above that it went on to acknowledge a balance which was inclusive of interest at the rate of 15% per annum in the letter dated 31 January 2014. While the legality of the interest rate can amount to a *prima facie* defence, it should be raised in good faith. In *casu* the defence was not raised in good faith.

In the result, the application's application for summary judgment is granted with costs.