STEWARD BANK LIMITED
versus
VERACITY ZIMBABWE (PRIVATE) LIMITED
and
DUMISANI HOVE
and
SIMBISAI HOVE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 14 March, 2019 and 7 May, 2019

Opposed application

Ms *L. Goba*, for the applicant
B.T. Mudhara, for the respondents

MANGOTA J: I heard this application on 24 March, 2019. I delivered an *ex tempore* judgment in which I granted the applicant's prayer.

On 15 April, 2019 the registrar of this court addressed a minute to me. He advised that the respondent appealed my decision and it requests reasons for the decision which I made. These are they:

On 6 September, 2017 the applicant, a financial institution, advanced a loan of $74 000 to the first respondent which is a legal entity. The second and third respondents stood as sureties and co-principal debtors with the first respondent in respect of the latter's indebtedness to the applicant.

On 23 October, 2018 the applicant sued the respondents, jointly and severally one paying the others to be absolved. It claimed from them payment of:

(i) The outstanding balance of $33 225.16;
(ii) Interest on the stated sum at 20% per annum calculated from the date of the summons to the date of full payment;
(iii) Collection commission in terms of the Law Society's by-laws-and
(iv) Costs of suit on a higher scale.

The respondents entered appearance to defend. They requested for further particulars which were duly furnished to them.

Before the respondents tendered their plea, the applicant filed this application for summary judgment. It remained of the view that the respondents did not have a *bona fide* defence to its claim. It alleged that they entered appearance to defend solely for purposes of delaying repayment of the loan which it advanced to them. It averred that they failed to comply with clause 7 of the facility letter through which it extended the loan to them. It alleged that the facility immediately became due when the respondents failed to make any payment which was due under the agreement. It insisted that the first respondent defaulted in its loan repayment instalments as a result of which it called up the entire outstanding balance on the loan.

The respondents opposed the application. They raised two in *limine* matters after which they dealt with the merits of the application. They stated, in the first preliminary matter, that the applicant did not plead any cause of action. They alleged that it did not state the amount which it advanced to them, interest which accrued and the amount which they repaid. Their second preliminary matter was that the application was premised on an inadmissible document- i.e. the latter which they addressed to the applicant on 2 November, 2018 on *a without prejudice* basis. They stated that their letter of 2 November, 2018 should be expunged from the record. They denied, on the merits, that they acknowledged their indebtedness to the applicant. They insisted that they had a *bona fide* defence to the applicant's claim. They moved the court to dismiss the application with costs.

It is accepted that the summary judgment procedure is a drastic remedy. It is also accepted that the procedure should not be lightly resorted to. It has been emphasised, on times without a number, that the same has far reaching consequences. It denies the respondent the benefit of the *audi alteram partem* rule. Where, therefore, the respondent is able to allege facts which disclose a defence, summary judgment cannot be granted [see *van Hoogstraten* v *James & Ors*, 2010 (1) ZLR 608 (H)].

Whilst the abovementioned matters hold true and should, as a general rules, remain undisturbed, a respondent who has no *bona fide* defence to the applicant's claim cannot be allowed to wriggle out of the case on the ground that the *audi alteram partem* rule has been, or would be, violated. The rule applies to genuine, as opposed to fancy, defences. Where there are no triable issues, as would be demonstrated *in casu*, the court would be accused of dereliction of duty if it allowed a dead matter to proceed to trial on the basis of some spurious defence (s) which the respondent would have raised. This is all the more so in respect of persons who

borrow money from financial institutions on clear and unambiguous terms which they violate and make every effort to run away from.

People who borrow money from financial institutions should not be allowed to hide behind some spurious defence(s). They must pay what they borrowed when payment becomes due. Where they refuse to pay the debt in terms of the contract which they voluntarily signed and the lender of the money approaches the court for redress, the court will, more often than not, lean in his favour and grant him the relief which he is moving it to grant to him.

It serves no purpose for a borrower who agreed, at the time of signing the contract, to a particular rate of interest being charged upon the outstanding sum, to turn around at the eleventh hour and contest the same. A *fortiori* when the contract which he signed relates to a debt which he secured from a financial institution. It is through the interest agreed upon by the financial institution and the borrower that these institutions are able to grow their business and be able to lend money to other prospective borrowers. Indeed, the whole effort of lending money to borrowers by financial institutions would come to a complete halt if borrowers are permitted not to pay whatever interest they signed for when the parties' contract was /is concluded.

The applicant acted in terms of subr (3) of r 64 of the High Court Rules, 1971 when it filed this application. The subrule allows it to attach to its affidavit documents which supports its cause of action and/or the belief that there is no *bona fide* defence to its action.

Amongst the documents which the applicant attached to its affidavit are annexures A and F. These respectively appear at pages 13 and 31 of the record. Annexure A is the facility letter through which the applicant advanced the sum of $74 000 to the respondents. It is dated 5 September 2017.

Clause 6 of the facility letter states that interest would be charged at 12% per annum. Clause 6.1 states further that interest that remained outstanding on maturity of the facility would attract a penalty rate of 8% per annum above the Bank's Prime Lending Rate subject to section 12.4. Clause 9 of the facility letter is more specific than clause 6 of the same. It reads, in part, as follows:

> "Failure to make interest repayments on due date or seven (7) days from due date shall attract a penalty interest of 20% per annum on Merchant Support Short term loan facility amount of $74 000 and shall constitute a breach of the loan agreement."

The second and third respondents who were directors of the first respondent acknowledged receipt of the facility letter on behalf of the first respondent. They did so on 5 September, 2017. They confirmed that they read, understood and accepted the loan which the

applicant advanced to the first respondent. They stated that they accepted, on behalf of the first respondent, the loan under the terms and conditions which were stated in the facility letter. They undertook to carry out the obligations which were set out in the same. Both of them stood as sureties and co-principle debtors for due fulfillment of the first respondent's obligations in relation to its indebtedness to the plaintiff.

Annexure E which the applicant forwarded to the respondents at the latter's instance and request showed the total sum which was advanced to the respondents, the repayments which they made and the balance which remained outstanding at the time that the applicant sued them under case number HC 9773/18.

Annexure C is the letter of demand which the applicant adressed to the respondents on 3 May, 2018. It showed that they owed an outstanding sum of $40 838,25 as at the mentioned date. The payments which they made during the period which extended from May to August, 2018 reduced the same to what the applicant claimed in the summons and declaration.

The applicant's narration of events as supported by the attachments left the court with no doubt as regards its claim, interest chargeable and all ancillary matters. It spelt out its cause of action in a clear and lucid manner. It did not leave anything to chance or to speculation.

It was for the mentioned reason that I remained of the view that the respondent's first *in limine* matter was misplaced. They could not seriously argue that the claim of the applicant did not have a cause of action when the latter stated, for the convenience of the court and them, that:

(i) it advanced to them $74 000;

(ii) $33 225.16 of the advanced loan remained due and still owing - and

(iii) because of their breach of the contract, interest chargeable on the outstanding sum is 20% per annum.

The applicant's cause of action was/is as clear as night follows day. It was well stated. It was also supported by documentary evidence. It resonated well with what the Supreme Court stated in *Scropton Trading (Pvt) Ltd* v *Khumalo,* 1988 (2) ZLR 133 wherein it remarked that:

> "A plaintiff seeking summary judgment must bring himself squarely within the ambit of r 64(2) of the High Court Rules, which requires that the cause of action must be verified. It must be substantiated by proof and the supporting affidavit must contain evidence which establishes the facts upon which reliance is placed for the contention that the claim is unimpeachable."

Nine years later, NDOU J made some incisive remarks which related to the summary judgment procedure. The learned judge stated in *Global Insurance Co. Ltd* v *Topnotch Computers (Pvt) Ltd*, BH 62/07 that:

> "The starting point is considering whether the applicant's claim is unassailable. The special procedure of summary judgment was designed so that a *mala fide* defendant might summarily be denied, except under onerous conditions, the benefit of the fundamental rule of *audi alteram partem*. So extraordinary an invasion of basic tenet of natural justice will not lightly be resorted to and it is well established that this is only when all proposed defences to the plaintiff's claim are clearly unarguable, both in fact and in law that this drastic relief will be afforded to the plaintiff."

The applicant did not allege, as the respondents asserted, that it relied on their letter of 2 November, 2018 when it applied for summary judgment. Its statement was/is that the respondents did not have *a bona fide* defence to its claim and that they did not deny liability.

The respondents' second preliminary matter did not, therefore, hold when regard is had to the position of the applicant on the same.

Annexures F and G which the applicant attached to its affidavit are relevant. They appear at pp 61 and 62 of the record respectively. They constitute the respondents' response to the applicant's letter of demand.

The annexures show that the respondents did not dispute their indebtedness to the applicant. The last paragraph of annexure F is relevant. It reads, in part, as follows:

> "Once I start trading, I would like to inform the bank that from 30 of June, all instalments would resume and Veracity will do its best to catch up but might require your assistance even with restructuring. I have made this arrangement in good faith and also realising Veracity's obligation to the bank." [emphasis added].

The above-mentioned annexure was written by the respondents on 17 May, 2018. They, therefore, acknowledged their liability to the applicant as at the mentioned date. Their statement which reads "*all instalments will resume*" says it all. It shows that the respondents' instalments ceased being paid with effect from before the date of the letter.

It is trite that only what has ceased can resume. That is the ordinary grammatical sense in which the respondents' letter of 17 May 2018 should be construed.

The author of the letter chronicled the challenges which stood in the way of the first respondent's performance. He stated, in a clear and unambiguous language, that the challenges disenabled it from performing its part of the contract. He advised of mechanisms which he said would be put into place to enable the first respondent to resume paying its instalments. He said the first respondent would do so with effect from 30 June 2018.

The applicant was, therefore, correct when it stated that the respondents breached clause 7 of the parties' agreement. Clause 7.2 of the same allowed it to call up the entire outstanding balance of the debt where the respondents make a breach of the contract. It reads:

> "7.2 that the facility becomes immediately due when the borrower --- fails to make contractual payments --- or fails to honour any of the terms of this facility."

It was the statement of the applicant that the respondent breached the contract. It insisted that they did not honour the terms of the facility. Their failure, it said, was the *raison de^etre* for the suit which it mounted against them under HC 9773/18.

Annexure G constitutes the respondents' unequivocal acceptance of liability. It chronicles the effort which the second respondent who is the director of the first respondent was making to secure the money with which the respondents would pay off their debt to the applicant. It reads, in the relevant part, as follows:

> "Our focus and our priority is to repay the bank loan. We anticipate to commence repayment of the loan end of August 2018 and, if possible, repay fully 3 or 4 months thereafter.
>
> We thank you for your consideration and support as we try to work towards extinguishing this loan." (emphasis added).

It becomes ludicrous for the respondents to deny liability in the face of the contents of the above cited annexures. The respondents admitted liability. They proferred no defence. They, in fact, have no defence to the claim of the applicant. They have no triable issue which entitles them to have the case referred to trial.

The applicant's case holds even without taking into account the respondents' letter of 2 November 2018. They, no doubt, entered appearance to defend as a way of a voiding the inevitable. The defence which they raised in opposition to the application for summary judgment was not genuine. It was raised in a *mala fide* manner.

Given that the respondents' acceptance of liability is beyond doubt, the complaint which they make in regard to the applicant's reliance on their letter of 2 November 2018 becomes meaningless. I, in this respect, associate myself fully with the remarks which the court was pleased to make in *Kazingizi & Anor* v *Equity Properties (Pvt) Ltd* HC 797/15 wherein it stated that:

> "there is no logic whatsoever for a party who accepts liability to refund money to send the payment plan on a "without prejudice" basis. What prejudice is there to talk about?"

It is on the strength of the foregoing matters, therefore, that I remained satisfied that the application was well made. I was alive to the fact that, although the remedy which I was being

moved to grant to the applicant was a drastic measure, the same was justified in the circumstances of the present case.

The applicant proved its case on a balance of probabilities. The application is, accordingly, granted as prayed in the draft order.

Takawira Law Chambers, applicant's legal practitioners
Mundia & Mudhara, respondent's legal practitioners