CONVERGENCE RESOURCES (PRIVATE) LIMITED
versus
FORTHFIELD INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
**MUSHURE J**
HARARE, 29 November & 19 December 2024

**Application for Summary judgment**

*M Muchada* for the plaintiff
*U Chikwetu* for the defendant

**MUSHURE J:**

**BACKGROUND**

[1] This is an application for summary judgment based on the defendant's failure to pay for services rendered by the plaintiff. The parties will be referred to as cited in the main action for consistency.

[2] On 25 September 2024, the plaintiff issued a summons, claiming US$86 340.74 from the defendant. It further claimed interest at the rate of 5% per annum calculated from 29 February 2024 to the date of payment of the debt, costs of suit on a legal practitioner and client scale and collection commission.

[3] In its declaration, the plaintiff alleged that sometime in January 2024, the plaintiff and the defendant entered into an agreement in which the plaintiff let two Tipper trucks with registration numbers AFJ9084 and AGJ 4166 to the defendant. The Tipper trucks were for the defendant's temporary use and enjoyment at its mining site in Shamva. In return, the defendant would pay US$300 for each Tipper truck per eight-hour shift. The payments would be made monthly upon issuance of an invoice by the plaintiff.

[4] In fulfilment of its obligation, the plaintiff supplied the trucks. It recorded the machinery's daily usage and computed the amounts due each month. It then issued invoices to be settled by the defendant. However, the defendant did not pay all the amounts. As a result, the plaintiff terminated its services and withdrew its trucks from the defendant's site. As of 30 August

2024, the defendant owed US$86 340.74. A sum of US$88 000, 00, representing the defendant's indebtedness, had been acknowledged by the defendant in an email on 8 July 2024.

[5] On 10 October 2024, the defendant entered an appearance to defend the summons. This prompted the plaintiff to make this application for summary judgment.

[6] In the affidavit filed in support of the application, the plaintiff sets out the facts on which the claim is based, verifies the cause of action and states that in its belief that the defendant has no *bona fide* defence to the claim but has entered appearance solely for the purposes of delay. Attached to the affidavit is a copy of the record of the machinery's daily usage. the plaintiff also attached copies of the invoices it issued to the defendant for payment. Further, it attached a statement showing the outstanding amounts due to the plaintiff as at 3 July 2024 standing at US$88 800, 00. Three separate payments totalling US$25 259.26 were made in July 2024, leaving the debt at US$63 540.74. On 5 August 2024, an additional invoice of US$15 300 was issued, followed by another invoice of US$7 500 on 30 August 2024, leaving a balance of US$86 630.74 due as at that date.

[7] The plaintiff also attached its email interactions with the defendant in which the defendant made a payment proposal and the response by the defendant's representative apologising for the inconvenience caused by the defendant's delays in clearing the financial backlog. Various telephone conversations between the plaintiff and the defendant exchanged through the WhatsApp platform were also attached to prove the defendant's undertaking to pay the debt.

[8] The defendant opposed the application for summary judgment. In opposing the application, the defendant's representative, who deposed the opposing affidavit, denied owing the plaintiff US$86,630.74, asserting instead that the amount owed was US$56,880.74. It stated that any amount owing would be fully liquidated by the defendant's counterclaim for fuel supplied to the vehicles, tyres bought for the vehicles per the alleged terms of the agreement between the parties as well as damages for premature cancellation of contract. It was alleged that the plaintiff actually owed the defendant US$30 830.88. The defendant alleged, without elaborating, that the plaintiff had not satisfied the requirements of rule 30 (1) of the High Court Rules, 2021 ("the Rules"). It disputed the computation of the shifts done by the plaintiff, stating that a shift was not only equivalent to eight hours but also ten loads.

[9] The defendant further disputed the plaintiff's entitlement to collection commission, stating that collection commission could only be charged on money collected by a legal practitioner.

According to the defendant, once summons have been issued for any debt, the legal practitioner is not entitled to collection commission unless, subsequent to the issue of summons, the debtor has agreed to pay it. In this case, there was no such agreement. It was argued, further, that the plaintiff did not show when it submitted the invoices to the defendant for payment and when the defendant acknowledged receipt of those invoices. The defendant asserted that the plaintiff could not claim money in circumstances where it did not issue invoices to the defendant.

[10] The defendant noted that in some instances, the plaintiff issued documents titled 'pro forma invoice' as opposed to 'invoice'. The terminology of the invoices was also queried, and the defendant went to great lengths to quote dictionaries on the meaning of a pro forma invoice and its difference from an invoice. The defendant argued that the plaintiff could not base its claim on pro forma invoices or quotations. It questioned one of the invoices issued in the name of one of the defendant's employees, Mr Marange. It also queried the dates the invoices were issued, on the basis that those dates had a bearing on the interest claimed by the plaintiff.

[11] The defendant challenged the authenticity of the email messages, arguing that they had not been certified as true copies of the original. Further, the email message from the defendant did not acknowledge the specific amount owed. The defendant also challenged the telephone conversations which had been exchanged between the parties on the WhatsApp platform, arguing that such messages were prone to manipulation, and could be created and deleted by users of the platform at any time. The defendant finally asserted that it had an arguable case and it would be unjust not to refer the matter to trial.

**ORAL SUBMISSIONS BY THE PARTIES**

[12] At the hearing of the application, the plaintiff applied for condonation for filing an answering affidavit without first obtaining leave to do so. The defendant had objected to the filing of that affidavit without leave of the court as required by r 30 of the High Court Rules.

[13] The rule grants discretion to a court to permit a plaintiff to supplement his founding affidavit. I pause here momentarily to note that the proper term for such an affidavit in terms of the rules of this Court should be 'supplementary affidavit' and not an answering affidavit. No answer is permissible in summary judgment proceedings. See the remarks per MAKARAU JP (as she

then was) in *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd & Anor* 2010 (1) ZLR 227 (H) at 228H.

[14] In the affidavit, the plaintiff denied the existence of a contract with the defendant in which it was agreed that the defendant would provide fuel and service of parts of the two trucks at the plaintiff's expense. It also disputed the shifts as computed by the defendant and stated undercutting had been deliberately done to reduce liability. It maintained that the defendant was acting in bad faith because, during their communications, the defendant had acknowledged indebtedness. The plaintiff added that the invoice in Mr Marange's name which the defendant was now questioning had been settled in greater part. In fact, the invoices the defendant was now querying had never been questioned, and the defendant had actually requested a payment plan in order to clear its indebtedness to the plaintiff. The defendant had not disputed the telephone conversations with the plaintiff.

[15] The filing of a supplementary affidavit in summary judgment proceedings is in the discretion of the court but is restricted to instances where a defendant raises a defence that was not anticipated by the plaintiff in his opposing papers. See *Omarshah* v *Karasa* 1996 (1) ZLR 584 (H) at p. 587A-D, *Stationery Box (Pvt) Ltd supra* at p. 229C-D.

[16] Paragraph (c) of r 30(7) of the Rules grants power to a court to allow the plaintiff to supplement his founding affidavit with a further affidavit to traverse either matters raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his or her founding affidavit; or the question whether, at the time the application was made, the plaintiff was or should have been aware of the defence.

[17] Rule 30(7) of the Rules provides as follows:

> (7) 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) permit evidence to be led in respect of any reduction of the plaintiff's claim;
> (b) put to any person who gives oral evidence questions—
> (i) to elucidate what the defence is; or
> (ii) to determine whether, at the time the application was instituted, the plaintiff was or ought to have been aware of the defence;
> (c) permit the plaintiff to supplement his or her affidavit with a further affidavit dealing with either or both of the following—
> (i) any matter arising by the defendant which the plaintiff could not reasonably be expected to have dealt with in his or her 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.

[18] The *proviso* to the rule allows the court to permit the adduction of further evidence, which may either be oral or documentary, to satisfy itself that the plaintiff's case is unanswerable on any cognisable legal ground. It has been held that the court should make use of its powers in terms of this rule so that spurious defences do not unnecessarily delay due relief to a plaintiff. The powers of the court in this rule are meant to be a tool to give effect to the summary judgment procedure. See *Stanbic Bank Zimbabwe Ltd* v *Vegra Merchants (Pvt) Ltd & Ors* 2017 (2) ZLR 64 (H) at 67C-D.

[19] In *casu*, I am inclined to condone the filing of the answering affidavit for the reason that the plaintiff's claim against the defendant is for the sum of US$86 630.74 in respect of services rendered to the defendant. Communication between the parties, prior to the issuance of summons, which was attached to the founding affidavit, indicated that the defendant was accepting liability. The additional purported agreement between the parties was never referred to in any of this communication. The computation of the shifts was never challenged, nor was the nomenclature of the invoices questioned. Neither did the defendant ever relate to the plaintiff owing it any money for the fuel and service of parts allegedly supplied to the plaintiff's trucks. In my view, it was therefore not reasonably expected of the plaintiff to deal with the issue relating to additional terms of the agreement, and the arrangement between the parties in relation to the fuel and service of parts in its founding papers.

[20] All these issues arose in the defendant's opposing papers and the defendant stated that it had a counterclaim. The plaintiff needed to deal with these unexpected allegations.

[21] On this basis, the filing of the supplementary affidavit, incorrectly titled as an 'answering affidavit,' is hereby condoned and permitted.

[22] On the merits, the plaintiff and the defendant largely abided by the papers filed of record.

**ISSUE(S) FOR DETERMINATION**

[23] The sole issue that falls for determination is whether or not the plaintiff has made out a case for granting of summary judgment.

**WHETHER OR NOT THE PLAINTIFF HAS MADE OUT A CASE FOR SUMMARY JUDGMENT**

[24] Summary judgment is a procedure provided for in r 30 of the Rules, and is specifically applicable in action proceedings. A plaintiff who has issued summons against the defendant,

and the defendant has entered an appearance to defend, may at any stage before the holding of a pre-trial conference, apply to the court to enter summary judgment in the plaintiff's favour despite the entry of the appearance to defend or any other pleadings filed by the defendant. The procedure is available where the claim is liquidated. See the *Stanbic Bank Zimbabwe* case *supra* at p. 66B-C.

[25] Summary judgment is a relief that enables a plaintiff with a clear case to obtain swift enforcement of its claim against a defendant who has no real defence against the claim. See *Zimplastics (Pvt) Ltd* v *Corbett* 2014 (1) ZLR 68 (H) at p.75F. Due to the drastic nature of the relief, it is a legal requirement that the plaintiff's claim must be clear and unassailable as set out in the summons and declaration, and verified in the founding affidavit. See the *Zimplastics* case *supra* at p. 75G.

[26] The founding affidavit must confirm the facts of the case, confirm the cause of action, and contain an averment that the defendant has no *bona fide* defence and has entered appearance solely for purposes of delaying the finalisation of the matter. See *Chindori-Chininga* v *National Council for Negro Women* 2001 (2) ZLR 305 (H).

[27] A defendant faced with an application for summary judgment has two courses open to him to resist summary judgment. He may give security to the plaintiff to the satisfaction of the registrar to satisfy any judgment against him or her which may be given against him or her in the action in terms r 30(5)(a) of the Rules. Alternatively, he or she may satisfy the court by affidavit, or, with the leave of the court, by oral evidence of himself or herself or any other person who can swear positively to the facts that he or she has a genuine and sincere defence to the action and such affidavit shall disclose fully the nature and grounds of the defence and the material facts relied upon by the defendant in terms of r 30(5)(b) of the Rules

[28] A defendant must therefore establish that it has a good *prima facie* defence. This has been interpreted by the courts to mean that the defendant must allege facts which if he can succeed in establishing them at trial, would entitle him to succeed in his defence at the trial. All he is required to do is to show that there is a mere possibility of success, it has a plausible case; and there is a real possibility that an injustice may be done if summary judgment is granted. See *Jena* v *Nechipote* 1986 (1) ZLR 29 (S).

[29] As provided in r 30 (5) (b) of the High Court Rules, 2021, the defendant's affidavit should not only disclose fully the nature and grounds of the defendant's defence and the material facts

relied upon by the defendant, but it must show that the defendant has a genuine and sincere defence to the action. Put differently, the defence relied upon to resist plaintiff's claim must set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing. See the case of *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at p. 238G.

[30] Thus, if the defence is averred in a manner which appears in all the circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of *bona fides*. A 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. The case of *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at p. 457 G-H illustrates the necessity of this.

**ANALYSIS**

[31] The defendant before me has denied that it owes the plaintiff. It claims that it has a counterclaim against the plaintiff based on an agreement it had with the plaintiff. At the date of the hearing of the matter, the plaintiff's argument was the purported counterclaim had not even been filed. Upon enquiry, Mr *Chikwetu*, for the defendant, submitted that the counterclaim had been filed on 6 November 2024. In contrast, an appearance to defend against the main claim had been entered on 10 October 2024. On being asked why the defendant took almost a month from the date it entered appearance to file its counterclaim, *Mr Chikwetu* stated that he had been engaged with responding to the application for summary judgment.

[32] The manner in which the defendant handled the counterclaim raises questions about its sincerity. I observe that three weeks after filing the counterclaim, it had not been served on the plaintiff. The plaintiff was not even aware that the counterclaim had eventually been filed. Mr *Chikwetu* was unable to explain why the defendant had not served the counterclaim on the plaintiff. He attributed the non-service to oversight. If the defendant was genuine and sincere about its counterclaim, it had no reason to overlook serving the same on the plaintiff. The defendant was quick to challenge the plaintiff's claim on the basis of the counterclaim, but suddenly became lethargic in serving the very pleadings substantiating that counterclaim. In my view, the defendant's lackadaisical approach to the filing and service of its counterclaim betrays its sincerity and genuineness.

[33] The defendant further challenged the authenticity of the email messages, arguing that they had not been certified as true copies of the original messages. It stated that it was difficult to accept that the messages had not been tampered with. It asserted that WhatsApp messages were prone to manipulation and could be created or deleted anytime. In any case, the email messages did not specifically acknowledge a specific debt or liability. From a reading of the defendant's opposition, it appeared to be making blanket averments and generalities which typically govern the filing of electronic evidence. The defendant did not allege that the specific WhatsApp and electronic mail communications between the parties had been tampered with, neither was it alleging that they were not authentic. Due to the critical nature of the averments made by the defendant's representative and their overall impact on the evidence the plaintiff was relying on, I pointed out the lack of specificity to Mr *Chikwetu*. I asked him to clarify whether the defendants were alleging, firstly, that the messages were not exchanged; secondly, if they were exchanged, whether the defendant was challenging their authenticity; and thirdly, whether the defendant was challenging the content of the messages filed of record. Mr *Chikwetu* submitted on behalf of the defendant that according to his instructions, the messages had indeed been exchanged between the parties in the form they were filed before the court. He further submitted that according to his instructions, the messages in the email and on the WhatsApp platform had not been tampered with. He confirmed that these were actually the same messages that had been exchanged between the parties.

[34] In light of Mr *Chikwetu*'s submissions, it is not in dispute that the messages were exchanged between the plaintiff's and the defendant's representatives. It is also not in dispute that the messages have not been tampered with nor altered. I am persuaded to accept the attachments extracted from the email messages and telephone conversations on the WhatsApp platform between the parties and produced on oath by the plaintiff's representative. On that basis, I find that the messages are substantially accurate and a fair depiction of the conversations between the plaintiff's and the defendant's representatives.

[35] I now relate to the content of the messages. In the messages, there is nowhere where the defendant ever alluded to the plaintiff owing it money for fuel or service of parts. There is nowhere where the defendant ever disputed the amount that it was being asked to pay. It never questioned the issuance of an invoice in Mr Marange's name. It never queried why it was being invoices labelled 'pro forma invoice' instead of 'invoice', neither did it allege that it

had not been given any invoices to enable it to pay. There was a request on the WhatsApp platform for the plaintiff's email address so that the defendant could put their payment commitment in writing. Once they sent that commitment, they advised the plaintiff's representative to check his email.

[36] For completeness, the email from the defendant reads as follows:

> Dear Mr L Tenda
> Ref: Payment commitment
> The matter refers.
>
> We write to apologise for the inconvenience caused by the delay to clear our financial backlog. This was due to the mine's nonpayment which was also beyond their control as they were migrating their global gateway. Now that the system is working again, we request that we commit to pay an amount between $15000 and $20000 not later than Wednesday 17 July 2024. This allows amounts received from the mine this week to clear so as to make the payment.
> To this effect we request that the trucks return back to work to avoid further delays in servicing the contract with the mine. We have engaged the mine at the highest level to ensure we will fulfil our commitment.
>
> Thank you very much for your usual understanding.
> Warm regards
>
> RT Marange

[37] This email was responded to as follows:-

> My proposal is that you make an immediate payment of $10000 the balance of $78800 will be paid weekly in instalments of $10000. This is until the debit (sic) has reached a minimal figure of $38800 ie weekly payments of $10000.00 until 5 August 2024
> I hope this is clear
> Regards

[38] Dr. Nelson Chipangamate from the defendant's company followed up the email exchanges with telephone messages on WhatsApp, to the effect that:

> Thanks for the email. Our thinking was that when we pay the $20k next week we submit a comprehensive plan for the backlog. The reason being our need to adequately engage with the mine so that we do not commit outside our agreed position with the mine. We want to avoid a repeat of these issues. We are having a top leadership meeting on Tuesday next week and the position will be finalized. If we can't deliver on our part it will be difficult to convince the mine to deliver on their part. I am flying to Zim to attend the meeting on Tuesday. Give us this leeway for now.

[39] The tenor of the exchanges does not speak to the defendant either questioning the figure it owed, the amount it was owed by the plaintiff or the computation of the shifts by the plaintiff. It never disputed the amount stated as owing by the plaintiff. Instead, it asked for some form of latitude on the payment plan that had been proposed by the plaintiff's representative via

email. In that email, the plaintiff's representative specifically stated the amount owed by the defendant. In my view, if indeed the plaintiff owed the defendant some money expended on fuel and service of parts expenses, the defendant would have reminded the plaintiff that it was mistaken that the defendant owed US$88 800. It would have also disputed the computation of the shifts by the plaintiff. I find it disingenuous and dishonest for the defendant to now turn around and allege a counterclaim, question the computation of shifts and challenge the general authenticity of email and telephone communications, which communications it knew happened in the manner placed on file.

[40] The defendant submitted that it could not make payments against a pro forma invoice. I did not hear the defendant stating that at the time the pro forma invoices were issued, it had questioned the issuance of an invoice titled as a pro forma invoice. The issue only arose upon the summary judgment proceedings being instituted.

[41] It has been held by our courts that the effectiveness of r 30 of the Rules, regarding applications for summary judgment, must be preserved and not compromised by rigidity resulting in formalism and technicality. See *De Aguiar* v *De Almeida* 1989 (2) ZLR 165 (HC) at 169A and *Stanbic Bank Zimbabwe Ltd supra* at p. 67D-E. In my view, the reference to five different dictionaries defining a pro forma invoice does not take the defendant's case any further. The defendant cannot argue that it failed to pay because the plaintiff did not issue it with invoices, but instead issued it with pro forma invoices, more so in circumstances where at the time they were issued, they were never queried. The defendant cannot choose to question the terminology of the invoices now because it is convenient to do so. If indeed the defendant understood the pro forma invoices to be quotations as it now purports to do, at the time of the email messages and telephone conversations through the WhatsApp platform demanding payment, it would have questioned the basis upon which the demand was being made instead of seeking an indulgence. From the communications exchanged, it was the substance of those invoices that mattered. I accept the substance of those invoices over their form. The substance is that the plaintiff rendered services and the defendant was expected to pay the amounts stated for the services rendered.

[42] In explaining the payment the defendant made which coincided with the invoice issued in the Mr Marange's name as well as other payments made by the defendant, Mr *Chikwetu* submitted that the defendant would make certain payments based on estimates anticipating the furnishing

of invoices. The calculations of the estimates was based on what Mr *Chikwetu* called 'prudent accountability'. Nothing in the defendant's papers suggests that the payments were made on estimates. Aside the fact that Mr *Chikwetu* was leading evidence from the bar, I find the explanation implausible. The correspondences between the parties show that on 7 May 2024 at 06.46 hours, a telephone message was sent by one of the defendant's representative, Marange Senior, on the WhatsApp platform advising that he was working on another payment and would advise the plaintiff's representative. On 25 July 2024, Dr Nelson Chipangamate sent the plaintiff's representative the following message: - "*Good day boss. We got payment for 20k so depositing 10k for now and keep pushing for substantial payment to catch up (sic). Thanks for understanding bro. We really appreciate your patience. We are committed to shoulder our part*." If the payments were being made as part of 'prudent accounting' one would wonder why Dr Chipangamate was referring to catching up? Surely, if invoices had not been exchanged, there was nothing the defendant needed to catch up with.

[43] This is not the only message that goes off on a tangent with the 'prudent accounting' explanation by the defendant's counsel. I extract just a few of these to demonstrate this. On 5 August 2024, Dr Chipangamate responded to the plaintiff's representative's "*Morning*" message in the following manner "*Morning Sir. I was going to reach out to you. We are winning this week so no worries. We are giving you finer details latter (sic) but indications so far we pay you Thursday or Friday latest*". The exchanges that followed related to a follow up on payments by the plaintiff's representative, and an issuance of a statement, which the defendant's representative acknowledged with a "*Thanks. Well received*" on 6 August 2024. Another message from the defendant's representative on 9 August 2024 said "*Hi. Once we receive the money we let you know (sic). lke I said we are working tirelessly to clear u guys in line with our arrangement (sic) Bear with us a bit.*" And another on 15 August 2024 where the defendant was literally begging the plaintiff to return the trucks he had withdrawn as a result of non-payment to which the plaintiff's representative responded "*Pay at least another 10k and we go to work*" and Dr Chipangamate said: "*Hi boss. We understand your concerns. Maybe you could bring back one truck one line for now because our hands are tied and trying to make do with the payment we got (sic) ….*".

[44] These messages do not in any way relate to a defendant who was making payments based on estimates as part of 'prudent accounting'. They speak to a defendant who is trying to persuade

the plaintiff to relent and bear with the defendant for failing to make the payments. I find the 'prudent accounting' argument misleading and insincere. From the defendant's own record, from 29 February 2024 to 26 July 2024, it paid the plaintiff a total of USD52 259.26. That amount was not paid based on any estimates and not as part of 'prudent accounting' as the defendant wanted this court to believe.

[45] On the basis of the foregoing, I find the possible defences set up by the defendant not plausible, insincere and disingenuous. They are inherently and seriously unconvincing giving rise to the inference that they were raised solely for the purpose of delay.

[46] Before I conclude this judgment, there are two issues raised by the defendant requiring my determination. It has been argued that the dates on which the invoices were issued are important so as to determine the correctness of the interest to be paid to the plaintiff. Closely connected to this issue, is the defendant's further argument that the plaintiff's legal counsel is not entitled to collection commission. I propose to deal with both issues in turn.

[47] On the issue of rate of interest, it is the plaintiff's argument that it has resorted to the prescribed rate of interest in terms of the Prescribed Rate of Interest Act [*Chapter 8:10*]. While I note that the plaintiff has indeed demanded interest at the prescribed rate, the point of departure is the demand for interest rate on the sum of US$86 340.74 from 29 February 2024. It is common cause that the amount due on 29 February 2024 was not US$86 340.74. The plaintiff therefore cannot be entitled to payment of interest on a debt that had not yet accrued on 29 February 2024. He can only demand interest on the actual debt that was due on that date.

[48] On the issue of collection commission, the observations by BHUNU J (as he then was) in *Micro Plan Financial Services* v *Chesets Trading (Pvt) Ltd & Ors* 2015 (1) ZLR 821 (H) at p. 826B-D are apposite:

> "The applicant is not entitled to both his costs and collection commission. In *SEDCO* v *Guveya* 1994 (2) ZLR 311 (H), it was held that:
>
> > "It was not appropriate to order that collection commission be paid as well as costs. A contractual provision to that effect would be penal in nature. Collection commission can only be charged on moneys actually collected by the legal practitioner. Once summons has been issued for any debt, the legal practitioner is entitled to claim his costs, not collection commission, unless subsequent to the issue of summons the debtor has agreed to pay collection commission."
>
> I have disallowed the claim for collection commission because there is no evidence that subsequent to the issue of summons the defendants agreed to pay collection commission."

[49] At the hearing of the matter, Mr *Muchada* for the plaintiff indicated that he was prepared to abandon this claim but left it to the discretion of the court. I see no reason why I should depart from the position already established by this court in the above-cited cases.

[50] Should the matter be referred to trial on these two issues? I think not. In reaching this conclusion, I am persuaded by the comments made by CHITAPI J in the case of *Stanbic Zimbabwe Ltd supra* at p.69H-70B that: -

> "It is important in my view that litigants appreciate that summary judgment procedure is in essence a tool of case management. If used effectively, the procedure discourages the prosecution of cases with little or no merit. In this regard I agree with the observations of LORD ROSKILL expressed in *Ashmore* v *Corporation of Lloyds* [1992] 1 WLR 446 as follows:
>
> > "…..In the Commercial Court and indeed in any trial court, it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible …. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn."
>
> It would therefore be remiss to refuse summary judgment and refer a matter to trial where there are no real issues for the trial court to decide on simply because a defendant considers as in this case that it wants a day in court."

[51] The court went on further to state that an issue should be referred to trial if it cannot be resolved on the papers filed in the summary judgment application and where necessary after resorting to the use of the wide powers given to the court by r 30 of the Rules. The issue to be referred to trial must be such that it is material to give a just disposal of the dispute.

[52] In my view, there is no need to refer the issue of the interest to trial because that issue can be resolved on the papers. Secondly, I have already alluded to the fact that Mr *Muchada* indicated that he was prepared to abandon the collection commission claim at the hearing of the matter, but left it to the discretion of the court. In exercising this discretion, I see no reason why the decisions in *Micro Plan Financial Services* and *SEDCO* cases *supra* should be departed from.

[53] The plaintiff has prayed for costs on a punitive scale. The jurisprudence in this jurisdiction is that the courts will not lightly accede to a prayer for an award of costs on a legal practitioner and client scale unless exceptional circumstances so warrant. I am of the view that there are no exceptional circumstances warranting such an award of costs in *casu*. Costs on the ordinary scale will meet the justice of the case.

**DISPOSITION**

[54] In the result, it is ordered that:

1. The application for summary judgment be and is hereby granted.
2. The defendant be and is hereby ordered to pay the sum of US$86 340.74 being the outstanding amount due and payable to the plaintiff.
3. The defendant be and is hereby ordered to pay interest on the amount referred to in paragraph 2 at the rate of 5% per annum reckoned from the due date of payment to the date of full payment.
4. The defendant shall pay the plaintiff's costs of suit on an ordinary scale.

**MUSHURE J**: .....

*M. D. Muchada Legal Practice*, plaintiff's legal practitioners
*Rufu Makoni & Partners*, defendant's legal practitioners