

INTERFIN MERCHANT BANK OF ZIMBABWE LIMITED

APPLICANT

VERSUS

MERSPIN ZIMBABWE LIMITED

1ST RESPONDENT

AND

**BERNARD CONSTRUCTION AND PROPERTY
DEVELOPERS (PVT) LTD**

2ND RESPONDENT

AND

COPPER TRADING COMPANY (PVT) LTD

3RD RESPONDENT

AND

DELMA LUPEPE

4TH RESPONDENT

AND

GRACE NTOMBENKULU HELEN LUPEPE

5TH RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 25 OCTOBER 2011 AND 3 NOVEMBER 2011

Mr N. Mazibuko for the applicant
Mr V. Majoko for the respondents

Opposed Matter

MATHONSI J: This is a summary judgment application in which the applicant claims payment of the sum of US\$250 000-00 together with interest, collection commission and costs of suit from the five respondents in respect of money allegedly advanced to the first respondent by virtue of a credit facility extended to the first respondent.

In its summons and declaration the applicant averred that the agreement between the parties provided for an acceptance commission at 2% per annum of the face value of each bill accepted by the plaintiff for the first defendant's account to be charged, interest on a daily

basis on daily cash balances at the rate of 10% per annum above the minimum lending rate, accrued interest was to be payable monthly in arrears and that the plaintiff would issue guarantees on behalf of the first respondent to third parties at a guarantee commission of 2,5%.

It is further averred that the agreement between the parties provided for costs on a legal practitioner and client scale and collection charges in the event of default and that as security for the debt the second, third, fourth and fifth respondents bound themselves as sureties and co-principal debtors. In addition three surety mortgage bonds of varying amounts were registered on properties belonging to the second, third and fifth respondents.

After the respondents had entered appearance to defend, the applicant launched this application for summary judgment alleging that the respondents did not have a bona fide defence and that appearance had been entered for purposes of delay. To substantiate its claim the applicant has submitted, *inter alia* the facility document dated 13 November 2009 setting out the terms of the agreement between the parties, acceptance documents signed on behalf of the first respondent, the document amending the terms of the facility including increasing the amount to US\$250000-00, which was signed on behalf of the first respondent and the relevant surety mortgage bonds.

More importantly acknowledgments of indebtedness signed on behalf of the first respondent have also been filed. In response to a letter from the applicant's legal practitioners dated 11 October 2010 demanding what is claimed in the summons, the first respondent wrote a letter dated 5 November 2010 signed by the fourth respondent, which reads in part as follows:

"RE: Merspin Borrowings with Interfin Merchant Bank of Zimbabwe Limited

We are in respect of your letter dated 11 October 2010 and would like to propose the following payment plan;

Date	30 November 2010	31 December 2010	31 January 2011
Amount	US\$100000-00	US\$100000-00	US\$147855-59

We hope you will find the above payment plan acceptable to yourselves.

Yours faithfully
For and on behalf of Merspin Limited

(signed)
Mr D. Lupepe
Executive Chairman”

On the same date another letter was written by the fourth respondent on behalf of the first respondent accepting liability to pay collection commission but suggesting that it be pegged at 5% plus vat.

Needless to say that although the proposal was accepted by the applicant no payment was made. Instead more written proposals to settle the debt were made which were not honoured either. It is against that background that the respondents’ opposition to the claim must be viewed.

In *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 at 238G and 239 A-B Malaba J (as he then was) set out what a respondent in an application for summary judgment must show in order to successfully contest the application as follows;

“---- while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence (*Maharaj v Barclays National Bank Ltd* 1976(1) SA 418 (A) at 426D--- the statement of material facts (must) be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff’s claim---- 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----he 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.”

In their opposing affidavits the respondents have not said much about the claim beyond stating that they have a bona fide defence. In the affidavit filed on behalf of the first respondent, it is accepted the “first respondent did indeed draw down on the money set out

therein". However what seems to be in contention is the rate of interest levied and the claim for both attorney and client costs and collection charges.

Unfortunately, the respondents have not set out what the correct interest should be and they have not recalculated their indebtedness to show their bona fides. See *Dewera's Farm (Pvt) Ltd and Others v Zimbabwe Banking Corporation Limited* 1998 (1) ZLR 368 (S) at 370 B-D. Their challenge therefore remains a bare denial which certainly does not meet the set standard to repel a summary judgment application.

The respondents have said nothing about the provisions of the facility document which set the interest at the prevailing daily rate in the money market. Mr *Majoko* for the respondents has only said that the interest rate was punitive making it susceptible to being interfered with in terms of Section 4 of the Contractual Penalties Act [Chapter 8:04]. I am not persuaded at all especially as the schedules submitted show that interest was fluctuating on a daily basis in response to the market stimuli.

The half hearted argument about collection commission and attorney and client costs being claimed at the same time is mere redherring in light of what Smith J and Gillespie J said in *Scotfin Limited v Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H) at 584 E.

I also do not agree that the defects in the wording of the resolution giving Brian Sanangurai authority to represent the applicant is fatal to the application especially as it is clear that authority was given.

I conclude that the applicant's claim is unassailable and that appearance has indeed been entered for purposes of delay.

Accordingly, I make the following order; that

- (1) Judgment be and is hereby entered against the First, Second, Third, Fourth and Fifth Respondents, jointly and severally, the one paying, the others to be absolved, as follows:
 - (a) That the Respondents pay to the Applicant the sum of US\$250000-00, together with interest thereon at 25% per annum calculated from the 20th May 2011 to date of full payment.

- (b) That the Respondents pay to Applicant accrued interest in the sum of \$130484-59 together with further interest thereon at 25% per annum calculated from the 20th May 2011 to date of full payment.
- (c) That the Respondents pay to Applicant costs of suit on a legal practitioner and client scale.
- (d) That the Respondents pay to Applicant collection commission.
- (e) That certain piece of land situate in the district of Bulawayo measuring 1 483 square metres being the remainder of Subdivision A of Stand 825 Bulawayo Township registered in the name of the Second Respondent under Deed Transfer No. 2992/2001 be and is hereby declared specially executable;
- (f) That certain piece of land situate in the District of Bulawayo measuring 7 281 square metres being an undivided 1,14% share being Share No. 209 in Stand 12151 Ascot Township of Stand 11301 Bulawayo Township of Bulawayo Turf Club, held by the Third Respondent under Deed of Transfer No. 4128/1997 be and is hereby declared specially executable.
- (g) That certain piece of land situate in the District of Bulawayo being Stand 295 Matsheumhlope Township 7 of Stand 186A Matsheumhlope, measuring 4 047 square metres and held by the Fifth Respondent under Deed of Transfer No. 842/82 be and is hereby declared specially executable.

Messrs. Majoko and Majoko, respondents' legal practitioners
Messrs Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners