

PEPPER GRINDER TRADING (PVT) LTD

Versus

TRANSMZANSI (PVT) LTD

And

TWALUMBA CIVILS

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO 22 NOVEMBER, 2013 & 13 FEBRUARY, 2014

C. Dube-Banda for applicant
K. Ngwenya for respondents

Opposed Application

MUTEMA J: This is a court application for summary judgment. The 1st respondent is a subsidiary of the 2nd respondent. In January, 2013 plaintiff and 1st defendant entered into an agreement wherein the former hired out its excavator, Komatsu Grader and Tipper trucks to the latter on agreed rates. Consequent upon the agreement plaintiff supplied its machinery to 1st defendant for the period January, 2013 to May 2013. Payment was due within seven days of each invoice being issued. 1st defendant neglected payment and this caused plaintiff to issue summons against both defendants jointly and severally, the one paying the other to be absolved, claiming a total sum of \$130 290,00. The relevant invoices marked annexures "A" to "H" were attached to the plaintiff's declaration.

The defendants contested the suit. In their plea, while admitting that the machinery was indeed supplied, they disputed that the invoices reflect the correct work and amount and also that the letter dated 20 May, 2013 does constitute "a proper a (*sic*) legal undertaking by second defendant to bind itself jointly and severally as a co-principal debtor."

Following this plea the plaintiff launched this application for summary judgment.

There is a plethora of case law authorities dealing with this subject of summary judgment. In *Roscoe v Stewart* 1937 CPD 138 it was held that the procedure of summary judgment was intended to eliminate bogus defences and defences which are obviously bad in law and have no substance or merit.

Summary judgment was, in the case of *Shingadia v Shingadia* 1966 (3) SA 24 (R) described as "an extraordinary, stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a judgment to be given without a trial." And in *Hughes v Lotriet* 1985 (2) ZLR 179 (H) it was stated that though the applicant's claim need not be

unanswerable his claim must be unimpeachable.

The *locus classicus* on this procedure is *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at 426 A where CORBETT JA said:

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material alleged by the plaintiff in his summons or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. All that the court enquires into is:

- (a) whether the defendant has ‘fully’ disclosed the nature and grounds of his defence and the material facts upon which it is founded; and
- (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.”

Simply put, in the instant case, has the applicant/plaintiff shown to the satisfaction of the court that it has a clear case against the respondents/defendants which the latter cannot possibly answer?

The plaintiff’s annexures “A” – “G” are very detailed. They are all directed to the 1st defendant for the attention of Mr P. Muzamba. Each invoice describes the number of days a particular product/equipment was hired out to do work at 2nd defendant’s Victoria Falls and or Binga road construction sites with the weeks hired out being specified, the unit price and the total amount clocked, and less part payments made where applicable. Each invoice also indicates at the bottom that it was verified and sent for payment by 1st defendant’s project manager M. Muchetu who appended his signature thereon. Annexure “H” is the statement of account encompassing all the invoices totaling \$130 290,00 addressed to 1st defendant for the attention of Mrs Miriam Sibanda.

Annexure “I” is written on a document bearing 2nd defendant’s letterhead addressed to plaintiff by a bookkeeper named G. Mukobvu dated 20 May, 2013.

It reads:

“RE: ARREARS PAYMENT

I refer to the above subject.

We acknowledge our arrears but due to our cash flow challenges we would like to advise that it will be settled soon. Please refer to the attached letter to confirm our anticipation. We pray that you find our communication in order.”

Of note here is that that letter was written on 20 May, 2013, some seven days following the date of the last invoice for \$30 800,00 dated 13, May 2013. Before that there have been some e-mail correspondence between the parties. Annexure “J” is an e-mail to the following effect:

“Subject: Re: Amt in arrears
From: gmukobvu@twalumba.co.zw
Date: Tue, April 30, 2013 2:17pm
To: “peppergrinder01@yahoo.com
Cc: twalumbaholdings@gmail.com

Hie,

I acknowledge receipt of your correspondence with reference to the above subject.

It is in this regard that we are busy working out a payment plan so as to settle our arrears.

The proposal will be sent to you soon.

We are however grateful to you for the service you rendered the group and we hope our proposal will meet your optimum consideration.”

Annexure “K” is another e-mail saying:

“From: miriam.sibanda<Miriam.sibanda@yahoo.co.uk
To: peppergrinder01@yahoo.com
Cc: gmukobvu@twalumba.co.zw
Sent: Wednesday, May 8, 2013 11:10 am

Subject: Payment Plan by Twalumba Civils to Peppergrinder

Dear Mr Utete

Sincere apologies for the tardiness. I had assigned our bookkeeping Mr Mukobvu to e-mail you our proposed payment plan.

Nevertheless, we should pay you \$5 000 five thousand United States dollars by next week when a payment we are expecting from ZINARA comes through. Thereafter, I should be able to pay at least a similar amount or more depending on the turnaround time of our claims per month.

I will be e-mailing the deposit slips to you with each payment.

Thank you for your patience. I will personally ensure that the payment is settled in the shortest possible time.”

On May 14, 2013 plaintiff had e-mailed Miriam Sibanda, copying the e-mail to Mukobvu saying:

“... Please find attached, copies of our March and April invoices for the hired equipment as per my telephonic conversation with Mr Mukobvu. The hard copies were given to your Project Manager, Mr Muchetu. Please be reminded of the payment you promised us mid- this week. I trust it will come through before Friday.”

Thereafter, on 5 June, 2013 Mukobvu sent this e-mail to plaintiff:

“Hie Mr Utete

We are working flood (sic) out to sort out your payment by Friday this week. Please bear with us as we are anticipating payment. The ZINARA pple said that they want to inspect the project first before processing payment. We are just anticipating.”

From the foregoing I have no doubt whatsoever in my mind that plaintiff has shown that it has a clear case against both defendants in the sum of \$130 290,00. Its claim is unanswerable and it is for work that was done as shown on the invoices annexures “A” – “G” and also on annexure “H”. Annexures “A” – “G” show work that was done and not to be done. The work done and the amounts charged for it were signed for by Mr M. Muchetu who is 2nd defendant’s project manager. This person did not file any affidavit disputing that the work reflected on the invoices alluded to *supra* as having been done was not done or was partly done or averring that the amounts reflected thereon were quotations. In their plea the defendants never stated that the amount owing is \$45 040,00. That amount was only broached for the first time in the opposing affidavit. In all the correspondence alluded to above wherein the arrears were admitted owing and payment plan proposed there was neither a denial of the amount of \$130 290,00 nor a partial admission that only \$45 040,00 was owed. By 20 May, 2013 all the invoices totaling \$130 290,00 had been compiled and transmitted to the defendants. They were therefore aware that the arrears plaintiff was talking about and the arrears defendants were acknowledging owing related to the \$130 290,00. It is therefore an afterthought for defendants to change goal posts only in the notice of opposition to start alleging that plaintiff’s invoices were quotations for work to be done or that only \$45 040,00 was owing. This cannot ever amount to a *bona fide* defence at all.

The other defence that 2nd defendant cannot be jointly and severally liable with 1st defendant is a long shot in the dark. The two defendants are subsidiary and holding companies respectively. Although initially the contract was between plaintiff and 1st defendant (the subsidiary company) once the invoices were dispatched to 1st defendant, the 2nd defendant (the holding company), without any invitation or solicitation whatsoever from the plaintiff, expressly roped itself in as a debtor of the plaintiff. It undertook to pay the amount of the arrears and even went on to propose a payment plan. It can now not be heard to say that it is not jointly and severally liable for the debt together with the 1st defendant. The principal requirements of suretyship are succinctly stated in Gibson, *South African Mercantile and Company Law* 8th edition: Juta and Company Ltd at page 532 as follows:

“Suretyship is a contract of which a third party [a surety] agrees to pay, while there is in existence an obligation due by a debtor to a creditor, the whole or part of that obligation to the latter, not in lieu of the debtor, but jointly and severally with the debtor. So the debtor remains bound to the creditor in terms of the principal obligation, and the surety is bound to the creditor in terms of his contract of suretyship.”

A party who expressly or impliedly undertakes to pay a debt due by a debtor to a creditor like what the 2nd defendant did *in casu* cannot attempt to resile from that undertaking before the debt is discharged. The 2nd defendant bound itself to the 1st defendant’s debt to plaintiff not only as a surety but also as a co-principal debtor. 2nd defendant must legally be held to the obligation it undertook.

The defendants were supposed to not only disclose the nature of the defence relied upon to resist the plaintiff's claim but set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing. This they dismally failed to do.

In the event, it is ordered that summary judgment be and is hereby granted against the defendants jointly and severally, the one paying the other to be absolved in the following terms:

- a) payment of \$130 290,00 being outstanding hire charges for plaintiff's machinery;
- b) interest on the amount of \$130 290,00 at the rate of 5% per annum from the date of summons to date of full payment; and
- c) costs of suit.

Messrs Dube-Banda, Nzarayapenga & Partners, plaintiff's legal practitioners

Messrs Mundia & Mudhara c/o Mabhikwa, Hikwa & Nyathi, defendants' legal practitioners